



Overview: The political economy of legal empowerment

Legal mobilisation strategies and implications for development

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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.

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1 What is legal empowerment?¹

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.²

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.

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.

¹ 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.

² 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), Gløppen (2006, 2008, 2011), Gargarella et al (2006) Gauri and Brinks (2008), Rodriguez Garavito (2011), Yamin and Gløppen (2011).

2 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).

3 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.

3.1 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).

3.2 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).

3.3 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).

3.4 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.

4 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.

4.1 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.

4.2 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).

4.3 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.

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

5.1 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.

5.2 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 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).

5.3 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 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.

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