



# The politics of legal empowerment

## Legal mobilisation strategies and implications for development

Pilar Domingo and Tam O'Neil

### Key messages

- Legal mobilisation can improve the lives of poor or marginalised people by:
  - contributing to pro-poor change in policy, law and regulation of service delivery across different sectors;
  - advancing the realisation of rights, and achieving redress for rights violations;
  - contesting unjust and illegal practices of resource allocation and power relations, including in relation to land and natural resources;
  - enabling citizens to exercise social accountability through legal action.
- The outcomes of legal empowerment of the poor are not politically neutral and need to be understood within broader social and political environments;
- Better coordination between justice, sector and governance interventions will maximise the development and social impact of international support for legal empowerment.

---

# Acknowledgements

The authors are very grateful to Stephen Golub and Camila Gianella-Malca for their support of this research, and their insights and comments on earlier drafts of this paper; and to Marta Foresti and Leni Wild for their advice and comments on previous drafts.

We would also like to thank Roo Griffiths, Claire Bracegirdle and Julie Grady for their help with the editing and layout of this publication.

We are grateful to the UK Department for International Development (DFID) for their funding support; however, the views expressed do not necessarily reflect the UK Government's official policies.

The views expressed in this paper and all responsibility for the content of the study rests with the authors.

---

# Table of contents

<b>Acknowledgements</b>	<b>ii</b>
<b>Abbreviations</b>	<b>3</b>
<b>Overview</b>	<b>4</b>
<b>What is legal empowerment?</b>	<b>4</b>
<b>Legal empowerment is relevant for development</b>	<b>5</b>
<b>The outcomes and impacts of legal empowerment</b>	<b>5</b>
Personal empowerment and concrete gains	6
Confirmation and extension of rights	6
Policy change and social accountability	6
Increased social justice	7
<b>Situating legal empowerment in social and political context</b>	<b>8</b>
Legal content, the rules of the game and the political order	8
Relevant 'demand-side' actors	8
Adjudicators, policymakers and implementation of law	9
<b>Towards a future policy agenda: evidence gaps and lesson learning</b>	<b>10</b>
The limits to legal empowerment	10
Gaps in knowledge on the empowerment potential of legal mobilisation	10
Lessons for the international community	11
<b>1 Introduction</b>	<b>12</b>
<b>2 Legal empowerment, politics and development: defining the issue</b>	<b>13</b>
2.1 Defining legal empowerment	13
2.2 Origins of legal empowerment within the international rule of law agenda	14
2.3 Legal empowerment as a socio-political phenomenon	16
<b>3 Analytical framework: the politics of justice chains and development outcomes</b>	<b>17</b>
3.1 Scope of the inquiry	17
3.2 Disaggregating the justice chain	18
<b>4 Women's use of the law and legal systems: when, how, to what effect and why?</b>	<b>23</b>
4.1 Claim formation: why do women use the law and what factors inform their decisions?	24
4.2 Adjudication, arbitration and mediation: women's experiences of making claims and resolving disputes	29
4.3 Implementation: enforcement of judicial and quasi-judicial rulings	34
4.4 Development outcomes: what are the social and economic impacts of women's legal action?	36
4.5 The politics of women's legal empowerment: key points and knowledge gaps	39

---

## **5 Service delivery, accountability and legal empowerment: law, justice and the politics of resource**

<b>allocation</b>	<b>41</b>
5.1 Claim formation: the judicialisation of entitlements and why citizens take legal action	43
5.2 Adjudication	51
5.3 Implementation and impact	53
5.4 The politics of legal empowerment: summary of key points	55
<b>6 The politics of legal empowerment: state of knowledge and remaining gaps</b>	<b>56</b>
6.1 What does the evidence say about process and impact of legal empowerment?	57
6.2 Gaps in knowledge on the empowerment potential of legal mobilisation	59
6.3 Lessons for the international community	59
<b>References</b>	<b>61</b>

### **Figures**

Figure 1: Summary of the justice chain	19
--	----

### **Boxes**

What is legal empowerment? .....	4
Box 1: Legal empowerment in plural legal orders .....	20
Box 2: Kinship entitlements and women's strategic use of the law in India .....	25
Box 3: Organisational support to women's legal empowerment in post-communist Poland.....	28
Box 4: Improving women's legal opportunity structures – specialised support services.....	29
Box 5: Accessibility depends on many different factors .....	29
Box 6: Observations on conditions in the local courts in Zambia .....	32
Box 7: Subversion of new rights to abortion by doctors in Colombia .....	35
Box 8: Village-level sanctions and compliance.....	35
Box 9: The Colombian Constitutional Court and conflict-related IDPs .....	43
Box 10: Legal mobilisation using regional justice and rights instruments – the Inter-American Court Judgement on the Plan de Sánchez Massacre in Guatemala .....	45
Box 11: Paralegals and legal action .....	47
Box 12: Contesting the rules on water and electricity provision – the Mazibuko water rights case and the Joseph case on access to electricity in South Africa .....	50
Box 13: Legal mobilisation in the 'Shadow of the Law' .....	52
Box 14: The Mendoza environment case .....	54

---

# Abbreviations

Abbreviation	Description
ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
AIDS	Acquired Immune Deficiency Syndrome
CLEP	Commission for Legal Empowerment of the Poor
ECHR	European Court of Human Rights
EU	European Union
FIDH	International Federation of Human Rights
HIV	Human Immunodeficiency Virus
IAHRC	Inter-American Human Rights Court
IDLO	International Development Law Organisation
IDP	Internally Displaced Person
IPC	Indian Penal Code
J4P	Justice for the Poor
NGO	Non-governmental organisation
TAF	The Asia Foundation
UK	United Kingdom
UN	United Nations
UNDP	UN Development Programme
US	United States

---

# Overview

## What is legal empowerment?<sup>1</sup>

Legal empowerment occurs when poor or marginalised people use the law, legal systems and justice mechanisms to improve or transform their social, political or economic situations. The concept of legal empowerment emerged within the development community in the early 2000s from a critique of the ‘rule of law orthodoxy’ and its perceived top-down technical assistance approach to justice sector reform. By contrast, legal empowerment approaches are explicitly interested in the agency and priorities of marginalised people, and understanding how they can use the law to advance their interests. As a concept, it was important in reorienting the attention of the international community towards the experience of the ‘end-users’ of law and justice programmes. At the same time, the use of the law and legal systems by disadvantaged people to contest the unfair distribution of power and resources is a real-world phenomenon that predates and exists independently of international law and justice assistance. These activities are rooted in context-specific histories of how law, politics and development intersect to shape the distribution of resources and power.<sup>2</sup>

### What is legal empowerment?

Legal empowerment occurs when poor or marginalised people use the law, legal systems and dispute resolution or redress mechanisms (formal and informal) to improve or transform their social, political or economic situations, to hold power holders to account or to contest unjust power relations. Legal empowerment can be individual or collective. The justice and legal mechanisms used can be formal and provided by the state. In plural legal systems, however, justice and redress is often provided by non-state actors and may not be recognised by law (informal).

Different types of engagement with the law can be empowering. We focus on cases where vulnerable people assert their interests or rights in the form of a claim or grievance through judicial and quasi-judicial mechanisms of dispute resolution, judicial review and legal accountability. Such mechanisms range from the local community level, including the work of paralegals or engagement with non-state forms of dispute resolution and redress, to strategic litigation in high courts or international forums. Legal empowerment can also occur through a wider array of social and horizontal accountability mechanisms, such as administrative redress mechanisms, ombudsman and human rights commissions.

---

<sup>1</sup> Pilar Domingo and Tam O’Neil are Research Fellow and Research Associate, Politics and Governance, ODI. This is an overview of Domingo and O’Neil (2014) *The Political Economy of Legal Empowerment*. The paper is part of a research stream on the political economy of legal empowerment within a broader programme of work at ODI, which explores the politics of service delivery and public goods. The working paper reviews the evidence on those political and social factors that influence the ability of women and other vulnerable groups to use legal empowerment in order to access rights and services. This overview includes some illustrative empirical examples, but full discussion of evidence and citations is found in the working paper. The authors would like to thank Stephen Golub, Camila Gianella-Malca, Leni Wild and Marta Foresti for comments on earlier drafts of this paper. The views expressed in this paper and all responsibility for the content of the study rests with the authors.

<sup>2</sup> On legal empowerment see among others Banik (2009), Golub (2006; 2010; 2013), Goodwin and Maru (2014), Maru (2010), Stephens (2009). On legal mobilisation see among others Dugard and Langford (2011), Epp (1998), Gloppen (2006, 2008, 2011), Gargarella et al (2006) Gauri and Brinks (2008), Rodriguez Garavito (2011), Yamin and Gloppen (2011).

---

To date, understanding of legal empowerment has remained confined to a relatively small group of legal experts and within a narrow silo of justice support as part of international assistance efforts. But, as this wider legal activism continues in countries around the world, its relevance to development outcomes is becoming much clearer. This includes use of the law and justice mechanisms to expand access to public goods and services or to reduce marginalisation and inequality. This overview summarises recent evidence on legal empowerment and highlights political economy perspectives on what it will take to realise greater empowerment for those who need it most

# Legal empowerment is relevant for development

In recent decades, how citizens see and relate to state authority has changed, and it continues to do so. Constitutional reform processes, democratic transitions and assorted rights movements at different levels have created new political agreements about citizens' entitlements and state responsibilities.

In some countries, the resulting political settlements have created new expectations about what recourse to law can achieve and new opportunities for people to use justice systems and redress mechanisms. This includes:

- pro-poor changes to policy, law and regulation of resource allocation and service delivery in different sectors (e.g. health, education, housing and water);
- redress for rights violations and injustices, and altering power relations in favour of vulnerable groups (e.g. women, indigenous movements);
- contestation of unjust or illegal distribution of resources (e.g. in relation to land or natural resource extraction); and
- improvements in citizens' ability to exercise oversight over public authorities (including forms of social accountability through legal action).

## The outcomes and impacts of legal empowerment

Legal empowerment needs to be assessed both as a process of change as well as for its more direct individual impact and social outcomes. Below we highlight four types of positive change from the evidence on legal empowerment: personal empowerment, confirmation and extension of formal rights, policy change and social accountability and, finally, increased social justice.

---

## Personal empowerment and concrete gains

The process of making a claim can improve personal capacities (such as enhancing a sense of self-belief and awareness about entitlements, and the scope for action to demand these) and, therefore, future choices of individuals as agents of self-realisation and change. Moreover, individual claims, often about practical needs and interests, can lead to broader concrete gains for poor and marginalised groups. Direct positive impact at the individual or group level may seem minimal in terms of wider goals of social transformation, but it reinforces the merits of recourse to the law and legal mobilisation *for that individual or group*. Such individual gains can encourage other people to use the law in disputes with other (potentially more powerful) individuals/groups or with public authorities. Moreover, in some cases, individual victories have also resulted in challenging power structures and have spurred communities to organise and act with others to advance their interests. For example, in one recent case in India, a man successfully sued the local health authorities for his wife's avoidable maternal death and this gave his community confidence to mobilise to claim their rightful food rations (Kaur, 2012).

## Confirmation and extension of rights

In a growing number of cases, judicial rulings have confirmed and clarified the legal rights of citizens. Litigation in higher courts can be effective in consolidating new progressive constitutional rights, including nullifying contradictory law, policy or customary practice. For example, strategic litigation by women's legal organisations has won landmark cases that redefine gender power relations in countries in all regions, particularly in relation to women's personal status, and inheritance and property rights (Scholz and Gomez, 2004; UN Women, 2011). Progressive constitutions, in countries like South Africa and Colombia, have also provided a legal platform from which civic organisations and networks have successfully challenged and changed government policy in relation to the provision and management of health, housing and water services. In a number of cases, access to services is articulated through constitutionally established social or economic entitlements, for instance to health, housing or water. This has involved calling upon the state to make good constitutional agreements, or activating its regulatory capacity over the provision and quality of services, as agreed in policy and services legislation (Cooper, 2011; Gauri and Brinks, 2008). And communities and their allies have also mobilised the law to defend their rights to land and to challenge natural resource extraction by powerful and organised interests (e.g. multinationals) (Houtzager, 2005; Olsen, 2008)

Such legal victories can give official (and moral) weight to the reallocation of resources. While direct policy change can have most immediate impact, and be most easily measured, no less important is where the process of legal mobilisation contributes to redefining dominant social norms around social justice over time. The 'naming and shaming' aspect of legal mobilisation can moreover be effective in ushering in new conduct among different social and political actors. Thus, strategic litigation often has symbolic value, leading to a re-articulation of the terms of public debate and mobilisation of public opinion – both important gains in democratic political systems. For instance, a recent ruling on abortion in Colombia by the Constitutional Court has changed the terms of public debate on the issue.

Finally, dispute resolution at community level, through traditional or hybrid alternative dispute resolution forums, has led to progressive social norms change or jurisprudence in favour of traditionally excluded groups. In Bangladesh, women are using NGO mediation programmes modelled to expose and challenge socially accepted domestic violence (Hasle, 2003; Jahn, 2009). In South Africa, rural women have successfully argued in village dispute resolution forums that social and economic changes, such as the increase in single mothers, mean that women should have the same right to be allocated land as men (Claassens and Minsi, 2009).

## Policy change and social accountability

Legal action can activate the state's regulatory and oversight capacity, including in relation to the acts and conduct of the private sector. For instance, a case brought by the Treatment Action Campaign against pharmaceutical companies in South Africa resulted in a settlement in which prices for essential antiretroviral drugs were reduced (Heywood, 2009). Importantly, legal mobilisation took place at a time when generic competition in the production of drugs had become an issue around which there was global mobilisation by a number of international NGOs. Evidence suggests that in both court cases and alternative dispute resolution, what counts is often not the legal action itself but rather the *threat* of litigation.

---

Legal action can have benefits not only for the individual claimants but also in terms of increased visibility of service provision obligations. In Brazil, the avalanche of individual health rights cases invoking the 1988 constitution has led to a routinised approach to using the law and justice mechanisms to demand the realisation of rights in concrete ways (Gauri and Brinks 2008). Whether the outcomes are this, mostly individual legal action, are socially just is less clear (Motta-Ferraz, 2011). In addition, the symbolic setting of precedent in itself can be important in shaping future policy discourse – even if implementation remains slow or, in practice, ineffectual. A 2004 Constitutional Court ruling in Colombia declared that the state must attend to the basic needs of people internally displaced by conflict was politically important (Uprimny Yepes, 2006). It gave visibility to a situation of injustice and recognition of the devastating impact of conflict on a substantial group of people. Implementation has been slow, but the moral and symbolic victory was significant. In some cases, legal action has also resulted in a constructive dialogue between the courts and the policy-makers on how to redirect policy to progressively realise rights and incrementally improve compliance with the constitution or legal framework.

Legal mobilisation can also involve holding the state itself to account for non-delivery of services or realisation of entitlements, or complicity with abuse of power, too. Typically, however, follow-up and implementation remains a challenge. For example, in the mid-2000s, a group of women successfully sued a large supermarket chain for unpaid overtime in Poland and received individual damages, but employment conditions did not change because the state enforcement agency lacked the resources and power to monitor and enforce regulations (Fuchs, 2013).

Finally, it is important to stress that community level engagement can raise awareness of entitlements, mechanisms of redress and legal and other services at the sub-national level. For example, the integration of legal services with healthcare provision practices in Kenya has increased the sense of citizenship among patients and their families, as it enhances their understanding of, first, what health services they are entitled to and, second, how best to protect the (inheritance) rights of their immediate family and dependents. Notable examples are found among women survivors of domestic violence and people living with HIV where legal literacy has enhanced their access to services and sense of self-worth. It has equipped them and their families to request referral and treatment (Open Society Foundations, 2013).

## Increased social justice

There are concrete cases of the law being used to achieve more socially just outcomes in developing countries. At the individual level, recourse to the law has led to the actual redistribution of either resources or power. For example, in a growing number of countries women are using specialist courts and services, such as family courts or NGO-sponsored community mediation, to make successful property, inheritance and marital claims (Basu, 2006, 2012; Hasle, 2003; UN Women, 2011). In Colombia there are cases where community interests have prevailed over the interests of large corporations on oil extraction explorations (Olsen, 2008).

Even where legal action is limited, or does not result in a court victory, court cases can provide a forum that gives political visibility to a matter of social injustice that would otherwise remain hidden. The moral and symbolic gains of use of public legal action to air the truth of an injustice should not be underestimated, even when there is limited expectation of implementation. The Phiri case in South Africa on the right to water was overturned in the final appeal, but some important principles were confirmed on the right to water and the state's obligation to ensure access as a basic service (Dugard, 2011).

In sum, legal mobilisation can be a means to contest injustice, reshape power relations and resource allocation, and hold public authorities or private firms to account for poor regulation or the withholding or inadequate delivery of services and other entitlements.

There is a growing body of work that documents and tells the many compelling stories about the positive effects of legal mobilisation strategies at different levels, but we also know that the individual and broader social impact of legal action is highly variable. Overall, the evidence suggests that the stakeholder's individual and collective capabilities and how they interact with each other and their socio-political and legal environment best explains when legal empowerment is more or less effective. Both the process and outcomes of legal mobilisation can alter the distribution of power and resources in ways that expand the capabilities and choices of disadvantaged

---

people, and has done so in practice. But, focusing too narrowly on the legal agency of marginalised people, in isolation from their broader political and social context, reveals only part of the story.

# Situating legal empowerment in social and political context

A range of context-specific political and economic structures therefore shape the potential for poor people to use the law to gain power and improve their wellbeing. The nature of the political regime, the legal framework, dominant social norms and histories of social mobilisation are just some of the factors that shape access to the law, the quality of justice and its social impact (Gloppen, 2008). The role played by different stakeholders, from paralegals to adjudicators to policy makers, and the relationships between them, is also fundamental. Across all of these actors, the distribution of power and resources is key, both as cause and effect of legal empowerment. In other words, the impact of legal empowerment depends on the socio-political context, the groups and individuals involved, the issue in question and what is at stake and the levels of support or resistance to pro-poor outcomes.

## Legal content, the rules of the game and the political order

How law is actually embedded in the social and political order influences its potential to empower individuals and groups. It matters whether the law itself is equity or rights enhancing. Much law on the books remains discriminatory or favourable towards elite interests (for instance property legislation that favours large capital over communal property, or laws or customary norms that discriminate against women). Thus, the law reflects the reigning formal political settlement and rules about how power is distributed and resources are allocated – for better or for worse. Even when law is progressive, there is usually discrepancy between the letter of the law and its practice in developing countries; progressive laws are often not implemented. Here the content of the law still matters, but more as a standard-setting device against which unruly power holders can, in time, be held to account and marginalised groups and their allies can mobilise to realise change in practice. It is also increasingly the case that progressive constitutional content has been a powerful enabler of legal action and judicial activism. Moreover, where there are plural legal systems – that is, multiple and overlapping norm systems, ranging from the formal to the customary – some of these may reinforce inequalities, patterns of exclusion and inequitable development, and can significantly condition opportunities for legal empowerment.

## Relevant ‘demand-side’ actors

Legal empowerment focuses on the legal agency and capabilities of poor or vulnerable citizens, and their capacity to choose to use the law to challenge social injustices. However, it is mostly not limited to engaging solely with affected populations. Vulnerable and disadvantaged people often have few resources and capabilities to make legal claims, and therefore benefit from external support structures of different kinds, such as paralegals, human rights organisations and litigation/legal support groups and professionals. These capabilities include financial resources, self-confidence and critical awareness, and social capital. Political and strategic capabilities are also needed for groups to recognise and take advantage of opportunities arising from changes in the law or policy environment and to mobilise, build alliances and engage with key political actors whose engagement is important to achieve results.

Our review highlights that the work of paralegals in particular can go a long way in enabling the legal agency of affected individuals or groups, and often (but not by definition) come from affected groups (Dugard and Drage, 2013; Maru, 2006). Typically, they acquire knowledge of law and rights through training. They have the merit often of possessing deep understanding of prevalent social norms and local practices, as well as local power

---

structures. Their effectiveness derives also from engagement with key adjudicating, decision-making and implementing actors. While valuable, paralegal work is often focused on localised and individual legal action, and this constrains its contribution to broader structural change. Where litigation is chosen, the role of other external support actors, such as pro-bono legal aid professionals and human rights organisations, at times in collaboration with paralegals, is important (Epp, 1998; Fuchs, 2013).

## **Adjudicators, policymakers and implementation of law**

Marginalised people can face structural bias and challenges in accessing all types of justice institutions (formal and informal), whether because of their class, race, religion, gender and so on. While support from paralegals, legal aid or human rights organisations can help level the playing field, they are not enough and the attitudes and behaviour of other organisations and actors are also important. This includes adjudicators or decision-making actors, such as judges or community elders and, ultimately, implementing agencies like local authorities, service providers or the executive branch. The presence and importance of these actors varies along different stages of dispute resolution and redress processes, and they respond to different motivations, capabilities, resources and power relations.

Both legal capacity and resources (necessary for considered judicial reasoning), as well as political and normative preferences, shape the judgement of those deciding dispute resolution, judicial review or regulatory outcomes. Understanding the relative position of adjudicators (at local and national levels) is a particularly important feature of the political economy of legal empowerment. The impartiality of adjudicators is influenced by such factors as culture, self-perception, political preference and, where judicial independence is weak, by political capture. Technical and legalistic approaches to justice sector reform tend to overlook these types of factors (Carothers, 2006; Kleinfeld, 2012).

Furthermore, the implementation of rulings depends on various other actors in order for legal action to make a difference. In claims related to service delivery, for instance, there is often a huge gap between judicial decisions that call upon providers or governments to make good on their obligations for service delivery and their implementation in practice. This emphasises the importance of legal mobilisation strategies that include political lobbying with those responsible for ensuring that rulings are executed (i.e. implementers). One example is when organisations challenging forced evictions in Soweto combined litigation regarding the right to housing with political strategy and engagement (Wilson, 2011) – legal expertise is important but not enough, and grounding social struggles in law can strengthen opposition to government decisions.

Legal empowerment therefore is more effective when underpinned by strategies to engage key decision makers – either in relation to adjudication (judges, elders, arbitrators) or implementers throughout. This involves advocacy, building networks and political lobbying strategies. This can include engaging constructively with municipal governments or health ministries on resource allocation, for example, or pursuing active dialogue with community elders to change social norms regarding discriminatory practices against women's rights to land, inheritance and to be free from violence (UN Women, 2011; Sieder and Sierra, 2010). These additional forms of engagement are crucial because legal literacy and litigation skills alone do not guarantee the implementation of decisions or rulings in favour of poor or disadvantaged groups or individuals, and ultimately the prospects for implementing just decisions will depend on the buy-in of more powerful actors.

The change processes that result from legal empowerment, therefore, are not politically neutral. They affect power relations and vested interests and cannot be understood in isolation from the wider socio-political and cultural environment. Effective legal action with pro-poor goals thus requires not only an understanding of law, norms and rights, but also various other resources and capabilities to achieve intended results.

---

# Towards a future policy agenda: evidence gaps and lesson learning

## The limits to legal empowerment

The impact of legal empowerment is positive to the extent that it advances equity-enhancing law and outcomes in, sometimes exclusionary, contexts. Gains achieved at an individual or group level are hugely important in terms of concrete gains, exposing social justice, changing the terms of public discourse or the experience of individual or collective empowerment that can underpin these processes. However, it is not possible to generalise about the efficacy of legal mobilisation in producing better development or redistributive outcomes – or indeed achieving structural or transformative change.

Furthermore, it is important to acknowledge that under many conditions, legal mobilisation does not empower. The experience of legal action can be humiliating or intimidating and can reinforce the status quo and acceptance of asymmetric power relations and injustice. Indeed, historically, dominant classes have used dispute resolution mechanisms and justice systems to reinforce social injustices, discriminatory social norms and defend their privileges. Even if high courts become socially progressive in the application of law, rulings in lower courts can continue to be reactionary or unconstitutional, particularly in relation to gender relations (Zambia Law Development Commission, 2004; Scholz and Gomez, 2004). Moreover, in how the separation of powers works in practice, courts (progressive or otherwise) can often be relatively powerless in the face of government intransigence and resistance to judicial review, including by other powerful interests. It is also the case that we do not know enough about whether legal mobilisation mostly benefits the most vulnerable groups, or if the beneficiaries are mostly those with most capacity and resources to undertake legal action.

Finally, whether legal mobilisation and court action is perceived as a viable site of political and social contestation depends on particular political and social histories. Law is only one part of the story of political settlements, and its relative weight is intimately linked to whether national, local or transnational elites agree through calculated consent or coercion to be bound by law in practice. The evidence also shows that where power asymmetries are robust, legal mobilisation is not likely to make a difference, for instance in relation to many land disputes in Sub-Saharan Africa where the balance of power and law often benefits foreign investment interests over those of local communities (Cotula, 2007). Thus, assessing the potential of legal empowerment to shape development outcomes requires taking account of what is possible given a country's socio-political and legal history and current political economy.

## Gaps in knowledge on the empowerment potential of legal mobilisation

What emerges from this review is that the impacts and drivers of success for legal empowerment reflect context-specific realities and require tailored policy solutions and support. Yet, at present, the evidence base remains highly uneven, concentrated mostly on particular activities (e.g. legal literacy) and on claim-formation and adjudication, rather than on the implementation and outcomes stages of the dispute resolution and redress process. Indeed, there is almost no systematic, comparative analysis of key factors that shape effective implementation and deliver tangible results. Moreover, the empirical observation of the bigger questions regarding whether and when such legal action contributes to structural or transformative change or results in, for instance better health outcomes for the poorest or most vulnerable, or more equitable land distribution at a more aggregate level, remains underdeveloped and lacking in evidence. There is, however, some emerging robust qualitative observation and analysis of some aspects of legal mobilisation in relation to service provision (in health, education, water and housing) (e.g. Yamin and Gloppen, 2011; Gianella-Malca et al 2013), disputes

---

relating to land and natural resources (e.g. Houtzager, 2005), and including high-quality case studies of women's disputes over land, property and marriage entitlements (e.g. Basu, 2006, 2012; Claassens and Mnisi, 2009; Khadiagala, 2001; Roa, 2007; Whitehead and Tsikata, 2003).

## Lessons for the international community

This is an emerging policy agenda. Based on the rich analytical and empirical studies that do exist, we can identify six broad insights and lessons for how the international community can improve its support to legal empowerment:

1. As with institutional reform more generally, the processes of change associated with legal empowerment are deeply political and efforts to support it must include work with locally driven processes of institutional innovation, and awareness of opportunity structures and constraints.
2. An overly narrow focus on only one part of dispute resolution or redress processes, such as support to poor people's claims, overlooks the importance of other parts, such as how judges make decisions or whether these are implemented, to empowerment in practice. Thus, support only to the 'demand-side', such as access to justice or to paralegals, can mean little without considering how they interact with other state institutions, public authorities and interest structures. Developments on the 'supply-side' of legal action are equally important to achieve meaningful change. This requires more holistic and interconnected engagement across justice sector reform strategies.
3. Law and legal mobilisation has potential empowerment and development effects, but this is different for different sectors and different populations. Depending on the issue, particular types of action and activities are likely to be more effective and less susceptible to resistance than others. This means that a priori assessments of which justice forums, or combination of forums, are more or less effective or empowering needs to occur on a case-by-case basis.
4. Finding concrete – and mostly localised – solutions to practical claims for poor or vulnerable individuals is important, but public interest litigation and follow-up political action is important for the sort of structural change that can influence horizontal inequalities and unjust power relations between groups in the long term.
5. International support for legal empowerment continues to remain in justice teams and largely separate from other sectors (such as health, education or governance). This overview highlights the strong imperative to move away from such siloed working in development agencies. Legal action of different kinds can advance gender, health, education and other social objectives and needs to be integrated more fully within programmes in these sectors. This has significant implications not just for support to governments but also for social accountability investments too.
6. Similarly, it is important to make the institutional linkages between justice and governance if legal and justice assistance of all kinds is to become more politically informed and the important linkages between legal and political mobilisation are to be made.

Experience shows that progressive social change is possible but depends on integrated social, political and legal strategies. These link legal mobilisation with political action, such as popular protest or lobbying of parliamentarians, and efforts to change social attitudes and behaviour.

---

# 1 Introduction

In the past two to three decades, in both discourse and practice, citizens in developing countries have made more and more use of the law, legal systems and justice mechanisms to seek redress for rights violations, to resolve disputes over resources and assets and to exercise oversight of the delivery of basic services. This reflects changing trends in relation to how citizens *in principle* conceive of their relationship with the law, the state and other structures of authority, whether this is at the national or the subnational level. Awareness of rights is greater, sometimes as a result of new political settlements or constitutional reform processes, and there are heightened expectations about what recourse to justice and the law should achieve.

What this looks like in practice varies greatly.<sup>3</sup> However, in the Global South, there is evidence to suggest that disadvantaged people invoking the law and mobilising through different justice mechanisms to advance their interests and entitlements has increasingly become a more relevant feature of social action.

Legal empowerment has become a term within the development community to describe the process of enabling the legal agency of poor or disadvantaged individuals and groups in society and the associated processes of empowerment. This paper seeks to identify and analyse the political and social factors that influence some of the activities and strategies that fall under the rubric of legal empowerment. To do so, we develop an analytical framework to guide a review of the knowledge base on legal empowerment in two areas: women's empowerment and access to basic services. We also draw on examples regarding resolution of conflict over land, property and management of natural resources.

Our interest is in how politics shapes the potential and the limits of the law and of legal or quasi-legal action to empower in practice, and the consequences of this for development outcomes. Our aim is to better understand how, why and under what conditions legal empowerment results in change processes as a means to support better policy and programming choices by the international community in and across relevant sectors. Importantly, this includes not only access to justice, legal empowerment and rule of law interventions but also to sector-specific approaches to thinking about the relationship between law, accountability and development outcomes.

This paper draws on range of literature on different aspects of legal empowerment, with a focus on legal mobilisation. It is not a systematic review, but rather it draws on *systematic review principles* (see Hagen-Zanker and Mallet, 2013) to review the state of the knowledge on the process and consequences of legal mobilisation following a three-track approach. The first consisted of an overview of the general literature on legal empowerment and judicial politics; the second looked at a more detailed (but not systematic) review of academic and grey literature which addresses different aspects of, first, women's experience of legal empowerment and, second, the experience of legal empowerment in relation to service delivery of basic services and the realisation of social and economic rights; and for the third, we consulted with a selection of experts to capture the most current and relevant work on two thematic areas as well as the wider literature on judicial politics and legal empowerment. The paper includes a list of those references cited, but additional sources were reviewed as part of this research paper.

---

<sup>3</sup> In a complementary study, Goodwin and Maru (2014) review the state of knowledge on legal empowerment and its impact. While their findings are broadly consistent with ours, their study differs in two main ways: (i) their definition of legal empowerment is much broader than ours, and includes all civil society efforts that 'seek to increase the capacity of people to exercise their rights and to participate in the process of governing'; and (i) their analysis of types of activities and impacts is quantitative.

---

The paper is structured as follows: Section 2 defines the concept of legal empowerment and briefly examines its origins. Section 3 sets out our analytical framework and the scope of enquiry. Sections 4 and 5 review the evidence on women's legal empowerment and on legal mobilisation by citizens to defend and improve their access to services. Section 6 summarises knowledge and evidence gaps, and outlines lessons for the international community.

## 2 Legal empowerment, politics and development: defining the issue

This section defines legal empowerment then briefly reviews, on the one hand, its history within the rule of law and international development agenda and, on the other, its position as a real-world socio-political phenomenon that predates development assistance. Informed by this discussion, we mark out the scope of our analysis.

### 2.1 Defining legal empowerment

This paper looks at what we know about the political economy of legal empowerment, what action it entails, how it is enabled and with what consequences. For this, we define legal empowerment as the use of law and justice systems (formal and informal) by marginalised groups or individuals to improve or transform their social, political or economic situation. This definition includes the three most common attributes of legal empowerment: (i) the use of the law and justice mechanisms (ii) by people who are marginalised in some way (iii) to advance their rights or interests. Like others, we emphasise that legal empowerment is concerned with implementation of the law in practice, not just entitlements on paper. In addition, the law includes diverse types of enforceable rules, such as regulations and contracts and international, customary or religious norms and their associated justice mechanisms, as well as statutory laws and judicial precedents applied through the courts.

Legal empowerment overlaps with, but is different from, three other terms. First, access to justice is about improving how people can access justice mechanisms and does not inherently concern itself with power and empowerment. Second, legal mobilisation is one activity through which the concept of legal empowerment is operationalised. Zemans (1983) has classically defined it as taking place 'when a desire or want is translated into a demand as an assertion of rights' (p.700) and where the focus is on articulating a demand or grievance that can be taken up into the formal court system. Third, social accountability refers to a broad range of activities and mechanisms through which societal actors hold the state to account, some of which include legal mobilisation and empowerment.

We delineate the boundaries of the concept of legal empowerment in a different way to others. First, we regard legal empowerment as taking place when legal mobilisation (the activity or means) results in some form of empowerment (the outcome or end). Empowerment requires that people gain new resources (psychological, social, material or political) and, through these, the ability to make and enact strategic life choices (Kabeer, 1999).

Both the process and the outcomes of legal mobilisation can empower people in several ways. It can lead to a concrete redistribution of power or a reallocation of resources – for instance, a judicial decision can lead to a change in entitlements or a redistribution of land or property. In addition, the process of using the law can itself

---

be transformational for those involved. It can lead to a change in capabilities and an awareness of self, even in the absence of more tangible outcomes – for instance, the process of using the law can change a person’s consciousness of their situation (the power within) (ibid.) and their interactions with their family, their community and wider society. It can also, under some social and political conditions, result in a different perception of the role of, and relationships with, public authority.

Second, while our definition limits the scope of enquiry relative to others, it is in another sense more expansive. The legal empowerment literature tends to emphasise a grassroots approach that begins with community needs and priorities and the centrality of the agency of the affected individual or group. In the majority of cases, legal empowerment activities involve individuals, with or without the support of legal professionals or non-governmental organisations (NGOs), engaging with local dispute resolution mechanisms of different sorts to seek solutions to, and immediate redress for, practical problems or claims.

But, legal empowerment can also describe legal action by groups, for instance through strategic litigation, to forward collective interests and to combat structural injustice in order to (incrementally) transform structures of abuse, exclusion, discrimination or systemic (horizontal) inequalities. This is often with the help of allies who may not benefit directly from the activity. These activities are just as central to our analysis. Recourse to intermediaries (such as litigation professionals) does not in our definition diminish the empowering effect of the strategic litigation as a form of legal empowerment.

Finally, while many definitions of legal empowerment include other forms of administrative mechanisms of redress, for the purposes of this paper we focus the scope of legal empowerment on those activities that involve the direct use of law and relevant justice and dispute resolution mechanisms (formal and informal).

## 2.2 Origins of legal empowerment within the international rule of law agenda

Legal empowerment is a term associated with the international agenda on rule of law reform and access to justice that emerged in the 2000s. It was articulated officially in the Commission for Legal Empowerment of the Poor (CLEP) report of 2008, but the term was coined as early as 2001 in a report by Stephen Golub and Kim McQuay to describe a range of activities carried out by The Asia Foundation (TAF) and the Asian Development Bank (ADB). Legal empowerment as an international agenda surfaced in response to growing critiques of an overly top-down agenda of rule of law reform that focused on state-centric and technical approaches to reforming judicial institutions (see essays in Carothers, 2006; Golub, 2003; 2006; Piron, 2005; Faundez, 2005, among others). This critique echoed an older literature on the shortcomings, inconsistencies and poor results of rule of law programming. The trajectory of international support to the rule of law and justice provision, and the different objectives international donors have pursued, has been well documented. The past 25 years have seen four key approaches.

First, an older tradition of the international rule of law agenda, which focuses on technical assistance to legal change, reforming the workings of formal judicial institutions, capacity development and court infrastructure, has prevailed into the 2000s. This approach is rooted in the Law and Development movement of the 1960s and was reinvigorated by the democratic transitions of the 1980s. Aligned with the good governance agenda, objectives have ranged from improving legal security for economic transactions and property rights to enhancing rule-bound democracy and combating corruption to making the criminal justice system more effective.

In practice, top-down, state-centric and technical rule of law assistance resulted in ineffective transplants of externally driven institutional and organisational models. Failure to take account of local needs and socio-political realities or to enable local ownership and engage with locally driven solutions, as well as an overall mismatch between the scale of ambition and the technical, piecemeal and siloed approaches, led to disappointing results. In this context, three other approaches surfaced in the 2000s.

The second trend in justice sector reform reflects a refocusing of international support towards access to justice. The starting point here is poor people’s experience of justice and a more holistic view of the sector; however, the focus is still principally on access to formal justice systems. Access to justice programmes have involved legal aid, legal literacy and education, rights awareness and, increasingly, support to grassroots actors such as

---

paralegals. Access to justice approaches have also included support to alternative dispute resolution (ADR) mechanisms, based on the acknowledgement that costly, distant and, often, unreliable courts may not best serve justice.

Related to access to justice efforts, in very recent years there has been growing interest among international actors in non-state dispute resolution – a third approach of engagement with informal or non-state justice mechanisms is emerging. This is based on the acknowledgment of the fact that legal pluralism is present in many developing countries; many people use non-state, informal or customary systems of justice to resolve most of their disputes (with a figure of 80% often cited). International preoccupation with conflict-affected and fragile states has also reinforced the need to take account of legal pluralism in justice sector support, given its prevalence in many of these contexts. At the same time, donors remain at pains to find effective ways of navigating through the messy waters of very context-specific challenges of responding to legally plural settings (Denney, 2012; Isser, 2013).

Fourth, and against this backdrop of trends in international support to the rule of law and justice, legal empowerment has emerged as a distinctive approach based on a critique of the ‘rule of law orthodoxy’ of top-down, state-centric approaches. Legal empowerment approaches emphasise the need to focus on everyday citizens’ experiences and needs related to justice and the importance of building their legal agency. Some aspects of legal empowerment work overlap with access to justice programming, but the focus is explicitly on enhancing the legal agency of poor and marginalised groups. This is achieved through support to a wide range of processes and mechanisms, including advocacy and rights awareness raising, law and redress mechanisms, legal literacy, legal aid, support to paralegals and support to strategic litigation organisations.

Stephens (2009) reminds us that, throughout the 2000s, international NGOs and some donors were already working in the area of access to justice and attempting to connect rule of law programming to what the World Bank Justice for the Poor (J4P) programme has termed the ‘end users’ (Porter et al., 2014). The CLEP report on legal empowerment therefore captured the changing mood and trends already underway. Banik

Golub (2003; 2006; 2010; 2013) especially has contributed to giving intellectual substance to the international agenda on legal empowerment and framing the discussion on this for the past decade. A definition following the CLEP report was further elaborated: ‘Legal empowerment is the use of legal rights, services, systems, and reform, by and for the disadvantaged populations and often in combination with other activities, to directly alleviate their poverty, improve their influence on government actions and services, or otherwise increase their freedom’ (Golub, 2009). This definition emphasises the pro-poor intent of legal empowerment as well as the importance of agency-building capabilities to enable disadvantaged populations to have voice and accountability.

In practice, however, justice sector programming continues to operate in siloes, both internally and in relation to other development sectors. That is, different thematic teams within the justice sector operate separately, as do justice advisors and other types of donor advisors (governance, health, education etc.). There is limited coordination and little coherence between projects and programming that provide the more traditional technical rule of law support to judicial institutions and those situated within the field of access to justice or those providing support to legal empowerment.

Moreover, although there are several reviews of the evidence regarding the relationship between the rule of law and justice and socioeconomic development – much of it noting the mixed evidence and findings – justice sector programming has tended to remain peripheral to mainstream development policy and programming. More specifically, there are very few direct linkages between sector-specific engagement and rule of law and access to justice work or legal empowerment activities. Greenberg (2014) signals incipient efforts among international actors to bridge work between development sectors (her work focuses specifically on health) and access to justice and legal empowerment.

This siloing – the failure to recognise crosscutting themes and shared concerns or instruments – is particularly salient when it involves legal empowerment. It might be inferred that, because of the term ‘legal’, legal empowerment rests solely within the realm of justice sector projects and programming. In fact, legal empowerment precisely often involves invoking rights and the use of laws and legal mechanisms in ways that promote pro-poor development outcomes in various socioeconomic development fields, such as land, public

---

health and education. Banik (2009) among others especially note the need to deal with the political aspects of legal empowerment.

### 2.3 Legal empowerment as a socio-political phenomenon

Introducing the concept of legal empowerment to the international community has been important to give substance to the process of reorienting law and justice assistance towards the experience of poor and disadvantaged people. However, the legal mobilisation actions that are associated with legal empowerment are socio-political phenomena that predate and exist independently of international development efforts. Mostly, they are driven by domestic actors interacting with local socio-political and legal conditions.

International and national political developments since World War II and then since the end of the Cold War, such as the creation of the UN and democratic transitions, have extended the law's potential as an instrument of reform, resistance and redress. The normative thickening through extended rights commitments at the global and national levels, including through new bills of rights and expanded redress mechanisms, such as empowered high courts or human rights ombudsman, has increased the opportunities available for vulnerable and previously disenfranchised groups to resort to the law or take legal action. In response to these new opportunities for, and the use of, the law, there is a growing body of research on the politics of legal mobilisation and its potential to transform power relations and resource allocation or to hold decision makers and service providers to account.

Some works have focused on understanding the nature of the conditions and processes associated with the enablement of legal agency, including issues such as the associative capacity of vulnerable groups, levels of legal literacy and rights awareness and institutional receptiveness among adjudicating bodies. Others have tracked the legal and constitutional aspects of what are considered to be pro-poor trends in constitutional law (e.g. Langford, 2008). Others still have explored the emancipatory and transformative potential of recourse to the law and to justice mechanisms (Dugard, 2008; 2010; Dugard and Drage (2011); Santos, 2002). This knowledge base charts a shift in how poor and vulnerable groups view the law and legal action as relevant instruments for resolving conflicts, seeking redress, exercising social accountability or staging more ambitious battles of social transformation.

However, it is less clear how much we know about the socio-political drivers and blockages of legal empowerment on the one hand, and its developmental or transformative consequences on the other. Transformation here refers mostly to incremental and piecemeal processes of change in social and political conditions and relations. In part, this is linked to the role of law in politics and whether it serves elite interests or can also be used to subvert social injustices. There are three points to note in this respect.

First, the content of the law matters, and legal reform is the outcome of political change over time. While the law can and does serve social justice, it is also a social and political construct that elites have used historically to exclude the masses from political and economic entitlements, preserve elite interests and sustain exclusionary ideologies. In practice, the content of law has always been a site of contestation over the terms of the reigning political settlement and the distribution of power and resources. In addition, the law (both formal and informal) is constantly (re)made as a result of contests between and within elites and other (including marginalised) groups, as are the mechanisms of law enforcement and dispute resolution (Porter et al., 2014; Santos, 2002). This is so at national and subnational levels. Thus, legal mobilisation and empowerment, like the law and its reform over time, are the stuff of politics.

At stake is contestation about what type of polity and economy is desirable and what law best supports this. The content of the law thus matters because it gives body to the prevailing normative, ideological and political choices about what constitutes development pathways and whether equitable and socially just outcomes are prioritised. Where the formal terms of the political settlement remain exclusionary and the associated legal framework is itself unjust, access to justice for marginalised groups is less likely to lead to socially just outcomes. Marginalised people can – and do – use the legal system, even in such contexts, to make claims and achieve concrete improvements in their life, and this is important. For example, where women are able to use discriminatory law to advance their material interests. However, where the law is unjust, collective struggles for social justice might be better fought through modes of action outside the justice system, such as political protest and social mobilisation, including to achieve legal reform.

---

Second, the gaps between (good) law and socio-political realities are often significant and reflect the real – informal – political and social rules, which follow a different logic of resource and power regulation than what is articulated in de jure law. This is a common feature of many developing countries and the reasons are multiple, ranging from the weight of (neo)patrimonial practices limiting the regulatory capacity of the state to the coexistence of multiple norm systems with varying degrees of conflict and complementarity. But, even in contexts where the gap between the law and political practice is important, the fact of an expansive constitutional agreement, as in post-Apartheid South Africa or Colombia, increases choices about how the law might be used strategically to expose ongoing social injustices and de facto practices of discrimination and exclusion.

Third, the question of legal pluralism is an important one, however, because multiple normative orders coexisting within the same space has implications for development outcomes. Understanding this complexity is important to identify and inform pathways of legal empowerment. See Box 1 below for further discussion on legal pluralism and the implications for legal empowerment.

In sum, legal empowerment cannot be analytically divorced from the wider social, political and normative conditions that are critical to framing its possibility and impact. Efforts to support legal agency should not, therefore, be so narrowly focused that they do not consider the concrete implications of supporting, for instance, access to justice where the reigning norm system (state law or informal norms) and the ruling political settlement are fundamentally unjust. Politically sanitised approaches to legal empowerment that do not take account of this wider political economy risk doing more harm than good. At the same time, effective legal mobilisation can contribute to reshaping the political and development order. The question of what legal empowerment actually looks like, how it is enabled and who gains and who loses from legal action, is a matter of empirical observation.

## 3 Analytical framework: the politics of justice chains and development outcomes

### 3.1 Scope of the inquiry

This paper sets out to examine the state of knowledge about whether, when and how legal empowerment occurs in practice, and to what effect. To focus our enquiry, we concentrate on those processes of legal empowerment that relate to use of the law by poor and marginalised people through recourse to dispute resolution or judicial mechanisms that occur at different levels, including both state and non-state mechanisms of justice. However, we note that legal empowerment can cover a wider set of activities (e.g. recourse to administrative redress mechanisms or human rights ombudsmen) and that support to legal empowerment can often combine several types of activities, such as legal literacy, legal aid, advocacy, mediation, etc. (Goodwin and Maru, 2014).

The main questions in this paper are:

1. What factors enable or constrain legal action by poor and vulnerable groups, and frame the scope for their strategic use of the law?
2. Why do poor and vulnerable groups resort to legal mobilisation? What do they hope to gain?
3. What is the impact of legal mobilisation on:

- The advancement and protection of rights, including in disputes between citizens resulting from the abuse of power;
- Contesting the unjust or illegal distribution of resources (e.g. in relation to land or natural resource extraction);
- The capacity of citizens to activate the regulatory function of the state regarding service provision and implementation of law and policy; and
- Citizens' ability to exercise oversight on public authorities (including forms of social accountability through legal action).

In the next two sections, we look at legal mobilisation in relation to two areas: women's empowerment and access to basic services, including through the realisation of social and economic rights. We also make some reference to other forms of disputes (e.g. in relation to land or natural resource management where power asymmetries can be especially acute) to illustrate legal empowerment challenges. We focus on legal action across different possible dispute resolution forums in developing countries, both state-sanctioned and informal or non-state.

Two main types of activities have been selected in this review, although, as noted, we acknowledge that the field of legal empowerment embraces a wider scope of engagement with legal and administrative processes than we have chosen to focus on:

1. **Legal action through lower courts and other forms of dispute resolution to advance basic or practical interests, often for individuals.** These forums include lower courts, customary or community forms of dispute resolution mechanisms and ADR. Paralegals and grassroots organisations can provide support in helping people understand their rights and legal options, and to navigate and negotiate the justice system (and under some circumstances undertake organising and political advocacy). These claims often invoke different norm or justice system orders in contexts of legal pluralism. Failure to secure justice may lead to appeals to higher courts, and this often involves the claim assuming the characteristics of strategic litigation.
2. **Legal mobilisation to advance strategic claims through the higher courts with potential benefits beyond the litigant.** This includes litigation with more modest individual objectives, but that can also result in advancing the rights of vulnerable individuals – over time, they may have impact beyond the individual. However, the costs of litigation and lengthy appeal processes mean strategic and public interest litigation tends to be supported by legal or human rights organisations with socio-political objectives and an interest in landmark cases with potential structural impact. Strategic claims also include judicial review processes that intend to test the limits of the law.

Legal mobilisation is not intrinsically pro-poor, but in this review we are interested in those experiences and outcomes that benefit disadvantaged people. We also recognise, however, that the distributional outcomes of legal mobilisation are likely to be complex. For instance, health rights litigation might not benefit the most vulnerable but rather those groups with greater associative or mobilisational capacity at the individual or group level (Gloppen, 2011).

### 3.2 Disaggregating the justice chain

Legal action involves a series of decision-making processes and choices across a range of actors engaging at different stages of the justice chain. This includes the decision by an affected group or individual to invoke the law or relevant justice mechanism, through to the conduct and decision of the range of actors involved in adjudication (e.g. judges, community elders, paralegals or litigation professionals) or implementation of decisions (e.g. municipal authorities, ministries, governments or different service providers) arising from legal mobilisation. The interests, incentives, resources, capabilities and conduct of the different actors involved plus the wider legal, institutional and cultural environment in which they interact combine to shape the options and outcomes of legal mobilisation (Gloppen 2006; 2008; 2011).

To identify the concrete ways citizens make use of the law and justice mechanisms, for what purpose and with what effect, it is therefore useful to break down the stages of dispute resolution and redress that make up the

‘justice chain’. Drawing closely on Gloppen (2006; 2008; 2011) and informed by Domingo and Denney (2013a; 2013b), Epp (1998) and Gauri and Brinks (2008), there are four stages of the decision-making chain that are relevant to the analysis of legal empowerment:

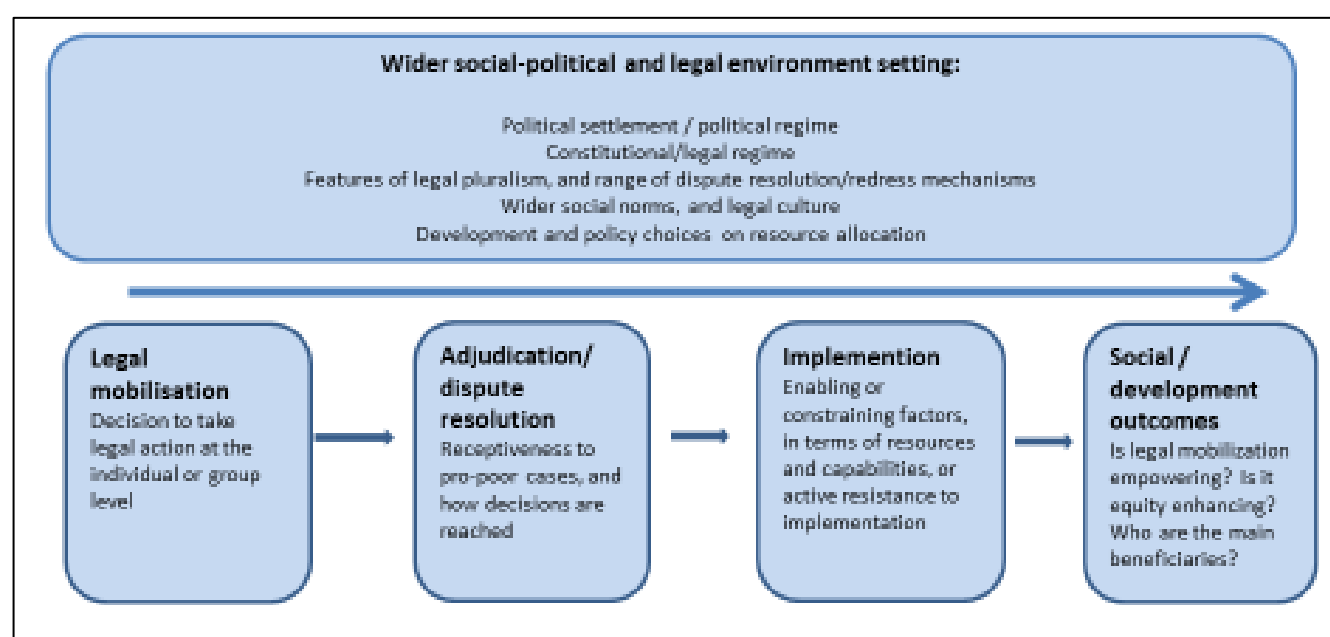
1. **Claim formation:** the decision to make a claim or take a grievance to a dispute resolution mechanism;
2. **Adjudication/mediation:** the process through which a decision or agreement is reached, whether in a formal or informal/extra-legal mechanism;
3. **Implementation:** whether enforcement occurs or not, and the process through which it takes place;
4. **Impact:** the personal, social and development impact of the process of legal mobilisation and the implementation of judicial decisions.

The merits of working through the justice chain are threefold. As noted by Gloppen (2006; 2008; 2011), different factors come into play at the different stages in the justice chain. First, disaggregating legal mobilisation experiences to the different stages of the justice chain provides a more accurate picture of concrete enabling conditions, opportunity structures and institutional blockages, as these will vary at different stages. This also allows for the fact that different actors and organisational/institutional issues are relevant at different stages of the chain – and that their conduct reflects different incentives, capabilities and resource conditions.

Second, this analysis sets the justice chain against the wider social and political context, the features of which are likely to shape the potential for effective legal mobilisation. Unpacking the justice chain enables a more accurate assessment of whether blockages are mostly located within the justice chain or result from the broader political settlement, that is, the de facto rules of the game and distribution of power.

Third, from the perspective of donor interventions, such an analysis can more accurately reveal what might be the most relevant and effective entry points to support legal empowerment in any given context. For instance, are efforts best directed at supporting paralegals, litigation NGOs, improving access to ADR and/or influencing conservative judges or community elders? Or, would legal empowerment be better served in the longer term if resources were used to support socio-political movements for more just law, including through constitutional reform processes.

**Figure 1: Summary of the justice chain**



### 3.2.1 Legal mobilisation, and claim formation

Claim formation involves understanding the factors that shape people’s decisions to mobilise behind the law. Whether a person or a group of claimants views the legal system and dispute resolution mechanisms (and which

---

ones) as viable instruments through which to advance their interests depends on their particular objectives and the legal and socio-political opportunity structure. Factors include:

- **The legal framework**, including the content of the law and the mechanisms in place to channel dispute resolution, rights protection and redress (formal and informal) that establishes whether the normative framework is in principle conducive;
- **Legal agency**, including the idea that individuals have the personal resources (psychological, material, social) to perceive use of the law as a viable option and to act on it to advance their goals and interests. This is shaped by factors such as power asymmetries, self-confidence and self-belief, critical awareness of social relations and possible alternative arrangements (e.g. changes to gender relations and roles), levels of awareness about law and entitlements and associative capacity to organise collectively. Notably, marginalised groups often have good reason to distrust dispute resolution or redress mechanisms which are often not ‘user-friendly’ and require complicated legal and bureaucratic procedures, or which are likely to reaffirm the practices and social norms (for instance of discrimination) that are the object of contestation;
- **External support structures**, and how available these are is relevant to shaping choices regarding use of the law. This includes diverse supporting organisations that provide legal literacy, legal advice and litigation support. These range from paralegals who provide support to the individual, group or community in question, and who often come from the community; human rights organisations at the national and transnational level; and legal aid and litigation clinics that can articulate and lead on strategic litigation and give legal advice to affected individuals or groups.

The legal opportunity structure is therefore multidimensional and involves different actors. It also involves different types of calculations about the benefits of engaging in legal action (and at what level) versus the costs of doing so and whether a just outcome can be reasonably expected.

#### A note on legal pluralism

Contexts where **legal pluralism** is the norm add an additional layer of complexity to the decision-logic of recourse to justice mechanisms and the law (see Box 1). The interconnections between formal law and informal or customary norms as well as those between formal justice mechanisms and other forums at the community level for dispute resolution, mean processes of legal mobilisation can include strategies to navigate plural norm and institutional systems to achieve the protection of rights or advance a claim. In other words, poor and other disadvantaged populations might seek redress not just through official state processes but also through traditional avenues, and may even resort to both simultaneously or in tandem.

#### Box 1: Legal empowerment in plural legal orders

The number and type of dispute resolution mechanisms available to a person in practice are key factors which shape the legal opportunity structure. Legal pluralism extends the range of potential options for dispute resolution, and all countries have plural legal systems to some degree. In many developing countries, disputes are resolved primarily through non-state systems of justice – so the implications for legal empowerment are critical. The range of forums can differ in all sorts of ways, including who hears and decides cases; how conflicts are pondered and resolved; the types of remedies and actions they can include (officially or de facto); and what normative order and corresponding beliefs about social justice they reproduce.

Importantly, different legal orders within plural systems are mutually constitutive rather than separate, even those that are partially or wholly autonomous. Different legal orders feed into one another not only through formal procedures (e.g. referrals) (Denney and Ibrahim, 2012) but also, more importantly, through common legal or social reference points, such as the shared subjectivity of both claimants and justice providers and the influence (often informal) of dominant sociocultural norms and ideas (such as patriarchy). Cross-fertilisation

between legal orders also occurs in terms of their procedures. For example, support for state-sponsored ADR is partly a response to the perception of the positive aspects of community dispute resolution, that is, 'the imagination of the local and customary as quick, effective and flexible' (Nagaraj, 2010: 430). Different legal orders therefore influence each other – at times, different legal orders will be in competition and one order may be able to undermine another; conversely, at other times, they will be complementary and serve to reinforce one another (Tamanaha, 2013). Whether competition or complementarity between orders better serves the interests of poor and marginalised people depends on the place, time and issue.

Legal orders should also not be thought of in dichotomous terms, as a choice between statutory and customary/indigenous law that operates in parallel. Studies of legal pluralism emphasise the complexity and variety of plural legal systems. In different countries, or even localities, we find different types of mechanisms applying different laws or norms. Customary and religious law is often incorporated into the official legal system and applied by the courts. Justice mechanisms outside the court system may be formally recognised by the state or they may be extra-legal, and these may apply to customary law or other norms and principles, such as common sense, localised agreements (about natural resource use, for instance) and/or human rights. Simplistic dichotomies, such as formal/informal or state/non-state justice, misrepresent these interrelationships and variations.

There is nothing inherently good or bad about legal pluralism, but its particular physiognomy is important to understand, precisely because of the implications it has for how the distribution of power and resources is contested and how these disputes about resources are resolved (Porter 2013). It also has implications in terms of how regulatory processes apply and what systems of accountability look like, for instance regarding the delivery of services or the realisation of rights (Jayasuriya, 2013; Porter, 2013; Tamanaha, 2013).

In recent years, accounting for and working with legal pluralism has become a growing feature of the international rule of law and access to justice agenda. The UN Secretary-General's report on Legal Empowerment highlights the need to take account of customary norms (UN, 2009). UN Women (2011) points to the complexities of navigating legal pluralism from the perspective of women's rights and their experience of justice and dispute resolution. The emerging documentation around international support to paralegals (Goodwin and Maru, 2014; Golub, 2000; Open Society, 2013, Dugard and Drage 2013) is providing evidence about the advantages that paralegals have in being able to navigate more easily across normative boundaries. It is also important to note warnings on the perils of uncritical engagement with the informal (Faundez, 2013; Porter, 2013). What matters is to understand what power structures and potential forms of inequality of discrimination are reproduced in different normative orders in order to be able to assess the potential for legal mobilisation strategies for progressive social change.

### 3.2.2 Adjudication and mediation

The key question here is what does it take for judicial and dispute resolution actors to take up cases and to rule in favour of claimants from poor or disadvantaged groups, or to mediate settlements in ways that attend to power imbalances and the rights of disadvantaged parties. Politics affects dispute resolution in practice in different ways. First, the overall features of regime type and national political dynamics and competition influence both the content of *de jure* law and policy, including the role and independence of the justice system. Second, *de facto* social norms, power hierarchies and structural bias within institutions and communities influence the nature and quality of dispute resolution in practice.

More specific factors that influence the nature and quality of adjudication and mediation include:

- **Access factors** associated with how easily claims can be formulated shape the likelihood that potential claimants will pursue a legal route to redress. This includes physical and cost-related barriers, cultural and linguistic barriers, and informational and attitudinal barriers as well as levels of awareness about rights and the possible forums and processes that can be used. Finally, a dearth of legal advice, representation and/or other forms of help may, in effect, preclude access to justice, even where informational, attitudinal, physical and other barriers are not in play.
- **Institutional /legal factors**, including the legal basis on which cases are filed and argued, or the equivalent for the customary (or ADR) system in question, issues of standing (who gets to make a

---

claim and what are the requirements), issues of jurisdiction, and the scope for judicial review, including whether rulings have general effect or apply only to the claimants.

- **Responsiveness of adjudicators**, as shaped by their attitudes, beliefs and incentives as well as issues relating to the prevailing legal culture. This is also related to how adjudicators are socialised into dominant social norms and structural bias that inform their judgement and attitudes towards cases and claimants. The political and social background of adjudicators matters in shaping the ‘worldviews’ and political preferences they hold, as well as how they are selected. Associated with this are issues of independence and impartiality – and moral credibility and legitimacy – and what interest and power structures with which they are likely to align themselves. At the same time, the increasing visibility of judicial processes in the mass media may also affect the judgement of adjudicators.
- **Capacity and resource issues**, has to do with the range of resource constraints and capabilities that adjudicators have – related to quality of legal training as well as levels of support and issues of case backlog.

The most immediate and tangible outcome of legal action is the ruling or settlement. The form and content of this varies according to the type of justice mechanism, for example, in terms of who can make a ruling, possible orders or remedies and who they can apply to, with differences both within the courts system (e.g. criminal vs. civil, level of court) and between courts and other mechanisms.

### 3.2.1 Implementation

While the ruling or settlement, and associated orders or agreements, is certainly an important outcome of the adjudication and mediation process, for the parties involved the implementation phase of the justice chain is as integral as the judgement is to effective remedy and dispute resolution. To understand the empowerment outcomes of legal mobilisation – whether it leads people to have access to new resources and improves their wellbeing *in practice* – it is critical to analyse how and why governments and public authorities respond to rulings. For example, do they systematically ignore them, or pay lip service to them by setting up commissions or reviews, but not implementing findings; do they enforce new rights; do they allocate appropriate resources, etc. Similarly, where dispute resolution involves mediated settlements between private parties, it is important to know whether they comply with the terms of the agreement and for how long.

Gloppen (2008) also distinguishes between the narrow implementation of concrete measures (say, as applied to an individual claimant) and longer-term implementation of decisions that require more systemic or wider policy change.

In many of the cases we are interested in, implementation is not a politically neutral process, as it can involve a reallocation of resources or a redefinition of power relations. Implementation thus can be hindered by active resistance among the ‘losers’; resource and capacity gaps within the implementing agency; regulatory gaps in overseeing implementation; the dominance of resilient social norms; or the weakness of state and other forms of authority and insufficient reach to ensure enforcement. Thus, factors such as corruption, patronage, gender biases, political pressure and personal favouritism often frustrate implementation.

Whether legal battles waged over the distribution of resources or access to services and entitlements result in positive outcomes for the poor *that are then effectively implemented* depends on the nature of the rule of law and the workings of multiple normative orders *in practice*, and how these are embedded within wider political dynamics. If legal action repeatedly fails to lead to desired outcomes, trust in dispute resolution institutions will decline and legal mobilisation can become discredited as an option. At the same time, claimants may mobilise the law for its symbolic value rather than because they expect the ruling to be implemented. In some cases, there is not even an expectation of a court victory, but the courtroom becomes an additional or alternative forum to air a particular issue – so legal mobilisation is politics by other means (Abel, 1995).

### 3.2.3 Social or development impact

A key question for this paper lies in assessing what we know about what type of change processes are unleashed through legal action: does legal mobilisation result in transformative changes or (directly or indirectly) improve development outcomes, such as those related to poverty reduction, improved services, gender equality or more transparent and accountable government?

---

Key questions include:

- Are power relations (such as gender relations or other inequalities) altered?
- Are there better outcomes in access to services (health, education, water)?
- Are citizens, as legal agents and rights holders, empowered in their relationship with the state or relevant structure of authority (either at national or at subnational level)?
- Is accountability of the state and government enhanced?

Mostly, as subsequent sections show, there is concrete evidence that, in some cases, legal action unleashes change processes. It is important to note that the types of change that might derive from different types of legal action vary and are not necessarily commensurate or comparable. For instance, the work of paralegals can result in change regarding levels of awareness and increase the legal choices of individuals or groups at the local level, and this has meaningful impact for those groups or individuals. This is different from change processes that might result from strategic public interest litigation (or threat of litigation), such as intended policy or legal change, which is likely to have a different level of ambition and scope.

This raises questions as to how we categorise and measure different types of impact.<sup>4</sup> The way we assess impact needs to take into account the objectives of the claimants themselves, their scale of ambition and hoped-for outcomes. It is also necessary to make reasonable assumptions about what is possible to achieve given the particular legal mobilisation strategy and socio-political conditions – including legal framework and availability (and quality) of organisations to support the legal action of disadvantaged people, as well as the broader political economy that influences how the justice system works.

This disaggregated analysis can thus deepen the understanding of the consequences of legal action for beneficiaries and for the wider public good – whether legal mobilisation is empowering in practice, for whom and at what level. This is important to inform international actors on how they can most effectively support legal empowerment processes.

Finally, it is important to highlight, first, that legal action is only one of many possible strategies to achieve change in power relations, resource distribution or access to and quality of services. Second, the scale of change can be more or less transformative and piecemeal. Change that happens at the subnational or individual level may seemingly not contribute to wider structural change, but it is still important.

## 4 Women's use of the law and legal systems: when, how, to what effect and why?

In this section, we use the justice chain framework to analyse what the primary and secondary literature tells us about the politics of women's legal empowerment. Women around the world face a conundrum. The legal system is a central social mechanism through which to seek redress and protection, and to challenge and extend their rights, but it is also a chief source of discrimination, injustice and insecurity for women (Jahan, 2009; UN

---

<sup>4</sup> Goodwin and Maru (2014), for instance, distinguish impact on citizens and their levels of awareness (that in turn signal enhanced agency) from institutional impact (that relates to change in law, policy and the conduct of state actors).

---

Women, 2011). This contradiction is not lost on feminist activists, who often focus on legal reform. By focusing on women's legal empowerment, we can ask whether and how legal action advances women's individual and/or collective interests *in spite of* an unfavourable legal environment. The three main questions are:

- What factors inform women's decision to use the law to improve their position?
- What conditions help or hinder their ability to do so?
- What are the outcomes of legal action, and for whom?

## 4.1 Claim formation: why do women use the law and what factors inform their decisions?

The section provides an overview of the types of factors that inform women's decisions about when and how they use the justice system. Women's common experience of patriarchy and gender discrimination means they have shared gender interests.<sup>5</sup> These are of two types: *practical gender interests* are immediate needs that emerge from women's everyday experience of gendered institutions, particularly the division of labour and marriage, whereas *strategic gender interests* are deduced from an analysis of the causes of women's subordination and desire to change these (Molyneux, 1985).

This distinction is also useful for thinking about the reasons why women use the law and their objectives when they do so. Some women and their allies use legal mobilisation to advance strategic gender interests in order to effect structural change with the potential to benefit large numbers of women, such as when feminist organisations use the courts to push for legal reform or the implementation of already-won progressive laws. This type of *strategic legal action* is politically motivated and usually takes the form of public interest litigation pursued collectively through the higher courts.<sup>6</sup> More often, however, women use the justice system to pursue practical gender interests, particularly those relating to divorce, inheritance, property, children and gender-based violence. This type of *practical legal action* is usually by individual women through lower courts and/or ADR mechanisms in pursuit of personal interests and private gains.

Beyond the basic distinction between practical and strategic gender interests and legal action, however, analysis of women's legal empowerment must be based on their particular circumstances. These inform not only the reasons why a woman takes legal action and what she wants or expects from it, but also her legal opportunity structure, that is, her *de facto* choices about where to make a claim, the costs and benefits of different legal avenues and her chances of a successful outcome. Three main types of factors influence women's decision logics and legal opportunity structures: the legal framework, personal capabilities and the external support structure.

### 4.1.1 Legal framework

A country's legal structure frames women's possibilities for legal action. Despite progress in legal change, statutory law in many countries continues to deny women the same rights as men.<sup>7</sup> This official gender discrimination is often direct, but acts of omissions by government can also lead to gaps in the legal framework (Chiongson et al., 2011).<sup>8</sup> In theory, legal pluralism should extend women's choices about types of forum and the legal or normative grounds on which to make an argument; in reality, one legal order can dilute or negate the substantive or procedural entitlements accorded by another. This is a particularly serious issue for women. Most women's claims relate to family law, where (statutory or extra-legal) customary or religious law dominates –

---

<sup>5</sup> Note that gender interests are different from the idea of 'women's interests' – a misnomer, since all women do not have homogenous interests by virtue of their being a woman (Molyneux, 1985).

<sup>6</sup> Conservative forces, which have historically been better funded and organised, also use strategic litigation to block attempts to reform gendered institutions (Rutkow et al., 2009).

<sup>7</sup> There has been significant progress in the formal recognition of women's rights, since the 1970s in Europe and, usually, accompanying and following democratic transitions in other regions. For example, 139 countries now have constitutional guarantees of gender equality, more countries formally recognise women's employment rights (e.g. 173 countries pay maternity leave and 117 have equal pay laws) and many countries have outlawed domestic violence (125). However, there remain *de facto* gaps between constitutional guarantees and women's statutory rights in many areas of law. The formal denial of women's rights and equality is particularly entrenched in relation to family laws (e.g. marriage, personal status, divorce, inheritance) and economic rights (e.g. ownership/control of assets and resources) and in particular regions (Middle East and North Africa, South Asia and Sub-Saharan Africa) (UN Women, 2011: Chapter 1).

<sup>8</sup> Direct discrimination includes overt gender inequality in entitlements or restrictions on only women's liberties; indirect discrimination includes the failure to address specific inequalities or gender-neutral laws that do not take account of how existing inequalities affect women's ability to access the law.

and these legal orders actively promote and protect gender inequality. Formal discrimination combined with *de facto* patriarchy and structural discrimination means women in developing countries must choose the least bad option.

Most women in low-income and conflict-affected countries will primarily use either indigenous/neo-traditional or community-based dispute resolution, but this does not mean women necessarily prefer such forums. Instead, empirical studies suggest women's legal preferences arise from their socio-political circumstances and their assessment of where they are likely to get the best outcome (e.g. Basu, 2006, 2012; Jahan, 2009; Khadiagala, 2001; Isser et al., 2009; Rao, 2007). These rational calculations about the costs and benefits of different forums are located within context-specific social relations and political regimes, as well as legal structures.<sup>9</sup> Women also do not view their position as a choice between parallel state and customary justice systems. Where they have active choices, women can be adept at navigating plural legal systems. Many women begin with more accessible and less costly community or customary forums, and progress to the formal courts system only if they fail to get a satisfactory outcome. But women can also iterate between forums, moving from community forum to court and back again to the community, or making claims in several forums simultaneously in order to increase their bargaining power (see Box 2).

### Box 2: Kinship entitlements and women's strategic use of the law in India

Case studies on women's use of dispute resolution to protect and advance their marriage and land rights illustrate how women navigate plural legal systems and use different legal orders/forums in strategic ways. Rural women in India will tend to try to resolve most disputes within first their kin group and then community conflict resolution forums, such as the village council, before taking their claims up to the state courts. When they do seek remedy outside of the community, hybrid and/or specialised ADR forums appear to offer the best chance of a favourable outcome for many women. Women may still feel they can make the best argument based on their customary kinship and marriage entitlements, but hybrid institutions have the benefit of having public authority while also being more affordable, physically closer and less intimidating than state courts. For example, while the revenue (civil) courts are beyond the financial reach of most Indian women, there has been an increase in women's land registration claims related to the practice of *gharjawee* (resident son-in-law) marriage among Santal people in Jharkhand in the settlement courts – intermediary institutions set up to hear local claims quickly based on universal norms as well as custom (Rao, 2007).

Indian women, including those on low incomes, can also use one forum or legal right as leverage to improve their bargaining power in their negotiations within another. For example, domestic violence is now a criminal offence in India, but women appear mostly to use this new right to improve their bargaining power vis-à-vis their in-laws in parallel negotiations – that is, some women lodge a complaint at the police station under Section 498 (of the Indian Penal Code), which prohibits the 'torture of women', to try to get better divorce terms in informal negotiations with their spouse and his family. This can be a risky strategy for women, however. Indians fear their venal and unpredictable criminal justice system and want to avoid the possibility (and expense) of pre-trial detention and prosecution. A formal complaint may therefore persuade in-laws to make concessions in informal negotiations. However, where they have means, husbands and their families can bribe the police to not lodge the wife's formal complaint, leaving the woman in an even weaker position in parallel negotiations about the conjugal contract (Basu, 2006; Hasle, 2003; Rayaprol and Ray, 2010). In other marriage disputes, spouses use community mediation first, then a hybrid forum such as the Lok Adalat (People's Court) to formalise their decision (e.g. a divorce), and then return to a community forum to agree settlement terms (Jahan, 2009).

Women who undertake strategic legal action in the higher courts also exhibit similar calculations and behaviour to those using lower courts to resolve their more practical disputes – that is they also choose the forum and argument that is mostly likely to be successful. For example, women's and legal organisations have been actively supporting public interest litigation in Poland, but have adopted different strategies depending on the nature of the case. In the *Tysiac* reproductive rights case, national legal channels were exhausted and claims taken up to the European Court of Human Rights. But, in the *Biedronka* labour rights cases, women's organisations leveraged domestic laws and popular discourses relating to labour rights to forward women's

<sup>9</sup> For example, Isser et al. (2009) describe how the socially embedded nature of security and livelihoods for rural Liberians mean their use of customary forums that emphasise reconciliation rather than retribution is based on rational calculation rather than moral affinity.

---

immediate and practical gender interests when this was more likely to advance their claim than a direct appeal to gender equality and women's rights (Fuchs, 2013).

#### 4.1.2 Legal agency: capabilities and perceptions

On paper, the legal framework applies to all women within its jurisdiction. In practice, women's personal capabilities and perceptions mediate the opportunities and constraints the legal structure affords. These personal resources arise from three different types of factors, which can have a positive or negative affect on women's legal empowerment: *socio-political*, *economic* and *cognitive/experiential*.

##### Socio-political factors

Gender is socially constructed and highly political because it is used to naturalise hierarchal relations between men and women, to exclude women from access to power, entitlements and assets and to subordinate women in all institutions, including legal ones. Patriarchy and gender roles and hierarchies affect women's capabilities and potential legal empowerment in myriad ways, including:

- **Limits on women's autonomy and choices**, through both external control (by the husband, the community, officials) and their internalisation of subordination, including about where they can or should take claims. Women can be under immense social pressure to resolve their claims within the family or community, particular in cases of sexual and domestic violence, and can face stigma and retaliation if they chose otherwise (IDLO, 2013; Sieder and Sierra, 2010; UN Women, 2011).<sup>10</sup> Men are often gatekeepers to the justice system and can actively prevent women from making claims, particularly in state-sponsored forums that require money, referral letters (e.g. from chiefs or local officials) or official action (e.g. police filing charges). Women may not complain at all about rights violations because of fear of the consequences<sup>11</sup> or acceptance of abuse.<sup>12</sup>
- **Limits on women's access to the opportunities and entitlements necessary to build the capabilities** that make legal empowerment more possible. These limits can arise from the direct exclusion of women from entitlements such as education or employment; they can also be more indirect. For example, women's triple burden of responsibility for reproductive, domestic and productive labour (Sieder and Sierra, 2010) means they have less time than men do for activities that build capabilities and political, economic and social capital, such as education, involvement in civic or political associations and socialising.
- **Structural bias within the justice system.** All women can experience systematic discrimination within the justice system, regardless of their country or the type of justice forum used. Structural bias results from hegemonic patriarchy and associated *de facto* social norms, underrepresentation of women within the justice sector and, in many countries, discriminatory laws.

Because these limitations on legal empowerment arise from the structural causes of gender inequality, any woman can experience them. Importantly, however, some groups of women face multiple and intersecting prejudices and exclusion based not just on their sex but also on their class, ethnicity and/or religion (IDLO, 2013; Sieder and Sierra, 2010; UN Women, 2011). Other socio-political factors to affect women's legal empowerment are based on a country's particular political histories and are therefore more generalised. For example, conflict, authoritarianism and communism influence levels of trust in the state and whether the law is seen as a viable instrument for legal or political mobilisation, and these perceptions can continue after democratic transitions or peace agreements (Fuchs, 2013).

---

<sup>10</sup> For example, women in Kenya report that they are seen to be disrespecting their husbands if they make land claims in court (IDLO, 2013), and Aymara women in Bolivia who seek help with disputes or violations from outside their community can face condemnation and risk alienating their family (Sieder and Sierra, 2010).

<sup>11</sup> Hasle (2003) found women victims of domestic violence in Dhaka slums to be reluctant to speak out, viewing overt conflict as too high risk and instead mostly adopting a strategy of non-confrontation.

<sup>12</sup> Studies in Ecuador, Guatemala and Peru suggest women and girls are reluctant to speak out about rape and intra-familial violence and district and community authorities fail to sanction gender-based violence unless it involves minors or is life-threatening, and may even cover it up (Sieder and Sierra, 2010).

---

## Economic factors

When deciding whether to take legal action and through which forum, women weigh up the economic (and social) cost and benefits of different courses of actions. Cost arises from a combination of official fees and physical location and the unofficial fees and costs that claimants incur when the justice process is inefficient or corrupt; benefits come from the expected outcome. Costs and benefits are therefore context-specific, and also relative, because their impact depends on the socioeconomic position of the individual, the type of claim etc. A women's economic circumstances, often directly related to gender and other forms of discrimination,<sup>13</sup> affect her potential legal empowerment in several ways.

- **Some women in developing countries lack financial autonomy.** Most forms of legal action require money or other assets; even those that are nominally free can have hidden costs.<sup>14</sup> Women may therefore be unable to take legal action without a man's support (e.g. husband, father, son, brother). This is particularly problematic when women's claims are domestic or inheritance disputes where the respondent is their male kin. Women can be reluctant to bring criminal charges when they are financially dependent on the perpetrators (e.g. in cases of sexual/domestic violence) (IDLO, 2013).
- **Women in low-income groups cannot afford some forms of dispute resolution.** Women in developing countries most often take legal action to improve their family's economic security.<sup>15</sup> Even if economically independent, most women (and men) in developing countries have little capital or disposable income<sup>16</sup> and may be excluded from some forms of dispute resolution in practice. This is particularly true of the courts, where legal advice and representation is required and fees can mount up.<sup>17</sup> Even where the potential benefits outweigh the costs, women often do not have the necessary assets to take out loans or see out lengthy litigation.<sup>18</sup>
- **Wealthier women are more likely to mobilise around strategic gender interests.** Public interest litigation involves drawn-out litigation in the higher courts, and often action against wealthy and organised interests, so claimants need to have significant resources to stay the course. Even middle-class women are unlikely to be able to pursue these types of claims without external financial and organisational backing. Limited finances, as well as social, cognitive and experiential factors, mean low-income women are more likely to pursue practical rather than strategic gender claims.

## Experiential and cognitive factors

Personal resources of a less tangible nature also influence choices about legal action, including cognitive traits and individual experiences. *Some* degree of knowledge of the law and legal system – that is, awareness that there has been a transgression of rights/entitlements and that there are potential avenues to make claims and seek remedy – is a necessary condition for legal empowerment.<sup>19</sup> Legal mobilisation to advance strategic gender interests also requires some degree of political consciousness of the injustice of gender hierarchies and how

---

<sup>13</sup> Women's triple burden of labour and lack of access to land, property and education means they are economically vulnerable, particularly women from marginalised groups. For example, 75% of indigenous population live below the poverty line in Mexico compared with 50% of the total population (Sieder and Sierra, 2010).

<sup>14</sup> While the financial costs of community mediation forums are negligible, this is not necessarily true of customary or popular justice forums, which can involve informal or under-the-table payments (bribes, gifts) or lengthy appeal processes (Henrysson and Joireman, 2009). For example, Khadiagala argues that (2001: 67) 'rather than shortening the judicial process and making it less expensive, Local Council Courts [in Uganda] have created additional complexities, expenses and delays'.

<sup>15</sup> For example, the majority of cases in family courts and in NGO ADR in India relate to economic claims (e.g. provision of food, freedom to work, maintenance) (Basu, 2006; Hasle, 2003).

<sup>16</sup> There is debate about whether female-headed households are poorer than their male counterparts (E.g. Klasen et al., 2011), but not that most households in developing countries live on extremely low incomes.

<sup>17</sup> For example, a formal claim for land in an inheritance case in Kenya can involve 17 different legal steps, costing up to \$780 for lawyers' fees and other administrative expenses, and the average cost of obtaining a divorce in religious courts in Indonesia, which handle 98% of legal divorces, is \$90 (and a survey carried out by a women's organisation of its members found that 90% of respondents in a survey would be more likely to use the state courts if the fees were waived or if circuit courts were held near to them) (UN Women, 2011).

<sup>18</sup> For example, Rao (2007) notes that women have a good chance of success if they take their land claims to the civil courts in India, but only women who have source of income other than the dispute land can afford to sit out these cases, which often drag on for years. Women who are subsistence farmers or are at risk of dispossession must instead opt for immediate decisions through social negotiation within the family or the village council, even though this may result in worse economic outcomes.

<sup>19</sup> The need for some basic rights or legal awareness in order for women to consider legal action is a reason why legal education programmes are an important (though insufficient) foundation for legal empowerment. In their analysis of types of legal empowerment activities, Maru and Goodwin (2014) found legal literacy to be the most common activity (featuring in 57% of the interventions studied, n=199). Beyond the basic knowledge needed for women to want to make a claim, paralegals and other legal professionals are important to provide the more extensive legal knowledge necessary for women to explore legal options and press claims successfully.

---

gendered institutions and patriarchal norms perpetuate these. A woman's worldview and her understanding of what is possible or desirable will be informed by her personal convictions (e.g. religious beliefs or self-belief/confidence) and exposure to different ideas.

Previous experience of legal or similar forums can improve a women's ability to make sound assumptions about the quality of justice she is likely to receive in different forums (e.g. accessibility, likely treatment by officials) and therefore better judgements about how best to press future claims. Personal experiences also matter because the nature of the transgression and whom the claim is being made against influences women's decision logics. For example, a survey of 57 countries found women were more likely to report robbery (38%) than sexual assault (11%) (UN Women, 2011). Women in Sierra Leone said they were more likely to use the criminal justice system if raped by an unknown assailant than if they were abused by an intimate partner (Denney and Ibrahim, 2012).

#### **4.1.3 External support structure**

Women's access to external resources strongly influences their chances of legal empowerment. This external support structure includes finance, organisational support (e.g. information, research, advocacy, networks) and able and willing lawyers (Epp, 1998).<sup>20</sup> For example, the importance of external resources to women's strategic litigation can be seen in post-communist Poland, where a network of women's organisations and international human rights NGOs have supported every important legal human right claim (Fuchs, 2013) (Box 3).

#### **Box 3: Organisational support to women's legal empowerment in post-communist Poland**

There has been an increase in Polish women's NGOs, such as Centrum Praw Kobiet (Women's Rights Centre), providing legal counselling, legal literacy and other support services. Fuchs (2013) speculates this is part of the reasons for the steady increase in strategic litigation in Poland. Polish NGOs are supported by international NGOs, such as the Helsinki Foundation for Human Rights, which has run a strategic litigation programme since 2004 and supported every important human rights case in post-communist Poland. However, future funding for women's NGOs in Poland is in jeopardy, as European Union (EU) funding has become more difficult for them to access post-accession.

A support structure is as important to advance the practical gender objectives of low-income women and increase their choice of forum. State legal aid, if available at all, is usually confined to criminal cases (UN Women, 2011), but NGOs can provide valuable financial and other support to women who fail to obtain an acceptable outcome through community mediation (Hasle, 2003; Goodwin and Maru, 2014).<sup>21</sup> Feminist lawyers are needed to champion women's claims and push for progressive reform of extremely conservative legal professions and procedures, but are in short supply not only because of women's underrepresentation in the judiciary but also because women lawyers and judges are themselves subject to gender discrimination (Rayaprol and Ray, 2010). Paralegals and specialised legal services can help women understand their rights and navigate the courts, police processes and administrative tribunals, as well as complex plural legal systems (UN Women, 2011). Police gender desks, one-stop shops, such as integrated care centres, and other multi-disciplinary teams and specialised state agencies have been shown to increase reporting rates, streamline processes and, ultimately, improve outcomes for women (see Box 4).

---

<sup>20</sup> Epp (1998) argues that the development of a support structure was the principal enabling factor in the growth in the use of the courts to assert and defend individual rights, including women's rights, in Canada, the UK and the US.

<sup>21</sup> One study comparing different legal empowerment interventions in villages in Mozambique found that, compared with villages where no legal support were available, dispossessed women who had access to paralegals almost always took their land rights claim to community leaders. However, when community forums did not uphold women's claims, only the women in villages where paralegals were supported by lawyers were women likely to take their claims up to the formal court system, where decisions were more often in women's favour (Goodwin and Maru, 2014, citing Kapur, 2011).

---

#### **Box 4: Improving women's legal opportunity structures – specialised support services**

Thuthuzela Care Centres, introduced in South Africa as part of the national anti-rape strategy, provide integrated services including emergency medical care, counselling and court preparation. They are located in public hospitals, staffed by specialised medical staff, social workers and police and aim to address the medical and social needs of survivors, reduce secondary victimisation, improve conviction rates and reduce delays in cases. The centres support survivors through the entire process through various staff members, from victim assistance officers, who explain the examination and complaint filing process, to case monitors. In Soweto, trial completion times have been reduced from the national average of two years to 7.5 months. Conviction rates are now 89% (UN Women, 2011).

Women's legal opportunity structure, preferences and choices are therefore context-specific, arising from a combination of factors that include de facto legal structure, personal capabilities and the existence and strength of an external support structure. However, structural discrimination and widespread corruption in developing countries means, even when women have a choice between forums, they are likely to ask, 'Where will I get relatively better treatment and a fairer hearing on the basis of this particular claim?'

### **4.2 Adjudication, arbitration and mediation: women's experiences of making claims and resolving disputes**

Four main factors influence women's experience of different dispute resolution mechanisms and the quality of justice they receive: accessibility; the attitude and behaviour of justice officials; institutional capacity; and the content of the ruling or agreement.

#### **4.2.1 Accessibility of dispute resolution**

Accessibility is a composite factor made up of things such as cost, efficiency and the language and style of proceedings (see Box 5). ADR has been promoted as a means of improving women's access to justice in developing countries in the context of unfamiliar, costly, overloaded and, often, corrupt court systems (Basu, 2006). As a result, there has been an increase in ADR forums that deal primarily with civil family disputes – and these do appear to provide quicker, cheaper and less formal dispute resolution for women. Specialised courts, such as mobile courts and family or domestic violence courts, bring state dispute resolution physically closer to rural women, streamline and simplify procedures and can provide access to specialist and sympathetic personnel (UN Women, 2011). The length of time from petition to ruling/agreement is much shorter in both state- and community-/NGO-sponsored ADR forums than in other courts.<sup>22</sup> Low-income women in developing countries appear to favour ADR when available (Crook, 2011; Khadiagala, 2001), and they can increase women's legal action (Hasle, 2003).<sup>23</sup>

---

#### **Box 5: Accessibility depends on many different factors**

Access to justice is a composite factor made up of elements such as cost and proximity; language and style of proceedings, including availability of interpreters; procedural rules, such as whether legal representation is required or rules formally discriminate against women (e.g. they are unable to speak, their testimony carries less same weight than men's); and efficiency, which depends on funding and staffing levels, quality and speed of process, equipment and infrastructure.

*Sources: Chiongson et al. (2011), Denney and Ibrahim (2012); Sieder and Sierra (2010); UN Women (2011).*

---

<sup>22</sup> For example, Basu (2006) reports that 75% of cases in the Family Courts in Kolkata are cleared within the first year of filing and only 3% of cases take more than three years.

<sup>23</sup> For example, Nagorik Uddyog (NU), a Bangladesh NGO, set up a mediation programme, modelled on the traditional shalish, in 2000. In its first year of operation it had applications. By 2003, this had increased to 146 (Hasle, 2003).

---

Access to justice is about not just women's ability to make a claim, however, but also the quality of justice they receive. Forums where women do not need legal representation make justice more affordable and, because women are able to speak for themselves, are characterised as instruments of women's empowerment. And women do appear to have more 'procedural power' when ADR is supported by organisations committed to equality (Crook, 2011; Jahan, 2009).<sup>24</sup> However, power asymmetries can mean women speak for themselves but are still unable to say what they want. Spouses, families or communities can pressurise claimants to ask for particular outcomes, such as divorce or reconciliation, leaving them dissatisfied with the ruling, even when it is apparently in their favour (Jahan, 2009). The style and atmosphere in family or other 'popular' courts in practice can be as intimidating and paternalistic for women as they are in mainstream courts, even for educated women (Basu, 2006; 2012). Some feminists also argue that, without lawyers as intermediaries, women are more vulnerable to prejudice, arbitrary decisions and potential miscarriages of justice (ibid.), particularly uneducated and illiterate women, who are less able to understand legal proceedings and documents (Khadiagala, 2001; Sieder and Sierra, 2010).

It is clear that, outside of community and traditional dispute resolution, an external support structure – that is, a network of women's organisations and rights advocates to provide financial and social support – is important to ensure women have access to the court system and to new forms of ADR, and it is essential to ensure women are able to pursue strategic litigation in the higher courts.

#### **4.2.2 Attitudes, incentives and behaviour of justice providers**

Indigenous and neo-traditional mechanisms provide the quickest, cheapest, most accessible and common form of justice for rural residents in many developing countries and, in recent years, there has been increased interest within the development community in how to engage with these 'non-state' forums (Denney, 2012). Feminist lawyers and women's organisations tend to be sceptical that women can secure a fair hearing and just outcomes from customary institutions, however, and instead advocate for reform efforts to be concentrated on the state justice system (Claassens and Mnisi, 2009; Whitehead and Tsikata, 2003; Rao, 2007). Their concern is not just with the discriminatory laws but also with their arbitrary application by conservative and self-interested local elites.

In principle, the rule of law is more able to advance women's interests and formal rights than is the rule of man. Whether it does so in practice, however, depends on whether justice officials are competent, honest and fair, and whether they treat women with respect – and the evidence suggests courts perform poorly against these standards. While legal reform is often needed to better protect women's rights, therefore – and gender-sensitive laws certainly improve women's legal opportunity structure – in many countries it is how officials throughout the justice system interpret and apply the law, not its content, that is the primary obstacle to better outcomes for women (Rayaprol and Ray, 2010).<sup>25</sup>

The internalisation of gender hierarchies and associated beliefs throughout society about women's status, role and 'proper' behaviour, including on the part of justice providers, is an important reason for *de facto* discrimination against women within the justice system. This is a problem in all countries, but it is particularly acute in extremely conservative developing countries where hegemonic patriarchy is reinforced through sexist religious and/or customary laws and beliefs. Such dominant social norms mean that, regardless of statutory guarantees, justice officials can, and frequently do, deny or subvert women's rights and gender equality. This can take the form of a predilection for reconciliation and the *de facto* decriminalisation of domestic violence by the police and judges (Basu, 2006, 2012; Macauley, 2005); patronisation or persecution of women in courts (Rayaprol and Ray, 2010); an assumption that women are at fault when there are marital problems or they are sexually assaulted (Basu, 2006); or continuing application of discriminatory customary law in lower courts (Scholz and Gomez, 2004).

---

<sup>24</sup> For example, Jahan (2009) asked women claimants in three different forums in West Bengal and Bangladesh whether they were able to speak and felt listened to, and found that what she called 'procedural power' was highest in *shalish* (mediation based on traditional dispute resolution) run by NGOs than in the mainstream courts. Interestingly, she found women felt more listened to in the state-recognised *panchayat* forums than in extra-legal traditional *shalishes*.

<sup>25</sup> Rayaprol and Ray (2010) observe, for example, that 'despite several gaps in the existing sections of the Indian Penal Code (IPC) dealing with violence against women, the limits of the law can be stretched to provide justice and relief to women. But [...] this does not happen' (p.350).

---

The underrepresentation of women within justice institutions is one reason for such discrimination;<sup>26</sup> in most justice forums, women's views and experience are simply lacking (Rayaprol and Ray, 2010). But redressing the gender balance will not be sufficient to tackle structural bias. Women judges, even those that are sympathetic to the position of female claimants, are often paternalistic and make assumptions about women's best interests (Basu, 2006; 2012). Ideological positioning alongside knowledge about the issue at hand may be more important than the sex of a justice official in determining their attitude to women and their claims (Kaur, 2012).

More progressive attitudes can emerge within the legal system, however. Feminist lawyers and activist judges have worked to advance counter-ideologies and to reform conservative attitudes, procedures and standards in order to improve outcomes for women, even if only slowly (Epp, 1998; Rayaprol and Ray, 2010; UN Women, 2011). NGOs and paralegals working with women at the grassroots have provided women with access to new hybrid mediation forums that build on traditional practices but also promote women's rights based on a critical understanding of women's status and treatment, particularly in South Asia (Hasle, 2003; Magar, 2003).<sup>27</sup> Paralegal presence and monitoring can also lead to gender-sensitive judgements (Goodwin and Maru, 2014).<sup>28</sup> Feminist and legal organisations working outside the system also play an important role in informing and influencing legal opinion (e.g. targeted amicus briefs), including through the development of progressive interpretations of religious or indigenous law and norms (Rutkow et al., 2009; Sieder and Sierra, 2010; UN Women, 2011).<sup>29</sup>

While patriarchal and sexist norms often explain discrimination against women, officials may also manipulate and subvert the law in ways that are detrimental to women in order to further personal, material interests. As men are much more likely to dominate judicial and quasi-judicial decision making, this more calculating behaviour also reproduces structural bias against women.<sup>30</sup> Capture of justice institutions and their use to maintain privilege and control of resources through arbitrary application of the law is clearest within local governance and community forums, such as the district council courts in Uganda (Khadiagal, 2001) or the traditional justice system (*shalish*) in Bangladesh (Golub, 2012; 2014).<sup>31</sup> But more outright examples of corruption, extortion and collusion within the justice system in developing countries – within the police and the legal profession and among lay-judges – are also common (Basu, 2006; Hasle, 2003; Khadiagala, 2001).<sup>32</sup>

This emphasises the second main reason why discrimination and structural bias against women is prevalent in all types of justice forums in developing countries: institutional and governance failures. Prejudice, mismanagement and corruption are possible in any organisation; whether or not they occur, and their form and extent, depends on whether governance arrangements effectively monitor behaviour and sanction actions that are unacceptable or unlawful. Not only are performance management and accountabilities of all kinds often inadequate within the civil service and state agencies in developing countries, but also institutional incentives can actively facilitate discrimination, abuse or complacency and incompetence. This can be either through commission, as when it is in a government's political interest to strengthen traditional or local political elites or give them free reign, or through omission, as when governments fail to invest in local courts (see below). At subnational and community level, the involvement of paralegals and grassroots NGOs can help rebalance power asymmetries between women and men elites somewhat, and curb corrupt and self-interested subversion of the law (Golub, 2013; Hasle, 2003).

---

<sup>26</sup> Part of the problem is the underrepresentation of women within the justice system: globally in 2009, women made up only 9% of the police force and 27% of the judiciary (UN Women, 2011: 61). Arbitrators in traditional dispute resolution are also mostly men, and often exclusively so.

<sup>27</sup> For example, the NGO staff who support the *mahila panchayats* in Delhi understand gender hierarchy and women's oppression to be the underlying reason for domestic violence, rather than alcohol or dowry (Magar, 2003).

<sup>28</sup> In Goodwin and Maru (2014, citing Golub, 2003), NGO-supported legal education of (male) members of traditional *shalishes* in Bangladesh alongside monitoring of the process by a women's committee was said to have eliminated particular discriminatory marriage and divorce practice based on a misrepresentation of religious law.

<sup>29</sup> Examples include the work of BOABAB, which has successfully challenged the convictions of women charged with extramarital death in Nigeria, which is punishable by death under sharia law (UN Women, 2011) and that of Casa de la Mujer Indígena's (the House of Indigenous Women's) work with judges in the indigenous courts in Cuetzalan, Mexico to challenge acceptance of violence against women (Sieder and Sierra, 2010).

<sup>30</sup> The line between behaviour motivated by social-cultural values and that motivated by more material interests is also extremely blurred because men benefit materially from social norms that exclude women from entitlements and power.

<sup>31</sup> 'The term *shalish* (or *salish*) refers to a traditional, community-based, largely informal Bangladeshi process through which small, loosely constituted panels of influential local figures help to resolve community members disputes and/or impose sanctions on them' (Golub, 2012: 71). Most rural communities in developing countries have their own version of informal mediation/adjudication by local leaders.

<sup>32</sup> For example, in her research of the Local Council Courts, Khadiagala (2001: 66) reports that 'the most common complaint of women litigants in Uganda is the "fee-for-service" strategy which fosters the perception that justice is for sale in the council courts ... One woman complained that "all they want is money ... If you have no money, you get no justice"'.

At national level, the legislature and executive should act as a check on the judiciary, but are as likely to manipulate judicial process informally for political ends. Given that gender equality is a highly political issue in socially conservative and religious societies, this is a problem for women's organisations that try to advance women's rights through the courts.<sup>33</sup> However, the involvement of international or domestic women's or human rights organisations can help level the playing field between women and powerful private interests, as can having the media onside (Fuchs, 2013). Finally, *a priori* assumptions should not be made about the motivations and behaviour of justice providers and other actors involved in dispute resolution: local elites can have an interest in facilitating women's access to justice (Rao, 2007) and paralegals can be conservative, incompetent or corrupt (Basu, 2012; Hasle, 2003).

#### 4.2.3 Institutional arrangements and capacity

National politics and policy choices (as well as other factors, such as conflict) also affect the capacity of the justice system in developing countries. Systematic underfunding of the court and other parts of the legal system by government has left them in a dilapidated state. Particularly in the lower courts, which women (and poor people in general) are most likely to come into contact with, it is common to find poor infrastructure, too few (particularly trained) staff, poor pay and benefits and inadequate equipment and supplies (see Box 6). Inadequate resourcing causes delays. This is in spite of decades of rule of law aid to build courts and train the judiciary (UN Women, 2011). In other words, resources often have been available but have been wasted or diverted, either to high courts or to people's pockets. Poor working conditions, such as insufficient or delayed pay, can motivate abuse of power (e.g. absenteeism to attend to other business interests in order to subsidise incomes). It also drains the competence of justice providers and therefore the quality of the justice they provide to all users. This can be particularly serious for women, however, for example when justice providers are ill informed about legal reform and how this affects the women's rights.

#### Box 6: Observations on conditions in the local courts in Zambia

The local courts in Zambia are the lowest tier of the judiciary and court system. Presided over by justices, they were set up to hear civil matters and to apply and enforce customary law and local by-laws and regulations in rural and urban areas. Local courts were intended to replace traditional courts, which are not recognised by law, but these continue to operate in parallel rural areas. Local court infrastructure is in dire straits, despite this being the busiest court. Buildings and furniture are in disrepair. They lack handcuffs, uniforms, stationery and, sometimes even robes. Litigants are asked to pay K500 for stationery to record proceedings. Justices rely on outdated statutes and do not have the Local Courts Act or the Local Court Handbook (which is not followed). There are too few staff, pay is too low and there is little or no training and no accommodation or transportation (Afronet, 1998; Scholz and Gomez, 2004; Zambia Law Development Commission, 2004).

In rural areas, chiefs nominate the justices, feeding nepotism and providing a mechanism through which chiefs can control the local courts. The competence of justices varies widely: many are retired civil servants but some are illiterate. Administrative staff give legal advice and sometimes perform adjudication functions and change court decisions despite having no training. Local court rulings can be appealed in the subordinate/magistrates courts but, in practice, litigants do not challenge the unlawful application of discriminatory customary law by local courts (Zambia Law Development Commission, 2004). A review of the local court system for the Ministry of Justice concluded that the traditional courts were more orderly than the local courts and were no more or no less gender-sensitive, and recommended that traditional courts be formally recognised and administer customary law and the local courts be merged into the magistrates courts and administer statutory law (*ibid.*).

#### 4.2.4 Content of rulings, settlements and remedies

The most immediate and tangible outcome of legal action is any decision or judgement and associated actions, the form or content of which varies according to the type of justice mechanism. However, the literature on women's legal mobilisation and empowerment makes it difficult to draw any firm conclusions about the most frequent rulings, within or across different forums, and what these signify in terms of the success of women's

<sup>33</sup> However, judiciaries, even in countries with autocratic presidents, appear to becoming more confident. For example, in a politically charged ruling on provisions relating to the (discriminatory) definition and punishment of adultery in the penal code in Uganda, the courts, despite being asked by the attorney-general to only modify rather than nullify the provisions, ruled that they were unconstitutional and invalid (Scholz and Gomez, 2004).

---

legal action. Studies tend to be either in-depth ethnographic case studies or thematic reviews that refer to *ad hoc* cases to illustrate a point. Only one systematic comparison of different cases within a single forum was found (Hasle, 2003), only one comparative analysis of different forums across two countries (Jahan, 2009) and no longitudinal studies.

It is therefore not possible to assess whether and under what conditions judgements tend to be more favourable for women.<sup>34</sup> Instead, we use the material to make some general observations about decisions/rulings:

- It is easier to assess the outcomes of litigation and criminal prosecution where there are clear winners and losers, and it appears that **women are consistent losers when they bring criminal charges related to gender-based violence.**<sup>35</sup>
- By their nature, **mediated agreements involve compromise, which often makes success relative and thus more difficult to assess**, particularly given power asymmetries and informal pressure on women.<sup>36</sup> It is not only the parties who feel the pressure to compromise: NGO staff also report having to balance promoting gender equality while maintaining their organisation's credibility among men within the community, and thus their participation in ADR (Hasle, 2003).
- **All justice providers appear to have a large amount of discretion and are subject to little oversight.** Some discretion in the application of the law is necessary and desirable, but proper oversight is important to ensure this is not abused. In principle, local leaders and others applying unwritten rules have the most discretion. However, in the context of broader institutional and dysfunction and limited appeal by claimants, judges and magistrates in the court system also have large *de facto* discretionary powers, and their actual practice may be far removed from the ideals of the rule of law.
- As a result, **power asymmetries and the personal character and values of justice officials have much more influence on the outcome of claims** at all levels of the justice system than is the case in countries where the rule of law and accountabilities are more robust.
- Several studies report a **predilection to reconciliation of spouses on the part of adjudicators throughout the justice system** in many developing countries, including in official courts, police and ADR forums.<sup>37</sup> In some cases, this may be warranted – studies in some countries (e.g. in South Asia) report that women also tend to favour reconciliation and that, when the outcome is divorce, this often reflects the husband's wishes (Hasle, 2003; Jahan, 2009) – but it is clear that some women are also coerced into mediation. Moreover, the severity of facing social exclusion or ostracism from family and community can reduce women's real options.
- **Power asymmetries can sometimes work in women's favour.** Male respondents perceive NGO and their mediation forums to be powerful, and the fear of court action or pre-trial detention appears to the prime motivator in men attending and agreeing to terms in community mediation.<sup>38</sup>
- **Women need social capital and alliances to make and successfully argue claims.** Local interests and alliances have a significant influence on the rulings of local leaders and women need connections and support within the community when pressing a case (which is problematic for women in patrilocal communities). In strategic litigation too, not only is support from women's movements critical for women to press their claims but so is the ability of these networks to persuade other powerful interests (e.g. professionals, unions, judges, media) and, ultimately, politicians and the public (Fuchs, 2013).
- Empowered by democratisation and progressive constitutions, **judiciaries have become more activist around women's rights in many developing countries** over the past couple of decades.

---

<sup>34</sup> This is true both on terms of using subjective measures such as whether the remedy or settlement met claimants' expectations, and more objective measures that look at trends in judicial/quasi-judicial ruling, for example conviction rates, average sentences, proportion of claims resulting in settlement, average compensation, number of cases overturned on appeal or whether remedies are in line with law.

<sup>35</sup> For example, conviction rates for both domestic abuse (Section 498) and rape in India are negligible, and police most often do not file criminal charges when women report domestic violence (Basu, 2006; Rayaprol and Ray, 2010).

<sup>36</sup> Jahan (2009) approached this by asking women what they had asked for, what the outcome was and whether they were satisfied with it, noting the disparity between women getting an asked-for outcome and their satisfaction with it (what she called 'distributive power'), which she attributed in part to women not being able to voice their actual interests.

<sup>37</sup> Basu (2006; 2012), Hasle (2003), Macauley (2005), Scholz and Gomez (2004) and Sieder and Sierra (2010).

<sup>38</sup> Basu (2006), Hasle (2003), Jahan (2009) and Magar (2003).

---

This has led to more progressive rulings, including landmark cases where higher courts in sub-Saharan Africa have ruled that some provisions in customary law undermine the constitutional rights of women to equality and are therefore unconstitutional (Scholz and Gomez, 2004).

- **Progressive jurisprudence can also emerge within customary law as a result of broader socioeconomic changes**, such as urbanisation, women's increased access to education, political liberalisation, land pressures or the AIDS epidemic (Scholz and Gomez, 2004; Whitehead and Tsikata, 2003).

### 4.3 Implementation: enforcement of judicial and quasi-judicial rulings

The implementation phase of the justice chain is as integral as the judgement to effective remedy and dispute resolution. But the literature on women's legal action and empowerment rarely looks in detail at what happens after a ruling and how this influences the claimant's situation, or at other potential externalities of a specific judgement.<sup>39</sup> This means a critical intermediary step in assessing whether legal action and mobilisation empower women in practice is missing. A frequent distinction that the literature does draw is between the enforcement powers of the state versus other types of authority and organisation, with a common observation being that the courts are slow and expensive but in principle have greater enforcement powers. The literature reviewed suggests the situation is less clear-cut in practice and the enforcement powers of the state depend on the type of claim and the precise nature of the forum, particularly given new hybrid justice institutions (Crook, 2011), as well as broader socio-political factors that have an impact on these.

#### 4.3.1 Enforcement of rulings by state-sponsored justice mechanisms

In Western legal theory, the mandate of the state to enforce the law and exercise its monopoly of coercive power means it should have the greatest enforcement powers. It is much less obvious that it does in practice in countries where the power of the judiciary relative to other agencies is weak, where oversight by society and the media is patchy, where the state's authority, including to set norms, is challenged by other groups (e.g. traditional or religious authorities, warlords, ethnic groups), where justice officials can be bought by the highest bidder or where the state lacks capacity and reach.

Courts appear to have more power to enforce rulings that require one-off actions that can be implemented immediately, such as incarceration, but much less capacity to compel compliance in those that require ongoing actions or changes to behaviour. For example, the family courts serving urban India provide relatively quick and cheap justice, but women's repeat claims for maintenance suggest recidivism is common in spite of the threat of fines and imprisonment of litigants who do not comply with legal orders (Basu, 2012).<sup>40</sup> Court rulings that require some degree of community support but are based on norms that lack local legitimacy or that undermine local elite interests – in particular those that relate to women's land and inheritance claims – are also difficult to implement in the absence of ongoing monitoring and action by the state (Rao, 2007).<sup>41</sup> This reinforces the point that not only does the state need to have credible sanctions, but also the law needs to be seen as legitimate by most citizens.

A degree of congruence between law and dominant norms is also needed to ensure public actors comply with court rulings, as well as private ones, as is clear from the subversion of the liberalisation of abortion laws by doctors in Colombia (see Box 7). This is particularly so in the context of weak monitoring and enforcement capacity by the state or where the government has nothing to gain from implementing a ruling or actively (even if informally) opposes it. Rights advocates and women's movements are a necessary, if not always sufficient, presence for women's rights to be implemented in practice in the face of government intransigence (Epp, 1998; Htun and Weldon, 2011; UN Women, 2011).

---

<sup>39</sup> One exception to this is Hasle's (2003) study of NGO-supported *shalish* arbitration in Bangladesh and implementation of its decisions. She notes that, 'despite numerous studies and evaluation of NGO interventions working with the informal justice system in Bangladesh, the question of enforcement is rarely given much attention beyond cursory evidence based on client satisfaction' (p.107).

<sup>40</sup> The reasons for this is not given but it could well be that the family courts in India are understaffed in the same way as the one in Morocco that produces 200,000 judgements a year but employs only a single bailiff (UN Women, 2011).

<sup>41</sup> As Rao (2007) points out, 'The civil code and courts of law see people as individual entities rather than embedded in social relations, and hence often fail to arrive at solutions that can be operationalized' (p.316).

### Box 7: Subversion of new rights to abortion by doctors in Colombia

In 2006, the Constitutional Court in Colombia ruled that abortion was a constitutional right for women, and should not be considered a crime, under certain conditions (e.g. her life/health is in danger, cases of rape/incest or serious foetal malformations). In practice, however, medical institutions are using the conscientious objection clause to deny women their reproductive entitlements – and doing so unlawfully, as the court stated that only individual doctors could exercise conscientious objection and must then refer women to an alternative doctor. One case was even found of a judge who had refused to hear a claim for a judicial order for an abortion by a woman diagnosed with fatal foetal malformations, on the grounds of religious conscience. By the time it reached the Constitutional Court, the woman had given birth (and the baby had died) and the court ruled the case to be moot.

Importantly, however, the case itself and the ruling have contributed to changing the terms of public debate on the issue of abortion.

*Source: Roa (2008), reporting research by Women's Link, a network of women's organisations that successfully campaigned for liberalisation of the abortion laws.*

#### 4.3.2 Enforcement of decisions by community dispute resolution forums

Many women's claims are related to issues around personal status and family relations, which means they are much more embedded in social relations than other types of claims. Decisions in favour of women are much more likely to disadvantage those in the community with relatively more power (men) and/or to challenge dominant social norms. Rulings are also much more likely to involve two parties that will need to continue to interact socially or economically. Local community support for women's claims and the decisions that follow is vital, and implementation is much more likely when local leaders support decisions.

Local leaders in rural areas not only influence the outcomes of dispute resolution (directly or indirectly) but also act as gatekeepers to all sorts of bureaucratic, economic, social and customary activities.<sup>42</sup> Despite not having formal coercive or enforcement powers, therefore, local leaders and justice providers *may* be able to exercise significant authority within a particular community, even though they do not have formal enforcement powers or coercive agencies to carry out their orders. As with the state authority and reach, however, the authority and enforcement power of local leaders is much stronger when they have not only credible sanctions through which to punish non-compliance but also respect and legitimacy within the community (see Box 8).

### Box 8: Village-level sanctions and compliance

The Santal people in India practice gharjawae – marriage. This practice often leads to conflicts between women and their family and their paternal male kin who attempt to claim the land. Hasle (2003) reports one case whereby the male kin of one woman tried to drive away her family on the death of their father, claiming that the women's marriage had not been gharjawae and she and her husband had cultivated the land. The village leaders supported the woman's rights to the land but her male kin would not accept the decision and continued to harass her family. To resolve the issue, the village leaders were forced to exclude the perpetrators from the common well and social rituals. In retaliation, the woman's male kin stabbed her son to death, and were arrested by the police.

#### 4.3.3 Enforcement of rulings by hybrid dispute resolution institutions

A different set of issues around enforcement emerge from community forums modelled on existing (customary or local governance) institutions but sponsored by women's organisations and based on more or less explicit feminist principles. Attendance and agreement are voluntary and the forums have no official enforcement powers but studies suggest they nevertheless can resolve claims effectively, including in ensuring parties comply with agreed terms (e.g. paying maintenance, not subjecting women to domestic violence). For example, in a

<sup>42</sup> For example, they may provide letters to government, control community committees, allocate government inputs/land or have the power to exclude people from use of the graveyard or even expel them from the village.

---

study of a *mahila panchayat* in a Delhi slum, Magar (2003) found 10 of 11 cases were resolved, with all women receiving financial maintenance, without the need for the NGO to refer the case to the police or court. Halse (2003) found that, in 84% of the NGO-provided *shalish* cases (n=40), agreements were adhered to at least for the three months they were monitored. This is more remarkable because women are likely to initiate cases and terms are likely to involve concessions to them. However, by contrast, a study of Timap's paralegal activities in Sierra Leone, found that unenforced mediation agreements and reliance on the goodwill of the disputant was one of the main problems reported (Dale, 2009).<sup>43</sup>

How do these forums incentivise compliance? Some researchers highlight the public nature of these proceedings and the importance of making known hidden behaviour, such as domestic violence, to prevent recidivism (Magar, 2003).<sup>44</sup> Others find that the involvement of a local NGO with the credible threat of official legal action in the event of non-compliance – either real (where there is recourse to NGO lawyers, or legal aid to refer the case to courts) or imagined (where respondents see NGOs as powerful and assume they are associated with the state system because they issue written notices, for instance) – a more significant factor than social pressure (Hasle, 2003; Golub, 2014).<sup>45</sup> Proceedings being seen to be fair and transparent – for example both parties have an opportunity to talk, the arbitration panel is seen to be neutral, agreements are recorded – is yet another factor said to improve enforcement (Hasle, 2003; Sieder and Sierra, 2010).

More research is needed, but some studies suggest state-sponsored hybrid institutions are effective at enforcing actions that follow immediately from the decision, such as payment of a one-off divorce settlement, and that do change behaviour.<sup>46</sup> However, as Jahan (2009) notes, high rates of compliance in divorce cases suggest these outcomes reflect the husband's wishes and interests. Basu (2006), looking at adjudication boards in Kolkata in India, which comprise local public officials (police, doctors etc.) who facilitate mediated agreements, suggests they are less successful at ensuring husbands comply with agreements that require changes in behaviour (stop drinking, stop beating your wife, less controlling etc.).<sup>47</sup>

#### 4.4 Development outcomes: what are the social and economic impacts of women's legal action?

The relative inattention to the implementation of rulings and their impact on women's power and position in practice means a robust assessment of what types of legal action empower which women, in what way and under which conditions is not possible. Instead, we look at four different ways legal action can have an impact on women's empowerment – practical, social, personal and symbolic – and some of the key findings and themes from the material in relation to these.

##### 4.4.1 Practical changes

Women most often seek improvements in their material circumstances when they mobilise the law,<sup>48</sup> and practical outcomes are empowering to the extent that they improve the claimant's economic or physical position. A common objective for women in disputes regarding the conjugal contract is reconciliation, but with improved economic or physical security (e.g. the husband provides food or allows his wife to work). The evidence base is limited but suggests NGO-sponsored mediation may be more effective for negotiating better terms for women who want to reconcile and for incentivising compliance in the short term (e.g. Hasle, 2003; Jahan, 2009), whereas state-sponsored forums may be better at enforcing one-off actions (divorce settlements, inheritance claims). However, there is often a trade-off between economic security (requiring reconciliation) and physical security (requiring separation), and women pressurised into either prosecution and separation or reconciliation can feel disempowered (Venning, 2009). In inheritance and property disputes, low-income women can also be

---

<sup>43</sup> However, it should be noted that, overall, the clients interviewed were positive about Timap's work, with praise for its speed and effectiveness at resolving disputes, accessibility, cultural awareness, willingness to use litigation if needed, and the empowerment effect of its education and advocacy efforts, particularly for women (Dale, 2009).

<sup>44</sup> However, no evidence is provided to support this claim.

<sup>45</sup> Hasle's (2003) study site was among slum dwellers. It is reasonable to assume that the force of social pressure is stronger in rural areas than in (peri-)urban areas.

<sup>46</sup> For example, *lok adalats* (popular courts) in India require that the husband bring the one-off divorce payment to be counted out in front of the judge before the divorce is validated (Jahan, 2009).

<sup>47</sup> Basu (2006) asked members of the adjudication board if they thought their intervention would prevent domestic violence in one case she observed and they thought it might 'reduce it a bit'.

<sup>48</sup> For example, Magar (2003) found that all cases reviewed in a *mahila panchayat* were related to economic claims and security, with the most common problem being lack of financial maintenance alongside domestic abuse (two-thirds of cases).

---

forced to settle for a quick but less favourable judgement from a community forum (when compared with the civil courts) (Rao, 2007).

While some hybrid justice institutions and specialised services can forward women's economic interests relatively well, some forums appear to consistently fail to provide practical improvements for women – because of capture and instrumentalisation by elites (Uganda's district council courts, traditional *shalish* in Bangladesh) or systematic venality and subversion of justice (police in India), or because dominant social norms lag behind the law and the state lacks capacity or incentives to enforce it (courts system in relation to gender-based violence).<sup>49</sup> Practical outcomes for women in the lower courts or customary justice systems and traditional community forums appear more mixed and to depend on the claim, the configuration of power, their relationship to the state, socio-cultural norms, etc.

Women may also find their material position is worse following legal action. Adversarial court proceedings may exacerbate conflicts, particularly problematic where future interaction with the other party is unavoidable (Isser et al., 2009). Women may suffer social stigmatisation and, if their claim fails, can face debt or emboldened abusers. Legal reform can also have unintended consequences for women's rights and insecurity, as when legally titling has undermined women's ability to negotiate access and usage rights through either customary forums or the courts (Nyamu-Musembi, 2007; Rao, 2007; Toulmin, 2008).

#### 4.4.2 Strategic changes

The potential empowerment impact is much greater when women mobilise the law, usually with the support of women's or legal organisations, to address the structural cause of women's oppression and exclusion. Reform of legal rights is the most common structural change to result from legal action, such as rulings that discriminatory laws are unconstitutional or those that lead to new rights and entitlements for women. Progressive formal rights are important because they improve women's legal opportunity structure and the bargaining position of women's organisations (Ssenyongo, 2007), and are often a prerequisite for gender equality. The scope of the jurisdiction of constitutional and supreme courts mean their judgements in particular can be game changers, particularly once the precedence of constitutional and statutory over customary law has been established (Scholz and Gomez, 2004).

However, women's empowerment in practice often depends on rights being implemented or justiciable, and the evidence suggests government can be slow to undertake legal reform following court rulings or does not undertake required policy measures, or that lower courts and state officials subvert or do not apply new laws (Scholz and Gomez, 2004). As Basu (2006) observes in India, gender advocates can win important legal gains only to find the intent of these altered as they are processed through the normative frame of frontline justice and other officials. The structural impact of successful strategic litigation can also be limited by how claims are framed.<sup>50</sup> And seemingly positive developments can have unintended and perverse consequences – as in Latin America, where criminalisation of domestic violence alongside increased access to ADR has led to a two-tier justice system and the *de facto* decriminalisation of domestic violence in some countries because police divert women to mediation (Macauley, 2005).

Progressive jurisprudence within customary law can also improve structural conditions for women over time, although changes in uncodified customary entitlements will arise out of negotiations around claims made within specific communities and the benefits for women will therefore be more localised. In theory, customary law can be more dynamic than statutory law: the informality of customary law means local leaders have more scope to adapt it to changing socioeconomic conditions (IDLO, 2013). And women's customary property and inheritance entitlements have evolved in some communities (Whitehead and Tsikata, 2003; Claassens and Mnisi, 2009). However, case studies show it is also often 'extremely difficult to address the profound structural

---

<sup>49</sup> Criminal prosecution of gender-based violence is problematic throughout the world, with attrition (i.e. cases being dropped at some point before the case gets to court) and conviction rates for rape and sexual harassment low in high-income countries as well as in developing countries. For example, a study of European Countries found that only 14% of reported rapes ended in conviction, with the rate falling as low as 5% in some countries (UN Women, 2011). We also know that only a small proportion of women who say they have experienced rape or sexual assault go on to report it. For example, in a survey of 57 countries, only 11% of women who said they had experienced sexual assault reported it (ibid).

<sup>50</sup> For example, in the Biedronka employment rights case in Poland, women claimants received damages but the supermarket's poor employment conditions remained. Potential structural changes were limited by several factors, including conservative gender attitudes, which led the case to be framed in terms of labour rather than women's rights, the low political salience of the issue to politicians and the weakness of both the unions and state enforcement agencies (Fuchs, 2013).

---

inequalities, power asymmetries and discriminatory social norms that perpetuate women's disempowerment within the informal justice setting' (IDLO, 2013: 30). Perversely, changes in statutory law can prevent more progressive interpretation of customary law.<sup>51</sup>

#### 4.4.3 Personal changes

The processes and outcomes of claim making and dispute resolution can also increase women's power in less tangible ways. Women often describe the stress and upset of their interactions with the legal system (Rutkow et al., 2009; UN Women, 2011) but, regardless of whether the ruling is in their favour, the processes and outcomes of claim making and dispute resolution *can* also increase their personal capabilities. Studies describe how claim making in employment tribunals in the US has given women the confidence to look for more challenging employment; how engagement with NGO *shalishes/panchayats* in Bangladesh and India have given women critical awareness of gender oppression and increased their autonomy through separation from their husbands and, in some instances, new business or civic ventures; how strategic litigation in higher courts in Poland and the European Court of Human Rights (ECHR) has restored the dignity of claimants and politicised them; and how presenting their case in family courts has built women's social capital and legal knowledge (Basu, 2006; Fuchs, 2013; Magar, 2003; Rutko et al., 2009). An increase in women's 'power within' (Kabeer, 2009) is as fundamental to their having increased choice and control in practice as legal reform and material outcomes are.

#### 4.4.4 Symbolic changes

Strategic litigation can also result in symbolic changes (Yamin, 2011), such as publicising and redefining issues and influencing public dialogue in ways that contribute to changes in the balance of power between women activists and other groups. Symbolic change may even be the main objective of litigation, with the courts used as an arena for political mobilisation in which activists wage political battles with legal weapons. Court cases can be an effective means to harness the media and mobilise public opinion in the face of government intransigence on an issue (Fuchs, 2013).<sup>52</sup> However, the legal process and language can also offer protection for political activists in oppressive regimes and where political mobilisation and popular demonstration are outlawed or dangerous. Because gender inequalities are ingrained and seen as the natural order, the symbolic changes that come from strategic litigation are particularly important to women's empowerment. Women's organisations all over the world have won landmark cases that have redefined public discourse on women's roles, rights and problems – such as the Supreme Court judgement in the *Visakha vs. the State of Rajasthan* in India, which not only led to legal change but also gave formal recognition that women face sexual harassment in the workplace and exposed the myth that upper-caste men could not touch (and therefore assault) *dalit* women (Rayaprol and Ray, 2010; UN Women, 2011).

#### 4.4.5 Which women mobilise and benefit from the law?

While any woman can be empowered through use of the law, it is valid to ask whether the middle and upper classes are more likely to effectively use the legal system to advance their interests. The evidence seems clear that women with financial means and education (and therefore greater knowledge, confidence and autonomy) are not only more able to access the formal court system but also likely to receive better treatment and outcomes. Women who have legal knowledge and confidence are also more likely to get a better outcome in ADR forums, which supports the perception that middle-class women benefit most from the opportunities to 'forum shop' that plural legal systems present.

Nevertheless, while women from higher socioeconomic groups may benefit relatively more from the legal system, this does not mean low-income women do not also benefit, directly or indirectly. Poor and uneducated women are the most frequent users of customary and community justice mechanisms<sup>53</sup> and, however imperfect these are, they would have less choice and access to justice without them. Rural and peri-urban women in

---

<sup>51</sup> For example, recent legislation in South Africa (e.g. Traditional Courts Bill) which priorities Traditional Leaders and Traditional Courts, including giving Traditional Leaders far-reaching powers to define the content of living customary law and making it an offence to refuse a summons to a Traditional Court, and minimises or ignores the important decision-making authority and dispute resolution at family and village level. Claassens and Mnisi (2013) argue that there is a real danger that this will undermine progressive jurisprudence around women's land entitlements by Village Councils as they apply living law.

<sup>52</sup> For example, in the Tysiak abortion case in Poland, there had been a clear transgression of the claimant's right to a lawful abortion on medical grounds and the case brought the media out in her favour, which was important in terms of the broader debate on whether there should be a total constitutional ban on abortion (Fuchs, 2013).

<sup>53</sup> For example, Hasle (2003) found the average income of parties using the alternative shalish sponsored by the Nagorik Uddyog (NU) to be well below poverty line and 75% had no schooling at all.

---

particular seem to favour and benefit from hybrid ADR forums, both NGO- and state-provided, that combine elements associated with ‘due process’, such as right of appeal and (relative) transparency and integrity, and elements associated with indigenous forums, such as greater informality and reference to local socio-legal norms (Crook, 2011; Hasle, 2003). Evidence from Uganda and India suggests poorer women can also be adept at ‘forum shopping’ to get the best possible outcome.<sup>54</sup>

When legal action or mobilisation leads to structural changes in gender relations, poorer women can also benefit indirectly from the legal empowerment of better-off women. Women’s legal and human rights organisations may champion individual test cases based on the claims of poor or vulnerable women who have been unsuccessful in the lower courts, and wins can benefit women from all classes when they redefine laws and norms, or lead to new services for women. While we still need to be alert to the intersection of different forms of discrimination, as Yamin (2011) argues, there is more reason to believe the appropriation of rights by the middle-classes will have benefits for women more generally in relation to women’s rights than there is in other areas, such as health rights.

## 4.5 The politics of women’s legal empowerment: key points and knowledge gaps

What do we know about the politics of the choices, process and outcomes associated with legal empowerment of women in particular, and where are the main gaps? Here, we summarise key findings and themes from this thematic section/case study.

- Women’s legal preference and choices depend on their socioeconomic position, legal opportunity structure and particular claim. Where possible, women utilise and move between different forums using the moral and legal argument best able to promote their interests. **Different legal orders and types of forums can be in conflict, but they are often complementary** – and this includes the interaction between women’s action and arguments in statutory and customary law.
- Structural bias is particularly acute for women from low-income and marginalised groups who face multiple prejudices. But **hegemonic patriarchy means all women face structural bias within the justice system**, regardless of their socioeconomic group or the legal order/forum they use.
- **No justice mechanism is therefore an ideal instrument to advance women’s interests.** Each has benefits and shortcomings, including trade-offs between different types of accessibility, and between accessibility and enforceability. Women need to weigh up the cost and benefits of different types of justice forum, and decide which will provide the fairest hearing and best outcome, on the basis of their particular claim and their legal opportunity structure.
- In many cases, however, **hybrid justice institutions are effective in managing manage trade-offs.** When their claims involve one-off actions, state-sponsored ADR can provide women with quick and cheap but (relatively) fair and enforceable justice. However, when justice requires sustained changes in behaviour, ADR forums that build on local institutions but are feminist NGOs with local legitimacy appear better able to secure practical outcomes for women. Such NGOs are located in or near communities, understand how material interests are often embedded in social relations and seek to work with communities, including traditional leaders, to change these in ways that advance women’s interests.
- The **state/customary dichotomy does little to capture the range of possible forms and styles of dispute resolution on the ground** and the growing number of hybrid justice institutions. Hybridity can be by design or it can arise in practice from the informal cross-fertilisation of norms, legal and moral arguments, procedures and styles of adjudication of different legal orders.
- The actual practice of dispute resolution often does not resemble either its ideals/underlying principles or the law on paper. In developing countries, the **quality of justice women receive depends on the competence, values and incentives of justice providers** – and these are shaped by norms and ideas, institutional incentives (formal and informal) and the *de facto* distribution of power.

---

<sup>54</sup> However, it may be that multiple legal orders/provisions benefit different classes in different ways: Basu (2006) describes how Section 498 of the Indian Penal Code can be used by elite women with the means to influence the police to secure charges whereas ‘women without socioeconomic resource have a hard time getting police to file complaints’; they instead tend to invoke Section 498 as a tactic to improve their position in civil negotiations within their in-laws and spouses (p.50).

- **Women's use of the law to advance their practical and strategic gender interests is in practice closely linked,** not least because strategic action emerges from women's everyday practical experience. **But there can be trade-offs between practical and strategic gains.** For example, women may consciously choose to make claims based on discriminatory laws as these best serve their immediate practical interests, but in doing so they may reproduce gendered institutions and roles that perpetuate women's structural vulnerability in the long term.
- **The wider socio-political context shapes women's opportunities to successfully press strategic gender interests through the courts and other justice forums.** The balance of power between elites (political, religious, neo-traditional, national, local) can both open up and close down the space for women's legal activism.<sup>55</sup> Critical junctures – such as conflict or a new political regime or settlement – can improve or undermine women's legal opportunity structure. There appears to be little research on the conditions in which government are incentivised to implement progressive court rulings and/or when state officials implement new laws in practice.
- **The external support structure is critical to women's ability to make claims and to improvement in the outcomes of legal action and dispute resolution.** Women's, legal and rights organisations provide the necessarily financial and organisation support, help build women's capabilities and social capital and can bolster the power of claimants *vis-à-vis* elites and officials. Elites do not relinquish power or accept changes to a status quo that benefits them willingly. Strong women's movements are therefore essential to incentivise governments, local leaders and male kin to comply with rulings.
- **Reform efforts will not be effective if they focus on only parts of the legal system.** Legal orders in plural systems are mutually constitutive; they inform each other in formal and informal ways. Reform of statutory law and the court system is important, but extra-legal, religious, customary and community forums are not only the majority legal order but also important interlocutors of social values – and therefore equally important for improved gender justice. In the longer term, therefore, better outcomes for women depend on changes in both *de jure* and *de facto* norms around gender roles and the rights and status of women, as well as in relation to other forms of discrimination (e.g. on the basis of age, disability, race, religion etc.). *A priori* assessments of which part of the justice system delivers relatively better justice for women and should be the focus of reform efforts also be made because different forums provide better or worse outcomes for women depending on both their claim and their socioeconomic circumstances, even within a single country or locality. A whole-of-system analysis is therefore required, even if reform or supports efforts are targeted at particular parts of the system.
- **The educated and the financially independent benefit relatively more from the legal system than women in low-income groups,** and are more able to use the court system to advance their interests. But low-income women also use the justice system, in particular customary and ADR forums, and benefit from the increased choice that plural legal systems provide. They also benefit indirectly when strategic action by middle-class professional women results in structural changes.
- More focused literature searches/review of particular areas of law or women's rights could well produce more evidence. But it does seem that there are **significant gaps in knowledge about women's legal empowerment and its outcomes.** More systematic, comparative analysis is needed, across time, countries and justice forums, and looking at implementation and outcomes of legal action as well as women's experience and immediate rulings. There is relatively more detailed/systematic analysis on South Asia than Africa (outside of South Africa).

---

<sup>55</sup> For example, using statistical analysis and process tracking, Htun and Weldon (2011) find that family law is closely linked to different state-building trajectories and political settlements: liberalisation occurs when state elites are strong enough to no longer need to accommodate religious elites.

---

# 5 Service delivery, accountability and legal empowerment: law, justice and the politics of resource allocation

This section looks at what we know about the political economy of legal empowerment in relation to basic services and to the realisation of social and economic rights. As recourse to legal action appears to have expanded in the Global South in the past 20-30 years, this section maps out some of the factors that have contributed to this trend, what the process has looked like and what we know about impact, using the justice chain framework presented in Section 3. Whether these trends have resulted in developmental gains or are equity enhancing (and the two are not necessarily the same) is a matter of empirical observation.

As this section shows, the evidence base suggests we can speak of novel trends in the past 20-30 years that indicate increased levels of legal mobilisation among individuals and groups from poor or marginalised sectors that are relatively unprecedented in terms of breadth and ambition. Moreover, legal mobilisation – notwithstanding the very diverse forms that it takes – has in different ways had an impact both on individuals and groups that undertake legal action and, in some cases, on the wider population. This is especially so when legal mobilisation results in policy change or in a systemic altering of the logic of resource and power allocation. There is, moreover, a small but emerging literature that is beginning to assess impact of litigation and legal mobilisation more generally in relation to the delivery of concrete services, such as health, education and housing, and relatedly to the realisation of social and economic rights.<sup>56</sup> At the same time, it is important to stress that evidence about impact remains underdeveloped, and the findings are uneven.

Progressive constitutional change in a number of developing countries has tended to result in texts that more explicitly mention of rights to basic services (articulated through different social and economic rights) and, in some cases, the redefinition of property and land rights in law to take account of communal and plural conceptions of property (as in Latin America and some constitutions in sub-Saharan Africa). In some cases, this has led to the *judicialisation* of social and economic conflicts over access to basic needs and services, over how natural resources should be managed (and with whose consent)<sup>57</sup> and over access to, and distribution of, property, land and housing. Such new constitutional pacts have in some cases resulted in new modes of societal engagement with the law, judicial review and dispute resolution mechanisms by a range of stakeholders (disadvantaged or poor people), who have historically tended not to see themselves as beneficiaries of the law or to perceive the emancipatory or transformative potential of legal action.<sup>58</sup>

Notably the social accountability component of legal mobilisation, in relation to service delivery for instance, has tended to be overlooked in contemporary narratives of social accountability among international actors (donors and INGOs). This is despite a longer-standing accountability literature that considers the role of

---

<sup>56</sup> See, for instance, in relation to litigation strategies, Bergallo (2011), Gauri and Brinks (2008), Giannella et al (2013a), Giannella et al. (2013b), Gloppen et al. (2006), Maestad et al. (2011) and Norheim and Gloppen (2011). Goodwin and Maru (2014) review the nature of the evidence base on impact regarding a wider range of legal empowerment experiences, many of which are outside the remit of this paper.

<sup>57</sup> For instance, where indigenous rights have been recognised.

<sup>58</sup> Dugard (2008, 2010), Dugard and Drage (2013), Dugard and Langford (2011), Gargarella et al. (2006), Gauri and Brinks (2008), Gloppen (2008), Langford (2008), Sieder et al. and Yamin et al. (2011) among others signal this trend towards a more widespread sense of the law being invoked to advance social interests and particular entitlements among a more diverse range of groups and interests in society.

---

citizens' legal action as a form of social accountability.<sup>59</sup> Where it is recently more explicitly being invoked is in relation to paralegals, and specific legal empowerment initiatives.<sup>60</sup> Legal agency to make claims in relation to basic services includes at least different aspects of health, education, water and sanitation provision and access to housing.

Here, we focus mostly on the experience of legal mobilisation strategies in issues of access to and delivery of basic services (health, water, housing), as well as their impacts. Sometimes, this involves invoking social and economic rights that feature in new constitutions of the Global South, but legal action in relation to service delivery includes a wider range of experiences along the justice chain. Different manifestations of citizens' legal agency can contribute to holding policymakers and service providers to account for, first, *policy gaps* – whether a government policy is in breach of any constitutional commitment to provision of a service or entitlement; second, *regulatory gaps*, where the practice of service providers undermines delivery of services to citizens in ways that contravene law or policy (e.g. through corruption or discrimination); and third, *implementation gaps*, where governments are challenged for failure to enforce and implement their laws and policies on provision of basic services.<sup>61</sup>

While our main focus is on service delivery and the impact of legal empowerment on overseeing and regulating state–society relations, we also draw on some examples from a wider range of conflicts and disputes that trigger legal mobilisation. This allows a more comprehensive picture of the political economy dynamics of legal empowerment, its potential and its limits, and how it is enmeshed in the wider political and social context. This includes disputes over land and property as well as over the use and exploitation of natural resources.<sup>62</sup> Examples of the latter include, for instance, disputes between communities/individuals and international extractive companies' interests, so the state or any public authority is not (directly) involved necessarily. In some cases, what is being contested is the state's decision to approve extractive companies' presence and development projects. How do contestations over resource and assets in society get resolved, and what is the role of different judicial remedy or dispute resolution mechanisms in arriving at equitable or just solutions?

Finally, we make note of some transitional justice experiences addressing past violations of rights (as in Argentina, Chile and Peru). These are relevant to our discussion because experience and organisational capacity built up through these processes in a number of countries have subsequently contributed to enabling legal aid and human rights associations to be effective in supporting legal empowerment in cases related to access to services, or other social and economic rights.<sup>63</sup> Such long term accumulation of capabilities, combined with the socialisation of law and justice institutions becoming useful spaces for contestation and pursuit of accountability is important to the political and social history of legal mobilisation. Seeking accountability for the past through the law has generated in some countries practices regarding the instrumental use of law against the powerful for the present and the future which are not unimportant.

The following sub-sections draw on evidence and examples from the literature to illustrate what the relevant enabling and constraining factors might be for legal action to take place and improve access to social and economic services, resources and assets.

---

<sup>59</sup> Domingo (1999), Goetz and Jenkins (2005), Gloppen et al. (2004; 2005), O'Donnell (1999), Peruzzotti and Smulovitz (2006), essays in Schedler et al. (1999), Smulovitz (2005), Smulovitz and Peruzzotti (2000). Maru (2009) contributes to re-connecting these strands of the literature by explicitly articulating the social accountability aspect of legal empowerment.

<sup>60</sup> Open Society stands out as an international actor that has most explicitly re-energised the connection between social accountability and legal empowerment. Namati, with support from Open Society, has most explicitly and purposefully connected legal empowerment with other social accountability agendas. Concretely, Maru (2011) and Goodwin and Maru (2014) invoke explicitly the social accountability feature of legal empowerment, albeit through a more expansive definition of legal empowerment than we are using here. But mostly there is a sense that mainstream donor work on social accountability makes limited reference to, and is poorly connected to, donors' rule of law or access to justice agendas. The silo-isation of the social accountability agenda is also present in UN Development Programme (UNDP) documents, despite UNDPs commitment to a legal empowerment agenda. See UNDP (2013), for instance, where legal action is mostly remitted to a more general human rights-based approach.

<sup>61</sup> Cooper (2011b: 194) provides this helpful distinction in relation to public interest litigation, but this can also apply to other types of claims regarding service provision.

<sup>62</sup> See, for instance, Cotula (2007), Olsen (2006, 2008), Ubink (2011)

<sup>63</sup> Research connecting experiences of legal accountability in relation to legal empowerment and legal mobilisation is mostly poorly developed, with some important exceptions, including Collins (2008), Domingo (2012), Golub (2000), Skaar (2010), Smulovitz et al. (1998) and Waldorf (2013).

---

## 5.1 Claim formation: the judicialisation of entitlements and why citizens take legal action

Why and how do citizens as individuals or groups choose to take some form of legal action in defence of their rights, in pursuit of protection from abuse and impunity or to hold decision makers and public authorities (at whatever level of state or government) to account for non-compliance or non-implementation? The factors that contribute to why affected individuals or groups begin to use the law strategically are varied.

### 5.1.1 Legal framework

The **content of the law** matters – whether in constitutional, statutory or community level/customary norm systems – in terms of what it says about *just means* and *outcomes* of dispute resolution and administrative redress processes matters. Some of the emphasis on the ‘demand side’ of legal empowerment, which focuses on the need to empower citizens to mobilise legally, assumes the main part of the battle is to enable agency or to gain access to the redress or justice mechanism. This is often with insufficient reflection as to whether the normative content behind how justice or redress is dispensed is likely to yield socially just outcomes (and by whose standards). If the reigning norms and political system are not amenable to just outcomes, access to justice and legal mobilisation are likely to have limited potential (Porter et al., 2014).

There is no doubt that the countries that are frequently cited as examples of quite radical legal mobilisation – in particular Colombia and South Africa, and, less frequently, Brazil, Costa Rica and India<sup>64</sup> – have seen some important transformations, not only in constitutional law but also in the associated judicial review mechanisms and issues of legal standing available to citizens. Such processes of constitutional change are sometimes the result of political transitions or post-conflict settlements of some sort (Bolivia 2008, Brazil 1988, Kenya 2010, South Africa 1996). In other cases of reform, legal change occurs as part of more reformist ongoing processes of political and normative renovation, but can lead to substantively changed rules of the game that create expanded opportunity structures for citizens to mobilise legally (as in the case of Costa Rica).

In Colombia, the 1991 constitution was the outcome of a political process intended to settle the country’s age-old conflict. It did not, and conflict entered new modes and intensities of violence. However, both the expanded bill of rights and new judicial review mechanisms, including a new Constitutional Court, and diminished barriers to constitutional review for citizens, led to a new dynamic in the political process. The law became a politically relevant tool for excluded sectors of Colombian society, and an instrument by which to restrain state and government action in its coercive measures. The role of the Constitutional Court has been instrumental, for instance, in giving protection to internally displaced persons (IDPs): it has ordered in its rulings that the state must make provision for their access to basic services (see Box 9).

#### Box 9: The Colombian Constitutional Court and conflict-related IDPs

Colombia has an especially large population of IDPs, an estimated 3 million, resulting from the intensification of the armed conflict. This represents a humanitarian tragedy of alarming proportions. During the 1990s, legal action became a recourse for IDPs through the tutela suit, or individual judicial review action, to demand for the realisation of their constitutional rights to basic services and housing. The Constitutional Court upheld the tutela cases, and, moreover declared the existence of an ‘unconstitutional state of affairs’, given the inconsistencies in and precariousness of state policy regarding forced displacement (Ruling T-025/200). In this decision, the Court ordered the national authorities to redefine and clarify their strategies and policy regarding IDPs in order to address the basic needs of this group. This and other decisions of the Constitutional Court regarding traditionally marginalised groups reflect an important judicialisation of certain public policy, which have had implications for public expenditure and conditioned the priorities and orientation of the governmental strategies. According to some calculations, the decision about forced displacement cost approximately \$425 million (General Budgetary Direction of the Ministry of Treasure unpublished document, 2004).

Source: Uprimny Yepes (2006).

---

<sup>64</sup> There is by now quite a lot of evidence documented about the importance of an enabling constitutional and legal context.

---

The Court has also been critical in constraining legislation under the government of Uribe, which aimed to grant wide amnesties to paramilitary groups in exchange for disarmament. Court action aimed to rebalance the political in favour of protecting the rights of victims of paramilitary violence. And, as discussed further below, legal mobilisation around a range of service issues has become a mainstream affair in Colombia. Thus, despite the ongoing conflict in Colombia, the law and legal mobilisation have become a strategic recourse for vulnerable groups across a range of issues because of the content of law, its legitimacy and the authority of the new Constitutional Court.

Constitutions should therefore be a first important point of call (often overlooked by donors), for two reasons. First, they tell us – at least in nominal terms – the nature of the formal political settlement regarding the terms and conditions of state–society relations, what states are responsible for and what citizens are entitled to (including in terms of services). And, second, they describe procedural agreements regarding the institutional and review mechanisms relating to what is justiciable, by what means of judicial review and administrative redress and what the scope is for citizen action to exercise vertical or social accountability through legal mobilisation. Constitutions establish rules of standing (who can make claims, to whom and for what), the jurisdiction of courts and other administrative processes (which courts and administrative bodies have a say on what issues, and at what level) and with what effect (what different dispute resolution and redress mechanisms can compel other authorities to do). We return to these issues below.

There are also other symbolic and political aspects in constitutional reform processes that affect how citizens relate to the law, and therefore their attitude to the potential value of legal mobilisation. Sometimes, this reflects a broad societal attachment to the vision of social justice articulated in the law because the law has come to represent the political victory of a new set of ideas regarding the project of state or nation (in many respects as in the case of the Kenyan constitution of 2010). New constitutions can be the fruit of political struggle and contestation, and this experience underpins new forms of societal ownership of a new political project, enhancing the legitimacy of the text itself.

This was true, for instance, of the South African post-Apartheid constitution of 1996, which represented a critical juncture marking the transition from one regime to another based on a deeply contested vision of inclusivity captured in the new text (Dugard and Drage, 2013). In Bolivia, the 2008 constitution, and the constituent process that preceded it, generated a deep sense of ownership of the text among those Bolivians who saw themselves as excluded from the reigning political settlement prior to 2008 (Domingo, 2009). In Kenya, political and social reference to the constitution has become a matter of daily reference by Kenyans from all walks of life in a way that cannot be said of previous constitutions. Such processes can fundamentally transform how citizens perceive entitlements, their relationship to the law and their opportunities to hold power-holders to account for wrongdoing and non-compliance with the social contract. This is all the more so, as in the cases of Colombia or South Africa, where legal mobilisation efforts reflecting these changed perceptions bear fruit.

The extent to which expansive constitutions are transformative in practice is another matter. This practical distance between law and reality may be the result of active resistance to the implementation of new norms or the limited regulatory capacity of the state, or it can reflect the complex reality of multiple normative orders coexisting within the same territory. In some cases, the constitutional formalisation of legal pluralism through the recognition of plural normative structures can alter the opportunity structures for vulnerable groups – but not always in their favour. Hence, the importance of avoiding any overly simplistic account of the merits of reaffirming normative pluralism uncritically. Cotula (2007), for instance, notes how chiefs in Sub-Saharan Africa have used their position of power – legitimated by virtue of emanating from traditional authority – for self-enrichment and to the detriment of community interests, and often in favour of foreign investors. Claassens and Mnisi (2009) also describe how the codifying the rights of traditional authorities as custodians of culture in South Africa locks in power asymmetries between them and their communities and can block new and more progressive interpretations of customary law from emerging.

At the same time, the recognition of legal pluralism can protect indigenous communities from discrimination and external threats. For instance, the 1991 Colombian constitution recognises alternative modes of ownership of property/land and establishes the right of indigenous communities to consultation on the use of natural

resources in their territorial space. This has created the legal basis for these communities to contest the exploitation of natural resources by large firms when this undermines their way of life (Cepeda Espinosa, 2006; Olsen, 2008; 2011). Such claims – and their endorsement by the judicial hierarchy – have resulted in barring international corporations from exploring oil extraction (Cepeda Espinosa, 2006). The recognition of legal pluralism in Latin America has mostly been considered a progressive trend, intended to give voice to alternative worldviews on how power and resources are allocated and structured. Notably, some early versions of multicultural reforms in the 1990s in Latin America, in the degree to which they involved decentralisation of responsibilities to communities, were also hailed as conveniently, if in unintended ways, complementary to the Washington Consensus structural adjustment policies of reducing the role of the state in service delivery.

Constitutional law is one matter. There is also the intricate web of legislation that affects resource management and service delivery issues. In sub-Saharan Africa, Cotula (2007) maps out, for instance, how legislation is often enacted to favour the interests of foreign investors over community's interests regarding access to land and natural resource investment. Sometimes, this imbalance is exacerbated by differences in the speed of law-making processes. Cotula points to the example of legislation in Mali to secure the resource rights of pastoralists taking so much longer to be adopted than the Mining Code of 1999.

Finally, there is the question of whether legal mobilisation is a relevant or viable option for vulnerable groups in legally 'hostile' settings. This would seem to be especially relevant, for instance, in Uganda, in the context of the current draconian anti-gay law. There is evidence however, that shows how even in less favourable legal contexts, legal action from below can be effective. Golub (2000), for instance, points to the role of paralegals and public interest litigation in South Africa during Apartheid, the work of Bangladeshi NGOs modifying the gender-biased and otherwise unfair aspects of the shalish and the joint efforts of Filipino attorneys and community-based attorneys assisting partner populations with labour, land, gender and other issues. Additional examples of work in hostile contexts that has served to build up experience, expertise and organisational capital, including in politically or legally hostile contexts can be found in transitional justice efforts. The work of human rights organisations in Argentina during and immediately after authoritarian rule in the 1970s paved the way for them to become formidable social accountability actors in democracy through legal action which continues to this day (Fruhling, 2000; Golub, 2000; Smulovitz 2003; 2005).

Where domestic action is politically constrained, regional frameworks can offer alternative opportunity structures for legal mobilisation. In Latin America, for instance, there are numerous examples of recourse to the regional human rights framework, both the Inter-American Court of Human Rights and the Commission. Regional and international frameworks and systems can serve as legal mechanisms to contest illegitimate political settlements and to counter ineffective domestic justice mechanisms in addressing redress for violations. There are examples – as in Guatemala – where this has included settling responsibilities through remedial action by ordering the state to pay damages in the form of basic services and public works to address legacies of violence and conflict and their underlying causes (see Box 10).

#### **Box 10: Legal mobilisation using regional justice and rights instruments – the Inter-American Court Judgement on the Plan de Sánchez Massacre in Guatemala**

In 1982, there was a massacre in the village of Plan de Sánchez in Guatemala. Over 250 villagers, mostly of Achi Maya origin, were abused and murdered by members of the security forces. Other similar incidents took place during the conflict period. This exemplified the government's scorched earth methods, mostly targeted at indigenous communities, under the pretext that the village supported guerrilla groups.

In the post-conflict period, and after exhausting domestic legal remedies, the case was taken by survivors of the massacre to the Inter-American Human Rights System. The Inter-American Court ruled that damages were to be awarded to the victims and their families by the state. The ruling also required the Guatemalan state to undertake remedial action in compensation for systemic discrimination against the Mayan community, which had restricted access to basic services. The Court ruled that the state should implement a number of programmes in the affected community, and that a number of public works be financed out of the national budget.

*Source: IAHRC (2004).*

---

In sum, the content of the law matters – including at the regional or international levels. It can reinforce unjust social orders and power asymmetries. But it is also a site of contestation, reflecting battles over the direction of political, social and economic development. In the degree to which the outcome of such battles reflect more inclusive political settlements that elites accept as binding, the rules and processes established in the law create opportunities for the legal empowerment of previously excluded groups. The symbolic and political value of the law is thus also associated with how it relates to experiences of political struggle and contestation. This affects public perceptions about the legitimacy of the law, including as a structure of opportunity to be invoked.

### **5.1.2 Legal agency: power asymmetries, capabilities, awareness and perceptions**

The likelihood of citizens undertaking legal mobilisation is also related to other factors beyond the legal framework.

#### **Socio-political factors**

Options for legal mobilisation are shaped by the power dynamics of context – at the national, subnational and community levels and in the private sphere – and by related perceptions about what can therefore be achieved through legal action, and what type of legal action. We have seen how some forms of legal action against gender-based discrimination can result in backlash effects. How potential claimants perceive the consequences of different forms of legal mobilisation therefore is also related to their relative position in the social order. This shapes perceptions about what can be gained through legal action – and what the risks are.

There is an emerging body of research that points to the merits of seeking resolution or redress through non-formal channels or ADR in relation to issues where the balance of power between parties is relatively even. Moreover, paralegals are increasingly seen as effective channels of awareness raising or as a pre-emptive presence against unjust practices/conduct by decision makers or public authorities, simply through their ability to invoke legal reasoning in their roles of legal accompaniment, education, mediation etc.<sup>65</sup> Berenschot and Rinaldi (2013), for instance, describe the effective role of paralegals in Indonesia as one of bargaining in the ‘shadow of the law’ and using the threat of law to achieve results. In disputes relating to land or working conditions, where paralegals were able to convey the threat of involving formal justice mechanisms, this forced the parties in dispute to consider the option of a mediated resolution. Notably, the authors point out that a necessary skill for paralegals to be effective is to have the ability to strategically navigate different spaces of power politics at the local level, as legal knowledge alone is likely to be insufficient to achieve results. But this politically savvy role for paralegals is a perilous one, given the crucial importance of safeguarding their impartiality.

Maru (2006) highlights the important point that paralegals are especially well placed to adapt their activities to react and respond to the needs of community, in their role of facilitating legal voice. This adaptive feature is further described in Dugard and Drage (2013) in their review of paralegal work in South Africa where there is a long-standing history of paralegals working both in conditions of political hostility, under Apartheid to provide legal advice on what available protection against abuse and access to services was available, to being able to more actively engage with legal change and proactive engagement with the legal opportunities for the realisation of rights of marginalised populations under the new constitutional order after 1996.

Paralegals play a multiplicity of roles. In some cases, they are able to contribute to altering power imbalances resulting from the weight of discriminatory social norms. In the degree to which they come from the vulnerable group in question, they have first-hand experience, for instance of barriers to certain services. To the extent that they exemplify the merits of legal action, they also serve as role models regarding what the gains are of developing legal agency (see Box 11 for a summary of the role of paralegals).

---

<sup>65</sup> There is an important literature on paralegals (Goodwin and Maru, 2014; Maru, 2006; 2009; Stapleton, 2010).

### Box 11: Paralegals and legal action

The presence of paralegals has increased in some parts of the world, as an effective form of support to legal agency of poor or disadvantaged groups to enable them to be better equipped to make use of the law. There are different forms of paralegal services. Maru (2006: 429) has defined paralegals as individuals ‘who provide justice services are laypeople with basic training in law and formal government who assist poor and otherwise disempowered communities to remedy breaches of fundamental rights and freedoms’.

In practice, paralegals are very diverse, in terms of whether they tend to be more specialist; whether they come from the communities they represent; whether they themselves have experienced the issues of rights denial or discrimination they work on; whether they are paid or voluntary; and the nature of the organisational base from which they work. Their historic role and presence also vary considerably. But there are four recurrent features in how they work (summarised from Maru, 2006):

- Paralegals are lay people working directly with the poor or otherwise disadvantaged to address issues of justice and human rights.
- Paralegals focus on achieving concrete solutions to people’s justice problems.
- Paralegals make use of the law.
- Paralegals are connected to lawyers and to litigation

The strength of paralegal work lies in the fact of their proximity to affected individuals and communities; in their deep knowledge of context, social norms and the nature of the resistance that legal action can face; and in their understanding of the range of real redress or justice options available to claimants, given the nature of inequalities in society, the reach of the state and the realities of legal pluralism. Paralegals moreover enable legal agency through a very wide range of types of engagement, including awareness raising and informing affected communities about their rights; providing legal advice; engaging in advocacy; and facilitating mediation processes. Paralegals thus can play a hugely valuable role in connecting communities to the law and enabling legal agency. At the same time, their localised nature means that they can have important impacts on the lives of individuals and communities in terms of legal agency.

A study by the Open Society Foundations (2013) of UNDP legal empowerment programmes signals good examples of how paralegal work has transformed in concrete ways the power balance between affected communities of very vulnerable groups (such as sex workers and drug users), health providers and justice and security actors.

- The **Women’s Legal Centre and Sex Workers’ Education and Advocacy Taskforce, South Africa**, provides information, advice and advocacy service with a focus on human rights and awareness of the law relevant to sex work for female, transgender and male sex workers. The work here appears to have improved the attitudes of police towards sex workers and increased the capacity of sex workers to challenge rights violations.
- The **Survivors’ Self-Help Group, Kenya**, provides legal defence for sex workers and workshops run by paralegals at community level regarding the concerns and rights of sex workers, the latter including a high proportion of law enforcement officials and bar owners/workers. Heightened awareness of access to HIV treatment combined with legal literacy appears to have reduced the risk of physical abuse and improved access to health services.
- The **Institute for Human Rights, Russia**, provides otherwise unavailable information on drug policy and law and strengthens access to health care in detention for people who use drugs. This has enabled greater capacity by drug users to navigate complex legal systems, including in relation to improved access to health.
- **LBH Masyarakat, Indonesia**, educates on rights/law in communities to address breaches of rights in detention, including provision of needed medication. Despite the especially challenging obstacles to gaining access to pre-trial detention centres in Indonesia, there is effective work at the community level and with families of detainees.

The emerging evidence on the role of paralegals signals the importance of these localised approaches to legal agency – but paralegals’ effectiveness is inevitably constrained by the political, legal and social environment and their regulatory and funding conditions. Dugard and Drage (2013) analyse, for instance, the range of paralegal forms and experiences in South Africa, noting their important role in supporting legal agency both under

---

Apartheid rule and subsequently, including because the potential of legal mobilisation is inevitably limited by issues of access and availability of legal assistance. Their ability to straddle different normative systems, and to represent and relate to local socioeconomic and cultural realities, enables them to take on ‘a quasi-welfare and community-sensitive role in dispute resolution, as well as acting as a critical bridge between state and society in assisting communities to access services and goods’ (p.41). However, such attributes cannot be taken for granted; the importance of the *political skills* of paralegals to navigate different normative orders and political settings seems insufficiently reflected in the literature, with some exceptions.

Where power asymmetries are more acute, the disincentives to take legal action are greater, as the perception is that the weaker party will lose. For instance, recourse to local redress mechanisms is unlikely to be an effective option in disputes between communities and organised interests, such as multinational companies (Cotula, 2007; Polack et al 2013). The legal opportunity structure is further constrained where the judicial system is seen to be complicit with elite interests, corrupt or lacking in credibility, capacity or independence. And finally, as noted by Grantikov and Porter (2010), the possibility of empowerment is also dependent on self-belief. The ability to take up a legal challenge is constrained where pervasive processes of socialisation entrench the belief that power asymmetries are immutable realities not easily overturned.

#### **Awareness, attitudes and expectations about the law and rights**

Lack of awareness about the law or rights is an important and well-documented barrier to justice. Evidence suggests investing in legal awareness and legal literacy shifts knowledge about, and potentially attitudes towards, the different options for legal action and their potential value.<sup>66</sup> Paralegal work moreover is contributing in important ways to generating awareness about the law and entitlements and to translating this awareness into legal action, including through legal accompaniment and connecting claimants to the next stages of claim formation (Open Society Foundation 2013).

Growing awareness of the law and of entitlements can have a ‘multiplier effect’ across different rights and legal issues. For example, training up paralegals among sex workers in Sub-Saharan Africa around rights to access to HIV treatment is interlinked with increased awareness about how to seek protection from physical abuse from both police and clients, or from wrongful arrest. This leads to a greater sense of empowerment among sex workers and a feeling of control over their lives, which they are able to take to other aspects of their lives (Open Society Foundations, 2013). Similarly, paralegal work with patients needing palliative care regarding their health care rights has extended to enhanced legal literacy on a range of issues related to inheritance and protecting immediate patients’ family from risks of dispossession (ibid.).

But legal literacy on its own will not alter the credibility or legitimacy of either the law or mechanisms of redress or dispute resolution. The political process of how legal change occurs (such as constitutional reform processes) can be important in contributing to attitudinal and self-confidence shifts. Constitutional and judicial reform processes can lead to an eruption of public interest litigation, for instance, as in Colombia or South Africa. But legal action as a strategic approach to change might lose perceived value over time if its efficacy is not evident.

In some cases, changed expectations about what can be achieved through legal action do not reflect a newfound belief in the credibility or impartiality of court systems, or even expectation that a favourable judicial outcome will result. Sometimes, using the courts is about using the space give visibility to social grievances or political conflict that would otherwise not be aired. Dugard and Langford (2011), in their analysis of two cases contesting the legality of the disconnection of water and electricity that had different court outcomes, signal precisely the unpredictability of litigation. They also note that, beyond the legal outcome, other social and political dynamics were also important for the litigants: ‘when mobilised by communities, social movements and groups other than lawyers, the legal platform can serve to powerfully politicise issues, and thereby to have a much more profound and lasting impact than the issuing of a judgment’, (p.56). Thus, choices about resorting to legal action also involve calculations about gains outside the court room, including the opportunity to give voice to situations of injustice that would otherwise not be aired.

---

<sup>66</sup> See, for instance, the different chapters in Polack et al. (2013) and Ubink (2011) on land rights in Africa.

---

In contexts of legal pluralism, awareness of the law and rights is also shaped by how different legal and judicial orders intersect and where individuals or groups might consider they are most likely to obtain the best legal outcome. This is also textured by what form of justice or dispute resolution mechanism is available. Recent literature considers the realities of legal pluralism and how this intersects with legal empowerment. The observation that customary dispute resolution mechanisms provide cheaper, more accessible, less confrontational forms of justice, and might be more legitimate and proximate dispute resolution mechanisms, is well established in the literature (Isser, 2013; Porter, 2013). At the same time, others note that how different interest structures and power relations are articulated within customary norm systems, as in all systems, is what matters.<sup>67</sup> Porter (2013) rightly urges the research and policy community to pull away from dichotomous and normative positions of being for or against legal pluralism. What matters is understanding who benefits and who loses, and how grievances, disputes and abuses are articulated and resolved within any normative regime.

Therefore, unpacking the political economy conditions of how poor and marginalised populations choose to engage (or avoid) the range of dispute resolution mechanisms that are relevant to their interests or quarrels, and *how these interact at national and subnational levels*, is important. Failure to problematise the political and distributional dynamics of the prevalent dispute resolution and normative systems in international actors' support to bottom-up legal empowerment risks doing more harm than good (Faundez, 2013; Porter, 2013).

### **Barriers to access to justice**

Pervasive barriers to access to justice are problematic in all countries, and particularly for those from low-income or marginalised groups. But the weighting of which barriers inhibit legal action varies, as does the calculation about what is the best dispute resolution forum to achieve results available to vulnerable or marginalised people.

We have noted the importance of issues of standing as well as how easily citizens can articulate claims.<sup>68</sup> Moreover, whether other non-affected organisations or individuals can file claims on behalf of others (though broad *locus standi*) is important in shaping the profile of cases around which legal mobilisation occurs (Gloppen, 2006). For service provision, such issues can have an impact on whether there is a predilection for individual cases or class action. The cost of legal action is widely addressed in the literature on access to justice, relating to physical proximity of courts; financial costs of litigation; whether there is access to legal advice/legal aid (depending often on how this is legislated and regulated); issues of distance; and linguistic barriers. Overall, however, the evidence base remains patchy on how these access barriers specifically affect legal action in relation to cases of service delivery.

Finally, issues related to trust are important factors in shaping options. Formal justice systems tend not to be considered trustworthy, credible institutions. Moreover, the experience of citizens everywhere is that law and justice systems are impenetrable, overly formalistic and unfriendly for the layperson with limited legal expertise or experience (Gargarella, 2002). This is exacerbated in contexts of heightened horizontal inequalities and power asymmetries.

### **External support structures: associative capacity and demand-led support structures**

There is an evidence base signalling that building up the associative and organisational capabilities of legal aid or human rights organisations and movements has in many cases been instrumental in building claims and channelling cases to the courts. In Epp's (1998) analysis, the support provided by such organisations is a necessary, if not sufficient, condition to enable the possibility of sustained legal mobilisation going beyond the claims phase to being taken up at high court levels – and for ongoing oversight over the implementation of the favourable rulings. Sustained legal action as a more structured measure of social accountability seems to require organised skills and resources.

However, Gauri and Brinks (2008) are more equivocal about this as a necessary condition of high levels of legal action in their review of litigious conduct and judicial outcomes on social and economic rights in a number of countries. They find, for instance, that the explosion of cases in Brazil in relation to access to health services and

---

<sup>67</sup> See Cotula (2008), Faundez (2013) and Galanter (1974), among others.

<sup>68</sup> In Colombia, for instance, the *tutela* writ – established in the 1991 constitution – allows citizens to file petitions on constitutional issues without the aid of legal counsel. This has been critical in motivating individuals and groups to use the *tutela* writ across a wide range of social and economic rights, which have consequences for the definition of basic services (Glanella-Malca 2013a; Yamin et al., 2011).

medical treatment, which has been mostly through small individual cases (and mostly drawn from the middle classes rather than from the most vulnerable or poor groups), where the main recourse has been access to a well-developed – albeit costly – legal profession. They also note, however, the importance of the robust organisational capacity for social rights litigation in South Africa as an important part of the story in that country. Motta Ferraz (2011) also warns about the need to take stock of whether the litigation explosion in Brazil is pro-poor or not.

Dugard and Langford (2011) in their comparison of two cases – one on water, the other on electricity – point to the importance of more nuanced understanding of what counts as effective organisational and mobilisational capacity, to be more than about legal strategy.

### **Box 12: Contesting the rules on water and electricity provision – the Mazibuko water rights case and the Joseph case on access to electricity in South Africa**

The Mazibuko case is an example of legal action in South Africa to challenge the installation of prepayment water meters in Soweto. The case drew on three years of legal preparation by the Centre for Applied Legal Studies together with the Coalition Against Water Privatisation and a group of community organisations and social movements, which in turn sits within a broader coalition, the Anti-privatisation Forum.

This case represented one of several (but unsuccessful) strategies of protest and direct action. The City of Johannesburg was initially found to be in breach of commitments under the Strategic Framework for Water Services, and the installation of prepayment water meters in Phiri, Soweto, was found to be unconstitutional and unlawful. The case was ultimately defeated in the Constitutional Court, yet it is an example of the strategic importance of organised legal mobilisation capacity to give weight to a case that raised issues of access to water and equitable water allocation.

Importantly, two other enabling conditions were the strong constitutional context, including the ‘right to access to sufficient water’, and the existence of a Constitutional Court with the competence and disposition to consider the case.

The Joseph case resulted from a decision in 2008, whereby City Power (Pty) Ltd disconnected the electricity supply of a low-rent residential building. Residents received no prior notice and were not liable for arrears with the municipality (blame lay with an absconded landlord). The applicants lodged a claim with the High Court that sought reconnection and procedural fairness in the form of notice.

The case was unsuccessful at the High Court, but in appeal at the Constitutional Court the decision went in favour of the claimants. The judgement ordered the electricity supply to be reconnected and the words ‘without notice’ to be cut from the City of Johannesburg’s electricity by-laws.

The claim was not rooted within a social movement or linked with particular civil society organisations, and thus presents an example of effective litigation in the absence of more strategic planning and organisation.

Despite the judicial win, the order to reconnect the electricity supply was ultimately not implemented owing to vandalism in the building, and legal follow-up was unsuccessful. The case did achieve a wide-reaching material change, however; the City of Johannesburg can no longer disconnect tenants’ electricity supply without notice.

*Sources: Dugard and Langford (2011). See also Dugard (2008) and Dugard and Molkoana (2009).*

In their analysis of the two cases, Dugard and Langford (2011) do not conclude that organisational capabilities of strategic litigation do not count. Rather, the point is that, for each case, the issues need to be set against a wider socio-political understanding of the context. Moreover, from a mobilisational perspective, especially as court victories are not a foregone conclusion, what matters is how cases are harnessed onto broader social and political mobilisation about the issues at stake. That is, the particular features of how organisations that provide legal aid or lead litigation strategies are nested in wider networks of related grassroots organisations, as well as strategic political networking and engagement with relevant public authorities (such as municipal governments), make a difference to outcomes. Legal agency notably is generated among beneficiaries in the degree to which they are connected to the litigation process, and that this is not seen to be a distant technical and legal process from which they are excluded. Wilson (2011), in his analysis of what makes for effective legal mobilisation in relation to housing rights and cases against forced evictions in South Africa, further notes the importance not

---

only of legal skills, but also of the necessary mobilisational skills to ensure that litigious strategies are embedded in the beneficiary groups they serve, as well as political skills to engage constructively with the necessary public authorities.

The importance of accumulating associative capacity and organisational resilience among legal aid and legal advice actors is therefore critical, and should not be underestimated. Thus, what seem to matter are wider processes of embedding legal mobilisation strategies that engage in more than the legal technicalities of the case. Domingo (2011) signals this also in an analysis of processes of ‘appropriation’ of the law, rights language and recourse to judicial mechanisms in Latin America. In South Africa, too, the political and legal activity surrounding the transition from Apartheid to a democratic regime consolidated into a robust web of organisations that serve the role of supporting legal mobilisation, and are a central part of the political economy context enabling legal empowerment around access to basic services. Here political advocacy has been as important as legal expertise in supporting pro-poor legal action. International funding has been strategic in securing some of this organisational capacity.

## 5.2 Adjudication

We focus mostly on adjudication in courts, when cases have entered the formal justice system, but take account of decision-making logics and conduct within all dispute resolution forums. Many of the issues reiterate points made in Section 4 on women’s rights. Four sets of factors determine the receptiveness of dispute resolution mechanisms. These are: (i) the legal framework, and the jurisdictional boundaries that exist (either *de jure* or *de facto*) that enable or constrain judicial activism; (ii) the ‘receptiveness’ of adjudicators, as shaped by legal culture, social norms and attitudes towards the normative issues at stake; (iii) judges’ capabilities in terms of skills and knowledge and infrastructural and support-related resources; (iv) and issues related to judicial independence and probity of the adjudication process.

### 5.2.1 Institutional/ legal factors

The **legal framework** sets out the roles and competencies of different levels of adjudication and arbitration. Moreover, it defines what is justiciable, and the scope of decision making adjudicators can engage with. This at least sets the contours of what is possible. However, as Wilson (2011) highlights, the law in its interpretation and application to judicial reasoning is never exact, and outcomes are highly uncertain reflecting also the political context in which legal battles are fought. Gauri and Brinks’ (2008) review of social and economic rights litigation points to a wider range of calculations that feature in the decision process of adjudicators, noting that similar legal structures result in different attitudes and different judicial and therefore political and social outcomes. Comparing Nigerian and Indian courts operating within similar constitutional constraints, the former have been chosen to argue more consistently for the non-justiciability of social and economic rights, whereas the latter have undertaken a more activist approach to integrate the non-justiciable rights to health and education into the justiciable ‘right to life’.

### 5.2.2 Attitudes, incentives and conduct of adjudicators

**Adjudicators’ receptiveness** to cases depends on the legal culture, normative attitudes and a sense of their own role in the polity and how directly they should interfere with policy processes. For instance, some courts have been more reluctant to dictate social or health policy to governments. Adjudicators also do not always adapt immediately to new laws, and the process of socialisation into new political orders can take time, including to accommodate new generations of adjudicators (Couso and Hilbink, 2011). Moreover, attitudes are also shaped by other, less open, interest structures that dictate, for instance, levels of elite capture of adjudicators, either at the national or at the subnational level (Domingo, 1999; Smulovitz, 2003 and 2005). This is also true within customary dispute resolution mechanisms (Cotula, 2007).

In order to align judicial structures with new political projects, high court judges are sometimes replaced following a constitutional reform process. In Kenya, a political decision was made with the new constitution to invite judges to reapply for their positions, undergoing a public vetting process. A similar system was introduced in Argentina to improve the quality and integrity of sitting judges with new appointments since 2003 (Domingo and Wild, 2011).

### 5.2.3 Judicial capacity and resources

**Judges capabilities** and resources in terms of both capacity to deal with caseload, but also whether judges are trained up to keep abreast of legal change is important. Law might change, but this can translate slowly into judicial decision-making.

As legal mobilisation processes have become more prominent, the appointment of high court judges has become especially politically fraught, as executive branches will aim to influence selection process. For instance, in Argentina, for fear of the threat of litigation against some of the structural adjustment measures of the 1990s, President Carlos Menem went to great lengths to ensure the political subordination of the Supreme Court to the executive branch (Bergallo, 2011).

### 5.2.4 Independence of adjudicators

**Judicial independence** is therefore important. In its absence, power asymmetries can lead to judges being bought or unduly influenced. At the same time, generational change and political and social processes by which new ‘zeitgeists’ are ushered in can result in critical shifts in judicial conduct. For instance, new political settlements can bring in new cohorts of adjudicators who see their role differently to the past. This was so for Colombian Constitutional Court magistrates following the 1991 reform. The sitting chief justice in Kenya represents the progressive agenda of the new constitution.

Adjudication is also a fluid and changing process. Judicial rulings change over time, including in relation to the same set of issues – and other actors also adapt their line of reasoning and strategic approaches to push their case. We noted in Section 4 in the case of Colombia how the Constitutional Court has changed its jurisprudence on access to safe abortion in response to changes in the public debate on abortion.

In some cases, it is the threat of litigation – and the assumed judicial outcome – that has led to changed conduct among the relevant parties. In some conditions – as seems to have been the case in South Africa, on the pricing of anti-retroviral drugs for HIV/AIDS treatment – the mere threat of litigation can improve the bargaining power of claimants to the extent that it might even result in policy change.

#### Box 13: Legal mobilisation in the ‘Shadow of the Law’

The threat of litigation can have powerful effect. Examples include the following:

- In 2002, the Treatment Action Campaign filed a complaint with the Competition Commission against GlaxoSmithKline and Boehringer Ingelheim, alleging high costs of essential antiretroviral drugs. The key point was that profiteering from drugs violated rights to life, dignity, equality and access to health services. This resulted in an out-of-court settlement in which the companies agreed to issue voluntary licences to drug companies to increase supplies and reduce prices.
- Another case in 2007 led to a settlement to price reductions in anti-retroviral drugs.

These are important outcomes from an access to health services perspective, achieved through the *threat* of litigation. Note the need to be careful with attribution, as it was also very helpful that this action took place at a time when other international actors (Oxfam, Médecins Sans Frontières and Health GAP) were lobbying at the global level. Generic competition in the production of drugs was also a global factor. However, it seems also to be the case that the legal mobilisation strategy of Treatment Action Campaign made a difference in South Africa, which has an especially high number of people with HIV/AIDS.

*Source: Norheim and Gloppen (2011).*

It is not only what occurs in the formal reasoning of adjudication, therefore, but how this is nested in the wider social political context. And, concretely, how different players calculate the effect of adjudication not just in relation on their own interests but also in terms of how it might alter other actors’ strategy and conduct.

Wilson (2011) on litigation strategies against forced evictions in South Africa especially notes the importance of the setting, and how the actors themselves are drawing on a range of other non-litigation-related resources, relationships and strategies.

---

*The question is not ‘can a judicial decision change things by itself?’ [...] The answer is clearly ‘no’ [...] the real question [...] is: ‘under what social and political conditions is a judicial decision likely to form an effective part of the arsenal of rights and resources upon which those seeking progressive change might rely? And what role does the decision play in the strategies of those seeking change?’ [...] Rights and law are always contingent and incomplete. Their importance in a strategy for change depends not just on their normative content – which is in any case indeterminate at best – but also on the position of the actor deploying them, his linkages with other individuals and groups in the social system in which he is embedded and his capacity to form alliances across a range of social groups and institutions. In short, the successful ‘practitioner’ of rights is something of a game-player, particularly skilled in the law, but keenly aware of its limitations and the social conditions necessary for its effective deployment (p.151).*

### 5.3 Implementation and impact

Legal action may result in favourable rulings or dispute resolutions for poor or vulnerable groups, but the matter of implementation relies on different sets of issues. Mostly the evidence base remains patchy and underdeveloped on implementation, with some research beginning to focus on what it looks like, and the difficulties of assessing it (Gloppen, 2008; Gloppen 2011, Maestad et al 2011; Gauri and Brinks, 2008).

Gloppen (2008) distinguishes between two forms of implementation. This includes first narrow compliance with concrete orders in a ruling or judicial decision (eg provide treatment to a patient). Then there is also the question of long-term implementation in terms of whether judicial recommendations, for instance, to redirect health or education policy results.

It matters whether there is a political system receptive to court rulings that can change, for instance, the direction of health or education policy. In Brazil, the avalanche of health cases through the courts is a development of the 1988 constitution, which formulates a right to health combined with the establishment of a health care system, and a conducive political context of left-leaning governments that have responded positively to judicial activism in the courts – notwithstanding the budgetary pressures that come to bear on the health budget as a result of this (Gauri and Brinks, 2008).

In other cases, the principle of progressive realisation is articulated to justify a slow response to rulings that order resource allocation to the delivery of services. Legal mobilisation therefore has the effect of establishing what has been called a ‘dialogic’ relationship between the courts and the executive branch. In this, the ‘horizontal accountability’ function of judicial review is to oversee political processes and policy choices to ensure they are aligned with the terms of the political settlement, within what is reasonable given resource and capacity constraints to deliver. But even such dialogic and more piecemeal processes require that ruling elites feel bound by judicial politics – this is often unrealistic in settings where state capacity is weak or there is political capture of those authorities in charge of service delivery.

Overall, there is limited evidence regarding what implementation looks like – whether we look at formal justice rulings or other decisions taken in other forums of justice provision (Gauri and Brinks, 2008; Gloppen, 2011). Qualitative studies do follow policy and practical outcomes on a case-by-case basis. For instance, Yamin et al. (2011) note that, in the case of the ruling in Colombia that ordered the government to attend to the basic needs of IDPs, the court did not provide a clear policy direction. Rather, it required the government to develop policy in order to meet certain basic provision standards. In Colombia, implementation of this ruling has been overseen by a network of civil society organisations that the court has formally recognised to oversee implementation. Implementation has involved a range of programmes and increases in budgets. However, at the same time, actual outcomes for IDPs, for instance in relation to health provision, have changed less than was expected or intended. Thus, the positive impact of the ruling has involved the important moral and symbolic victory of acknowledging the plight of IDPs, but the material gains have been far more constrained.

There is evidence of examples in which legal action has had a concrete impact on development issues, as noted in Goodwin and Maru (2014). But as these authors – and others – also note, we need to be wary of citing partial stories of progress as clear evidence of impact. Moreover, the evidence is disparate and needs to be addressed from different perspectives, so it at least problematises what we mean by good outcomes, for whom and at what cost (Bergallo, 2011; Maetas et al., 2011; Norheim and Gloppen 2011).

It is useful to distinguish impact in two measures: direct impact, understood as gains by claimants, affected individuals or groups; and indirect impact, where legal action benefits the wider population. The two are not always aligned. This is especially so, for instance, with litigation on access to expensive drugs treatment, which might benefit the claimant but lead to a reallocation of resources in the health budget away from other important health services (Gloppen, 2008). The issue of equity and social justice is thus complicated, and raises the question of whether adjudicators rather than policymakers are the most legitimate voice to decide this.

Overall, the knowledge base on whether legal mobilisation has tended to result in equity enhancing outcomes, or structural change that is pro-poor is patchy and uneven. Essays in Gauri and Brinks (2008), Rodriguez Garavito (2011 and essays in Yamin and Gloppen 2012, as well as Polack et al (2013) represent some evidence based analyses of the impact of concrete forms of legal mobilisation on equity, but mostly also confirm the very variable form and therefor outcomes of legal action.

#### **Box 14: The Mendoza environment case**

The Mendoza case is an example of direct and indirect benefits arising from the consequences of legal mobilisation.

The Matanza-Riachuelo river basin in Argentina is one of the most polluted places on earth. Residents suffer from severe health problems. In 2004, Beatriz Mendoza and a group of neighbours from one of the worst polluted shanty towns filed a case with the Supreme Court against the national government, the Province of Buenos Aires, the City of Buenos Aires and 44 companies, related to health damages caused by the environmental contamination. They were supported by lawyers from a private law firm.

The Supreme Court rejected the individual claims but accepted a collective environmental case, in the public interest, because it addressed an inter-jurisdictional pollution problem that violated the constitutional right to a healthy environment.

##### **Achievements**

- The Supreme Court, in a landmark judgement in 2008, sentenced the authorities to clean the river basin.
- The national government, the Province of Buenos Aires and the City of Buenos Aires were also sentenced to prevent future environmental harm, remove the industrial pollution, clean up the landfill, expand potable water networks, improve drainage and sewage sanitation systems, develop an emergency health plan and inform the public about measures taken.
- A special inter-jurisdictional river basin authority in charge of the environmental management plan was established.
- The case set an important precedent in terms of:
  - Jurisprudence on environmental rights; and
  - Accountability; responsibility for the pollution had been deadlocked between jurisdictions at different levels of government.
- More legal mobilisation on environmental rights has been seen throughout Argentina since the Supreme Court accepted the Mendoza case, with various similar cases presented directly to the Supreme Court.
- More broadly, there has been a notable increase in public deliberation and national and international media attention and a discernible shift in public opinion regarding the urgency and gravity of the pollution problem.
- The Supreme Court ordered the environmental management plan to be discussed in public hearings and stakeholders were consulted substantively.
- The litigation process has had positive influence on dispute settlement procedures and changed how the responsible authorities respond to demands.
- Controlling industrial pollution is now on the government's agenda, although this is only mentioned in passing.

##### **Issues**

- No judgement was issued regarding the 44 private companies involved.
- At the time of writing, operations to clean the river had begun, but relevant authorities had run short

of time to comply with the judgement. However, the Supreme Court had issued several follow-up judgements in response.

- The monitoring committee has expressed concern regarding the lack of citizen participation in decision-making processes at the new river basin authority.

Following the Supreme Court judgement in 2008, Argentina was granted a World Bank loan of \$840 million to finance large infrastructure projects in the Matanza-Riachuelo river basin. The control mechanisms set up after the Supreme Court ruling make it less likely that funding will be diverted elsewhere, as happened with an Inter-American Development Bank loan to clean up the river in the 1990s.

*Source: Staveland-Saeter (2012)*

Litigation can also serve to protect more vulnerable groups from the excesses of power asymmetries in the social and political order. In Colombia, for instance, judicial review cases, invoked by indigenous communities demanding the right to have a voice on decisions about resources on their territories, have resulted in barring international corporations from exploring oil extraction (Cepeda Espinosa, 2006). In Brazil, the Landless Movement have mobilised effectively before the courts to challenge large land take-overs, and succeeded (Houtzager, 2005). By contrast, Cotula (2007) documents the negative consequences for local communities with insecure rights to property to contest legislation in Sub-Saharan Africa intended to draw in foreign investment in agriculture and natural resource extraction. This is further reflected in Polack et al (2013).

Impact is not only about the details of the case in question. Rather, court cases can represent a forum in which to air an issue in public. Symbolic gains are those that involve establishing the truth of an injustice, even though there is limited expectation of real change. Such symbolic gains can contribute to reframing the terms of the public debate on an issue. For instance, the Phiri water rights case in South Africa was ultimately overturned in the final appeal, but some important principles were confirmed in relation to the right to water and ensuring access as a basic service (Dugard, 2010).

Impact may involve contributing to changing the terms of public discourse and ideas on certain issues, to ‘ideological alterations with respect to the problems posed by the case’ (Rodríguez Garavito, 2011). This could be reflected in how a problem is framed in public discourses and official documents—for example if, after a ruling on access to abortion, the government or the public starts referring to the right to safe abortion, as in the case of Colombia.

Finally, it is important to note that what constitutes a plausible impact of legal mobilisation experiences needs to be commensurate with the level of engagement, the type of activity and the wider political and normative context. Judging impact in terms of its potential for systemic change cannot be fairly applied to the work of paralegals yet is relevant for some of the constitutional review processes considered in the cases of Colombia and South Africa. Gianella et al. (2013a), for instance, documents a legal mobilisation process regarding children’s access to health care in Colombia. A court ruling ordered the Colombian health authorities to provide all children with access to the same health plan, resulting in concrete measures such as the unification of the Child Health Plan and the creation of a health regulation commission to oversee this. Moreover, the ruling uncovered other structural problems in the health system, including in relation to practices of corruption and overpricing of drugs. By contrast, at the level of paralegal engagement, the levels of personal empowerment experienced through enhanced legal agency can be commensurably considered to be transformative at the personal level, including in the degree to which it results in rebalancing power relations at that very personal level.

## 5.4 The politics of legal empowerment: summary of key points

- Enhanced legal awareness, legal literacy, and the experience of engaging with legal mechanisms can be empowering in and of itself, contributing to a repositioning of different actors in relation to each other and the perception of entitlements, rights and therefore capacity to contest situations of injustice or rights violations

- 
- Legal empowerment to a large extent involves the strategic action of a range of demand side actors, including but not only the decision of individuals or groups to undertake legal action. The presence and support of different ‘supporting’ actors is often instrumental, such as the work of paralegals, litigation professionals and human rights organisations, as well as also grass-roots associations made up of potential beneficiaries. Individual legal action can also be effective in some circumstances to give wider visibility to situations of injustice, and thus result in wider change.
  - A range of organisational, knowledge related capabilities are relevant on the demand-side support actors include, but are not limited to, being able to navigate legal structures and mechanisms of redress, judicial review or dispute resolution. In addition to legal engaging with political processes, embeddedness in social processes, building up alliances and navigating the political economy conditions that define key opportunities are important capabilities and skills.
  - Legal mobilisation also involves understanding and engaging with the ‘supply side’ of the justice chain. This includes engaging with the content of law (legal expertise), how it relates to the wider political settlement, and political opportunity structures that this provides, both in terms of the rules of the game regarding the allocation of power and resources (including through rights commitments and the terms of the social contract), and understanding the features and fluidity of political opportunities and constraints.
  - We know relatively little about implementation challenges in practice. However these range from active resistance to resource and capacity issues. Understanding the nature of the implementation challenges in each case is important, including in order to understand the limits of legal empowerment, and what other actions and strategies are necessary to advance intended outcomes.
  - The question of how power asymmetries affect adjudication, implementation and ultimately outcomes is important, and tends to reflect the terms of the ruling political settlement.
  - Finally, whether legal mobilisation is equity enhancing or not needs to be assessed on a case by case basis.

## 6 The politics of legal empowerment: state of knowledge and remaining gaps

The paper sought to identify what the process of legal empowerment and its consequences looks like in relation to women’s rights and the realisation of social and economic rights, especially in relation to the delivery of basic services. To this end, we drew on the academic and some grey literature to assess and reflect on the opportunities and constraints marginalised people encounter when they articulate claims in available dispute resolution and justice mechanisms – and the consequence of such strategies. Key questions included the factors that enable legal voice; how cases are decided in the different justice mechanisms (ranging from customary dispute resolution to high court litigation); whether decisions are implemented and with what consequences (with a particular emphasis on development and social impact).

What do we know about the politics of the choices, process and outcomes associated with legal empowerment, and where are the main gaps in the knowledge? Here, we summarise key findings and themes from the review.

---

## 6.1 What does the evidence say about process and impact of legal empowerment?

There appears to be an increase in legal mobilisation among poor or vulnerable groups in the Global South – albeit variably so – to advance their rights, protect their interests, seek redress for injustices and hold public authorities to account for the non-delivery of services. This has resulted in a range of process experiences and outcomes with varying impact and relevance for development. In some cases legal mobilisation has contributed to the advancement of the rights and interests of poor, vulnerable or marginalised groups.

### Direct and indirect outcomes

The positive impact of legal mobilisation, when it is effective from a pro-poor perspective, is observable in the following change processes and outcomes:

- pro-poor changes to policy and practice regarding the delivery or regulation of service delivery in different sectors (e.g. health, education, housing and water);
- redress for rights violations and injustices, which can result in altering power relations in favour of vulnerable groups (e.g. women, indigenous movements);
- unjust or illegal practices in the distribution of resources are contested with favourable results for vulnerable or marginalised groups (e.g. in relation to land or natural resource extraction); and
- improvements in citizens' ability to exercise oversight over public authorities (including forms of social accountability through legal action).

A favourable ruling for an individual or group, or a specific policy change, is the most **direct outcome** of legal mobilisation. It is also often the outcome that is easiest to measure and has the most immediate impact. These types of outcomes of legal action for individuals or small groups may appear limited in terms of their wider reach or transformative effect, however, legal action can be transformational *for that individual or group*; and positive rulings over time can reinforce the merits of resorting to legal mobilisation. Recourse to legal action can contribute to a sense of 'empowerment' and self-realisation, and may rebalance power relations with other (potentially more powerful) individuals/groups or with the state, government or local authority, in ways that favour the poor or vulnerable. Moreover, when legal action results in a concrete change in policy to redirect the reallocation of resources, the effect goes beyond the individual level.

There are also a number of **indirect consequences** that can result from legal mobilisation, even if a good decision is not reached, or that arise from the experience of legal action itself. First, dispute resolution forums can provide a space to give public visibility to a situation of injustice. In the face of reduced public or political space to articulate opposition to a situation of rights abuse, illegality or injustice, legal action becomes an additional instrument in a wider arsenal of tools of social or political contestation. Second, legal action can contribute to redefining the terms of public debate about an issue or to shifting beliefs about discriminatory (but often dominant) social norms – regardless of whether the ruling itself is positive or whether effective implementation occurs. Third, the 'naming and shaming' aspect of legal mobilisation can contribute to ushering in a change of conduct among 'wrong-doers' whether among public officials or in the private sector, as it can lead to a re-calculation of the reputational risks of non-compliance with a new legal or political order.

### Influence of social-political environment on legal mobilisation processes and outcomes

At the same time, it is important to stress that the impact of legal empowerment processes is highly variable. One factor is the extremely wide range of potential issues, types of claimants and ambitions involved in action. Another is the variation in the broader environment in which legal mobilisation takes place, for example in terms of the support networks and actors available and the socio-political and legal context in which such contests arise. Moreover, the profile of who is most likely to engage in legal mobilisation is relevant in order to assess whether both the process and impact of legal mobilisation really does make a difference to the poorest, most vulnerable or marginalised groups and individuals.

In assessing the transformative potential of legal mobilisation, the review of the evidence finds that how legal empowerment works in practice is best understood by looking at the process and experience of legal empowerment at the different stages of the justice chain, *but not in isolation from the wider socio-political environment*. Important features of the process of legal mobilisation were found to include the following:

- 
1. The content of the law/constitutional order and how it is embedded in practice in the social and political order is key.
  2. The specific features of legal pluralism and whether these reinforce horizontal inequalities, patterns of exclusion, discrimination and inequitable development are also critical in defining what the options of legal voice are, and whether there is space for contesting and redefining exclusionary normative orders.
  3. It is important to understand how structural bias is embedded into the justice mechanisms available to poor or vulnerable groups and individuals because this shapes their ability to use the law and legal mechanisms effectively. For instance, hegemonic patriarchy means all women face structural bias within the justice system, regardless of their socioeconomic group or the legal order/forum they use.
  4. The external support structure is critical to enabling legal voice for poor or disadvantaged groups to make claims. External support is important not only in terms of legal advice and ability to navigate different justice mechanisms. External support structures are important in the degree to which they have the capacity to both follow up on the complexities of the legal process and to engage in the political manoeuvring necessary to enhance the chances of success. Concretely, women's, legal and rights organisations provide the necessary financial and organisational support, build women's capabilities and social capital, and can bolster the power of claimants *vis-à-vis* elites and officials. In service delivery, engaging with service providers (at government, municipal or community levels) is critical to maximising the chances of implementation of a favourable ruling.

#### **Legal mobilisation, empowerment and transformation**

The review has shown that it is not possible to reach generalizable conclusions about the transformative, empowering and emancipatory, or indeed pro-poor potential of legal mobilisation.

Over time, legal empowerment is meaningful only if it translates into meaningful change. Understanding the political economy of how resistance to legal mobilisation is articulated, or implementation of good rulings resisted, is important. It is not possible to reach generalisable conclusions on how effective legal mobilisation is in producing transformative (or more modest) development or other outcomes. The expectations generated around the potential of legal empowerment need to be adapted to an assessment of what is possible and plausible given the concrete combination of factors discussed in this paper. Moreover, the development impact can be commensurate only to the level of legal action and the nature of the political and social setting against which legal action of any sort is set. Gains achieved at an individual level in the community are of course hugely important, not just for the individual involved but also in the degree to which related decision making constitutes a shift, first in legal agency and second in how the individual or group experiences change through empowerment. But, the bigger question of whether legal action results in, for instance, better health outcomes or more equitable land distribution, requires a different order of observation.

It is also important to stress that in many contexts, legal mobilisation *does not* empower. The experience of legal action can be humiliating or intimidating and can reinforce the status quo and acceptance of asymmetric power relations and injustice. Indeed, historically, dominant classes have used dispute resolution mechanisms and justice systems to reinforce social injustices, discriminatory social norms and defend their privileges. Even if high courts become socially progressive in the application of law, rulings in lower courts can be reactionary or unconstitutional, particularly in relation to gender relations. Moreover, in how the separation of powers works in practice, courts (progressive or otherwise) can often be relatively powerless in the face of government intransigence and resistance to judicial review, including by other powerful interests. The evidence also shows that where power asymmetries are robust, legal mobilisation is not likely to make a difference, for instance in relation to many land disputes in Sub-Saharan Africa where the balance of power and law often benefits foreign investment interests over those of local communities

Finally, whether legal mobilisation and court action is perceived as a viable site of political and social contestation depends on particular political and social histories. Law is only one part of the story of political settlements, and its relative weight is intimately linked to whether national, local or transnational elites agree, through calculated consent or coercion, to be bound by law in practice. Thus, assessing the potential of legal empowerment to shape development outcomes requires taking account of what is possible given a country's socio-political and legal history and current political economy.

---

In this regard the review confirms that legal empowerment, when it occurs in ways that advances the interests and rights of vulnerable or marginalised groups or individuals is not politically neutral. It has consequences that alter the balance of power or the distribution of resources, and as such generates winners and losers – as is true for all rights battles. There is therefore a need to ‘repoliticise’ our analysis and understanding of legal empowerment.

## 6.2 Gaps in knowledge on the empowerment potential of legal mobilisation

What emerges from this review is that the impacts and drivers of success for legal empowerment reflect context-specific realities and require tailored policy solutions and support. Yet, at present, the evidence base remains highly uneven, concentrated mostly on particular activities (e.g. legal literacy) and on claim-formation and adjudication, rather than on the implementation and outcomes stages of the dispute resolution and redress process. Indeed, there is almost no systematic, comparative analysis of key factors that shape effective implementation and deliver tangible results.

Moreover, the empirical observation of the bigger questions regarding whether and when such legal action contributes to structural or transformative change or results in, for instance, better health outcomes or more equitable land distribution at a more aggregate level, remains underdeveloped and lacking in evidence. It is also more difficult to measure impact or demonstrate attribution in relation to some objectives of legal mobilisation, such as changes in social attitudes compared with, say, distribution of medicine. But, even within a sector, such as health, assessing what constitutes an equitable outcome requires prejudging how resources are best expended across a complex field where there are tough policy decisions on how to allocate scarce resources.

There is, however, some emerging robust qualitative observation and analysis of some aspects of legal mobilisation in relation to service provision (in health, education, water and housing), disputes relating to land and natural resources, including high-quality case studies of women’s disputes over land, property and marriage entitlements. Overall, there is a strong need to invest in developing the evidence base on the process and outcomes of legal mobilisation, and the impact of the legal empowerment that results from this.

## 6.3 Lessons for the international community

This is an emerging policy agenda. Based on the rich analytical and empirical studies that do exist, we can identify six broad insights and lessons for how the international community can improve its support to legal empowerment:

1. As with institutional reform more generally, the processes of change associated with legal empowerment are deeply political and efforts to support it must include work with locally driven processes of institutional innovation and awareness of opportunity structures and constraints.
2. An overly narrow focus on only one part of dispute resolution or redress processes, such as claim-making, overlooks the importance of other parts, such as how judges make decisions or their implementation, to empowerment in practice. Thus, support only to the ‘demand-side’, such as access to justice or to paralegals, can mean little without considering how they interact with other state institutions, public authorities and interest structures. Developments on the ‘supply-side’ of legal action are equally important to achieve meaningful change. This requires more holistic and interconnected engagement across justice sector reform strategies.
3. Law and legal mobilisation has potential empowerment and development effects, but this is different for different sectors and different populations. Depending on the issue, particular types of action and activities are likely to be more effective and less susceptible to resistance than others. This means that a priori assessments of which justice forums, or combination of forums, are more or less effective or empowering needs to occur on a case-by-case basis.
4. Finding concrete – and mostly localised – solutions to practical claims for poor or vulnerable individuals is important, but public interest litigation and follow-up political action is important for the sort of structural change that can influence horizontal inequalities and unjust power relations between groups in the long term.
5. International support for legal empowerment continues to remain in justice teams and largely separate from other sectors (such as health, education or governance). This overview highlights the strong

---

imperative to move away from such siloed working in development agencies. Legal action of different kinds can advance gender, health, education and other social objectives and need to be integrated more fully within programmes in these sectors. This has significant implications not just for support to governments but also for social accountability investments too.

6. Similarly, it is important to make the institutional linkages between justice and governance if legal and justice assistance of all kinds is to become more politically informed and the important linkages between legal and political mobilisation are to be made.

Experience shows that progressive social change is possible but depends on integrated social, political and legal strategies. These link legal mobilisation with political action, such as popular protest or lobbying of parliamentarians, and efforts to change social attitudes and behaviour.

---

# References

- Andrews, M. (2013) *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions*. Cambridge: Cambridge University Press.
- Afronet (1998) 'The Dilemma of Local Courts in Zambia: A Question of Colonial Legal Continuity or Deliberate Customary Law Marginalization?' Lusaka: Afronet.
- Banik, D. (2009) 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication'. *Hague Journal on the Rule of Law* 1: 117-131.
- Basu, S. (2006) 'Playing off Courts: The Negotiation of Divorce and Violence in Plural Legal Settings in Kolkata'. *Journal of Legal Pluralism* 52: 41-76.
- Basu, S. (2012) 'Mediating Marriage in the Family Courts of Kolkata, India'. *Signs* 37(2): 469-492.
- Berenschot, W. and Rinaldi, T. (2011) 'Paralegalism and Legal Aid in Indonesia: Enlarging the Shadow of the Law'. Report for Open Society Institute.
- Bergallo, P.. (2011). "Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina." *Texas Law Review* no. 89:1611-1641.
- Bruce, J.W., Garcia-Bolivar, O., Hanstad, T., Roth, M., Nielson, R., Knox, A. and Schmidt, J. (2007) 'Legal Empowerment of the Poor: From Concepts to Assessment'. Report for USAID.
- Carothers, T. (2003) 'Promoting the Rule of Law Abroad: The Problem of Knowledge'. Working Paper 34. Washington, DC: Carnegie Endowment for International Peace.
- Carothers, T. (ed.) (2006) *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington, DC: Carnegie Endowment for International Peace.
- Cepeda Espinosa, M.J. (2005) 'The Judicialization of Politics in Colombia: The Old and the New', in R. Sieder, A. Angell and L. Scholden (eds) *The Judicialisation of Politics in Latin America*. London: Palgrave.
- Chiongson, R.A., Desai, D., Marchiori, T. and Woolcock, M. (2011) 'Role of Law and Justice in Achieving Gender Equality'. *World Development Report 2012 Background Paper*.
- Claassens, A. and Mnisi, S. (2009) 'Rural Women Redefining Land Rights in the Context of Living Customary Law'. *South African Journal on Human Rights* 25.
- CLEP (Commission for Legal Empowerment of the Poor) (2008) *Making the Law Work for Everyone*. New York: UNDP.
- Collins, C. (2008) 'State Terror and the Law: The Re-judicialisation of Human Rights Accountability in Chile and El Salvador'. *Latin American Perspectives* 35(5): 20-37.
- Cooper, M. (2011a) 'Preventing the Gendered Reproduction of Citizenship: The Role of Social Movements in South Africa'. *Gender and Development* 19(3): 357-370.
- Cooper, C (2011b) 'South Africa: Health Rights Litigation, Cautious constitutionalism' in
- Cotula, L. (2007) *Legal Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa*. London: IIED.

- 
- Couso, J., Huneus, A. and Sieder, R. (eds) (2010) *Cultures of Legality: Judicialization and Political Activism in Latin America*. Cambridge: Cambridge University Press.
- Couso, J. and L. Hilbink (2011) "From Quietism to Incipient Activism: The Ideological and Institutional Roots of Rights Adjudication in Chile". In Helmke G. and Ríos-Figueroa, J. (eds.), *Courts in Latin America* New York: Cambridge University Press.
- Crook, R. (2011) 'The State and Accessible Justice in Africa: Is Ghana Unique?' Policy Brief 3. London: APPP.
- Dale, P. (2009) 'Delivering Justice to Sierra Leone's Poor: An Analysis of the Work of Timap for Justice'. Justice for the Poor Research Report. Washington, DC: World Bank.
- Denney, L. (2012) 'Non-state Justice and Security in Fragile State: Lessons from Sierra Leone'. Briefing Paper 76. London: ODI.
- Denney, L. and Ibrahim, A.F. (2012) *Violence against Women in Sierra Leone: How Women Seek Redress*. London: ODI.
- Dezalay, Y. and Garth, B. (2002) *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. Chicago, IL: University of Chicago Press.
- Domingo, P. (1999) 'Rule of Law, Citizenship and Access to Justice in Mexico'. *Mexican Studies* 15(1): 151-191.
- Domingo, P. (2005) 'Judicialisation of Politics: The Changing Political Role of the Judiciary in Mexico', in R. Sieder, A. Angell and L. Scholden (eds) *The Judicialisation of Politics in Latin America*. London: Palgrave.
- Domingo, P. (2009) 'Governance after Neo-liberalism: The Case of Bolivia', in J. Grugel and P. Riggirozzi (eds) *Governance after Neo-liberalism*. London: Palgrave-Macmillan.
- Domingo, P. (2012) 'Dealing with Legacies of Violence: Transitional Justice and Governance Transitions'. Background Note. London: ODI.
- Domingo, P. and Denney, L. (2013) *A Problem-focused Approach to Violence against Women: The Political-economy of Justice and Security Programming*. London: ODI.
- Domingo, P. and Sieder, R. (2001) *Rule of Law in Latin America: The International Promotion of Judicial Reform*. London: Institute of Latin American Studies.
- Domingo, P. and Wild, L. (2011) , "Will Kenya's 2010 Constitution work for women and children?", ODI project briefing
- Dugard, J. (2008) 'Rights, Regulation and Resistance: The Phiri Water Campaign'. *South African Journal on Human Rights* 24: 593-611.
- Dugard, J. (2010) 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy'. *Review of Radical Political Economics* 42(2): 175-194.
- Dugard, J. (2011) 'Civic Action and Legal Mobilisation: The Phiri Water Meters Case', in J. Handmaker and R. Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Research and Practitioners*. Pretoria: PULP.
- Dugard, J. and Drage, K. (2013) 'To Whom Do the People Take their Issues? The Contribution of Community-based Paralegals in Access to Justice in South Africa'. Justice and Development Working Paper 21. Washington, DC: World Bank.
- Dugard, J. and Langford, M. (2011) 'Art or Science? Synthesising Lessons From Public Interest Litigation and the Dangers of Legal Determinism'. *South African Journal on Human Rights* 27: 39-64.
- Dugard, J. and Mohlakoana, N. (2009) 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa'. *South African Journal on Human Rights* 25: 546-572.
- Dugard, J., MacLeod, J. and Alcara, A. (2012) 'A Rights-based Examination of Residents' Engagement with Acute Environmental Harm across Four Site on South Africa's Witwatersrand Basin'. *Social Research* 79(4): 931-956.

- 
- Epp, C. R. (1998) *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago, IL: University of Chicago Press.
- Faundez, J. (2005a) 'The Rule of Law Enterprise: Towards a Dialogue between Practitioners and Academics'. Working Paper 164(5). Warwick: CSGR.
- Faundez, J. (2005b) 'Community Justice Institutions and Judicialization: Lessons from Rural Peru', in R. Sieder, A. Angell and L. Scholden (eds) *The Judicialisation of Politics in Latin America*. London: Palgrave.
- Faundez, J. (2013) 'Legal Pluralism and International Development Agencies: State Building or Legal Reform', in Tamanaha et al. (2013).
- Fuchs, G. (2013) 'Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries'. *Canadian Journal of Law and Society* 28(2): 189-208.
- Fruhling, H. (2000) *From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America*, in Golub, S. and McClyment, M. (eds.) *Many roads to justice : the law-related work of Ford Foundation*. Ford Foundation.
- Gargarella, R. (2002) "'Too Far Removed from the People": Access to Justice for the Poor: The Case of Latin America'. UNDP Issue Paper. Bergen: Chr. Michelsen Institute.
- Gargarella, R., Domingo, P. and Roux, T. (eds.) (2006) *Courts and Social Transformation: An Institutional Voice for the Poor?* London: Ashgate.
- Gauri, V. and Brinks, D. (2008) (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. Cambridge: Cambridge University Press.
- Gianella-Malca, C., Gloppen, S. and Fosse, E. (2013a) 'Giving Effect to Children's Right to Health in Colombia? Analysing the Implementation of Court Decisions Ordering Health System Reform'. *Journal of Human Rights Practice* 5: 153-176.
- Gianella-Malca, C., Gloppen, S., Sieder, R. and Yamin, A. (2013b) 'Sexual and reproductive rights - a global legal battlefield' Bergen: Chr. Michelsen Institute (CMI) Brief vol. 12 no. 1
- Gloppen, S. (2006) 'Courts and Social Transformation: An Analytical Framework', in R. Gargarella, P. Domingo and T. Roux (eds) *Courts and Social Transformation: An Institutional Voice for the Poor?* London: Ashgate.
- Gloppen, S. (2008) 'Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health'. *Health and Human Rights* 10(2): 21-36.
- Gloppen, S. (2011) 'Litigating Health Rights: Framing the Analysis', in A.E. Yamin and S. Gloppen *Litigating Health Rights. Can Courts Bring More Justice to Health?* Cambridge, MA: Harvard University Press.
- Gloppen, S., Gargarella, R. and Skaar, E. (eds) (2004) *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*. New York: Frank Cass.
- Goetz, A.M. and Jenkins, R. (2005) *Reinventing Accountability: Making Democracy Work for Human Development*. Basingstoke, UK: Palgrave Macmillan.
- Golub, S. and McClyment, M. (eds.) (2000) *Many roads to justice : the law-related work of Ford Foundation*. Ford Foundation.
- Golub, S. (2000), *Battling Apartheid, Building a New South Africa*. In Golub, S. and McClyment, M. (eds.) *Many roads to justice : the law-related work of Ford Foundation*. Ford Foundation.
- Golub, S. (2003) 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative'. Working Paper 41. Washington, DC: Carnegie Endowment for International Peace.

- 
- Golub, S. (2006) 'The Legal Empowerment Alternative', in T. Carothers (ed.) *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington, D.C.: Carnegie Endowment for International Peace
- Golub, S. (2009) '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(1): 101-116.
- Golub, S. (2010) 'What is Legal Empowerment? An Introduction', in S. Golub (ed.) *Legal Empowerment: Practitioners' Perspectives*. Legal and Governance Reform: Lessons Learnt 2. Rome: IDLO.
- Golub, S. (2012) 'The Political Economy of Improving Traditional Justice Systems: A Case Study of NGO Engagement with Shalish in Bangladesh'. *World Bank Legal Review*. Washington, DC: World Bank.
- Golub, S. (2013) 'Legal Empowerment's Approaches and Importance', *Justice Initiatives Autumn*. New York: Open Society.
- Golub, S. (2014) 'Mitigation Corruption in Informal Justice Systems: NGO Experiences in Bangladesh and Sierra Leone'. U4 Brief.
- Golub, S. and McQuay, K. (2001) 'Law and Policy Reform at the Asian Development Bank'. Report for ADB.
- Goodwin, L. and Maru, V. (2014) 'What Do We Know about Legal Empowerment? Mapping the Evidence'. Working Paper. Washington, DC: Namati.
- Greenberg, J. (2014) 'The Donor Landscape for Access to Justice and Health'. Draft paper for the Law and Health Initiative, OSF.
- Gramtikov, M. and Porter, R.B. (2010) 'Yes, I Can: Subjective Legal Empowerment'. Tisco Working Paper on Access to Justice, Dispute Resolution, and Conflict System Design 8/2010.
- Hagen-Zanker, J. and Mallett, R. (2013) 'How to do a rigorous, evidence-focused literature review in international development: a guidance note'. ODI Discussion Paper
- Habermas, J. (1996) *Between Facts and Norms: Contributions to Discourse Theory of Law and Democracy*. Cambridge, MA: MIT Press.
- Hasle, L. (2003) 'Too Poor for Rights? Access to Justice for Poor Women in Bangladesh'. *Bangladesh Development Studies* 29(3-4): 99-136.
- Henrysson, E. and Joireman, S.F. (2009) 'On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya'. *Law and Society Review* 43(1): 39-60.
- Houtzager, P. (2005) 'The movement of the landless, the MST, the juridical field and legal change in Brazil.' In Santos, B. S., and Rodriguez-Garavito, C. (eds) *Law and Globalization from Below: Towards a Cosmopolitan Legality*. New York and Cambridge: Cambridge University Press. 218-241.
- Htun, M. and Weldon, L. (2011) 'Sex Equality in Family Law: Historical Legacies, Feminist Activism, and Religious Power in 70 Countries'. *World Development Report 2011 Background Paper*.
- IAHRC (Inter-American Human Rights Court) (2004) 'Case: Plan de Sánchez Massacre v. Guatemala'. Judgement Series C, No. 116, 19 November.
- IDLO (International Development Law Organization) (2011) 'Customary Justice: Perspectives on Legal Empowerment'. Rome: IDLO.
- IDLO (International Development Law Organization) (2013) *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment*. Rome: IDLO.
- Isser, D. (ed.) (2011) *Customary Justice and the Rule of Law in War-torn Societies*. Washington, DC: USIP.
- Isser, D.H. (2013) 'The Problem with Problematising Legal Pluralism: Lessons from the Field', in Tamanaha et al. (2013).

- 
- Isser, D., Lubkermann, S.C. and N'Tow, S. (2009) *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*. Washington, DC: United States Institute of Peace.
- Jahan, F. (2009) 'Gender, Violence and Power: Retributive versus Restorative Justice in South Asia', in A. Sing, and N.A. Zahid (eds) *Strengthening Governance through Access to Justice*. New Delhi: PHI Learning Private Limited.
- Jayasuriya, K. (2013) 'Institutional Hybrids and the Rule of Law as a Regulatory Project', in Tamanaha et al. (2013).
- Jones, G A. (2000) 'Resistance and the Rule of Law in Mexico'. *Development and Change* 29: 499-523.
- Kabeer, N. (1999) 'The Conditions and Consequences of Choice: Reflections on the Measurement of Women's Empowerment.' UNRISD Working Paper No. 108: Paris: UNRISD.
- Kaur, J. (2012) 'The Role of Litigation in Ensuring Women's Reproductive Rights: An Analysis of the Shanti Devi Judgement in India'. *Reproductive Health Matters* 20(39): 21-30.
- Keck, M. and Sikkink, K. (1998) *Activists Beyond Borders*. Ithaca, NY: Cornell University Press.
- Khadiagala, L.S. (2001) 'The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights'. *Development and Change* 32: 55-76.
- Klassen, S. Lechtenfeld, T. and Povel, F. (2011) 'What about the Women? Female Headship, Poverty and Vulnerability in Thailand and Vietnam.' Discussion Paper No. 76. Gottingen: Courant Research Centre, University of Gottingen.
- Kleinfeld, R. (2012) *Advancing the Rule of Law Abroad: Next Generation Reform*. Washington, DC: Carnegie Endowment for International Peace.
- Langford, M. (2008) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. Cambridge: Cambridge University Press.
- Litowitz, D. (2000) 'Gramsci, Hegemony and Law'. *Brigham Young University Law Review* 2: 515-51.
- Macauley, F. (2005) 'Judicialising and (De)criminalizing Domestic Violence in Latin America'. *Social Policy and Society* 5(1): 103-114.
- Maestad, O, Rakner, L. and Motta-Ferra, O. (2011) 'Assessing the Impact of Health Rights Litigation' in Yamin, A.E. and Gloppen, S. (eds) *Litigating Health Rights: Can Courts Bring More Justice to Health?* Cambridge, MA: Harvard Law School, 273-304,
- Magar, V. (2003) 'Empowerment Approaches to Gender-based Violence: Women's Courts in Delhi Slums'. *Women's Studies International Forum* 26(6): 509-523.
- Maru, V. (2006) 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide'. *Yale Journal of International Law* 31: 427-476.
- Maru, V. (2009) 'Access to Justice and Legal Empowerment: A Review of World Bank Practice'. *Justice and Development Working Paper* 9. Washington, DC: World Bank.
- Maru, V. (2010) 'Allies Unknown: Social Accountability and Legal Empowerment'. *Harvard Journal of Health and Human Rights* 12(1): 83-93.
- McCann, M.W. (1994) *Rights at Work: Pay equity reform and the politics of legal mobilisation*. Chicago: University of Chicago Press
- McClymont, M. and Golub, S. (eds) (2000) *Many Roads to Justice: The Law-related Work of Ford Foundation Grantees around the World*. New York: The Ford Foundation.
- Molyneux, M. (1985) 'Mobilization without Emancipation? Women's Interests, the State, and Revolution in Nicaragua'. *Feminist Studies* 11(2): 227-254.

- 
- Motta Ferraz, O. (2011) 'Brazil, Health Inequalities, Rights and Courts: the Social Impact of the Judicialization of Health' in Yamin, A.E. and Gloppen, S. (eds) *Litigating Health Rights: Can Courts Bring More Justice to Health?* Cambridge, MA: Harvard Law School, 76-101
- Nagaraj, V. (2010) 'Local and Customary Forums: Adapting and Innovating Rules of Formal Law.' *Indian Journal of Gender Studies* 17(3): 429-450.
- Norheim and Gloppen (2011)
- Norheim, O.F. and Gloppen, S. (2011), 'Litigating for medicines: how can we assess impact on health outcomes' in Yamin, A.E. and Gloppen, S. (eds) *Litigating Health Rights: Can Courts Bring More Justice to Health?* Cambridge, MA: Harvard Law School, pp.304-331
- North, D. C., Wallis, J. J. and Weingast, B. R. (2009) *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History*. Cambridge: Cambridge University Press.
- Nyamu-Musembi, C. (2007) 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights'. *Third World Quarterly* 28(8): 1457-1478.
- Olsen, V. (2006) 'Protecting Indigenous Peoples' Lands and Resources: The Role of the Constitutional Court of Colombia'. Thesis submitted in partial fulfilment of the Master of Philosophy Degree, Norwegian Centre for Human Rights.
- Olsen, V. (2008) 'Legal Framework for Indigenous Peoples' Rights in Colombia'. *Human Rights Everywhere*. <http://www.hrev.org>
- Open Society Foundations (2013) *Bringing Justice to Health: The Impact of Legal Empowerment Projects on Public Health*. New York: Open Society Foundations.
- Peruzzotti, E. and Smulovitz, C. (2006) (eds.) *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies*. Pittsburgh, PA: University of Pittsburgh Press.
- Piron, L.-H. (2005) 'Donor Assistance to Justice Sector Reform in Africa: Living up to the New Agenda? Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses'. Report to the Open Society Justice Initiative.
- Polack, E., Cotula, L. and Côte, M. (2013) *Accountability in Africa's land rush: what role for legal empowerment?* IIED/IDRC, London/Ottawa.
- Porter, D.J. (2013) 'Some Implications of the Application of Legal Pluralism to Development Practice', in Tamanaha, B.Z., Sage, C. and Woolcock, M. (eds) (2013) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge: Cambridge University Press.
- Porter, D., Isser, D. and Berg, L.-A. (2014) 'The Justice-Security-Development Nexus: Theory and Practice in Fragile and Conflict-affected States'. *Hague Journal on the Rule of Law* 5: 310-328.
- Rao, N. (2007) 'Custom and the Courts: Ensuring Women's Rights to Land, Jharkhand, India'. *Development and Change* 38(2): 299-319.
- Rayaprol, A. and Ray, S. (2010) 'Understanding Gender Justice: Perceptions of Lawyers in India'. *Indian Journal of Gender Studies* 17(3): 335-363.
- Roa, M. (2007) 'From Constitutional Court Success to Reality: Issues and Challenges in the Implementation of the New Abortion Law in Colombia'. *IDS Bulletin* 39: 83-87.
- Robins, S. and von Lieres, B. (2004) 'Remaking Citizenship, Unmaking Marginalization: The Treatment Action Campaign in Post-Apartheid South Africa'. *Canadian Association of African Studies*: 575-586.
- Rodríguez Garavito, C. (2011) 'Beyond the Courtroom: The Impact of Judicial Activism on Social and Economic Rights in Latin America'. *Texas Law Review* 89(7): 1670-1698.

- 
- Rutkow, L., Vernick, J.S., Webster, D. W. and Lennig, D. J. (2009) 'Violence against Women and the U.S. Supreme Court: Recent Challenges and Opportunities for Advocates and Practitioners'. *Violence Against Women* 15(10): 1248-1258.
- Sage, C., Menzies, N. and Woolcock, M. (2010) 'Taking the Rules of the Game Seriously: Mainstreaming Justice in Development: The World Bank's Justice for the Poor Program', in S. Golub (ed.) *Legal Empowerment: Practitioners' Perspectives*. Rome: IDLO.
- Santos, B.S.( 2002) *Toward a New Legal Common Sense*. London: Butterworth LexisNexis Group.
- Santos, B. S., and Rodriguez-Garavito, C. (eds) (2005). *Law and Globalization from Below: Towards a Cosmopolitan Legality*. New York and Cambridge: Cambridge University Press.
- Schedler, A., Diamond, L. and Plattner, M. (eds) (1999) *The Self-restraining State*. Boulder, CO: Lynn Rienner.
- Scholz, B. and Gomez, M. (2004) *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women. A Survey of Law and Practice in Sub-Saharan Africa*. Geneva: Centre on Housing Rights and Evictions.
- Sibley, S.S. (1998) 'Ideology, Power and Justice', in B.G. Garth and A. Sarat (eds) *Justice and Power in Sociological Studies*. Evanston, IL: Northern University Press.
- Sieder, R. and Sierra, M.T. (2010) 'Indigenous Women's Access to Justice in Latin America'. Working Paper 2. Bergen: Chr. Michelsen Institute.
- Sieder, R., Angell, A. and Scholden, L. (eds) (2005) *The Judicialisation of Politics in Latin America*. London: Palgrave.
- Skaar, E. (2010) *Judicial Independence and Human Rights in Latin America: Violations, Politics, and Prosecution*. New York: Palgrave Macmillan.
- Smulovitz, C. (2005) 'Petitioning and Creating Rights: Judicialization in Argentina', in R.A. Sieder, A. Angell and L. Scholden (eds) *The Judicialisation of Politics in Latin America*. London: Palgrave.
- Smulovitz, C (2002). "The Discovery of Law: Political Consequences in the Argentine Case." In *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*, Yves Dezalay and Bryant Garth, eds. Ann Arbor: Michigan University Press. 249–75.
- Smulovitz, C. and Peruzzotti, E. (2000) 'Social Accountability in Latin America'. *Journal of Democracy* 1(4): 147-158.
- Ssenyongo, M. (2007) 'Women's Rights to Equality and Non-discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court'. *International Journal of Law, Policy and the Family* 21: 341-372.
- Stapleton, A. (2010) 'Empowering the Poor to Access Criminal Justice: A Grassroots Perspective'. *Legal Empowerment Working Paper 2*. Rome: IDLO.
- Staveland-Sæter, K (2012) *Assessing the impact of the Mendoza case in Argentina*, CMI Brief
- Stephens, M. (2009) 'The Commission on Legal Empowerment of the Poor: An Opportunity Missed'. *Hague Journal on the Rule of Law* 1: 132-157.
- Tamanaha, B. Z. (2007) 'Understanding Legal Pluralism: Past to Present, Local to Global'. *Sydney Law Review* 30: 375-411.
- Tamanaha, B. Z. (2004). *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press.
- Tamanaha B.Z. (2011), 'The rule of law and legal pluralism in development', Washington University of St. Louise Working Paper,
- Tamanaha, B.Z., Sage, C. and Woolcock, M. (eds) (2013) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge: Cambridge University Press.

- 
- Tamanaha, B. Z. (2013) 'The Rule of Law and Legal Pluralism in Development,' in Tamanaha et al. (2013). Tamanaha, B.Z., Sage, C. and Woolcock, M. (eds) (2013) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge: Cambridge University Press.
- Toulmin, C. (2008) 'Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions'. *Land Use Policy* 26: 10-19.
- Trebilcock, M.J and Ronald J. D. (2008) *Rule of Law Reform and Development: Charting the Fragile Path of Progress* Northampton: Edward Elgar.
- Trubek D.M and A. Santos, eds., 2006. *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press;
- Ubink, J.M. (2009) "Legalizing land rights in Africa, Asia and Latin America: An introduction". In *Legalising Land Rights: Local practices, state responses and tenure security in Africa, Asia and Latin America*, edited by J. Ubink, A.J. Hoekema and W. Assies. Leiden: Leiden University Press, 7-31
- Ubink, J.M (ed) (2011) *Customary Justice: Perspectives on Legal Empowerment*. Rome: International Development Law Organization
- Ubink, J.M. and B, van Rooij (2011) "Customary Legal Empowerment: An Introduction". In Ubink, J.M (ed) *Customary Justice: Perspectives on Legal Empowerment*. Rome: International Development Law Organization, 7-27
- UN (2009) 'Legal Empowerment of the Poor and Eradication of Poverty: Report of the Secretary-General'. A/64/133. New York: UN.
- UNDP (UN Development Programme) (2013) 'Reflections on Social Accountability: Catalyzing Democratic Governance to Accelerate Progress towards the Millennium Development Goals'. New York: UNDP.
- UN Women (2011) *Progress of the World's Women Report: In Pursuit of Justice*. New York: UN Women.
- Uprimny Yepes, R. (2006) 'The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates'. In Gargarella, R., Domingo, P. and Roux, T. (eds) *Courts and Social Transformation: An Institutional Voice for the Poor?* London: Ashgate.
- Venning, P. (2009) 'Marrying Contested Approaches: Empowerment and the Imposition of International Principles: Domestic Violence Case Resolution in Indonesia'. *Journal of Development Studies* 46(3): 397-416.
- Von Broembsen, M. (2012) 'Legal Empowerment of the Poor: The Re-emergence of a Lost Strand of Human Rights?' Working Paper 1. Austin, TX: The Bernard and Audre Rapoport Center for Human Rights and Justice.
- Waldorf, L. (2013) 'Legal Empowerment in Transitions: A Short Concept Note.' Unpublished paper.
- Whitehead, A. and Tsikata, D. (2003) 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary'. *Journal of Agrarian Change* 3(1-2): 67-112.
- Wilson (2005)
- Wilson, S. (2011) 'Litigating Housing Rights in Johannesburg's Inner City: 2004-2008'. *South African Journal on Human Rights* 27: 127-151.
- Yamin, A.E. (2011) 'Power, Suffering and Courts: Reflections on Promoting Health Rights through Judicialization', in A.E. Yamin and S. Gloppen (2011).
- Yamin, A.E. and Gloppen, S. (eds) (2011) *Litigating Health Rights: Can Courts Bring More Justice to Health?* Cambridge, MA: Harvard Law School.
- Zambia Law Development Commission (2004) 'Report on the Review of the Local Courts System to the Minister of Justice'. Lusaka: Zambia Law Development Commission.

---

Zemans, F. (1983) 'Legal Mobilization: The Neglected Role of Law in the Political System'. *The American Political Science Review* 77(3): 690-703.

# Annex 1: definitions and key features of legal empowerment

This table provides an overview of a selection of definitions of legal empowerment in the literature and, in some cases, details of the its key features and the types of interventions that are involved. The table is informative, but does not claim to be an exhaustive list of legal empowerment definitions

Source	Definition	Features	Types of interventions
Bruce et al. (2007)	'Legal empowerment of the poor occurs when the poor, their supporters, or governments—employing legal and other means—create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization. Empowerment is a process, an end in itself, and a means of escaping poverty.' (p.29)	<p>'The new definition expands and further specifies, however, in these respects:</p> <ol style="list-style-type: none"> <li>1. The source of the empowerment could be government or it could be the poor and others.</li> <li>2. The means used may be legal or not legal (administrative, physical, other).</li> <li>3. Empowerment is not empowerment in general but empowerment to use law and legal mechanisms.</li> <li>4. Legal empowerment is achieved through not only economic, but also social and political means.' (p.29)</li> </ol> <p>LEP should involve four tasks:</p> <p>Reforming the law, and including poor in the process of reform, and giving the poor voice through democratic and transparent political processes (rights enhancement)</p> <p>Providing knowledge as a means for empowerment, incl. overcoming barriers to awareness (rights awareness)</p> <p>Levelling the playing field to ensure that poor can overcome bureaucratic and cost barriers to access economic opportunity and wealth generation (rights enablement) – core process of legal empowerment, e.g. procedural assistance, affirmative action, capacity-building, compensatory benefits (for barrier poor face) (see pp.21ff)</p> <p>Providing access to enforcement , affordable, fair mechanisms for enforcement of rights and contracts and dispute resolution (rights enforcement)</p>	<p>LE interventions can be put in four categories:</p> <ol style="list-style-type: none"> <li>(1) those that involve major constitutional or legislative change;</li> <li>(2) those that involve major institutional change (which will usually require major legal change);</li> <li>(3) those that only require changes in regulations or ministerial instructions or that can be accomplished within the ministry or other agency concerned; and</li> <li>(4) measures that can be undertaken without any legal change or through contractual means.</li> </ol>
CLEP (2008)	'a process of systemic change through which the poor and excluded become able to use the law, the legal system,	<p>Emphasises four pillars of LE:</p> <p>Enabling framework (A2J, rule of law) – 'the core bundle of rights [above] cannot be fully effective unless there is a realistic option of</p>	<p>Chap 4 of report = reform measures within each of the four pillars.</p> <p>Chap 5 of the report = implementation</p>

	<p>and legal services to protect and advance their rights and interests'</p> <p>main goal of LEP is 'expanding protection and opportunity for all: protecting poor people from injustice – such as wrongful eviction, expropriation, extortion, and exploitation – and offering them equal opportunity to access local, national, and international markets.' (p.28)</p>	<p>enforcing them' – this requires legal identity, repealing discriminatory laws, strengthening CSOs, ADR, paralegals, improved police force, accessible judicial and land administration systems that integrate customary and informal legal procedures, focus on LE of marginalised groups.</p> <p>Property rights (mainly land) (incl. collective/customary rights -- but needs to be non-discriminatory)</p> <p>Labour rights – right to association, employment opportunities, social protection, workers rights in informal sector, GE, ILO standards.</p> <p>Business rights – not a HR, ability of SME to access basic financial services and infrastructural facilities.</p> <p>LEP context-specific, and implementation depends on 'broad political coalitions', local knowledge, gender-sensitive methods, and focus on vulnerable groups.</p>	<p>strategies relating to mobilisation of stakeholders and allies at different levels</p> <p>Major recommendation is to establish 'A Global LE Compact' to codify core rights and i.d. framework for their implementation, track progress, document what works, etc.</p> <p>Banik (2009) 'The CLEP's recommendations remain very top-down, state-centered and orthodox in nature.' (e.g. reliant on reform of legal framework, protection of the core rights, by politicians)</p>
Domingo and O'Neil (2014)	<p>'the use of law and justice systems (formal and informal) by marginalised groups or individuals to improve or transform their social, political or economic situation'</p>	<p>Empowerment cannot be done for someone. Poor/marginalised people, often with the support of others, themselves use the law to gain power.</p> <p>Legal empowerment takes place when legal mobilisation (the activity or means) results in some form of empowerment (the outcome or end). Empowerment requires that people gain new resources (psychological, social, material or political) and, through these, the ability to make and enact strategic life choices.</p> <p>Concerned with implementation of the law in practice, not just entitlements on paper.</p> <p>Recognises legal pluralism with relevant law includes diverse types of enforceable rules, such as regulations and contracts, and international, customary or religious norms, and their associated justice mechanisms, as well as statutory laws and judicial precedents applied through the courts.</p> <p>May be grassroots activity or public interest litigation through higher courts.</p>	<p>Alternative dispute resolution, including specialised services, such as family courts or land tribunals, NGO mediation, and community/neo-traditional dispute resolution.</p> <p>Litigation</p> <p>Public interest litigation and judicial review</p> <p>Administrative redress mechanisms</p> <p>Legal aid, human rights organisations and paralegals.</p> <p>Advocacy and rights awareness</p> <p>Importance of combined strategies/interventions, including joining up basic service, justice and governance concerns/programming.</p>
Golub (2003)	<p>'the use of legal services and related development activities to increase disadvantaged populations' control over their lives'</p>	<p>Alternative means to integrate law and development than use of 'rule of law orthodoxy' (which is top-down centred on law, lawyers and state institutions, neo-liberal market purposes) (though two approaches not mutually exclusive, and orthodox approach may be appropriate in some circumstances).</p> <p>LE advances RoL – empowered poor more able to make officials implement law and private parties abide from it and to play greater role in law reform, all of which builds good governance.</p>	<p>To date, mainly diverse civil society initiatives rather than deliberate donor programs.</p> <p>'RoL practitioners need to think less like lawyers and more like agents of social change. Conversely, development practitioners in other fields could benefit from thinking a bit more like lawyers and human rights advocates' (p.3).</p> <p>LE should be integrated into many mainstream</p>

		<p>LE transcends RoL as not just about RoL or governance, but poverty alleviation in the multidimensional sense (i.e. to include empowerment) – LE may expand rights of poor but this not the same as their gaining control: ‘key concept in legal empowerment is not law; it is power’ (p.7)</p> <p>LE as rights based approach in some ways – ‘uses legal service to help the poor learn, act on, and enforce their rights in pursuit of development’s poverty-alleviating goal’ – but more about power and freedom than law (or rights on paper), uses some rights-based mechanisms but not others. [nb: h/e RBA proponents may make same case of Golub about the related activities (such as livelihood development) being part of their approach.</p> <p>Manifestation of community-driven and rights-based development. Grounded in grassroots needs and activities but can translate community-level work into impact on national law and institutions. Prioritises CS support as typically best route to strengthen legal capacity and power of poor – but engages govt / public officials wherever possible.</p> <p>Offers concrete mechanisms, involving but not limited to legal services, that alleviate poverty, advance the rights of the disadvantaged, and make the rule of law more of a reality for them.</p> <p>Addresses reality that law on paper is not implemented unless poor or their allies push for law enforcement.</p> <p>LE differs from RoL orthodoxy in four ways:</p> <p>attorneys support poor as partners rather than dominating them as proprietors of expertise.</p> <p>disadvantaged play role in setting priorities</p> <p>frequent use of nonjudicial strategies that transcend narrow notions of legal systems, justice sectors and institution building.</p> <p>use of law often part of integrated strategies that include other development activities.</p>	<p>socioeconomic development efforts e.g. natural resource management, livelihoods, health and gender, that generally do not address RoL or the legal needs of the poor.</p> <p>But can also be discrete LE programmes or in conjunction with RoL programmes.</p> <p>Legal work often only part of an integrated strategy that features other development activities – group formation, literacy training, livelihood development.</p> <p>Focus should be ‘support for legal services and capacity building for the poor, towards the dual ends of both implementing and reforming the law. Where LE is the sole focus of a law program, it could be organized around general themes such as gender or agrarian issues, or could more comprehensively support pro-poor legal services’ (p.39)</p>
Golub (2013)	‘the use of rights and laws specifically to increase disadvantaged populations control over their lives’		
Goodwin and Maru (2014)	‘we defined civil society legal empowerment efforts as those that seek to increase the capacity of people to exercise their rights and to participate in processes of governing’ (p.4)	<p>About giving people the power to understand and use the law.</p> <p>Poor people understand and drive the process.</p> <p>Law-related processes through with which ordinary people can exercise agency (e.g. mediation, community-level decision-making or formal adjudication, and public litigation when clients are driving process)</p>	<p>Legal literacy</p> <p>Community mobilisation</p> <p>Advocacy</p> <p>Community scorecards</p> <p>Expenditure tracking</p> <p>Citizen audits</p>

			Identity registration Legal aid Support to mediation or other dispute resolution processes Paralegals Right to information
Haki (2011)	'the use of law as a tool to empower the poor and marginalised' (p.1)	<p>Nexus of law and development          Subset and extension of RoL          Practical legal solutions to everyday problems, community-driven models (e.g. paralegals and other non-lawyer resources).          Addresses 'missing link of power' (Carothers) in law and development.          Emphasises implementation of law, not just formal law/structures.          Enables coalitions of under-represented interests to engage with law and use it as a tool for variety of aims.          Tool to:</p> <p>(a) empower citizens/communities as agents of their own development: focuses on poor and populations that face discrimination and injustice, aim to strengthen their capacity to stimulate reform/exercise control.          (b) demand state accountability: improve provision of public services and state accountability; facilitate greater civic engagement in governance processes (e.g. via community-based paralegals, monitoring local expenditure).          (c) foster RoL and peaceful dispute resolution: Contributes to RoL by building equitable solutions to disputes and conflict and increasing demand for responsive and transparent institutions.</p>	<p>Basic interventions: legal awareness, legal rights and obligations and mechanisms.          Focus on resolving legal problems and administrative challenges faced by groups, via both formal and informal mechanisms; community-driven e.g. mediation, legal counselling, land titling w/ paralegals playing key role.          High-level strategies, focus on policy constraints that persist despite resolution of individual/community cases; systemic factors that shape circumstances in which legal problems arise; target power relations e.g. PIL, legal reform advocacy, corruption monitoring, justice system reform.          Few comprehensive, multifaceted LE programmes; sometimes subset of RoL programmes.</p>
Maru (2010)	'seeks to help people to protect their rights ... to provide legal aid in a way that is practical, flexible, and responsive to socio-legal context' (p.83)	<p>Grew out of tradition of legal aid for the poor. Legal aid not accessible to most poor people (cost of lawyers, preference for informal justice.) LE offers more practical way to citizens to seek remedies to breaches of rights.          Also includes redress from wider network of state authority.          5 defining principles of LE <u>approach</u> (based on Timap approach):          Focus on concrete solutions to instances of injustice (e.g. specific disputes – awareness and advocacy important but not enough on their own) to demonstrate that justice is possible even in environments of arbitrariness and unfairness.          Combination of litigation with more flexible grassroots tools e.g. education, organising, advocacy, mediation; credible threat of litigation and high-level advocacy gives weight to grassroots</p>	<p>LE programmes often combine small corps of lawyers with a larger frontline of community paralegals who are closer to community and employ a wider set of tools.</p>

		<p>activities.</p> <p>Pragmatic, synthetic orientation towards plural legal system.</p> <p>Commitment to empowerment; cultivate agency and power; work with not for people; people not just victims or clients.</p> <p>Balance between rights and responsibilities; emphasis on self-sufficiency; citizenship obligations.</p>	
UN (2009)	<p>'process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors'</p> <p>'seeks to establish the rule of law and ensure equal and equitable access to justice and tackle the root cause of exclusion, vulnerability and poverty'</p>	<p>Means and an end.</p> <p>Strengthen RoL contributes to LE of poor.</p> <p>LE of poor can be necessary condition to create enabling environment for sustainable livelihoods and poverty eradication (with broad view of poverty including 'lack of intangible assets and social goods including legal identity, good health, physical integrity, freedom from fear and violence).</p> <p>Rooted in HRBA – recognises poverty results from disempowerment, exclusion and discrimination.</p> <p>LE empowers and strengthens voice, starting at grassroots and from within, which contributes to development.</p> <p>Recognises that all should have access to justice, including due process and action to eliminate discrimination.</p> <p>Recognises importance of CSOs and CBOs to ensure marginalised have identity and voice.</p> <p>Can strengthen democratic governance and accountability.</p> <p>LE both preventive and curative – security (of livelihoods, shelter, tenure, contracts) can enable and empower poor to defend themselves against rights violation. Goes beyond legal remedies and leads to better economic opps for the poor.</p> <p>Livelihood security as means by which LE delivers both freedom from want and freedom from fear.</p> <p>Conditions for LE of poor = identity, information, voice and organisation.</p> <p>Reference that LE should support 'social movements to strengthen the voice of the poor and marginalised people and safeguard their rights' [as noted by Golub, 2010 – though could also argue that thought this is mentioned, this is not a prominent element of the report and not enough is done to balance the neo-liberal slant brought in by the CELP approach?]</p>	<p>Mechanisms to support empowerment: inter HR framework, free legal aid, justice work of NGOs and bar associations.</p> <p>Establishment of accessible and effective mechanisms of redress/accountability and dispute resolution.</p> <p>A2J, legal awareness and legal identity.</p> <p>Legal reform.</p> <p>Inclusive and pro-poor property rights</p> <p>Labour rights.</p> <p>Removing unnecessary barriers to formal markets and institutions.</p> <p>Paralegal services.</p> <p>Special focus on women and children – awareness raising &amp; legal literacy campaigns that target women, legal aid services and removal of barriers to justice mainstreamed in all development interventions, repeal discriminatory laws and related administrative practices.</p>





ODI is the UK's leading independent think tank on international development and humanitarian issues.

Our mission is to inspire and inform policy and practice which lead to the reduction of poverty, the alleviation of suffering and the achievement of sustainable livelihoods.

We do this by locking together high-quality applied research, practical policy advice and policy-focused dissemination and debate.

We work with partners in the public and private sectors, in both developing and developed countries.

---

Readers are encouraged to reproduce material from ODI Reports for their own publications, as long as they are not being sold commercially. As copyright holder, ODI requests due acknowledgement and a copy of the publication. For online use, we ask readers to link to the original resource on the ODI website. The views presented in this paper are those of the author(s) and do not necessarily represent the views of ODI.

© Overseas Development Institute 2014. This work is licensed under a Creative Commons Attribution-NonCommercial Licence (CC BY-NC 3.0).

ISSN: 2052-7209

**Overseas Development Institute**  
**203 Blackfriars Road**  
**London SE1 8NJ**  
**Tel +44 (0)20 7922 0300**  
**Fax +44 (0)20 7922 0399**



This material has been funded by UK aid from the UK Government, however the views expressed do not necessarily reflect the UK Government's official policies.