Commission on
Legal Empowerment
of the Poor

Making the Law Work for Everyone

VOLUME II
WORKING GROUP REPORTS

Making the Law Work for Everyone

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Preface*

Success in endeavours of this kind draws from the contribution of a very large number In November 2006, a delegation from the Commission on Legal Empowerment of the Poor visited a teeming open air market (known as the 'Toi market') in an impoverished neighborhood in Nairobi, Kenya. To picture the market, imagine a mall without walls –or, for that matter, a roof or a floor – where each business is represented by a small table or a blanket laid on the ground. Imagine, as well, a surrounding area that is notorious for poor sanitation, pollution and crime. Floods are frequent. About one person in five has HIV/AIDS. Most of the residents lack legal title to the ramshackle dwellings they call home or to the tiny businesses upon which they depend for a living. These are men and women who are vulnerable and disadvantaged in every way – except for one – they are determined not to be victims.

About a decade ago, the sellers in the market created a communal savings plan to which each contributed fifteen cents a day. The money was used for small business loans and to make civic improvements, such as a public bath. Fifteen cents a day may seem a trifling sum, but in that place and for those people the payment often meant forgoing the purchase of new clothes for a child, food for the family, or a used bicycle for transportation. This was democracy at its purest – the willing surrender of a private benefit to build a ladder out of poverty for the community as a whole. Proposals for loans and projects were approved openly and collectively, with consent signified by the wiggling of fingers and the clapping of hands. Over time, the fund grew by tiny increments to more than $200,000.

This was still not much in a market with 5000 stalls crammed together, selling everything from toys and cabbage and to spark plugs and flip-flops. Still, the savings plan was a source of hope and pride to people who had put their faith in cooperative action, understood the importance of abiding by shared rules, and were doing everything possible to help themselves. Their courage underlined our conviction that those who consider poverty to be just another part of the human condition are ignorant, for the poor do not accept it, and when given the chance, will seize the opportunity to transform their lives. Because of what we saw and the people we met, the Commission left Nairobi encouraged.

Then, in December 2007, Kenya held a presidential election. The voting was flawed and fights broke out. Hundreds of people died and the market we visited was completely destroyed. There is literally nothing left.

**reprinted from Volume I*

In reply to its expression of sorrow and concern, the Commission received a letter from Joseph Muturi, one of the market leaders. He wrote that the social fabric built up over decades had been torn, and that people had been forced into exile in their own country, simply because of their ethnicity. 'We have gone back in time,' he wrote, and 'it will take us many years to come back to the level where we were both socially and economically.' He observed that it had taken Kenyans to make Kenya; and now Kenyans had broken Kenya; but they would – he was sure – recover it again, although at an expense of time and resources that could never fully be regained.

The lesson is clear. When democratic rules are ignored and there is no law capable of providing shelter, the people who suffer most are those who can least afford to lose. Creating an infrastructure of laws, rights, enforcement, and adjudication is not an academic project, of interest to political scientists and social engineers. The establishment of such institutions can spell the difference between vulnerability and security, desperation and dignity for hundreds of millions of our fellow human beings.

In his letter from the ruins of the Toi market, Joseph Muturi said that 'the big task that has occupied me is to try to bring the people together in order to salvage our sense of community.' Creating a sense of mutual responsibility and community on a global basis is a key to fighting poverty and a challenge to us all. It is our hope that this Commission report, with its recommendations, will help point the way to that goal and to a better and more equitable future for us all.

Respectfully,

Madeleine K. Albright Hernando de Soto

Co-chairs
Commission on Legal Empowerment of the Poor

Acknowledgments

Success in endeavours of this kind draws from the contribution of a very large number of people. We name several of them below and apologise in advance to those whose names are not mentioned.

We acknowledge with thanks the valuable contributions of the working group chairs, rapporteurs, members of the working groups and associated experts.

Chapter 1, *Access to Justice and the Rule of Law*, is the outcome of the working group chaired by Commission member Lloyd Axworthy, former Minister of Foreign Affairs of Canada and currently President and Vice Chancellor of the University of Winnipeg. Members and associated experts of the group included Maurits Barendrecht, Nina Berg, Christina Biebesheimer, James Goldston, Robert Kapp, Vivek Maru, Sam Mueller, Clotilde Medegan Nougbode, Richard E. Messick, Kathurima M'Inoti, Wendy Patten, Sonia Picado Robin Sully and Matthew C. Stephenson, who also served as its rapporteur until June 2007 after which the group was supported by Maurits Barendrecht and Nina Berg.

Chapter 2, *Property Rights*, is the outcome of the working group chaired by Commission member Ashraf Ghani, Dean of Kabul University and former Minister of Finance of Afghanistan. Members and associated experts of the group included Liz Alden Wily, Banashree Banerjee, Karol Boudreaux, Wolfgang Bruelhart, Anis Dani, Maleye Diop, Susana Lastarria-Cornhiel, Jon Lindsay, Sylvia Martínez, Paul Monro-Faure, Edgardo Mosqueira Medina, Rehman Sobhan, Gerardo Solis, and Belinda Yuen. Francis Cheneval, who served as the rapporteur, succeeding Robert Mitchell, presented the group's findings and recommendations.

Chapter 3, *Labour Rights*, is the outcome of the working group chaired by Commission member Allan Larsson, former Swedish Finance Minister and currently Chairman of the Board, University of Lund, Sweden. Members and associated experts of the group included Azita Berar-Awad, Haroon Bhorat, Steven Miller, Jamele Rigolini, Victor Tokman, and Rosanna Wong. Sandra Yu served as rapporteur until June 2007, after which Martha Chen and other members supported the group.

Chapter 4, *Business Rights,* is the outcome of the working group chaired by Commission member Medhat Hassanein, formerly the Egyptian Minister of Finance. Members and associated experts of the group include Martha Chen, Gabriel Daly, Claire More Dickerson, S Taher Helmy, Sunita Kapila, Arun Kashyap, Michael Henriques, Tanwir H Naqvi, Enrique Pasquel, Lucas Robinson, David Roll, Rehman Sobhan, Gerardo Solis, A John Watson. Asif Chida served as rapporteur.

Chapter 5, *Road Maps for Implementation of Reforms*, is the outcome of the working

group chaired by Commission members Hilde Frafjord Johnson, former Norwegian Minister of International Development, and Milinda Moragoda, Sri Lanka's former Minister of Economic Reforms, Science and Technology. Members and associated experts of the group included Maria Gonzalez de Asis, Christina Biebesheimer, Michael Bratton, Derick Brinkerhoff, Getachew Demeke, Lalanath de Silva, Philip Dobie, Szilard Fricska, Terence Jones, Daniel Kaufmann, Lily La Torre Lopez, Bruce Moore, Esther Mwaura-Muiru, Sheela Patel, Arjun Sengupta, and Anne Trebilcock. Bibek Debroy served as rapporteur until August 2007 and was succeeded by Arthur Goldsmith.

Several members of the Secretariat supported the work of the working groups. Special thanks go to Cate Ambrose and Parastoo Mesri who assisted in the establishment and early guidance of the groups and also to Veronique Verbruggen who supervised the work of the working groups from November 2006 to November 2007. We are thankful to the members of the Secretariat for their tireless efforts, particularly to Timothy Dolan for the production of this publication and Jill Hannon for Secreteriat management. Special thanks also go to Kristin Cullison for her support of our work. A long list of interns, including Sabiha Ahmed, Shailly Barnes, Wanning Chu, Francesco Di Stefano, Patricia de Haan, Ruth Guevara, Alena Herklotz, Brian Honermann, Emily Key, Rajju Malla-Dhakal, Farzana Ramzan, Erica Salerno, Alec Schierenbeck, Asrat Tesfayesus, Tara Zapp, and Luis Villanueva, supported the Commission.

Apart from participating as members in our Commission, several multilateral institutions supported the activities of the working groups. ILO hosted meetings of working group three on labour and one meeting of working group four on business rights, UN-Habitat and the World Bank provided technical expertise in several areas of the work of the working groups.

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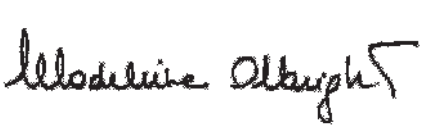

Co-chair

Executive Director

Co-chair

Introduction

Co-chaired by former US Secretary of State, Madeleine Albright and Peruvian economist Hernando de Soto, the Commission on Legal Empowerment of the Poor is the first global initiative to focus specifically on the link between exclusion, poverty and law.

Poverty manifests itself in multiple ways. One of the staggering facts about poverty is that the vast majority of the world's economy lives their daily lives in what is often referred to as the *informal* or *extralegal* sector. At all levels (individual, family, community and national) the lack of access to effective legal protection and formal policy and welfare systems, as well as a lack of recognition of economic assets/activities, worsens existing vulnerabilities and further constrains the economic and social development opportunities of the poor. When the majority of the world's populations live their lives in the informal sector, and the formal economy is dwarfed by the informal, the result is lower growth, less revenue and less room for investment in health, education and infrastructure. In addition, corruption and the resulting governance problems may affect the informal sector even more than the formal sector; this is significant due to the known negative impact on economic development, poverty reduction and effective social service provision.

The Commission's unique mission is built on the conviction that poverty can only be reduced if governments give all citizens, especially the poor, a legitimate stake in the protections provided by the legal system, which should not be the privilege of the few but the right of everyone. Thus the Commission sets out to explore how nations can reduce poverty through reforms that expand access to legal protection and opportunities for all. The Commission, which is composed of policymakers from all over the world with long experience leading reform initiatives, is unique in that it seeks to solve problems as opposed to deliberating them.

There are both similarities and differences in the way countries around the world, and over time, have approached the challenge of legal empowerment. These experiences are only partly understood, both in terms of their key attributes and their outcomes. Furthermore, there has been no systematic effort to compare or synthesise lessons learned across global experience in this area. One of the essential tasks of the Commission is to examine a representative selection of such experiences in order to identify promising reform paths and tools. Ultimately the Commission seeks to use these experiences to influence real outcomes on the ground. In order to succeed, the Commission must achieve fundamental change in relation to how international development institutions approach development and poverty reduction, as well as capture the public interest around the world and stimulate demand for such changes at all levels.

One of the objectives of the Commission is to legally empower informal sector actors

so that their informal contracts have the protection of the law, and that a safe, secure and equitable way is found for their integration within the mainstream economy. This is considered necessary for empowering them to derive due benefits from the growing national and global economy.

The key elements of the strategy to achieve the desired outcomes are as follows:

- Create political climate for change.
- Synthesize global knowledge relevant to the legal empowerment agenda. To this end, four areas of focus have been identified: Access to Justice and Rule of Law, Property Rights, Labour Rights, and Legal Mechanisms to Empower Informal Businesses. Working groups have been established around each of these themes. A rapporteur or technical team-leader, who works closely with the working group Chair (a member of the Commission), to coordinate its work, manages each working group.
- Promote the legal empowerment agenda at national and regional level and capture local experiences.
- Develop policy recommendations and tools that will guide policymakers in the implementation of reforms at the country level.

Gender equality and the rights of indigenous communities are central to the legal empowerment agenda. These issues have been mainstreamed across the work of the Commission, and specific strategies and recommendations have been generated in all its areas of work.

This is the second of two volumes of the report of the Commission on Legal Empowerment of the Poor and consists mainly of the outcomes of five working groups established to inform the Commission's deliberations through substantive work in the thematic areas of Access to Justice and Rule of Law, Property Rights, Labour Rights, Business Rights and with respect to overall implementation strategies. The working groups consisted of a core of between five and seven experts and stakeholders in their individual capacities from around the world, with leading edge expertise and experience in the theme to be studied.

Each chapter is devoted to the findings of one of the working groups and numbered accordingly.

Chapter 1, *Access to Justice and Rule of Law*, focuses on how the poor can be legally empowered and poverty reduced by improving access to justice and expanding the rule of law, as defined by national views and structures. The working group considered the top-down and bottom-up processes necessary for generating effective reforms and practical recommendations, and examined the legal tools accessible to all citizens so

that they can protect their assets and use them to create trust, obtain credit, capture investment, access markets, raise productivity and protect their rights.

Chapter 2, *Property Rights*, examines how the poor can be legally empowered and poverty reduced when they have fungible rights over property and other assets in a transparent and functional manner. Because capital has a tendency to concentrate, contributing to the economic exclusion of marginalized groups, legal systems, which give the poor access to structured businesses, expanded markets and labour rights are required for their legal empowerment.

Chapter 3, *Labour Rights*, looks into how the poor can be legally empowered and poverty reduced when the gap between the formal and informal economy is bridged and labour rights are respected. The working group studied the factors that constrain participation in the formal economy and the challenges to enforcing labour rights. The group made practical recommendations on how to facilitate convergence between formal and informal systems and the enforcement of labour standards.

Chapter 4, *Business Rights*, studies the factors that preclude the poor from benefiting from full participation in the formal economy, with a specific focus on the regulatory environment for micro, small and medium sized businesses. It also examined local financial capacity and incentives for lenders to expand access to credit for individuals and enterprises owned or operated by the poor.

Chapter 5, *Road Maps for Implementation of Reforms,* synthesises the key practical outputs of the work of the other chapters / working groups into a tool kit for use by policymakers around the world. Work in this chapter draws on existing guidelines, frameworks, manuals, indices, indicators and other related aids, which can help the key audiences of the Commission and facilitate the implementation of its policy recommendations. The aim of the tool kit is to support policymakers in proposing reforms and, once implemented, in measuring their results.

The chapters contained in this volume reflect the views of the respective working group members, though not necessarily the view of the Commission.

Naresh C. Singh,
Executive Director of the Commission

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Chapter
ONE

Access to Justice and the Rule of Law

1. Introduction

The Commission on Legal Empowerment of the Poor (CLEP) emphasises reforms to the law and justice sector that will provide poor people with the institutional environment, protections, and incentives that they need to realise their full capabilities and reap the maximum potential return on their existing assets. This in turn requires legal protection for physical assets (property rights), human capital (labour rights), and the ability to engage in profitable market transactions (entrepreneurial rights). Poor communities also require basic services that cannot be supplied efficiently in the private market, such as essential utilities, a healthy environment, public security, and a social safety net. The legal system must protect access to both private rights and public goods if poor people are to be able to escape poverty.

Poor people tend to live in communities with scarce resources. The challenge for the justice system, those who govern and their international partners is formidable: How to turn the law into an effective tool for those living in absolute poverty — people living with less than a dollar a day?

The optimistic goal of our working group for Chapter 1 was to identify promising strategies for legally empowering poor people to have access to justice. In the process, we investigated best available practices and solicited suggestions during a series of national consultations organised by the Commission (CLEP), and we reviewed evaluation studies of access to justice programmes conducted by various NGOs. It was apparent that academic research had delivered many case studies about informal justice systems in developing countries.

In addition to the focus on practice, experience and the variety of outcomes, we propose to consider theory. Although law and development is a recognised research topic (since the 1960s), there is as yet no generally accepted framework our working group could use for analysing access to justice issues. Many strands of research, however, from institutional economics to negotiation theory and from legal anthropology to the analysis of market failure, can yield information about the most promising strategies for providing access to justice. Law and development, operating under the name of legal empowerment, is one particular strand the Commission could usefully build on (Golub and McQuay 2001; Golub 2003), and there are others using bottom-up perspectives (Van Rooij 2007). More generally, bottom-up and empowerment approaches have been part of the development agenda since the late 1990s (Narayan 2005), and they have now become building blocks of programmes such as the World Bank's work in Community Driven Development and, more recently, its Justice for the Poor programme.

In addition to issues of practice and theory, we will consider legal principles. It may be difficult

to achieve access to justice for the poor through a formal justice system, but the ideals of the rule of law are an indispensable part of the vision of the legal empowerment agenda. Legal Empowerment of the Poor requires a society governed by the rule of law. While the 'rule of law' has different meanings in different contexts, US Justice Anthony Kennedy (a Commissioner of the CLEP) has defined the rule of law as requiring fidelity to principles regarding law being superior and binding, non-discriminating, respectful of people, giving people voice and their human rights, and effective (see Textbox 1 for his and other definitions).

Rather than attempting a comprehensive survey or a tailor-made theoretical framework, this chapter focuses on varying aspects of the access to justice issue. Section 2 addresses a widespread and so far underappreciated problem: many poor people lack any sort of legal identity or formal legal recognition, and as a result they are completely excluded from the formal protections of the state legal system and as beneficiaries of public goods and services. Section 3 turns to the basic challenge for our working group: How can the justness and fairness of what is delivered be improved? How can the costs be reduced? Four strategies to improve access to justice are discussed. We start at the client end of the supply chain with facilitating self-help and education. Then we move on to the provision of legal services, the development of procedures that are better suited to legal needs and resources of the poor, and the potential of informal justice.

Box 1 Rule of Law and Justice

The rule of law (….) refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

(…)"justice" is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant. The international community has worked to articulate collectively the substantive and procedural requirements for the administration of justice for more than half a century (Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report of the Secretary-General; S/2004/616 of 23 August 2004).

The Law is superior to, and thus binds, the government and all its officials.

The Law affirms and protects the equality of all persons. By way of example only, the law may not dis-criminate against persons by reason of race, color, religion, or gender.

The law must respect the dignity and preserve the human rights of all persons.

The Law must establish and respect the constitutional structures necessary to secure a free and decent society and to give all citizens a meaningful voice in formulating and enacting the rules that govern them.

The Law must devise and maintain systems to advise all persons of their rights and just expectations, and to empower them to seek redress for grievances and fulfilment of just expectations without fear of penalty or retaliation. (Kennedy 2007).

Theoretical perspectives that inform this analysis are reducing transaction costs, as well as remedying market failure like imperfect information. Section 4 addresses the related but distinct issue of access to justice in relation to the bureaucracy of public administration. It considers how the poor can get access to the complaint structures of the state and the public administration. Conclusions are drawn in a final fifth section.

2. An Access to Justice Cornerstone: Legal Identity[1]

The Nature of the Problem

One important basis of legal empowerment is 'legal identity': the formal, legal recognition by the state that a person exists. In developed countries, citizens take this for granted. Whether through a birth certificate, national ID card, or other means, they are empowered to own property, legally work, contract to buy and sell goods, receive government benefits, vote, initiate a complaint through the channels of public administration, bring suit in a court of law, or avail themselves of other legal protections.

But the situation in many developing countries is much different. Weaknesses in the management of birth registries, costly and time-consuming procedures needed to register, and other obstacles can make securing a legal identity a challenge. And a person without legal identity is denied a whole range of benefits essential for overcoming poverty. She may be unable to attend school, obtain medical services, vote in elections, get a driver's license, or open a bank account. Moreover, those who lack a formal legal identity are often unable to take advantage of anti-poverty programmes specifically designed for them. Those who lack a formal identity may also be especially vulnerable to exploitative practices, including child labour and human trafficking.

The importance of providing all people with formal legal recognition has long been recognised. Indeed, the Universal Declaration of Human Rights announced over 50 years ago that, "Everyone has the right to recognition everywhere as a person before the law" (Art. 6). The Universal Declaration also affirmed the right of all people to 'nationality,' meaning the right to be considered a

citizen of some state (Art. 15). Subsequent global and regional human rights treaties have reaffirmed and refined the basic human right to legal recognition and nationality.[2] (It should be noted that legal registration and citizenship, though related, are distinct issues. One can have uncertain citizenship even in the presence of a valid birth registration. The primary focus of the current discussion is the issue of *registration*, though the issue of citizenship is necessarily also part of the discussion, given the close linkages between the issues.)

Despite this formal recognition of a fundamental individual right to a formally recognised legal identity, however, the lack of legal identity remains a widespread problem. Although reliable systematic data is limited, the available evidence suggests that the number of people who lack a legal identity number in the tens of millions (UNICEF 2005). Those without legal identity are disproportionately poor, and are often members of disadvantaged indigenous peoples or other ethnic minorities.

In Latin America, for example, some estimates put the number of "functionally undocumented" Bolivian citizens as high as two million or close to one-third of the total population; in some parts of the country, over 90 percent of the population lacks a valid form of identification (Ardaya and Sierra 2002). In Peru, approximately one million Peruvian highlanders have no legal identity and no legal rights (Axworthy 2007). In several Argentine municipalities, some 15 percent of potential beneficiaries of an anti-poverty programme were unable to participate due to the lack of a valid national ID card (IADB 2006). According to UNICEF (2005), roughly 23 million South Asian children — over 60 percent of all children born in the region — are born but not registered each year. In Nepal, about four-fifths of all births are unregistered, which means that upwards of four-fifths of Nepalese citizens may be denied lawful access to education, employment opportunities, and the political process (Laczo 2003). Things are not much better in sub-Saharan Africa: over half of all children in this part of the world are not registered, meaning that each year approximately 15 million children are born without the means to access either the formal economy or government-provided social services. Worldwide, approximately 40 percent of children in developing countries are not registered by their fifth birthday, and in the least-developed countries, this number climbs to a shocking 71 percent (UNICEF 2005).

It is therefore no exaggeration to describe the current situation as a worldwide governance crisis. Effective remediation of this crisis requires both a diagnosis of its causes and an assessment of different strategies for reform.

Addressing the Causes of the Legal Identity Crisis: Incapacity, Exclusion, and Avoidance

Although no two countries are exactly alike, the legal identity crisis appears to have three primary causes:

- *First,* many countries lack an effective bureaucratic system for providing accessible, reliable, and low-cost registration services for all people who would like to formally register themselves with the state.
- *Second*, in far too many countries the denial of legal identity is the result of a deliberate interest in excluding certain groups from full participation in the economy, polity, and public sphere. Sometimes this exclusivity arises because of reprehensible discriminatory animus. In other cases, such as those involving

long-term migrant or refugee populations, the problem is more complex and delicate, and it may implicate the policies of more than one state. Despite these differences, in all these cases people are deprived of their fundamental entitlement to formal legal recognition because of a political decision to exclude them.

- *Third*, some poor individuals may lack formal legal registration because they choose not to take the steps necessary to acquire it. This avoidance may seem irrational given the adverse consequences of lacking a legal identity. Sometimes this avoidance behaviour may arise because of an ingrained distrust of state authorities. But often avoidance of state authority, and formal registration in particular, may be entirely rational. Formal legal registration may also make one more vulnerable to taxation, conscription, or various forms of undesirable state monitoring. Thus, government policy may lead to the legal exclusion of poor disadvantaged communities not only because of a lack of capacity or a deliberate policy of exclusion, but also because other government policies create excessive disincentives to registration.

These three categories are not mutually exclusive, nor are the boundaries between them always sharp. For instance, the capacity of the bureaucracy to register births may remain weak because powerful political interests have an incentive not to fix the problems. This "passive" discrimination is partly an issue of bureaucratic incapacity and partly an issue of deliberate exclusion. Nonetheless, this crude tripartite scheme is useful because it underscores the fact that the legal identity problem has a diverse set of possible causes, and proposed solutions must therefore be tailored to the particular situation. Proposed reforms to the registration system may be of limited use when exclusion results from deliberate policy choices. Likewise, high-level political pressure and the entrenchment of non-discrimination norms do not guarantee success when the problem is low bureaucratic capacity. Let us consider the three primary sources of the legal identity crisis and what might be done about them.

Strengthening the Capacity of the Registration System

Many government-run civil registration systems impose particularly onerous burdens on poor people. Registration systems often require registrants to pay a fee; many will not waive this fee even for the indigent. Some registration systems also require that the registrant appear in person at a registration office that may be located a significant distance from a prospective registrant's residence. Both travel costs and the opportunity costs of the prospective registrant's time may weigh heavily against registration, especially for poor people in remote areas with limited disposable income. And, of course, petty corruption may substantially raise the costs of formal registration, as the prospective registrant may have to pay bribes as well as official registration fees. Furthermore, the bureaucratic registration process itself is often complicated and time-consuming, presenting applicants with a labyrinthine array of forms and procedural requirements, and the bureaucratic personnel who run many national registration systems are often insufficient and poorly trained (Barendrecht and van Nispen 2007). Registration offices may also lack the most basic resources. For example, surveys of woman in Latin America reveal that approximately 10 percent of women did not register their children because the local registration office lacked the proper stationary (IADB 2006).

A natural first step in redressing the legal iden-

tity crisis is to reduce the financial and physical barriers to access that disproportionately burden poor and rural communities. With respect to the financial barriers, an obvious reform is the elimination of fees for registration and acquisition of a first copy of the necessary identification documents. The usual arguments for user fees for government services do not apply for legal registration: legal identity is not a scarce resource that a government might legitimately want to ration, nor is registration a service that people have an incentive to "over-consume" if they do not bear the costs of providing the service. Also, most of the cost of a registration programme is the fixed cost of creating and maintaining the necessary bureaucratic infrastructure; the variable cost associated with the number of registration requests is likely to be relatively small. As between eliminating registration fees altogether and providing a waiver for poor individuals, the former approach is generally preferable as it eliminates the administrative costs associated with determining who is eligible for a waiver. The costs of operating registration programmes, in most cases, should be met through lump-sum budget allocations made out of general public revenues rather than through user fees.

In addition to eliminating fees, prospective registrants should, where possible, be given multiple avenues through which they can register their identities, rather than forcing them to rely on a single bureaucratic provider of registration services. This redundancy might admittedly entail some administrative costs, but it would yield two significant benefits. First, this system would allow each individual to select the method that is easiest and cheapest for her. Second, having multiple providers of registration services reduces the opportunities for corruption, abuse, and delay, because prospective registrants will avoid a registration provider that has a bad reputation (Shleifer and Vishney 1993). As a rough-and-ready rule of thumb, every individual should always have at least two realistic, viable options for registering herself or her child. Of course, right now many people have zero realistic, viable options, so going from zero to one would have to be counted an improvement, but two or more would be better.

In communities that have the requisite information technology infrastructure, it might also be possible for private firms, civil society organisations, governments, or some combination of all three to set up offices where people can register themselves using a simple interactive computer system, perhaps with assistance from on-site technical staff (Barendrecht and van Nispen 2007). This alternative may not be realistic for all poor communities, but where it is feasible, it may be a better alternative to relying on paper forms and in-person interaction with government bureaucrats. Employing such a strategy, where it is feasible, may free up more resources that can then be targeted at other communities.

The difficulty of reaching poor communities, especially dispersed rural communities, remains a challenge. There are several strategies that governments and interested organisations might use to improve the outreach and efficacy of registration efforts. One strategy is to simplify the registration process and to improve training of government officials and others. Another technique that has shown promise involves the wide distribution of semi-portable registration kits. In the Democratic Republic of Congo, for example, UNDP and the United Nations Mission to Congo succeeded in registering approximately 25.7 million Congolese in 2006 in advance of the national elections. They did this by using planes, boats, trucks, canoes, and carts to distribute registration kits, each of which contained a laptop computer, fingerprinting materials, and a

digital camera that could be used to issue photo ID cards on the spot (Paldi 2006). The Cambodian government used an even more aggressive approach to 'mobile registration': following changes to the Cambodian Civil Code that made birth registration mandatory, mobile registration teams — run by non-governmental organisations but with the government's blessing — have been going door-to-door to deliver free birth registrations to people's homes since 2004. The results have been dramatic: over the course of only a few years, the number of registered Cambodian citizens increased from 5 percent to 85 percent (Damazo 2006). A UNICEF-backed programme in Bangladesh has employed a similar strategy, sending trained registrars house-to-house, with similar results: in the ten years since this programme began, over 12 million births have been formally registered (UNICEF 2006).

Another potentially valuable approach to improving registration efforts is to 'bundle' registration with other service delivery programmes. For example, many countries have, or are considering, extensive vaccination programmes for children in poor communities. It may often be relatively easy for the health worker providing the vaccination to register each child she vaccinates (ADB 2005). This approach, used successfully in Bangladesh, is more cost effective than financing a separate registration campaign alongside the vaccination campaign for the same population (UNICEF 2006). In addition, it is conceivable that the mother, and even the extended family members, can be registered at the same time without much extra effort, thus profiting from a fitting chain registration service. Similarly, some poor women — sadly, not nearly enough — receive some form of prenatal care, and some have the assistance of a health care professional at delivery. While women receiving prenatal and delivery care are already more likely to register their children, empowering health providers to register newborns might substantially improve registration efforts. For example, a pilot programme in large public hospitals in South Africa was successful in registering large numbers of poor children (UNICEF 2003). Primary school registration at enrolment time is yet another opportunity for registering children who might otherwise lack a legal identity if they had not have been registered at birth.

An alternative strategy that might be effective, provided that incentives are well targeted, is outsourcing the partial or entire registration process to local stores, banks, and other places were people engage in economic activities. Similarly, some poor women — though, sadly, not nearly enough — receive some form of prenatal care, and some have the assistance of a health care professional at delivery. While women who receive prenatal and delivery care are already more likely to register their children, empowering these health providers to register newborns might substantially improve registration efforts.

Another sort of 'bundling' strategy might link formal legal registration with traditional cultural practices such as naming ceremonies (ADB 2005). Just as religious leaders are often empowered to officiate at weddings and legally validate marriages, so, too, can religious or community leaders officiating at childbirth rituals be empowered by the state to register children. This approach has the advantage of making registration seem less like an alien formality imposed by the state and more like an integral part of familiar cultural traditions. A related observation is that local chiefs or community leaders can often serve as a valuable liaison between registration authorities and poor communities. The local chief can both provide information to the community and deal with the state authorities.

Thus, reaching out to local cultural and religious leaders, and empowering them to formally register individuals, may be a more viable strategy than attempting to expand the state registration bureaucracy. At the same time, care must be taken not to grant local elites a monopoly on the provision of formal legal identity. A useful rule of thumb regarding registration is that every individual should always have at least two realistic, viable options.

Reducing Political Opposition to Full Registration

Fee waivers, redundancy, outreach, and bundling may all help redress non-registration that arises because of a lack of bureaucratic capacity, but all too often the denial of a legal identity results from an explicit or tacit political decision to exclude certain segments of the population from full and equal participation. This problem is especially obvious in the case of groups that have been denied citizenship on grounds of their ethnicity or their status as refugees or migrants. Examples of groups that have no formal citizenship rights, or very limited 'second class' citizenship rights, include the Russians in Estonia and Latvia, the Kurds in Syria, the Palestinians throughout the Middle East, the Rohingyas in Myanmar and Bangladesh, the Lhotshampas and Bihari in Bangladesh, the Banyarwanda in Congo, and the Nubians in Kenya.[3]

Even in cases that do not involve overt deprivation of citizenship, political considerations may influence government decisions to leave barriers to formal registration in place. For example, in the case of the Peruvian highlanders, formal registration could potentially draw large numbers of poor indigenous Peruvians into the political process, posing a potential threat to the incumbent political elites. Additionally, precisely because the lack of legal identity may block access to government social services, politicians may recognise that extensive legal registration of the poor may be very expensive, because registration would put greater demands on the public treasury.

When legal exclusion derives from a lack of political interest in providing legal identity — or, worse, from an affirmative political desire to deny legal identity — one strategy that is sometimes effective is to increase the international profile of a problem and to identify those countries that deprive their residents of an adequate legal identity on a discriminatory basis. Such 'naming and shaming' approaches may not be effective against countries where the interest in discriminatory exclusion is especially strong or where the interest in international reputation is especially weak, but in some cases greater international attention to the issue may help effect a shift in policy. For example, international pressure appears to have influenced the Thai government's stance toward the registration of the approximately 2.5 million people living in northern Thailand, most of them members of various Hill Tribes, who lack official registration documents and who consequently are denied citizenship (Lynch 2005, Lin 2006). In addition to country and situation-specific international pressure, it would be useful if an international organisation, such as UNICEF, UNESCO, or some prominent NGO, regularly ranked countries with regard to their policies on registration, citizenship, and legal identity. This sort of publicity-based approach should be carried out in conjunction with more sustained efforts to gather reliable data on the scope of the legal identity problem.

However, any international attempt to address the legal identity issue must be sensitive to legitimate state interests in restricting citizenship rights, regulating immigration, addressing ongoing international disputes, and combating voting

or social services fraud. Thus, although greater international attention and the use of 'naming and shaming' approaches may be useful, the international community must take care to develop its evaluations and prescriptions through a dialogue with relevant stakeholders.

Another possible approach to combating politically motivated legal exclusions is to bring legal claims before international human rights tribunals. The track record of this strategy is mixed, however: while international human rights litigation has sometimes succeeded in raising awareness, the tribunal decisions themselves have typically not been enforced effectively. While international human rights litigation may have a place in the broader campaign to address the legal identity crisis, it would be a mistake to presume that politically-motivated exclusion can be cured by litigation. Political problems demand a political solution, and human rights litigation is useful only if it is part of a broader political strategy.

More generally, the crisis of politically-motivated legal exclusion highlights the need to increase the relevance and effectiveness of the various international covenants and declarations that establish the basic human rights to legal identity and nationality. Part of the problem might be attributable to a failure of national and international political will to make the enforcement of these fundamental rights a priority. Another problem might be that most of the existing human rights conventions and protocols discuss general goals or end-states, but do not establish concrete benchmarks or standards by which to judge compliance efforts. It may therefore be worth considering if existing international human rights instruments relating to legal identity should be supplemented with clear international standards establishing markers by which national actions on legal identity can be evaluated. An alternative or complement to public international action might be greater efforts by the donor, academic, and NGO communities to establish institutes and foundations dedicated to raising the profile of the legal identity issue and monitoring state compliance with the obligation to ensure that all people have proof of nationality and are recognised as people in the eyes of the law.

Providing Information and Creating Incentives to Register

Even when opportunities to register one's legal identity are available, many of the poor may still fail to take advantage of these opportunities. One reason may be because poor people do not know about formal registration, or they do not understand the benefits of a formal legal identity. Another reason may be that the poor are suspicious of the state and its agents, and this wariness leads them to avoid formal registration even when it would be in their interests. Yet a third possibility is their rational calculation that the expected costs of formal registration outweigh the benefits.

When ignorance or wariness of the state are the major obstacles, one method of redress may be to rely on culturally familiar and reliable intermediaries to convey information about registration and to assist with the registration process. Bundling of registration services together with other government or NGO services or with traditional rituals and practices would be consistent with this approach. More generally, many successful registration efforts have relied on paralegals, NGOs and laypeople to assist poor individuals and communities in completing the formal registration procedure.

For example, the Egyptian Centre for Women's Rights and other Egyptian civil society organi-

sations, with the cooperation of the Egyptian government and some financial support from the World Bank, have helped thousands of women obtain legal identity cards (World Bank 2007). A UNICEF-backed project in Bangladesh run by local NGOs used a similar approach, with similarly encouraging results (UNICEF 2006). Reliance on NGOs and community-based organisations is particularly valuable in registering groups (such as women and traditionally disadvantaged ethnic minorities), which may be especially wary of the state bureaucracy. In addition, there is some evidence that improvements in women's health and education will also improve birth registration. For example, studies in Latin America have found that the likelihood a child will be registered is positively correlated with the mother's age and education (UNICEF 2005). This and related findings suggest that programmes designed to educate and empower poor women, in addition to their numerous other benefits, may also help redress the legal identity crisis.

Major difficulties arise when poor people avoid formal registration for rational reasons — for example, avoiding taxation, conscription, or vulnerability to a variety of state abuses. Ultimately, expanding access to legal identity in this situation will require either mitigating the adverse consequences of formal registration or increasing the benefits associated with formal registration, both of which might entail extensive changes to substantive law or political institutions. While this barrier to change defies clear general solutions, it is nonetheless important to recognise it as a possibility. Well-meaning observers are sometimes too quick to assume that the poor are either ignorant or irrational when they fail to take advantage of an apparently available government service. It may be that this avoidance is both informed and rational, in which case, institutional reforms and registration drives may not be helpful; they may even be counter-productive if they coerce or persuade poor people into registration that is ultimately against their own interests.

3. Strategies to Create Affordable, Inclusive and Fair Justice

The Nature of the Problem

The Social Realities of Access to Justice

The poor themselves know best when they need justice most. Legal needs surveys and case studies display a recurring pattern of situations in which poor people have needs or grievances that are translated into justifiable claims invoking substantive rights (Michelson 2007; UNDP Indonesia 2007). First, and foremost, they need personal security and guarantees that their physical integrity is not threatened. Worries about personal and physical safety and fear that property or other assets will be taken by force diminish the human resources people have left for seizing opportunities. This also requires legal protection for physical assets (property rights), human capital (labour rights), and the ability to engage in profitable market transactions (entrepreneurial rights). Poor communities also require basic services that cannot be supplied efficiently in the private market, such as essential utilities, a healthy environment, public security, and a social safety net. The legal system must protect access to both private rights and public goods and services if poor people are to be able to escape poverty. Protection of their property not only requires effective registration, transparent and accountable land tenure systems, but also protection against expropriation and procedures and accessible enforcement mechanisms that resolve conflicts (see Chapter 2). Similarly, their interests as employees and as entrepreneurs should be recognised formally, as well as protected against attempts of others to take advantage of their efforts (see Chapters 3 and 4).

Surveys consistently show that the needs of individuals for legal interventions are concentrated around the major transitions or changes in personal status in a lifetime. A likely reason for this is that property and other assets often accrue within a relationship. This is especially true for poor people. Their homes usually belong to families and kinships. They make use of their arable land where the different members are designated different tasks, roles and rights, whilst formal officially recognised ownership is unclear even though a clear informal regime may exist. They work in businesses as employees, but also as spouse, as a nephew, or as business partner. Communities jointly own pastures, share water, and use the same fishing grounds. These close relationships are powerful tools for value creation, but they also build on inter-dependent relations. The partners are tied to each other by specific investments, which will be lost if they leave the relationship (Williamson 1985). And often the poorest person will have more to loose: tenants and employees tend to invest more in this specific piece of land or in the business, than the landlord or the employer invests in their person. Women often invest more time and effort in the family and its assets than their husbands. That makes it difficult to leave the relationship, and makes them vulnerable to exploitation.

The formal (modern) legal system, with its focus on the individual and not on a more or less strongly defined collective entity, which is also mirrored in how ownership is construed, often discriminates against poor people or excludes them *de facto.* In some societies, property that does not clearly belong to an individual will be regarded as state property (see Chapter 2). The assumption that contracts are the only means that allocate residual ownership to one of the partners in the relationship equally works against

the poor. Usually, they do not formally regulate their relationships. Even in developed countries, marriages, land use arrangements, and the relationships around small businesses are often not dealt with in contracts, out of convenience, mutual trust or because it is impossible to foresee every contingency.

Thus, the most serious legal problems that the poor report in legal needs surveys revolve around transitions in these relationships. Death of the head of the family, divorce, termination of land use relationships, termination of employment, leaving a community (selling property), changes in business relationships, and expropriation for property development are the most common transitions. These transitions do not only create problems of division of property, but also do so in a setting that is likely to lead to conflict. This is particularly true in areas with scarce natural resources and high population growth where poor families cannot create sufficient extra value between transitions to the next generation to make up for the growth in numbers of mouths that have to be fed. In post conflict zones, and in areas struck by natural disaster, dislocated persons need to find property where they can rebuild their lives. The claims of those returning home create extra transition problems and thus legal needs.

The paths to justice available to the poor in order to cope with these problems and for accessing their rights often develop spontaneously. Communities tend to organise social structures that deal with conflict. Within days from the setting up of a refugee camp, the inhabitants create social norms and start addressing certain individuals with their grievances. Where a formal registration system is lacking, some person may start collecting information about who owns which piece of land and make these data available to others (see Chapter 2). Sometimes these structures will mirror structures from their home areas because whole communities have been moved to the same locations. Or such structures are of a more practical nature then reflecting formal or informal principles of justice or customary normative systems. Whether the disadvantaged can use them successfully to deal with their problems is variable and depends on access to resources, power relations and other factors. Another option for the poor is often present in the form of religious norms and faith based dispute resolution mechanisms. The scope of these mechanisms may be limited, however, to family issues and crime. They are less likely to extend to property rights, employment problems, and the issues related to setting up businesses on which the Commission on Legal Empowerment of the Poor focuses.

In some communities, informal dispute resolution mechanisms exist. A recent survey of informal justice systems identified the following common characteristics of these systems (Wojkowska 2006). The problem is viewed as relating to the whole community as a group — there is strong consideration for the collective interests at stake in disputes. Decisions are based on a process of consultation. There is an emphasis on reconciliation and restoring social harmony. Arbitrators are appointed from within the community on the basis of status or lineage. There is often a high degree of public participation. Rules of evidence and procedure are flexible and no professional legal representation is needed. The process is voluntary, although there is frequently a lot of pressure internally in the family or other groups on the 'victim' to be part of the process. The decision is based on consensus, providing a high level of acceptance and legitimacy. There are no clear distinctions between criminal and civil cases, and between informal justice systems and local governance structures. Enforcement of decisions

is secured through social pressure or more organised structures invoked to ensure that parties to the conflict abide by the common decision.

Because these systems have been studied more intensively than the loose spontaneous ordering that has been discussed above, more is known about their weaknesses. These often work against the poor. Informal systems tend to reinforce existing power structures. Because they are based on consensus, women and disadvantaged groups may not be assisted to overcome differences in power levels. Mediated settlements can only reflect "what the stronger is willing to concede and the weaker can successfully demand." (Wojkowska 2006). And sometimes local norms suggest solutions that are clearly against the interests of the weakest (they are regularly all poor).

For those living on less than $1 a day, the formal legal system is often out of reach. As we have seen, fees for birth registration can already be unaffordable, and a court action to protect property rights or to enforce a contract with a tenant is out of the question. The only dealings the poor may have with the official justice system may be as defendants in criminal cases, in which they will normally have to cope without legal representation. They may suffer from bureaucratic procedures and red tape (see Chapters 2, 3 and 4), or from police abuse. On the other hand, if the poor live in a country that has a functioning legal system, the influence of formal legal rules and the threat of intervention by neutral courts, even if just a remote possibility, should not be underestimated (Kauffmann 2003).

The actual situation from which processes improving access to justice have to start can be summarised as follows. The poor have legal grievances and are even more likely to have such grievances, because of the scarcity in which they live and because they are more likely to be dependent on others that are more powerful. They may have some options to access their rights, through spontaneous arrangements, through faith-based systems, through informal justice, or through the formal legal system. But through these options, taken jointly, they are unlikely to obtain fair and just outcomes against reasonable cost.

Starting with the legal needs of the poor is essential in a legal empowerment approach. Such an analysis can clarify which elements of the rule of law are particularly important for the poor and to which neutral interventions they need access. Targeting the most common legal needs can help to make legal institutions more responsive. Attempts to improve access to justice are less likely to succeed if they aim at access to criminal and civil justice in the abstract. Justice is costly to provide and priority setting is essential. Table 1 highlights some likely priorities, and shows in which parts of this chapter these are discussed. It takes the perspective of individuals needing law to protect them and to solve their disputes, rather than the perspective of the lawyer who applies rules. Which norms do poor people need to know and to apply, and which interventions can help them?

Seen from this side, many norms (like the ones protecting property against theft, and life against murder) are self-evident, whilst other norms may yet need to be formed, or interpreted to become easily applicable (such as the ones on division or compensation in property disputes or on termination of an employment contract). Likewise, the needs for interventions may be different. Seen from the perspective of the poor, criminal acts should perhaps primarily be deterred, problems in ongoing relationships should primarily be settled in a fair and just manner, for commercial transactions simple enforcement of debts may be the

Table 1 **Needs for Norms and Interventions**

	Norms	Intervention capacity
Personal security and property protection > Mainly criminal law, not covered in this chapter	Responsibility to protect Respect for others' human rights	General prevention strategies Retributive/restorative/criminal justice for most serious crimes
Identification of person, property, business (registration) > See Section 2 of this chapter	Rules that deal with standard complications efficiently	Registration capacity that serves the entire population
Issues within long term relationships in which the poor invest (entrepreneurial, family, land-use, employment, community) > Section 3	Default rules for fair treatment during relationship Rules of thumb for division of assets at termination	A setting that facilitates settlement, with: A credible threat of a neutral intervention (settlement in the shadow of the law)
Market transactions (debt, credit, consumer) > Section 3	Rules regarding reasonable quality expectations Simplified contractual regimes	Self-enforcement through reputation mechanisms Enforcement of simple contracts
Protection against unfair government interference (police, detention, other) >Section 4	Regulation of government conduct Respect for human rights	Complaint procedures with independent enforcement
Problems arising out of failure of government to perform positive duties > Section 4	Norms relating to positive duties	Responsive government Complaint procedures

priority, and complaints against government may have to be used primarily as a tool for creating more responsive government. But any strategy to improve access to justice should start from a thorough analysis of the particular needs in the local situation, as well as an inquiry into the way the local institutions already fulfil them.

An analysis like this not only shows what the rule of law and access to justice look like from the perspective of the poor. It also makes clear that their demands for justice are not unlimited or unrealistic. The poor need some norms in particular to protect them and to give them opportunities. They do not need a court or lawyers for every problem that they have in relation to other people, but in some situations they are vulnerable. In relationships in which they are dependent on others, they need a credible threat of an intervention by a neutral and trustworthy person. Similarly, their human rights and their contractual rights should be backed up by the possibility of enforcement. Like other people, the poor tend to settle their problems themselves. But like people who live under a more effective legal system, they need the shadow of law to get access to fair and just settlements of their differences.

Increasing Quality and Reducing Transaction Costs

The observation that poor people have unmet legal needs does not, however, adequately diagnose the problem to be solved, nor does it provide

sufficient guidance as to the best solutions. The reason for this is three-fold. First, access to legal services — and, for that matter, access to justice — is not valuable in and of itself. The legal system is a means for improving social welfare and social justice. Justice services are valuable insofar as they advance those underlying goals. Second, justice services are a scarce and costly resource, and like any scarce resource, they must be produced and allocated efficiently. Third, while poor people consume fewer justice services than is optimal from a social welfare perspective, this is true of most goods and services that the poor want to consume. Poor people have unmet legal needs, but they also have unmet needs for food, clothing, shelter, land, medical care, transportation, credit, leisure time, and virtually every other scarce resource. Everyone who advocates spending social resources on providing justice services to the poor should therefore be required to explain why access to justice should be a priority.

As a thought experiment, it is instructive to consider whether it would not be better simply to take the amount spent on an access to justice programme and give it directly to poor people in the form of a cash transfer. After all, if the poor recipient is most in need of legal services, she can spend the transfer on such services. If she needs something else more, then she can allocate the transfer to that need instead. The point is not that general redistribution in the form of welfare benefits should always be preferred to reforms targeted specifically at justice services. Rather, thinking about the comparison to general redistribution is useful because it forces the analyst to approach the problem of access to justice in terms of what can be improved in the system of delivery of such services rather than in terms of 'unmet need'.

Applied to access to justice, the challenge can thus be phrased in the following terms. Start with investigating the legal needs of the poor, then look for strategies that increase the quality of what people get when they try to obtain access to justice, and decrease the costs. Phrased in these terms, the size of this challenge becomes apparent. In order to ensure that legal services reach the poor, quantum jumps in price/quality (Prahalad and Hart 2002) should be achieved. The case study presented in Section 2 regarding access to legal identity shows how difficult this can be in practice. Even a procedure that aims to register simple data and provide citizens with means to prove their identity is difficult to organise in a way that effectively reaches out to the poor. Fortunately, it also shows where strategies to improve access may be located.

First, *users weigh the costs of access against expected benefits.* If costs are higher then benefits, they are not likely to register. These costs can have many different forms. A mother wanting to register her five-year-old child may have to travel, pay fees, spend time to obtain documents, or consult a specialist in legal services. The benefits of accessing the procedure can be huge. A child obtaining a registration is allowed to go to school or can get health care. Similarly, resolving a dispute about water within a community may lead to better use of land that has to be irrigated and lead to improved, more stable and more productive relationships. However, as the example of access to identity registration shows, there can be hidden disadvantages. Claiming rights may increase one's visibility as an object of exploitation, or as a citizen that has to pay tax without corresponding benefits. Thus, access to justice will not materialise unless its benefits outweigh its costs.

Next, in order to organise access to registration services, a quite *substantive government infra-*

structure is necessary. This is even more so for the complex interventions of the legal system. Establishing the rule of law requires a smooth interaction of many different institutions that cooperate to perform complicated tasks. A functioning legal system has mechanisms for lawmaking in place, but also for facilitating settlement, neutral fact-finding, neutral decisions in disputes, and enforcement of rights. Police, courts, prisons, lawyers, and clients themselves form a very complicated supply chain. This is also true to some extent for informal systems. What its clients get depends on local mechanisms that create social norms, the possibilities to challenge them if necessary, the quality of the forum that deals with their grievances, and the local ways of accepting and implementing decisions.

What helps, is to give people *choice*. Multiple points of access do not only liberate the poor in the sense that they increase the odds that interventions fit their problems. They also trigger an innovation process in which it becomes transparent that the poor prefer some ways of delivering justice services above others. This gives service providers incentives to improve what they deliver. Choices are already part of the realities of access to justice. People have choices between access to informal procedures and formal ones. Choices between different forms of alternative dispute resolution (ADR) and choices between settlement and decision by a neutral party. Although having more choice can initially lead to higher costs in the search for the most appropriate approach, it is a sure way, in the long run, to empower the poor. Finally, choice is a weapon against the new dependencies a legal system creates. Instead of depending on their opponent, disputants become dependent on professionals with a dedicated and protected position: government officials, licensed lawyers, official judges, or the powerful in their community. Increased choice may be the answer to the monopolies that come with official positions.

The case of registration also shows in which direction to search for *approaches to reduce the costs of legal services*. Interactive computer systems that let people perform some registration tasks themselves, mobile registration units, and bundling registration with other services are but examples of a more general class of opportunities. In the European Middle Ages, kings and nobles travelling the country were offering mobile dispute resolution services. Social workers help people to sort out the problems of life, and may bundle this with valuable pieces of legal advice. Filing grievances online can save travel costs and the costs of intake by professionals. If citizens obtain access to the right information, self-help can not only empower them, but also relieve the supply chain of costly tasks.

A related lesson from the registration example is that it shows how liaisons can be formed. A legal system functions by forging productive links: between formal and informal; between government services and services provided by the market; between settlement negotiations and the shadow of a neutral decision; between clients and professionals. Rule of law is a combination of public goods (laws, information, neutral interventions by police and courts) and services delivered by private suppliers (private safety measures, self help, legal services, neutral interventions from ADR, local justice, religious institutions).

The last lesson is that *politics matters*. Exclusion or limiting access can be profitable for the ones already inside the system, as the examples about ethnic groups that are denied legal identity show. One way or the other inclusion should be made more attractive for insiders. Naming, shaming, or other sanctions can achieve this, and probably

even better, by showing the ones with power the benefits of increased security, or of a larger class of prosperous customers.

This analysis also suggests which theoretical concepts and strands of empirical knowledge can be helpful to improve access to justice:

- Political economy and sociology can help to identify the deals that have to be forged in order to facilitate inclusion.
- The image of delivery of justice through a supply chain, points towards the perspectives of transaction costs economics and logistics (supply chain management).
- Legal anthropology, law and sociology, negotiation theory, conflict resolution theory and game theory can yield valuable information about the construction of environments that help people to settle their differences.
- Removing barriers to justice and the similarities to the delivery of health care or education, suggest remedies that emphasise the efficient correction of market failures (Shavell 1997, Barendrecht and van Nispen 2007). While the 'unmet legal needs' framework typically leads directly to proposals to increase legal aid subsidies or build a better formal legal infrastructure, the market failure framework both offers more guidance on how to allocate scarce legal aid subsidies and suggests other sorts of structural reforms that can improve access to justice.
- Knowing that the supply of justice is not a pure market transaction, but involves public goods as well, and requires a substantial neutral infrastructure invites the perspectives of government failure and of public management.
- Many of the issues discussed above, and the links between access to justice and economic development, are topics studied by new institutional economics, a body of thought that emphasises the importance of public sector institutions, including the legal system, in generating economic growth, and also focuses on transaction costs (North 1990).

As we proceed with this section, we will discuss four strategies to improve access to justice that have proven their value in practice, or seem to be particularly promising, and link them to these theoretical concepts. Our focus will be on the need to respond to the essential challenge: how can the justness and fairness of what is delivered be improved, and, in particular, how can costs are decreased? For this reason, the reduction of transaction costs figures prominently in our analysis.

We start at the client end of the supply chain, with concerns about facilitating self-help, education, and with the theoretical concept of imperfect information. Then we turn to the provision of legal services, using primarily a market failure perspective. Following this we will review strategies to develop procedures that are better suited to the legal needs and the resources of the poor. The potential of informal justice, and its links to the formal legal system, are discussed at the end of this section.

Enabling Self Help with Information and Community Organising

For a person with limited resources trying to get access to justice, the first (and sometimes the only) option is to decide what she can do herself. Her time may be less scarce than money. If she can find ways to solve the problem without paying legal fees that is what she will tend to prefer. So a first strategy for legal empowerment may be to enhance the possibilities for self-help in the area of access to justice.

The Working Group has noted that this is a topic that has not yet attracted sufficient attention in academic thinking about access to justice. There is a certain tendency to equate access to justice with access to legal services, assuming that the only road to justice leads through lawyers and courts. This is rapidly changing, however, now that even the Western world discovers that many people appear in courts without legal representation and that information about legal rights and dispute resolution is an essential tool for empowerment, as well as for prevention of social strife. The UK government even set up a Public Legal Education and Support (PLEAS) Task Force. At this stage, however, the available information is limited, and this is certainly an issue on which further research is warranted.

Information about Norms: Legal Education

Within this strategy that encourages self-help, know-how about legal norms is essential. Poor people may not receive the protection or opportunities to which they are legally entitled because they do not know the law or do not know how to go about securing the assistance of someone who can provide the necessary help. This lack of information engenders vulnerability to exploitation and abuse, and impedes legal empowerment (NCLEP Kenya 2007, NCLEP Philippines 2007). In many developing countries, simply finding out what the law is can be a time-consuming and costly endeavour. In Bangladesh, for instance, the government only publishes a small number of copies of the statutes passed by Parliament, and these were available only to those who pay a fee. The few public libraries in Bangladesh suffer from an acute shortage of legal resources (Afroz 2006). In Tajikistan, new statutes are typically published only in the Parliamentary Gazette, which is not widely accessible, and ministerial decrees are not published at all. This makes the simple task of figuring out what the law is a time-consuming chore even for a trained legal professional (ADB 2002). Furthermore, many countries draft and administer the law only in the national language (often the language of the former colonial government), which many of the poor do not speak. This language barrier creates a significant transaction cost for poor people who might otherwise avail themselves of the legal system.[4]

An obvious way to remedy this is to inform people more broadly about norms and interventions that they may have to rely on. Information technology is arguably the most promising avenue for this, now that the poor will increasingly have access to internet connections close to the places where they live. Preferably, such information must address the practical priorities of specific populations. Street vendors want to know which specific regulations allow them to ply their trade; what specific lawyers, government offices or non-governmental organisations (NGOs) they can go to for help if police harass them; or how to press for reforms of laws that have not yet formalised their status and protected their livelihoods. Conversely, women living in societies in which the laws discriminate against them may be interested in constitutional provisions or international human rights treaties that at least provide a basis for hope, confidence and activism in favour of equal rights. The information should also be geared towards the best practices for solving the problems the poor face. What are the rules and the best ways for solving inheritance problems? A farmer working for years on a plot of land who is confronted by others who show him a deed that seems to prove their property-rights will probably want to know the going rate for settling such a problem, instead of getting abstract information from the civil code about property and leasing contracts (Barendrecht and Van Nispen 2007).

A related option is teaching the poor about their rights. It can show them that the law is on their side, or that it is deficient and should be changed, or that they should be confident in pressing for the reform of bad laws or the implementation of good ones. Non-formal legal education (NLE, as opposed to formal law school education) is geared toward making the disadvantaged more legally self-sufficient by building their legal capacities. It can take place through community training sessions, radio and television broadcasts, theatre plays, and printed and audiovisual materials and, as discussed below, paralegal development. A crucial point about these educational efforts is that they must be pitched at the levels of sophistication of lay people and their particular situation. Effective NLE typically borrows from more general international development pedagogy in that it is interactive and creative. It may feature such techniques as discussions, games, role-playing and quizzes.

Before interventions are considered, however, it is useful to investigate what causes the lack of information, why market forces do not provide a solution for this, and what are the consequences of this lack of information for the provision of justice services to the poor. In an efficient market for justice services, prospective consumers would be able to evaluate their own legal needs and seek out appropriate providers. Furthermore, consumer information about the nature and quality of the legal services offered would ensure that the market price for legal services reflects the value of that service to consumers. Not all prospective consumers need to be perfectly informed, because the prices themselves would convey information (cf. Schwartz and Wilde 1979). Nonetheless, a critical mass of informed potential consumers is necessary for the market to allocate legal services efficiently. If a population of potential consumers lacks sufficient basic information on what legal services are available, their benefits and costs they involve, and how to evaluate their quality, then the market is unlikely to allocate legal services efficiently even if potential consumers would be willing to pay a price that potential suppliers would accept.

Lack of sufficient information about legal rights and entitlements, and about available legal services, is thus problematic for the poor themselves and also causes justice services to be insufficiently responsive to the needs of the poor. But why does this lack of information arise? In most markets, consumers learn information about service availability and quality from three sources. The first source of information is the suppliers, who typically have an incentive to disseminate information about the services they provide. The second source of consumer information consists of other consumers — either directly of indirectly through the price mechanism. The third source of information is general media coverage. If these three sources of information are sufficient in most consumer markets, why might they not be sufficient to communicate information about rights and legal services to poor communities? Understanding the answer to this question will help reformers design interventions that are appropriately targeted to the underlying problems.

We consider first the question. Why might legal service providers not disseminate the relevant information? There are several likely explanations. First, there may not be providers willing to offer legal services to a given population at the price consumers would be willing or able to pay. If that is the reason, then the lack of legal information is a consequence of some other market failure. This suggests that lack of legal information may sometimes be more symptom than disease. Second, general information about legal rights and

entitlements is a public good. If expected profits from providing legal services to a poor community are relatively low and the costs of disseminating information to that community are relatively high, there may be insufficient incentives for any one justice provider to supply information. Lawyers, courts, or ADR providers may have little reason to inform their possible clients about the rules they need to solve their problems. This problem is likely especially acute with respect to legal information that is not immediately connected to the need to hire a legal professional. Third, some countries impose stringent restrictions on advertising for legal services and on the unauthorised practice of law, and these professional conduct rules. Although these restrictions are sometimes defended as necessary to protect vulnerable consumers from deceptive or misleading information, they may also make it difficult for service providers to disseminate useful information (Rhode 2000, Barton 2001).

These observations suggest that eliminating many of the other market failures discussed later in this chapter may also redress the informational problem, as legal service providers will have an incentive to communicate more about legal entitlements and how to defend them. Thus, while it is often supposed that disseminating more information about legal rights is the first step in promoting access to justice, it may sometimes turn out that improvements on this dimension follow other reforms without the need for substantial additional government or donor spending. Also, an information-dissemination strategy that relies in large measure on private service providers requires a liberal policy toward the advertising of legal services and the solicitation of clients. While many countries have traditionally viewed legal advertising and solicitation as unseemly, overly aggressive prohibitions of these activities may stifle the effective communication of legal information. In addition to relying on individual service providers to disseminate information, bar associations and other lawyers' organisations are a natural candidate for educating the public about law and legal services. Because these organisations represent the legal profession as a whole, they can assist lawyers in overcoming the collective action problem that reduces the incentives of individual legal service providers to disseminate information about legal rights. Bar associations, however, might have too little incentive to disseminate information about legal services providers other than lawyers, such as paralegals.

With respect to the second source of information, other consumers, when a service is consumed only rarely within a given population, then other potential consumers are unlikely to be a useful source of information. This suggests the possibility of a vicious circle in which a dearth of information about legal rights and legal services leads to limited use of the legal system, and limited use of the legal system perpetuates the lack of information about law and legal services. This problem is likely to be especially acute when social networks for sharing information are relatively small and insular. To address this problem, reformers should strengthen information-sharing networks that allow transmission of information about law and legal information. Building networks of legal service providers, NGOs, and community advocacy groups can go a long way to increasing the informal dissemination of legal information. Additionally, the dissemination of legal information is likely to be more effective when legal services are integrated with other social services provided by an umbrella NGO. Uninformed potential consumers are unlikely to seek out a legal service provider if they do not even know they have a legal problem. But if they seek out

some other trusted service provider and discuss their problem, and that service provider has an adequate knowledge of the legal system, then the potential legal services consumer is more likely to learn that her problem has a legal dimension and that she can seek some form of legal redress. This is yet another argument for 'bundling' legal services with other social services (ADB 2001a).

Third, even when all the above strategies have been implemented, there is likely to be a residual need for governments or donor-subsidised dissemination of legal information, especially generalized legal information or information that is not immediately connected to an ongoing or imminent dispute. For this sort of targeted legal information dissemination, governments and NGOs can make use of the mass media or the Internet. Linguistic barriers (including both language barriers and illiteracy), cultural barriers, and a weak communications infrastructure (including limited access to radios and televisions) may limit the effectiveness of mass media. Different national media also differ in their propensity to devote attention to legal issues. Experience suggests that the best approach to mass legal education is to use a mix of print media (both newspapers and pamphlets), posters, radio, and television, along with strategies that integrate legal information into popular entertainment such as comic books, soap operas, popular music, local theatre, and interactive, participatory activities (ADB 2001a, Abdur-Rahman et al. 2006).

However, it should be emphasised that knowledge usually is not enough. Farmers may learn that they are entitled to land. But that knowledge is useless if government personnel, the military, a company or a landlord are powerful enough to ignore the law, sometimes by corrupting or intimidating the police, the courts or land ministry officials. Thus, promoting knowledge of the law is worthwhile, but as a stand-alone strategy it seldom galvanises legal empowerment. And assuming that knowledge is power can be counterproductive if it confines legal empowerment strategies to simply teaching people their rights.

Self Help Interventions: Forming of Peer Groups

In the experience of the disadvantaged, it often is more correct to say that "organising is power." We saw that besides knowledge about the norms that fit their problems, access to justice also implies that there is a credible threat of an intervention. To assert their rights, the disadvantaged often have to organise around mutual interests. A woman may know that it is illegal for her husband to beat her. But she may only be able to make him stop if the women in her community band together to shame him, pressure otherwise indifferent police to take action, persuade male community leaders to intervene or seek the help of lawyers or NGOs. In this way, they can increase the incentives on their partners or their opponents to live up to norms.

Sometimes community organising (or organising groups within a community) can directly target problems such as violence against women, lack of land title or property theft. Under other circumstances, where civil society is too weak or entrenched and opposition too strong, a more indirect approach may be necessary. Group formation around relatively 'safe' development issues such as livelihood, micro-credit or reproductive health can pave the way for more assertive action down the line, as the groups and their NGO partners gain more credibility in their communities. Later, once their group has established some credibility, and if they so desire, it is possible to focus on more rights-oriented work. Women in Bangladesh have thereby benefited from integration of legal empowerment into a reproductive health programme

(Asian Development Bank 2001a). In Nepal, they have similarly gained through a multi-faceted empowerment project that included non-formal legal education (Thomas and Shrestha 1998).

Community-based legal education seems to have a great empowering potential. Improving legal literacy may be one goal of legal education. However, if the efforts are additionally targeted at establishing and maintaining peer support networks, legal education can be a powerful participatory strategy that enables people to help themselves and to assist others in current and future situations. Peer support networks can be aimed at the ongoing dissemination of general legal information, provide preventive education, share knowledge, or teach practical skills. Peer groups can also be tailored to specific legal needs or community groups, such as women wanting to start a small business. Moreover, peer groups can be a means to organise people, e.g. to identify, set and promote community priorities, build influence, gain negotiation power, or even develop pilot programmes. Paralegals and other legal educators can accommodate peer networks, e.g. by conjointly developing legal and non-legal strategies that match the needs of the community, or help building partnerships with the local authorities, and the formal legal system.

Broadening the Scope of Legal Services for the Poor

This brings us to the next strategy to improve access to justice. Like other users of the legal system, and even when they become more empowered to solve problems themselves, the poor will often need help. Without assistance, they would likely be incapable of finding the rules that apply to their situation, and would therefore be unable to induce the 'other party' to meet their rightful demands. Where, then, could the poor find legal services that fit their problems and their resources? Our working group suggests that efforts be focused on following approaches: (1) lower cost delivery models; (2) legal services that contribute to empowerment; (3) alternative dispute resolution; (4) bundling legal services with other services to the poor, and (5) removing artificial constrictions of supply.

The gist of this strategy is that the poor could benefit from an expanded conception of what 'legal services' might involve. There are many functions, beyond legal education and conventional legal representation, which justice services providers like paralegals can usefully perform. These include mediating conflicts, organising collective action, and advocating with both traditional and formal authorities. This breadth of functions makes alternative service providers attractive in their own right, and not merely cheap substitutes for lawyers. It is worth highlighting that legal services have an important role to play in the categories covered within the other three chapters of this volume; namely, in helping people to secure legal identities, to navigate plural legal systems, and to hold the state accountable. Instead of viewing legal services narrowly as lawyers providing access to courts via forensic representation, our working group argues that we should conceive of them more broadly, as follows:

- That they may include non-lawyers like community-based paralegals.
- That they could also function in the areas of advocacy, mediation, education, and organising.

That their aims as legal service providers include empowering poor people, increasing the accountability of public and private institutions, and decreasing impunity for violators of basic rights.

From an economic perspective this strategy aims create an efficient, effective system for delivering legal services. The following analysis will again be informed by a transaction costs and market failure framework. This approach is unconventional: most discussion of access to justice proceeds (1) from the observation that poor people have unmet legal needs, to (2) the assumption that the best way to remedy this problem is to provide subsidised legal services, to (3) the conclusion that governments and donors should increase funding for various forms of legal aid. The usual discussion then focuses on the *form* that legal aid services should take — whether they should be delivered by governments or NGOs, whether they should emphasise lawyers, law students, or paralegals, how they should be funded, and so forth. Our working group suggests that this view of improving access to legal services is too narrow. When one defines the problem not as 'unmet legal need', but rather as some specific failure or distortion in the market for legal services, a variety of approaches other than direct subsidisation emerge, and the appropriate scope for subsidised legal aid services becomes more refined and more focused.

Lower Cost Delivery Models: Paralegals

Paralegals and law students are critically important to improving legal service delivery to poor communities. The term 'paralegal' may be somewhat misleading insofar as it suggests an assistant who performs ministerial legal tasks. Paralegals in many developing country programmes are better thought of as community activists who not only have a basic training not in legal principles, but also a familiarity with local community norms and practices and an ability to offer advice and advocacy services that go beyond narrow legal advice. Many paralegal programmes have proven efficient and effective in expanding legal assistance in poor communities (McClymont and Golub 2000, McQuoid-Mason 2000, and Maru 2006). A particularly notable example is the *Timap for Justice Initiative* in Sierra Leone, which has helped poor individuals deal with problems like corruption in government service delivery, domestic violence and child support, and some criminal matters (Maru 2006).

Law students are another relatively cost-effective way to invest scarce legal aid resources. Legal aid clinics staffed by law students or recent law school graduates in Russia, Ukraine, South Africa, India, and elsewhere have demonstrated remarkable competence in delivering valuable legal aid services to poor communities at low cost (Golub 2004, USAID 2002). Therefore, governments and donors who have to allocate a limited legal aid budget might do well to place more emphasis on supporting the activities of paralegals and law student clinics.

Strengthening the national bar association and developing an effective working relationship with the bar is important in developing effective targeted legal aid programmes, especially when the services of attorneys are required. Although one-to-one lawyer-client relationships would normally not be affordable by the poor, nor perhaps by governments or donors who might subsidise legal aid, there could be a role here to be played by bar associations. They could help to gather and disseminate information in the legal community about access to justice issues, and provide useful formal or informal oversights. They could, moreover, offer political support for access to justice reform and increased funding for necessary legal aid services, help to determine the most worthy candidates for targeted legal aid subsidies, and possibly sponsor continuing legal education programmes concerned with meeting the legal needs of the poor. It is, of course, possible that some

bar associations might be wary of certain approaches to legal services reform (such as those that call for increasing competition in the provision of legal services or reducing the demand for legal services); or, they might be excessively enthusiastic about other approaches (those, for example, that call for large government or donor subsidies to lawyers who offer legal aid services). Access to justice reformers cannot ignore the bar, even where those structures are weak and disorganised, because the long-term sustainability of subsidised legal aid programmes will also have to depend on the support and collaboration of a strong and motivated lawyers' association.

Legal Services that Empower the Clients

Quality of legal services matters as much as cost, however. In fact, the conventional approach to legal services envisions experts providing technical assistance to needy clients. This approach is not concerned with clients' agency or empowerment outside the pursuit of redress for any given legal claim. Some legal services efforts do consciously seek to empower the people with whom they work. Empowerment techniques include incorporating education into every aspect of service delivery, working with and strengthening community organisations, organising collective action to address justice problems, and engaging in community education and community dialogue on justice issues. Paralegal approaches may be attractive, then, not simply for cost advantages but also because paralegals may be better positioned to engage in a broader, empowerment-oriented method of legal service delivery. In the end, however, this is a matter of philosophy and attitude, rather than the professional status of the legal service provider.

This creates a need for appropriate training. Working with the poor involves a set of skills that is quite different from what most law schools teach and what most lawyers practice. Mechanisms for inculcating these development-oriented skills and perspectives are NGO internships for law students and young lawyers and law school clinical legal education programmes. The result is 'development lawyering', as it is sometimes called, which can involve a willingness to trek out to the remote rural areas or into crowded slums. It can equally involve viewing litigation as a last resort and administrative advocacy, alternative dispute resolution and building of the poor legal capacities as preferred options. Such lawyering frequently requires skills suitable for carrying out nonformal legal education — interactive techniques rather than lectures. It involves an awareness of how the law can relate to other development fields. This includes viewing the disadvantaged as partners with whom to strategise on law reform and implementation. Similarly, it includes listening rather than dictating to clients — the hallmark of any good lawyer, but particularly challenging in helping impoverished people who usually defer to more educated and affluent individuals.

This type of service may be desirable, but it is not yet clear whether they form a sustainable business model and this may be one of the reasons that there is little spontaneous supply of these empowering legal services. Suppliers may be hesitant to empower their clients to solve problems by themselves, because they may fear this leads to loss of future business.

Alternative Dispute Resolution

Another form of broadening legal services is to expand the use of various forms of alternative dispute resolution (ADR), including small claims courts, as well as arbitration, mediation, and conciliation (Lopez-de-Silanes 2002, Hammergren

2007). Such mechanisms prove preferable for the poor because they are more accessible than courts, affordable, comprehensible and (often) effective. They can include government administrative tribunals, where paralegals can sometimes provide representation, such as for agrarian reform and labour disputes in the Philippines. Third party arbitration courts have been set up in many countries of the former Soviet Union where, in connection with livelihood projects, the parties select arbitrators for land, agrarian or property disputes.

This is not to say that ADR is always preferable to, or mutually exclusive with, litigation. It can be severely hampered by gender biases or other power imbalances between disputants (as can the courts, however). It is often inappropriate for handling criminal conduct, particularly violent conduct (though non-state systems are often still used for that purpose). And there are many contexts, such as with public interest litigation in South Africa, where going to court is an effective legal implementation strategy.

From an economic perspective, ADR is most appropriate when the primary objective is to resolve individual disputes over private rights and benefits (Landes and Posner 1979). For those sorts of disputes, the case for substantial public subsidisation of judicial dispute resolution is much less compelling — though the state may still need to supply courts as a backstop to make sure the ADR processes comport with basic principles of fairness. Reformers should attempt, when possible, to steer private disputes into appropriate forms of ADR, and to husband scarce judicial resources for disputes that involve public goods (including the articulation of norms and principles) and fundamental public values.

In addition to the arbitration, mediation, and conciliation programmes traditionally associated with ADR, reformers might also address the demand for judicial services by encouraging or requiring the resolution of more disputes (at least in the first instance) in the administrative bureaucracy rather than the courts. For example, the claims of injured workers could be resolved by workers' compensation boards rather than in lawsuits against employers. Consumer issues could be brought before easy accessible, low-cost consumer committees. A similar strategy for reducing demand for expensive judicial services is to adopt reforms that allow for the resolution of certain types of disputes according to customary law or other traditional practices of the non-state sector. These approaches raise a host of additional concerns related to the equity and efficiency of the bureaucratic justice system and the non-state justice system, which subsequent sections of this chapter will discuss in more detail. For purposes of the present discussion, bureaucratic and customary dispute resolution can be considered as special types of ADR.

The design of just and effective ADR systems is itself an enormous topic. It is also a subject where it is difficult to make general recommendations, because the optimal design of ADR systems depends very much on the unique circumstances of each country. Three concerns about ADR programmes are especially prominent. The first is that these programmes are often biased in favour of powerful interests and lack adequate safeguards to protect less sophisticated parties (UNDP 2005).

The second concern is that ADR programmes tend to become increasingly 'proceduralised' over time — that is, they begin to look more like quasi-courts, and they lose the cost and speed advantages that justified their creation in the first place. The third concern has to do with the final-

ity of ADR decisions. If it is too easy to challenge an ADR ruling in court, then parties do not have a sufficient incentive to take ADR seriously (Shavell 1995). On the other hand, the harder it is to contest ADR decisions, the greater the concern that important individual rights and entitlements are being decided outside of the judicial system by non-state actors.

While all of these problems are serious and legitimate concerns, a number of countries have had considerable success crafting ADR programmes that reduce the burden on the judicial system and increase access at a relatively low cost. In Bangladesh, for example, local mediation councils resolve 60 -70 percent of local disputes (USAID 2002). In Argentina, the Ministry of Justice and USAID supported the creation of legal service centres in Buenos Aires to provide mediation services, and these centres appear to have been effective (USAID 2002). Again, while the design of appropriate ADR programmes is challenging and context-dependent, most available evidence indicates that developing cost-effective ADR programmes is an important though imperfect means of providing an alternative to using an overcrowded court system.

Bundling with Other Services

Legal aid programmes are most effective when they are bundled with other social services rather than offered as stand-alone programmes. For example, the South African Legal Aid Board, which experimented with a variety of models for providing civil legal aid, found that the most effective model is a 'justice centre' model — a 'one stop legal shop' that provides comprehensive legal services through a combination of lawyers, advocates, paralegals, and administrative staff (MacQuoid-Mason 2000). Similarly, many Latin American countries have had success with 'Casas de Justicia' (Houses of Justice) that provide assistance with both legal and non-legal aspects of common problems, such as child support and custody issues, property disputes, domestic violence, and administrative matters (USAID 2002). This model may be more effective than state subsidisation of private lawyers and advocates who provide legal services to the poor.

A related point is that international donors have had more success funding local NGOs that provide a variety of services, including legal services, than in funding NGOs that provide exclusively legal services. More encompassing organisations tend to be more effective in reaching the target population, and they also tend to be more sustainable in the long term (ADB 2001a). Thus, adding legal services capacity to existing community-based organisations is a more promising strategy than supporting or establishing new organisations that focus exclusively on providing legal aid. One possible 'bundling' strategy that holds particular promise is the integration of legal aid services with microfinance institutions (MFIs). MFIs have regular access to poor communities and a group-based service delivery model well-suited to legal aid services, especially when collective action is necessary. Reformers have already begun to experiment with incorporating health and education services within existing MFIs, and early indications suggest this integration has been effective (Dunford 2002). Adding legal aid services seems like a reasonable next step

Many of the generic and actual examples cited in this paper reflect how legal implementation can build on or integrate with other development activities and fields. In fact, legal empowerment often is most effective when this takes place. The integration with community organising and group formation represents this phenomenon. Another example is the use of the media, which

can play an important role in mobilising the poor to assert their rights or the public to support their advocacy. In a more substantive vein, the urban poor and tenant farmers who receive land titles may need multi-faceted assistance to make best use of their new property. This can include advice on and availability of credit programmes for the former and agricultural technologies for the latter.

Removing Constrictions of the Supply of Legal Services to the Poor

Another reason why poor individuals may not have adequate access to legal services is the artificial constriction of the supply of legal service providers. In an efficient market, if potential consumers are willing to pay more than it would cost a potential supplier to provide a service, the provider should enter the market to provide the service. Collectively, this dynamic should drive the price of the service down to an efficient level. However, if barriers to entry prevent potential suppliers from entering the market, the market price will be artificially high and certain consumers will not be able to acquire services they would like to purchase. The excluded consumers are often the poor, since they are less able to pay a higher market price.

Many observers believe that this sort of market failure is common — perhaps pervasive — in the market for legal services. There are two primary reasons why the supply of legal service providers might be artificially constricted. The first has to do with the nature of legal education, and the second has to do with the regulation of the legal profession.

With respect to education, the formal legal system in many countries is the province of the elite, and this legal elitism extends to the way in which lawyers are trained. Many law schools prepare their students to practice the sort of law that is most relevant to the affluent or to the international business community, and the population of law students is often drawn disproportionately from the more well-to-do segment of society. On top of this, in many countries the number of slots at law schools is very limited: often there are only one or two major public law schools with a limited number of spaces, and it is difficult for private law schools to enter the market.

The end result is a supply problem: Developing country law schools train few lawyers overall; the lawyers that are trained are disproportionately interested in the legal problems of the elite; and those lawyers who might consider focusing on the legal problems of the poor face substantial entry barriers because they have not received much early training in the relevant fields and skills (NCLEP Ethiopia 2007). Even if representation of poor clients could prove financially or personally rewarding for larger numbers of potential lawyers, distortions in the legal education system may entrench distortions in the supply of such lawyers relative to what one would observe in a hypothetical efficient market.

One step that might redress this problem is to make it easier to enter the market for providing legal education, for example by relaxing accreditation requirements or encouraging distance learning. Elite lawyers might sneer at 'night school' or 'trade school' lawyers, but expanding the opportunities for legal education will help increase the supply of lawyers, especially lawyers who come from non-elite backgrounds. Additionally, it may be advisable to create and fund more training programmes for paralegals or other non-lawyer service providers (McLymont and Golub 2000), as well as training programmes for practicing lawyers who want to move into practice areas that emphasise the provision of legal services to poor or otherwise disadvantaged

clients. The organised bar or other associations of legal professionals may be especially helpful in pursuing these goals, especially in the contest of continuing legal education.

Of course, one must guard against the dangers of 'diploma mills' that give students a law degree but not any real skills or training, especially when these fly-by-night operations exploit less educated prospective students. This danger should not be exaggerated, especially when compared with the significant costs associated with overly limited opportunities for legal education. Nevertheless, in some developing countries, the poor may suffer as much from an 'oversupply' of poorly-trained, dishonest 'lawyers' as they do from an under-supply of competent lawyers interested in representing poor clients. The solution to the quality control problem, however, cannot be sharp restrictions on access to legal education. Rather, it must be a combination of sensible regulation, market competition, and information dissemination.

In addition to expanding opportunities for legal education and training, reforming the nature of legal education at the elite law schools could make it easier for young lawyers to pursue careers that include a substantial amount of public service work or compensated representation of poor clients. There is no one right way to do this, and different law schools will necessarily take different approaches to curricular reform. With that caveat, possible reforms might include expanding course offerings on subjects of particular relevance to poor clients (such as landlord-tenant law, labour law, land law, natural resources law, customary law, mass torts, and criminal defence); providing more opportunities for clinical legal education; and using incentives or requirements to encourage law students to spend a period of time after graduation doing public interest work or providing legal aid. Additionally, elite law schools should explore ways to increase enrolment of students from disadvantaged backgrounds, and to provide special classes to such students so that they can compete with their classmates from elite backgrounds (Menon 2007). While there is no guarantee that students from disadvantaged backgrounds will end up providing legal services to the poor, they are probably more likely to do so as a statistical matter, and they may also serve as role models for other members of their communities.

The risk of an approach that emphasises drawing more talented young people — especially talented young people from disadvantaged backgrounds — into the legal profession is that their talents might be better deployed in some other field (Murphy, Shleifer and Vishny 1991). Many who think and write about legal education and legal aid have an unfortunate tendency to neglect the opportunity costs associated with a greater allocation of talent to the legal sector. Nevertheless, in most developing countries the supply of legal service providers in poor communities is so constricted, and existing law school training is so distorted in the direction of preparing young lawyers for elite practice, that the benefits of expanding the opportunities for legal education are likely to exceed whatever costs arise from diverting some number of talented youths from alternative careers in business, medicine, science, public service, or some other calling.

Distortion in the legal education system is one source of the supply problem in the market for legal services. Another potential problem may arise when countries adopt stringent 'unauthorised practice of law' rules — that is, when countries mandate that certain legal services can only be offered by a certain legal professionals, such as licensed attorneys, barristers, or notaries. While these restrictions may arise from the purest of

motives — such as the desire to maintain minimum quality standards and to protect consumers from exploitation — they often have the effect of conferring a monopoly on a particular set of legal service providers. This drives up the price of legal services to the disadvantage of consumers in general and poor consumers in particular (Rhode 2009, 2004, Spaulding 2004). This phenomenon has led to calls in some quarters for complete elimination of prohibitions on the unauthorised practice of law, and in other quarters for more modest changes that would allow paralegals and lay people to perform a larger proportion of the activities that are currently restricted to legal professionals (Cantrell 2004, Kritzer 1997, Rhode 2004, NCLEP Philippines 2007).

Though some bar associations have shown an appreciation of the problem and indicated a desire to work with reformers to liberalise the market for legal services, other legal professional associations have fiercely opposed any reforms that might threaten their monopoly on legal services (Hammergren 2007, Messick 1999). The arguments against loosening restrictions on who can provide legal services typically emphasise the need to protect consumers from incompetent or unscrupulous service providers. Of course, many service markets function effectively without strict ex ante licensing schemes and entry barriers, so the case for this sort of regulation in the legal services context is hardly self-evident. Moreover, there is a small but growing body of empirical research — most of it, admittedly, conducted in rich countries — that indicates non-lawyers (especially paralegals) and lay people can perform a variety of 'legal' services as effectively as lawyers, and that market mechanisms and less intrusive regulation can be effective in protecting consumers from exploitation (Cantrell 2004, Kritzer 1997, Domberger and Sherr 1989). This evidence, though suggestive rather than conclusive, indicates that liberalisation of the market for legal services — in the form of weakening restrictions on who can provide particular legal services — is likely to improve access to justice for the poor substantially, while imposing relatively few costs on society so long as alternative quality-control institutions are in place.

A major attraction of a reform strategy that emphasises the liberalisation of the market for legal services is that, compared to many other legal reform strategies, liberalisation may require fewer government or donor expenditures, at least in the medium- to long-term. Instead of compensating for a market distortion through continuous payments to the individuals, the liberalisation strategy focuses on curing a market distortion through a change in the regulatory scheme. The major obstacle to the liberalisation strategy, however, is likely to be political: As noted above, many (though not all) associations of legal professionals strongly oppose this sort of liberalisation. Organised legal professionals are indispensable partners in achieving the objectives of expanding access to justice and promoting legal empowerment (Grajzl and Murrell 2006), and it would be a serious mistake to alienate the bar by adopting an overly confrontational posture with respect to the liberalisation in the market for legal services. Though the appropriate implementation strategy will depend on the specific circumstances of each individual case, as a rule of thumb it is probably advisable for reformers to work with the bar to find points of agreement and opportunities for collaboration; to begin the process of liberalising the legal services market with those legal services where the most powerful lawyers and lawyers' associations are least threatened; and to emphasise forms of liberalisation that increase the participation of non-lawyers in contexts were few lawyers currently offer services.

For example, reformers could support special ex-

ceptions to 'unauthorised practice' restrictions for paralegals that want to offer legal services in poor rural communities that are not currently served by many lawyers. Or, reformers could encourage arrangements where non-lawyers provide services under the nominal supervision of a licensed legal professional (cf. Maru 2006). These gradual first steps may build political support for broader liberalisation of the legal services market while at the same time reassuring the legal establishment that doing so will not threaten their livelihood or undermine the reputation and integrity of the profession. A further advantage to this gradualist approach is that it allows for regular feedback and adjustments to make sure that consumer interests are adequately protected in the liberalised market. A badly designed and overly aggressive liberalisation strategy is likely to backfire if large numbers of consumers find themselves victimised by dishonest or incompetent service providers.

The fundamental point here is that the legal services market will not operate efficiently for the benefit of the poor if the supply of individuals who can supply legal services to poor people is artificially constricted by the nature of the legal education system or by a regulatory regime that restricts entry excessively. Therefore, reformers should adopt measures, appropriate to the particular circumstances, to eliminate both distortions in the system of legal education and restrictions on the market for legal services, when these distortions and restrictions artificially restrict the supply of legal service providers for poor communities.

Financing of Claims: Legal Insurance and Targeted Legal Aid

The costs of justice services are likely to remain considerable, even if the broadening suggested in the preceding paragraphs would take place. But individuals do not need expensive legal services frequently. These events are likely to occur once or a few times in their lifetime. Even then the costs can be limited, unless it is necessary to take the issue up to a court for litigation and enforcement. So it is interesting to consider whether the costs of litigation can be insured by private or public arrangements, or whether governments should invest in subsidising these services.

- Insofar as legal services confer private benefits on individuals, one might expect that these services would be efficiently supplied in well-structured private markets. If people would benefit from hiring a lawyer to help with a problem or dispute, they will hire one. If the cost of securing legal representation exceeds the expected value of the services, then it would be inefficient to hire a lawyer. But in the real world, serious market failures complicate this facile characterisation of the legal services market. One set of problems, discussed below, is that the costs of pursuing a legal claim may deter even those with positive expected value claims from retaining the necessary legal services. Even if we put that problem aside, we would still have to consider two other market failures that can leave litigants who ought to retain a lawyer unable to do so: *First*, private mechanisms for providing optimal insurance against legal risks are often unavailable or inadequate.

- *Second*, many poor people lack access to a well-functioning private market for financing the pursuit of their legal claims. Both of these problems share a common root: poor people have limited assets, but litigation typically requires a relatively large up-front transfer of resources to a legal services provider.

The inadequate insurance problem arises primarily in cases where a poor individual is the target

of some legal action brought by the government or another party. For example, a poor person may suddenly find herself the target of an eviction proceeding, a private lawsuit, or — most terrifying of all — a criminal prosecution. When this sort of disaster occurs, the individual may suddenly find herself in need of expensive legal services, but she may not have sufficient assets on hand to pay these costs herself. One might reasonably suppose that the private value to the potential target of having access to such services in case of a legal emergency exceeds the probability-discounted cost to potential providers of promising to make such services available. In other contexts where this is the case, private first-party insurance markets emerge: The potentially needy individual pays some regular fee to the insurer, and in the event of emergency the insurer pays the majority of the cost of providing the emergency service. But although efficient private insurance markets for legal services have developed in some parts of Europe (Killian 2003, Regan 2003), they are generally rare elsewhere in the world. The lack of effective insurance against legal risk burdens the poor much more than the affluent, because the affluent are better able to self-insure — for example, by having large 'rainy day funds' available to cover unforeseen emergency expenditures.

One reason for the dearth of effective private legal insurance arrangements may be the generic problem that very poor individuals devote all their assets to short-term subsistence; they would not be willing or able to buy legal insurance even if it were available. Insofar as that is the main cause, the most obvious solution is straightforward redistribution of wealth rather than any reform targeted at legal services specifically. Another reason may be that poor people lack sufficient access to information about the benefits of legal insurance. This consideration is a variant on the general concern about the lack of adequate legal information, considered in a later section.

Other reasons for a failure in the market for legal insurance involve problems with insurance markets generally. The first problem is 'moral hazard': those with insurance are less likely to take care to avoid taking actions that are likely to trigger the need for insurance coverage. The second problem is 'adverse selection': those at greater risk are more likely to purchase insurance, which leads to a vicious cycle in which price increases deter purchases by relatively lower-risk individuals, and the increasing concentration of high-risk individuals in the insurance pool drives the price up further (Bolton and Dewatripont 2005). In other private insurance markets, providers and regulators try to deal with the moral hazard and adverse selection problems through devices like deductibles and co-payments, price discrimination on the basis of risk factors, and mandatory group insurance plans. These mechanisms may not be adequate to address the problem in the context of legal insurance, however. The result, then, is that many people of modest means may not be able to purchase private insurance against legal risks, even if they are willing and able to do so.

One straightforward solution to pervasive failures in the market for legal insurance is for the state or the international donor community to step in to provide universal insurance against certain types of legal risks. The most obvious and widespread form of government-administered legal insurance is the provision of public defenders for indigent criminal defendants. Governments and NGOs that offer free or subsidised legal assistance to individuals fighting eviction, defending against civil lawsuits, or contesting fines levied by government agencies are also essentially providing subsidised legal insurance.

The case for government or donor-funded legal insurance is powerful in the presence of the market failures described above, but it is important to recognise that such insurance is very expensive. It also involves significant redistribution of social resources — not only from the well-off to the poor, but among different sub-groups of the poor. Subsidised legal insurance does nothing to mitigate the moral hazard problem, and it may erode individual's incentives to take precautions to avoid being subject to legal action. Subsidised insurance also reduces the incentives of marginally indigent individuals to self-insure even when they could do so (cf. Hoffman, Rubin and Shepherd 2005). Moreover, although there is no adverse selection problem under a universal insurance scheme — because opting out is impossible — the scheme transfers resources from people who rarely make use of emergency legal services to those who use these services more frequently. Often this resource transfer takes the near-invisible form of the opportunity costs of the resources spent on emergency legal services for high-risk individuals and groups. Those resources might otherwise have been spent on other legal or non-legal services that would benefit different populations of poor individuals.

This is not to say that state or donor provision of emergency legal insurance is a bad idea. Indeed, in some cases — such as the provision of competent criminal defence counsel free of charge to indigent defendants — state-funded legal insurance may be a moral and legal obligation. But because the operation of a universal legal insurance scheme is so costly, it is worth considering other techniques that reformers might employ to redress the failures in the market for emergency legal insurance. One such approach is to expand the use of local community-based organisations that allow individuals to pool their risk. For example, labour unions can — and often do — provide legal services on behalf of their members, especially to contest termination decisions and adverse employment conditions. Tenants' associations can provide emergency legal assistance to contest evictions; similarly, while landlords' associations can offer emergency legal assistance to take action against unruly or destructive tenants. The advantage of relying on small community-based representative groups to provide emergency legal insurance is that these groups may be better able to monitor and police their members and to apportion insurance costs in rough proportion to risk.

The financing problem typically involves poor individuals who have some legal claim — either a positive legal entitlement or an injury to a legally protected interest — that has a positive monetisable value that is greater than the cost of the legal services necessary to pursue the claim. In an efficient market, because this claim has a positive net expected value, the individual should be able to retain representation and receive an award (perhaps through litigation, but more likely in a settlement) that exceeds the cost of the legal services. But in many cases poor individuals do not have the assets on-hand to pay the up-front fees necessary to retain legal services in the private market (Yeazell 2006). Moreover, their disputes usually unfold with other poor people as defendants, and are mostly about division of property rather than damages. It is unlikely that there is a 'deep pocket' around that can be the target of a claim. For these reasons, the solution that their claim is financed by others — by their lawyer for instance — is usually not available. That being said, there may be situations where financing of claims is an option, such as in the case of personal injury arising from road traffic accidents, and this will increasingly be the case at higher stages of development. To that end gov-

ernments may consider to remove artificial barriers to the market for financing of claims, for instance by changing the rules against contingency fee arrangements (Kritzer 2004, Yeazell 2006), although this may prove to be a controversial issue.

Another alternative, which combines elements of the contingency fee system with a more traditional civil legal aid system, is the 'contingency legal aid fund' (CLAF) (Capper 2003). In a CLAF system, the government establishes a fund to subsidise litigation by indigent civil plaintiffs. Lawyers who represent such plaintiffs are reimbursed for a portion of their costs if they lose. If they win, on the other hand, they are required to contribute a portion of the damage award to replenish the fund. A CLAF system would place more burden on the public treasury than a system that relied on contingency fees, but it would be less expensive than a traditional civil legal aid system. Similarly, while a CLAF system would have less powerful incentive effects than a contingency fee system: cases with a low probability of winning look more attractive, and cases with a high probability of winning look less attractive, under a CLAF system as compared to a contingency fee system. Whether that is a good thing or a bad thing depends on the social value we attach to expanding the opportunities for individuals with facially weak claims to have access to a lawyer. CLAF may also be an attractive 'middle way' for countries that have traditionally rejected contingency fees, but are interested in experimenting with market- or incentive-based alternatives to traditional civil legal aid. It is also possible to use the same basic approach suggested above for emergency legal insurance: greater reliance on relatively small, community-based representative organisations. In addition to providing support for members who are facing a legal emergency, these organisations could also provide financial support for members who need to hire a legal professional to pursue a legal claim for damages against some other party; the claimant, if victorious, could then pay back the organisation for fronting the money. Alternatively organisations large enough to retain their own legal services could 'loan' their legal representatives to members in need without charge.

The preceding discussion has focused primarily on cases in which an individual's ability to access legal services confers benefits primarily on that individual. However, the private benefits that an individual may derive from effective access to the legal system may not always be equal to the social interest in providing such access (Shavell 1997). In some cases, the social resources — in terms of both time and money — that result from an individual's pursuit of a legal claim may be very high, even though the costs to the individual are relatively low. In those cases, individuals will have an incentive to 'over-consume' legal and judicial resources. In other cases, and that is far more likely to be a problem in relation to the rights of the poor, individual pursuit of legal claims may confer more general benefits on a larger class of people, or on society generally. In those cases, individuals may have too little incentive to press their legal claims. There are three primary reasons why this might occur.

First, each individual legal claim brought by an injured victim against an injurer contributes to the general deterrence of unlawful conduct. The individual claimant, however, does not internalie the full value of this deterrence benefit (Shavell 1997).

Second, where an individual seeks a remedy that involves the reform of an institution or the elimination of a harmful unlawful practice, that remedy, like general deterrence, will typically benefit

a much larger class of people. As a result, each individual's incentive to pursue that systemic relief may be too small.

Third, each individual who pursues a legal claim may influence the development of the underlying substantive law. Comparative studies have found that this is true even in countries where, as a matter of official legal ideology, judges merely apply pre-existing law to new disputes (MacCormick and Summers 1991, 1997). Even though an individual litigant internalises some of the benefit of a favourable change in the law, she typically will not internalise the full social benefits of such changes. Thus, individuals have insufficiently strong incentives to press for beneficial legal reform (Landes and Posner 1979). Furthermore, litigants who have only occasional contact with the legal system will be at a disadvantage to entities that are 'repeat players', because the latter will generally have a stronger incentive to influence the development of the law. This may put poor individuals at a systematic disadvantage relative to entrenched institutions and elites (Galanter 1974).

For these and other reasons, the pursuit of legal claims — and the investment in capable legal service providers to advance these claims — may benefit many besides those directly involved. Where disputes have such 'public goods' characteristics, individual demand for legal services will be too low from a social perspective. In these situations, reforms that provide an incentive to secure legal services specifically (as opposed to efforts to redistribute income generally) may be appropriate.

One approach to redressing this type of market failure would be for governments, NGOs, or international donors to provide targeted legal assistance in cases where the individual pursuit of a legal claim is most likely to confer a public good as well as a private benefit (Shavell 1997). A second approach to addressing this sort of market failure would be to empower local community advocacy groups and other representative civil society organisations (including, for example, public interest advocacy groups, labour unions, renters' or landlords' associations, and coalitions of small business interests) to pursue legal claims on behalf of their members. While these organisations may not be perfect representatives of collective or public interests, they may have a stronger incentive to pursue legal relief that has broad public benefits than does any one individual. An established community organisation is also more likely to be a repeat player in the legal system, which means that it typically will have a stronger incentive to pursue a long-term strategy of legal change. Furthermore, community-based organisations, while hardly perfect, are likely to have better judgment than national governments, international donors, or other NGOs about what allocation of scarce legal aid resources will achieve the greatest collective benefit.

These observations suggest three approaches to strengthening the role of local civil society organisations. First, it is important to create an institutional environment in which such groups are relatively easy to form and sustain (NCLEP Philippines 2007). Second, it may often be a wise to empower organisations to pursue legal remedies on behalf of their members or the general public. Relaxing rules on who can bring a suit for example, by liberalising standing requirements and expanding the availability of representative actions, two reforms that the Indian Supreme Court has pioneered, may enable community organisations to pursue public interest litigation even when no individual would have a sufficient incentive to do so (Dembowski 2000). Third, because local community organi-

sations may make better decisions about how to target scarce legal aid resources, it is often advisable for governments and international donors to provide funding to these local organisations and allow them to decide how to allocate these resources. That suggestion must be tempered, however, with the recognition that corruption and abuse by these local organisations may be serious concerns. Thus, effective monitoring is essential. Finally, and more controversially, the incentives of claimants or legal service providers to pursue claims that serve the public good may be strengthened through the use of special damage awards and fee-shifting arrangements.

The preceding discussion leads to the following general recommendations:

- First, in the context of legal entitlements with a high private value, governments and donors should target their subsidies at those cases where individuals find themselves in legal emergencies and self-insurance or private insurance are not viable options. Providing free legal representation for indigent criminal defendants is the most obvious example, but there are other cases in this category as well.
- Second, when legal aid resources are scarce, it makes sense to ration these resources so that legal aid is targeted primarily at cases where the pursuit of the individual legal claim is more likely to benefit a larger class of disempowered individuals: 1) disputes where deterrence of future wrongdoing is particularly important; 2) 'impact' litigation that seeks broad institutional reform remedies or changes in the substantive law.
- Third, governments and donors should encourage and facilitate the organisation of local groups that can provide legal representation (or funding for legal representation) to their members. In many cases, governments and donors should funnel their legal insurance funding through these groups rather than trying to reach individuals directly. Local, community-based representative groups, much like the rotating credit associations celebrated in the literature on micro-finance, allow individuals to pool their risk and provide them with a source of financing in times of need. These organisations also provide more effective monitoring and allocate resources more efficiently than states or donor organisations.

Reducing Transaction Costs: Wholesale Reforms

The preceding section concluded with an analysis of the situation where one lawsuit creates benefits for a large number of poor people. This is an example of a more general strategy to look for approaches that lead to economies of scale. Like the benefits of access to justice can spread over many people, there are also approaches that reduce the costs of access to justice for many people at the same time. A typical example is the costs that result from complex and archaic procedures that serve little or no useful function. It is often cheaper to eliminate the source of such costs 'wholesale' than it would be to provide 'retail' assistance to individuals who want to use the system. Thus, when the diagnosis of the problem is high transaction costs of using the legal system, reformers should consider wholesale solutions as an alternative, or complement, to subsidised provision of individual-level legal services. Such solutions include: 1) making the laws simpler, focusing access to justice efforts on common problems the poor; 2) creating small claims courts with simplified procedures that do not require a lawyer's assistance; and 3) allowing those with similar complaints to bring their cases up as a group or class. A fourth and more general strategy would be to find econo-

mies of scale in the legal system.

Consider as a simple example, access to basic information about the law. As we saw in many developing countries simply finding out what the law is can be a time-consuming and costly endeavour, because the laws are not available in print, or only in a language not understood by the poor. One way to ameliorate these transaction cost barriers would be to provide or subsidise legal service providers who are fluent in both the national language and the local vernacular. This approach, however, would be extraordinarily expensive. A more sensible solution would be to translate the law into all significant local languages, to provide user-friendly terminology or explanatory notes for likely incomprehensible terms and jargon, to disseminate it widely, to ensure that law is administered (to the extent possible) in the language of the relevant region, and to provide centralised translation services where this is not possible (e.g. NCLEP Pakistan 2007, NCLEP Tanzania 2007, NCLEP Uganda 2007). While this set of approaches is not cost-free, it is a much cheaper way of reducing linguistic barriers to access than providing individual-level legal assistance.[5]

Standard Routes for the Most Urgent Legal Needs

One of the values instilled in law students all over the world is that solutions to legal problems should be highly contextual, taking into account every aspect of the situation. This ideal is also reflected in the way law firms and courts tend to be organised. A case is assigned to a lawyer, or to a judge, who spends as many hours on the case as the case needs. Although other billing methods exist, most lawyers are paid by the hour, so that they have fewer incentives than other similar service providers to look for standardised solutions to similar problems. Standardisation does occur in bigger law firms, but these are not very likely to serve the poor.

Compare this to doctors and other healthcare providers, who increasingly work from protocols that reflect the best treatment practices for common ailments. These protocols are informed by research and make implied trade-offs between quality (risk) and costs. The protocols are available on the Internet, so that clients can check them, and hold their doctors accountable if necessary. Like people come to doctors with more or less standard problems, many legal problems of individuals are rather similar. Termination of employment, changes in land use or rented housing arrangements, splitting up of families, death of parents, termination of cooperation between business partners and expropriation for property development are the most common transitions in a life time. They tend to lead to similar problems with division of property and redefining relationships in such a way that social capital is preserved. Issues between husband and wife, between landlord and tenant, between users of the same source of water, or between employer and employee follow certain common patterns as well.

This creates possibilities for economies of scale. Standard information leaflets for clients can save the costs of intake and leave clients better informed. Best practices for the settlement process can be designed. Rules of thumb for division of property can be defined, if necessary with standard exceptions when common reasons for derogation from the more general rule occur. Trade unions can specialise in employment issues, and leave family issues to other specialists.

However, policy makers should also investigate why this standardisation does not happen spontaneously. One possible reason is that providers of justice services have little means to influ-

ence others in the supply chain to accept more efficient settlement and litigation procedures. Their clients, often opponents in a conflict, are not very likely to cooperate in order to find the most efficient process. The incentives on lawyers, who are in a unique position as professionals because they can directly create work for each other, are very different from those in a normal supply chain. There, producers, distributors and clients all have the same incentives to cut the transaction costs, because there is an exposure to outside competition. The incentives on judges and other neutrals may also work against standardisation. They have no duty to the disputants to make a trade-off between costs and quality when they organise the process through their decisions on procedure, and in some legal systems they are supposed to leave the management of the procedure to the parties.

These issues regarding the management of the justice supply chain have, as far as the Working Group could establish, not yet been studied in depth (Hadfield 2000 is one of the exceptions). An open question is, for instance, why legal services to individuals tend to be performed by individual lawyers, or small partnerships, and not by bigger companies that offer standard services for common problems, such as is the case for banking and insurance. Another issue is where the responsibility for the design and improvement of procedures should be located: Is this primarily the task of the legislator, of the judiciary, or is there a role here for bottom up processes as well? We now turn to this topic of improving the design of procedures Simplifying Procedures

An attractive approach to reducing legal transaction costs wholesale, rather than attempting to subsidise these costs on a retail basis, would be to simplify the substantive and procedural law. One essential step could be to allow individuals to advance their legal claims without representation in small claims courts or other more informal tribunals (Lopez-de-Silanes 2002, Buscaglia and Ulen 1997). Adopting this approach is probably not without costs: Simplifying laws so that they can be understood and invoked by uneducated lay people may require making laws cruder, less nuanced, and less efficient, although some may argue that targeting laws better to the problems of the poor may have the opposite effect. If the legislator has sufficient information and background analysis regarding what constitute the most common concerns and grievances of poor people and other disadvantaged groups, the substantive legislation may be tailored to be receptive to such grievances.

There may be several layers within pieces of legislation that aim at different target groups ensuring that principles of equality and non-discrimination are adhered to, whilst on another level the legislation is drafted in a sufficiently sophisticated manner to cater for the needs for nuances and detail. Administering laws in small claims courts or informal tribunals entails dispensing with some of the procedural safeguards that attend more formal legal proceedings, and the adjudicators in such forums may be less competent. However, many of the legal issues of poor people are reasonably simple in legal terms the problem is that they are met with overtly and unnecessary completed procedures that only work to exclude the poor from justice settlement mechanisms.

One way of dealing with this is to provide people with ‘simple’ and ‘sophisticated’ procedures next to each other. Poor plaintiffs will then be able to choose the procedure they find is most appropriate to their problem and circumstances. However, this requires clear consumer information, and necessitates designing ‘simple’ procedures that

at least meet certain quality thresholds.

Nonetheless, legal and adjudicative simplification may drastically reduce the transaction costs of access to justice for a very large number of potential consumers of justice services (NCLEP Tanzania 2007, NCLEP Uganda 2007). The net social welfare gains associated with this strategy may be much larger than the net gains associated with trying to provide every needy individual with sufficient legal aid to navigate the complexities of a more 'sophisticated' legal and judicial system (Galanter 1976, Hay, Shleifer and Vishny 1996, Posner 1998).

General formalistic court procedures may also be altered to accommodate poor people or people who have had little contact with formal state structures before appearing in court. Archaic regulations regarding dress-codes, how to sit or stand, the set up of the court where the judges and the officials of the court sit on a higher plateau than the audience and the parties to the suit, use of official language without necessary interpretation into local languages are all features that can easily be removed and interpretation can be organised with little extra resources.

A potential political difficulty with these sorts of wholesale institutional reforms is that many of them reduce the demand for the services offered by attorneys or other legal professionals; indeed, that is part of the point of such reforms. Thus, even when wholesale transaction-cost reducing strategies are efficient, they may provoke political opposition. For example, Brazil recently established small claims courts in which individuals can appear without having to retain counsel. The Brazilian Bar Association opposed the provision and is contesting the legality of this aspect of the small claims court system (Hammergren 2007). Similarly, the bar association in Uruguay strenuously objected to transaction-cost reducing reforms that streamlined and expedited civil and criminal trials (Messick 1999). And when Peru wanted to liberalise its property registration system to make it more accessible to low-income Peruvians, lawyers and notaries objected because the reforms eliminated the monopoly that the legal profession previously had on verifying and registering property ownership (World Bank 1997). In other cases, though, organised bar associations have recognised the value of reforms to reduce aggregate transaction costs, and have been a powerful ally of pro-poor reformers. It is therefore important to cultivate the support of the legal profession when pursuing these sorts of reforms.

Bundling Claims: Class Actions

Another important situation in which the transaction costs associated with individual-level legal services may lead to failures in the legal services market involves situations is when many individuals suffer a relatively small injury from a common or similar source. In such cases the aggregate injury to social welfare may be large, but no individual has sufficient incentives to incur the costs of securing the legal services necessary to seek redress of the injury. While it would be possible to address this problem by providing subsidised legal services to every individual who might have a valid legal claim, this approach is extremely inefficient. An alternative approach is to authorise some form of aggregate multi-party or representative litigation, so that a small number of legal service providers can represent a large group of similarly situated individual.

One model for such litigation is the class action mechanism widely used in the United States. While class actions have their flaws, the class action device has been a powerful tool in expand-

ing access to justice for disadvantaged groups in the United States (Bloom 2006). In the developing world, class action suits have also produced notable successes for poor people in India, South Africa, and elsewhere. Although class action suits are less common in civil law jurisdictions, recently some civil law countries, including Brazil and Indonesia, have begun to experiment with authors class action suits for certain types of issues (Gidi 2003). While these reforms have their problems and detractors, there is some evidence that the class action mechanism has improved access to justice for the poor. In Brazil, for example, class actions against municipal governments have successfully challenged illegal taxes and illegal fare increases for public busses. Brazilian plaintiffs have also successfully deployed class action litigation against private companies to redress mass wrongs such as product defects, environmental damage, and abusive or deceptive marketing practices (Gidi 2003).

This is not to say that U.S., Indian, or Brazilian approach to class action litigation is the right model. Rather, the point is that when large numbers of poor people are victims of the same or similar legal injury, it is prudent to design some sort of mechanism through which they can pursue their claims collectively, rather than requiring each potential claimant to pursue her own claim separately. That latter approach entails either a wholesale denial of access to justice (if few or no potential claimants are able to afford adequate legal representation) or massive costs (if large numbers of claimants pursue their individual claims separately). One attractive political feature of expanding access to multi-party representative litigation is that, in contrast to transaction-cost reduction strategies that reduce demand for legal services, expanding the availability of collective litigation devices tends to increase the demand for legal services and therefore should appeal to the legal profession (at least its more entrepreneurial members). Political opposition to this sort of reform is more likely to come from potential targets of class suits, including government agencies, municipalities, and large corporations.

An alternative bundling mechanism to class actions that also supports a controlled handling of large numbers of similar (tort) claims is the establishment of a compensation fund. Compensation funds usually provide fixed amounts of compensation to injured parties in cases where the rules of (tort) law and/or the institutional legal infrastructure function inadequately or function not at all, e.g. in post-war and post-disaster situations. Simple, user-friendly application procedures, for instance run by NGO's in collaboration with the local community and authorities, could facilitate people in need of basic subsistence to rebuild their lives with monetary and non-monetary means at relatively low transaction costs.

Other Ways to Reduce Costs of Access Wholesale

Standardisation of settlement and negotiation processes, improving procedures, and bundling claims are but examples of ways to reduce transaction costs wholesale and to raise the quality of procedures and outcomes. A substantial proportion of the costs of access to justice comes from the process of finding, establishing and substantiating the facts. How extensive fact-finding should be, however, is a design issue for procedures, that is seldom addressed explicitly. There is an obvious trade-off between the costs of the registration procedures and processes to settle disputes or to enforce rights and the costs of error if the wrong facts are established. Requiring unnecessary documents or evidence can be a serious barrier to access.

The issue of fact-finding is again related to the applicable legal criteria and the way they are pro-

duced. In most legal systems, the rules of private law that determine the outcome of the most common disputes of the poor are rather open ended. Both in common law and in civil law countries case law is supposed to generate more guidance over time, but deciding and publishing cases one by one is not the only — and often not the most efficient — way to procedure criteria that can help people to settle disputes. Neutral institutions like government commissions, committees of judges, or academics can play a useful role here. An example is damage scheduling, which guides the disputants and the judge when they have to establish the value of a personal injury claim without binding them. This is very common in European legal systems that have to deal with personal injury claims. Such criteria may reduce the costs of fact-finding substantially, can increase transparency of the outcomes, and make settlement easier to achieve (Bovbjerg et al.). One of the key issues here is that these rules act as a presumption, without sacrificing the possibility to tailor the result to the specific circumstances, thus saving decision costs without a corresponding increase in the costs of error (Schauer 1991, Kaplow 1992).

Another example in which wholesale reform makes more sense than subsidising individual legal transactions involves the legal documentation of common transactions — such as sale, rental, and employment contracts — as well as common legal documents like wills, title registrations, and government claim applications. Securing the assistance necessary to draft legally valid versions of these and other formal documents can be expensive. As a result, poor people may simply forego the activity in question (which is inefficient), may forego legal documentation (which is risky), or, in the case of transactions with a more sophisticated party, may rely on documents provided by that party (which might lead to exploitation).

One solution to this problem is to provide retail legal aid services, provided either by lawyers or paralegals. The advantage of this approach is that the legal service can be tailored to the individual client's needs. The disadvantage, however, is that this client-by-client approach is extremely expensive. Another drawback of one-on-one services especially in commonly occurring legal needs is the non-profitability of the service for the larger community. An alternative strategy might be for local lawyers, in collaboration with civil society groups and other community-based organisations like local councils, chambers of commerce, banks, among others, among others, to draft and disseminate standard-form documents for common legal transactions and provide education and outreach explaining the significance of the documents. This approach sacrifices individual tailoring in the interests of exploiting economies of scale. However, it facilitates sharing the benefits of legal services amongst groups of citizens in comparable situations at lower costs.

The bottom-line message is: The inability of poor people to access the legal system is frequently the result of the transaction costs associated with the pursuit of valid legal claims. It is often the case that many individuals face similar transaction costs arising from a common source, or would have to pay similar transaction costs to seek redress of a common legal injury or problem. In the presence of such aggregate or redundant legal transaction costs, reformers should try to address the problem at the wholesale level, rather than focusing exclusively on the provision of retail-level legal aid services or neutral dispute resolution to individuals. Wholesale reform strategies include both reforms that eliminate the source of significant legal transaction costs for large numbers of individuals (e.g., legal stand-

ardisation and simplification) and also reforms that enable large numbers of potential claimants to pool their resources to pursue their common legal interests rather than forcing them all to pursue their individual claims separately (e.g., class action mechanisms).

Improving Informal and Customary Dispute Resolution[6]

Most poor people — especially the poorest of the poor — have little or no contact with the formal legal system, and are not likely to do so even if all aspects of the legal empowerment agenda are implemented. They instead seek justice from customary law (which may be highly formalised and is sometimes officially recognised by the state system) and from informal norms, practices, religions and institutions. For example, in sub-Saharan Africa, customary land tenure law covers roughly 75 percent of land and in some countries, such as Mozambique and Ghana, over 90 percent of land transactions are governed by customary law (Wojkowska 2006). In urban shantytowns in Columbia, squatters who cannot rely on the formal system because of their illegal status have established informal urban justice systems to deal with disputes and provide basic services (Faundez 2006). Traditional and modern civil society institutions continue to play an important role in local dispute settlement in Afghanistan. Traditional decision making assemblies are estimated to account for more than 80 percent of cases settled throughout Afghanistan (Afghanistan HDR 2007). These examples are merely isolated illustrations of a much more pervasive phenomenon: the predominance of non-state justice systems as the primary mode of dispute resolution in the lived experience of the overwhelming majority of the world's poor.

One element of the Legal Empowerment's agenda, of course, is to enable more poor people to make the transition from the informal sector to the formal, while at the same time integrating useful norms and practices from informal or customary systems. These approaches are discussed in detail in the chapters prepared by the Commission's working groups on property rights, labour, and business, and we will, therefore, not focus on the formalization of the informal sector or on facilitating the transition from the informal sector to the formal. Formalization is not always possible, however, and indeed, not always desirable, as the other working groups discuss in detail in their chapters within this volume. Informal justice systems may be more culturally familiar, more easily accessible, cheaper, and better tailored to local circumstances than the state-run legal system. Poor people may also be more willing to use non-state justice systems because of a general distrust or fear of formal state institutions, including the formal justice system (NCLEP Uganda 2007).

For these and other reasons, many countries have opted to formally recognise, or tacitly accept, the legitimacy of customary law in certain geographic regions or substantive areas. And some systems are formally integrated in the formal legal system and reflected in substantive legislation and the structure of the judiciary. Regulations have also been enacted to provide formal procedures for what legal system to chose and for how far the customary system may reach in the formal judiciary and justice system. Informal or customary systems, of course, have serious problems, and it would be a mistake to romanticize or glamorize them. Informal and customary law can be oppressive to women. They are almost totally excluded from participating in the decision making of *jirgas/shuras* resulting in serious consequences for their status and the protection of their rights (Afghanistan HDR 2007). Informal systems may

also exclude other disadvantaged social groups, may perpetuate the power of local elites and stifle dissent, and may be unsuited to rapid economic development (NCLEP Uganda 2007). Just as poor communities may find it difficult to access formal justice institutions, marginalized members of poor communities may find it difficult to achieve equal access to the institutions of customary or informal justice (NCLEP India 2007, NCLEP Philippines 2007). Nonetheless, despite these problems, reformers must acknowledge that in many situations replacing informal or customary justice systems with the formal legal or bureaucratic institutions of the state is either impossible or would do more harm than good. Therefore, alongside programmes to improve the state justice systems, reformers should seek out opportunities for strategic interventions that improve the operation of informal or customary justice systems and facilitate the efficient integration of the formal and informal systems.

Ultimately, reforms and improvements to the non-state justice system must emerge 'bottom-up' from the participants in that system. While a government's role in facilitating reform of non-state justice systems is necessarily limited, it can (perhaps in collaboration with international donors working through government) take actions to influence the development of non-state justice systems. We may group them under four categories: education and awareness campaigns; tailored legal aid services; targeted constraints, and structuring institutional relationships.

Education and Awareness Campaigns

Empowering the poor to demand changes in the customary system is the first approach. Reformers can encourage transformation from within simply by providing information about individuals' legal rights under the constitution and about the norms of the formal legal system. In Bangladesh, for example, the Constitution forbids the practice of oral divorce, but in poor rural communities, the practice is still widespread. A Bangladeshi NGO found that simply informing the members of local customary courts that oral divorce was forbidden by the constitution substantially reduced the practice. More generally, this NGO found that it was possible to introduce norms from national law into community deliberations and mediation practices otherwise based on customary law and traditional norms (Golub 2000).

Although this may be an exceptional case, education and awareness-raising campaigns may have long term effects on the evolution of customary law systems. This effect may be particularly powerful if educational efforts are coupled with improved access to the state system as an alternative to the customary system. Customary legal officials who want to retain their authority may then feel some competitive pressure to modify the norms of the customary system to align them more closely with those of the formal system. Education efforts are not likely to reap visible short-term benefits, but in the longer term they may effect significant change in cultural practices.

A variant of the education-oriented approach is to provide information on how other customary courts have resolved similar disputes. Implementing schemes that let customary officials and disputants in customary systems know how other customary courts have resolved similar issues may encourage consistency, limit abuse, and allow for the gradual evolution of the customary system. This is not to say that customary legal systems should be converted into common law style courts with binding precedent. Rather, the suggestion is that information sharing not only about the norms of the formal legal system, but also about the norms adopted by other custom-

ary or informal systems, may improve the overall functioning of the system and empower poor people to challenge customary practices that seem like arbitrary abuses of power.

Tailored Legal Aid Services

Most government and donor sponsored efforts to provide more legal services to the poor emphasise access to the formal legal system. Hence, a significant fraction of legal aid resources are targeted at subsidising lawyers or reducing costs associated with using the formal court system. But as it turns out, many poor people tend to rely on informal or customary justice systems. In theory, these alternatives may be more familiar and accessible; but in practice, many poor people — particularly women, young people, and members of other disadvantaged groups — may also find it difficult and intimidating to navigate the customary system. These vulnerable individuals may also be subject to abuses by the local elites who administer traditional justice systems.

Reformers should, therefore, consider targeting legal aid resources and legal service providers who can help poor people deal with both the customary and the formal state system. The paralegal programme in Sierra Leone discussed earlier is exemplary in this regard (Maru 2006). These paralegals have a basic training in formal law, but they are also drawn from the local community and are familiar with local traditions and customary law. They can therefore assist clients with the non-state justice system. They can also monitor abuses, and are better positioned to advise clients on when they should threaten to take a dispute to the formal state system. Particularly in light of the fact that markets for representation services for non-state justice institutions are typically thin or non-existent, legal aid resources may be especially productive when focused on subsidising this sort of representation.

Targeted Constraints on Informal Justice

The most straightforward strategy for trying to reap the benefits of non-state justice while avoiding its flaws is to accept (formally or tacitly) the legitimacy of non-state justice systems within certain limits, but to strategically and aggressively intervene to require the non-state system to respect certain fundamental norms that might otherwise conflict with traditional practices. That is, instead of attempting to displace or formalize the informal system entirely, government reformers might selectively impose a relatively small number of especially important norms on the customary system.

This approach is appealing because it seems to reflect a reasonable compromise between the interest in preserving and promoting non-state dispute resolution and the interest in respecting fundamental constitutional principles and human rights norms. This proposed compromise, however, immediately raises the question of exactly which norms are so fundamental that they must take precedence over informal or customary practices. Because this question implicates the appropriate design of formal laws on topics including property, labour, and business activity, our chapter does not cover this aspect of the problem in detail. It is worth emphasising, however, that the most prominent and difficult set of questions concerning the degree to which formal law should trump informal law concerns the status of women and domestic relations.

Despite the fact that many customary systems claim that the subordination of women is consistent with traditional cultural practices, this is one area where the state should be more aggressive in limiting their authority. Taking a strong stand against gender discrimination in customary sys-

tems is important both for intrinsic moral reasons — reflected in the human rights principles laid out in the Convention for the Elimination of All Forms of Discrimination Against Women — and for pragmatic economic reasons. This is in light of the growing body of research that gender equality and women's empowerment fosters sustainable economic growth and promotes health and education.

South Africa and Tanzania both offer powerful recent examples of cases where the state has recognised the legitimacy of customary law up to a point, but has required that customary systems change to respect the equal rights and status of women. In South Africa, NGOs successfully lobbied for the passage of a 'Recognition of Customary Marriages Act' that formally recognised marriages concluded in accordance of customary law, but only if customary law provided for equality of husband and wife in terms of status, decision-making authority, property ownership, and child custody (Centre for Applied Legal Studies 2002).

Tanzania has enacted two Land Acts that confer formal recognition on customary title, but also mandate the elimination of customary practices that discriminate against women with respect to land ownership (Ikdahl et al. 2005, Tsikata 2003). Neither the South African nor the Tanzanian laws have been implemented perfectly, and customary gender discrimination is still a pervasive problem in both countries, but these experiments nonetheless suggest that it is possible to enact reform built around a political compromise: formal recognition of customary law in exchange for the rejection of certain customary norms that are repugnant to principles of non-discrimination and gender equality.

Another lesson of both the South African and Tanzanian experiences is that these sorts of reform strategies cannot be imposed immediately from the top down. Where cultural practices and discriminatory attitudes are deeply entrenched, successful legislative reform requires sustained consultation, lobbying, and political organising efforts. Also, in some cases the pursuit of gender equity goals might need to be tempered by pragmatic considerations, and it might be better to pursue a gradual reform strategy that starts by targeting only the most extreme forms of gender discrimination, and then progressively expanding the scope of this anti-discrimination principle. As the example in Box 2 shows, a complex legal universe governs the legal position of poor women in many developing countries. This example further illuminates the effect of legal regimes in the field of inheritance and property rights of women and its effects on the prevalence of and societal situation with regard to HIV/AIDS.

While the implementation strategy will vary by country, targeted interventions to eliminate discriminatory practices — particularly gender-based discrimination — should be a prerequisite to widespread recognition or acceptance of customary dispute resolution systems.

Structuring Institutional Relationships

The government can also influence access to justice in non-state institutions by structuring the institutional relationship between the state and non-state justice systems. One basic issue the government must consider is whether to give one justice system exclusive jurisdiction over a particular class of disputes, or whether disputants have the option of choosing between different systems. (The absence of choice may be *de jure* — as when the formal law gives customary courts in a particular area have exclusive jurisdiction over family relations or property disputes — or *de facto* — as when the formal court system is so

Box 2 Coping with Legal Pluralism in Relation to Women's Rights in Ethiopia

In the Amhara region in Ethiopia, photographs of both husband and wife are required on the land title. The provision also restricts one spouse from selling or in any other way transfer the property without the knowledge of the other. This also reduces confusion that may occur at the death of one spouse. Although Ethiopia is quite advanced from a formal legal perspective, the issue of women's inheritance and property rights is still complex. This is demonstrated for instance through the inter-relationship between the HIV/AIDS epidemic and women's property and inheritance rights. Comparatively, a ten-country study on women's inheritance rights in sub-Saharan Africa suggests that unequal housing, property and inheritance rights increase women's vulnerability to HIV, because it is, in part, why women remain in abusive marriages. Moreover women are often blamed for the deaths of their husbands and subsequently forced from the household and left destitute. If they remain in the household, they are treated as servants or are married off to the father, uncle, brother or another close male relative — a practice known as "wife inheritance."

To address the issue of HIV and women's inheritance and property rights an initiative was launched. The aim was to build the capacity of the formal and informal justice systems, to generate individual and collective action and to empower women in gaining equal treatment in owning and inheriting property. A comprehensive analysis of the legal framework was carried out which included a review of the statutory, civil and customary laws. The study provided a solid empirical foundation and underlined the strength of Ethiopian law. However, the substantive laws are not being applied or enforced. This is a result of a number of factors, including lack of awareness, lack of enforcement and ineffectiveness of the court system. Additional challenges include a lengthy and costly legal process, which most Ethiopians cannot afford, cultural barriers, free legal services are not yet readily available; the fear of being shunned and stigmatised by both family and society; and conflicting laws which cause confusion or discrimination against women.

The conflict between religious law and constitutional law has also come to the fore. It stems from a clause in the constitution which recognises the adjudication of personal and family matters under religious or customary law, if both parties agree. Article 34(5) of the constitution states [on Marital, Personal and Family Rights], 'This Constitution shall not preclude the adjudication of disputes relating to personal and fam-ily laws in accordance with religious or customary laws, with the consent of the parties to the dispute.' The conflict arises out of provisions in the Shariá law that contradict the terms set forth in the constitution. In reality, women are sometimes coerced into 'consenting' by pressure from family or society. Although these challenges exist, Ethiopia is surpassing neighbouring countries in the sense that they do not need to create new laws or reform archaic ones. Initiatives and campaigns have been set in motion to counteract some of the problems and to respond to the challenges that are demonstrating encouraging signs.

expensive and inaccessible that customary law is the only affordable option.) Some have argued that integrating the customary system of dispute resolution into the mainstream legal system may be an effective way to import desirable features of the formal system — including norms of gender equality and regularity — into the more accessible customary system (NCLEP Uganda 2007).

Others praise NGO efforts that have not focused on a formal integration of the formal and informal systems (Golub 2007), such as the Bangladeshi programmes that have taken up the issue of legal empowerment for women (UNDP 2002). Rather, some of these efforts have used the threat or reality of litigation (that is, the formal system) as an incentive for resistant or recalcitrant parties to

participate in the informal system and for such parties to honour agreements they have made. The *de facto* impact has been to increase women's power and well-being in informal systems that are very gradually becoming less gender-biased.

When there is overlapping jurisdiction between legal systems, a second issue arises: What should the rules be for choosing a forum and selecting the appropriate law to apply? Although one must be cautious in offering conclusive answers to these general questions, a useful general presumption is that individuals should always be able to opt into the state system in the early stages of a dispute, and they should be able to challenge decisions of the non-state system that are repugnant to fundamental human rights principles. However, disputants who have elected to have a dispute resolved through the customary system should not be able to seek to undo an adverse judgment by re-litigating the dispute in the formal court system. These are basic principles typically applied to ADR systems, and while they may not be universally applicable, they tend to promote efficiency, fairness, and healthy institutional competition.

4. Improving Access to Justice in the Government Bureaucracy

The Nature of the Problem

The preceding section focused on access to the formal (adjudicative) legal system and to informal justice mechanisms. But courts and out-of-court facilities are not the only institutions that enforce individual rights and resolve disputes. A great deal of such work is done by public bureaucracies, especially in the context of government regulation and service delivery, do a great deal of such work. Often the first (and sometimes the only) line of defence individuals have against government abuses and threatening or already encountered injustices from neighbours, the wider community or companies is through the bureaucratic system. If that system is not adequately accessible for and responsive to the needs and interests of poor individuals, then it will not be possible to legally empower the poor through bureaucratic means. Therefore, it is important to consider the problem of access to *bureaucratic* justice.

One of the most important public bureaucracies, and the one which has great impact on the lives of many poor communities, is the police force. Public order and security are essential public goods, and a well-functioning law enforcement apparatus is necessary to provide individuals with a stable and orderly living environment and to protect them from violence and exploitation. Yet all too often the police not only do not provide adequate protection to vulnerable communities, but are themselves perpetrators of violence and exploitation (Anderson 2003).

In addition to law enforcement, state bureaucra-

cies (including local authorities) are also responsible for providing a variety of other services, including clean water, health care, education, transportation, infrastructure, and social insurance. The degree to which these and other services should be supplied by the state rather than the market is a subject of considerable controversy, and not a matter on which a position is taken here. Even when these services are supplied in a competitive market, it is almost always a market that is regulated by some public bureaucracy. Indeed, in most countries the provision of access to a competitive market is — perhaps paradoxically — the responsibility of government regulatory agencies.

Yet all of these public bureaucracies may be vulnerable to a variety of 'government failures', analogous in some respects to the 'market failures' discussed earlier. The great variety of government failures can be grouped into three major categories: malfeasance, underperformance, and incompetence.

'Malfeasance' is the tendency of bureaucrats, or bureaucratic organisations, to abuse their power to pursue illegitimate goals. The most well-known and comprehensively studied form of bureaucratic malfeasance in poor countries is, of course, corruption (Shleifer and Vishny 1993). Public officials may demand bribes, may show favouritism to family or friends, or may use their power vindictively against personal enemies. Powerful incumbent politicians may also view the bureaucracy as a tool for entrenching their own power rather than a means for improving public welfare. Whatever the form of malfeasance, the results for the poor are fairly similar: deprivation of services, of (avenues to) shared power, and of security. These problems are pervasive and much discussed throughout the developing world. Malfeasance may also take more subtle forms. For example, even well-meaning bureaucrats may be prone to subconscious prejudices resulting in a continuous neglect of certain interests or measures with unintended discriminatory effects for certain groups. Also, when certain groups are more effective at mobilising resources to influence bureaucratic decision-making, public decisions may be distorted in favour of these groups, even if the bureaucratic decision-makers are not consciously biased, and even if these interest groups are acting legally and in good faith.

The second category of bureaucratic failure, 'underperformance', refers to the tendency of even well-meaning bureaucrats to pursue their missions with a socially insufficient level of effort (Bueno de Mesquita and Stephenson 2007). The basic problem is that the rewards a bureaucrat receives are imperfectly correlated to how hard she works or how well she performs. As a result, bureaucrats may be slow to complete tasks or respond to inquiries, and may have weak incentives to figure out how to improve the overall efficiency of the system, preferring to rely on pre-existing approaches to new problems rather than putting in the time and effort to come up with better ones. Another form of underperformance that derives from the same basic incentive problem is insufficient bureaucratic responsiveness to consumer input or consumer complaints. Even hard-working, public-spirited bureaucrats may become demoralized and give up if they feel like most members of their organisation are more interested in leisure than in innovation.

Third, bureaucratic organisations may simply lack the competence or capacity to achieve their assigned tasks, even when the bureaucrats themselves are well-motivated (Huber and McCarty 2004). Bureaucratic competence depends on a variety of factors, including the talent level of

the individual bureaucrats, budgetary resources, the design of bureaucratic institutions and procedures, and appropriate feedback and accountability mechanisms. Where some or all of these are deficient, government bureaucracies will not be successful.

Where the government bureaucracies that are supposed to deliver services and protections to the poor suffer from malfeasance, underperformance, or incompetence problems, and the poor are powerless to change this. Remedying this situation requires reform along two related dimensions:

- The first dimension is *public administration:* How can we design bureaucracies that perform their assigned functions with integrity, effort, and responsiveness to their clients? How can we structure service processes, bureaucratic grievance and dispute resolution procedures that are fair, efficient and user-focused?
- The second dimension of bureaucratic justice reform involves *administrative law*: What set of legal rules and procedures will empower the bureaucracy to achieve its goals while simultaneously constraining potential abuses of power? What is the proper degree of judicial and political oversight of government agencies?

Public Administration Reform

To improve access to bureaucratic justice through reform of public administration, reformers should work to strengthen external monitoring and to implement structural reforms that will improve bureaucratic incentives and capabilities. The right mix of reform strategies will vary depending on the political and institutional circumstances in different countries, and will also have to take into account the specific social and cultural context. Nonetheless, experience in a variety of countries suggests that there are some general lessons to be drawn about the types of public administration reform that may be appropriate.

External Monitoring

Effective and responsive public administration often requires monitoring by entities outside the bureaucracy, including the intended recipients of bureaucratic services, the general public, and other government agencies.

One institutional reform that many countries have implemented to improve monitoring is the establishment of an independent ombudsman's office to respond to complaints and investigate allegations of malfeasance. In Peru, for example, the ombudsman was able to resolve a dispute involving allegations that an agency had overcharged consumers for electricity and telephone services: After the ombudsman investigated, issued a report, and credibly threatened litigation, the agency took action to address the consumer complaints. The effectiveness of an ombudsman may, as this case illustrates, depend on background institutions such as an effective court system that give other agencies an incentive to take the ombudsman's recommendations seriously.

The effectiveness of ombudsman offices may also depend on their resources. The Philippines, for example, has an ombudsman's office that is constitutionally very powerful, but chronic underfunding has rendered it less effective in practice. Similarly, although the Pakistani ombudsman has secured relief for some victims of maladministration and has been hailed as one of the most successful instruments of the Pakistani government in serving the people, the number of complaints lodged has increased dramatically making the office greatly overburdened. It has also been unable to address systematic bureaucratic failures that go beyond the resolution of individual disputes

(ADB 2001b). These and other examples suggest that while an ombudsman or and similar institutional device may be helpful, it is not a panacea.

Other legal and institutional reforms may improve access to bureaucratic justice by aiding the efforts of private individuals and organisations to monitor the bureaucracy. Educating poor communities about their rights and means of redress *vis-à-vis* the bureaucracy is an important first step in ensuring bureaucratic accountability. Providing legal or quasi-legal assistance is another. Both of these issues are versions of the more general issue of how to provide access to legal information and legal services, discussed earlier in this chapter. However, particularly in cases where legal service providers support the public against state behaviour, attention must be paid to institutional arrangements which protect the independence of justice services providers, because such services will inevitably be more threatening to the state than, say, health or education.

Government agencies can and should take additional steps to facilitate monitoring of bureaucratic performance. For example, bureaucracies should employ an accessible case tracking system, which individuals and organisations can use to monitor the progress of disputes through the bureaucratic system. USAID helped develop a case tracking system in Bosnia-Herzegovina that allows civil society organisations to monitor cases at various stages in the administrative process and to draw the attention of responsible authorities to cases that have been ignored or seem to be languishing in the system without a resolution (USAID 2006). Another approach that can contribute to increased public accountability is the introduction of citizen charters, which are preferably developed in collaboration with the community. Citizen's charters should contain clear standards for performance that are fit to be measured and benchmarked by the bureaucracy, independent agencies and the community itself. In this way the public has a yardstick for assessing public service delivery. An illustrative bottom up example of the citizenry measuring public performance are the efforts of citizens' groups in Bangalore, India — these groups conducted consumer surveys regarding the performance of local government agencies and published the results in order to create pressure for reform. This 'naming and shaming' approach spread to other states in India as well (Narayan 2002). Where feasible, modern information technology (e.g. Internet, cell phones, etc.) could be used to disseminate information on bureaucratic performance more broadly, which would facilitate external monitoring.

Structural Reforms

As useful as it may be to improve external monitoring mechanisms, significant progress toward improving access to bureaucratic justice may require more systematic reforms of the bureaucratic institutions themselves. A starting point is the improvement of each agency's internal adjudicative procedures, monitoring mechanisms, appeals processes, and grievance procedures. The administrative dispute resolution system and the public interventions aimed at facilitating the resolution of disputes between private parties do not always receive as much attention from governments and the donor community as the judicial system, but more people — and a larger proportion of poor people — are more likely to come into contact with the bureaucratic system than the court system. (This would certainly be true of non-criminal matters.) Government bureaucracies responsible for delivering essential services and for interventions in relationships between citizens should have a well-functioning system for providing enforcement and mediation services, addressing complaints, resolving disputes, and providing

redress. These systems should be cost-efficient, transparent, user-friendly and swift.

A second strategy for making public bureaucracies more responsive to the needs of poor communities is increasing the participation of poor communities, or the public generally, in bureaucratic decision making. Participatory methods such as interest-based dialogs, consensus building, and public collaboration aim to actively engage people in decision-making processes that concern their lives (Vidoga, 2002). The possibilities to have input, to voice concerns, to make recommendations and to co-produce outcomes are likely to improve the quality of public decisions. Participation further increases the public's understanding and acceptance of decisions, and advances a sound partnership between the bureaucracy and the citizenry. An interesting example of participatory regulatory decision making is the system of municipal water regulation in Porto Alegre, Brazil. The municipality wholly owns the Porto Alegre Municipal Department of Water and Sewage, but it is a separate legal entity with financial and operational autonomy. The mayor appoints the Department's general director, but its management board includes representatives from a wide range of civil society organisations. Porto Alegre also uses a participatory budgeting process in which citizens register their vote on budget priorities after hearing presentations from the directors of different service departments. Overall, this arrangement appears to have succeeded in creating incentives for high-quality service delivery (UNDP 2006).

Other countries have also experimented with participatory regulatory decision-making. Vietnam, for example, recently established a legal framework for consultative relations between local-level administrators and the people they serve. This framework allows citizens to provide input and oversight in selected areas of local planning and decision-making (ADB 2001c).

Direct public participation in regulatory policymaking does have its drawbacks, however. Bureaucracies desiring to introduce participation should not underestimate the efforts it will possibly take. Issues that need attention are, among others, the design of the procedure for participation, the role and authority citizens will have, and decisions about representation. For example, expectations on both sides should be made clear from the beginning on. Decision-making processes may need to be adjusted to the abilities of the non-professional participants, who may be illiterate, inexperienced, or perhaps distrustful. The provision of supportive facilities could be necessary, or the involvement of neutrals and experts who can help to process information, assess options and facilitate negotiations. And even so, not all issues might be equally suited for participatory decision-making. Sometimes, an agency needs to be able to credibly commit not to change its policy in response to short-term public pressure. It might be difficult, for example, to encourage long-term investment in telecommunications infrastructure if investors know that rates will be set in participatory fashion by consumers: even if consumers initially want to encourage investment by promising a high rate of return, it may be difficult for them to make that promise credible if investors know that future rates will be set by an agency that is dominated by consumer interests (Levy and Spiller 1996, Henisz and Zelner 2001).

A third strategy for improving access to bureaucratic justice would emphasise reforms that institutionalise standards of good governance and promote public services morale. By giving bureaucratic managers sufficient means to offer their subordinates incentives for good performance, to discipline bad performance, and to reorganise outdated practices, bureaucratic organisations could

be restructured in a way that reduces inefficiency and waste and avoids inertia. This strategy may be politically sensitive, however. Civil service unions are very powerful in many developing countries, and for decades they and their members have enjoyed almost complete tenure and salary protections, little oversight, and few serious demands. It may therefore be risky for the government to take on the civil service unions by proposing reforms that would threaten the power or livelihoods of these unions and their members. Therefore, measures enhancing bureaucratic justice and service quality need to take into account the interests of both the civil servants and their representing organisations. Reorganisations might be more acceptable if they are build on trust rather than disapproval, motivate good practices rather than punish incompetence, stimulate learning from feedback rather than reprimand underperformance, and provide safeguards for justified concerns regarding job security, wage guarantees and status. Approaching this delicate issue therefore requires skilful politicians to enter into a consensus-building process with stakeholders and put together 'package deals' in which the existing civil service establishment is given benefits in exchange for accepting reforms that promote greater bureaucratic productivity and efficiency. As an alternative or complementary strategy, reformers could try to build a countervailing coalition that would push for bureaucratic reform.

A fourth type of strategy might promote decentralisation, bureaucratic redundancy, or some degree of privatisation in service delivery, at least for certain types of service. The advantages of decentralisation are that it brings bureaucracy 'closer to the people', may increase accountability and responsiveness to local needs, and may promote healthy competition between regions if local governments have input into bureaucratic governance within their jurisdictions (Girishankar et al. 2002). Decentralization, however, may increase risks of corruption if it weakens centralized oversight and depends on local individuals to make impartial decisions on matters affecting their family, friends, and enemies (UNDP 2006). Decentralization may also reduce competence if powerful central bureaucracies are more likely to attract talented individuals.

Bureaucratic redundancy — that is, having two or more separate agencies or office provide the same service to the same target population — has three main advantages. First, it reduces the likelihood of incompetence or corruption by giving consumers with a choice of provider (Shleifer and Vishny 1993). Second, if bureaucrats are rewarded at least partially on the basis of demand for their services, redundancy may lead to healthy competition between providers. Third, redundancy may facilitate experimentation and innovation. Bureaucratic redundancy also has costs, however. The first and most obvious is the extra budgetary cost of staffing two or more offices to provide essentially the same service. The second concern is that the existence of multiple providers may blur lines of accountability and, if incentives are improperly aligned, may encourage bureaucrats to 'let the other guy do the hard work' (Ting 2003).

Privatisation of service delivery functions holds the promise of more efficient service delivery. Consumer choice, value for money, proximity to the client and hands-on mentality are some appealing elements of this basic change towards governance (Rhodes, 1997). The remix of bureaucracies and markets containing the use of business principles and incentive structures is believed to motivate both the publicly and privately organised service providers to adjust the service delivery to the specific customers' needs, resulting in an increase in effectiveness, respon-

siveness and transparency (Lane, 2000). However, privatisation also risks undermining public accountability and creating more opportunities for corruption. Some high-profile scandals have done serious damage to the image of privatisation as a reform strategy. While these cautionary tales illustrate the dangers of ill conceived or badly managed privatisation efforts, they should not obscure the fact that some privatisation schemes can substantially increase the access of poor communities to vital government services. For example, water provision in Chile is heavily privatised, but subject to a strong regulatory system and coupled with a subsidy programme to address equity concerns. The scheme is widely viewed as effective in providing clean water to poor communities efficiently and equitably (UNDP 2006).

Administrative Law Reform

In addition to general public administration reforms, there are a number of strategies for improving access to bureaucratic justice that emphasise a more direct role for the legal and judicial system. Administrative law may affect bureaucratic performance in two distinct ways. First, legal rules enforced by courts may facilitate or enforce the public administration reform strategies discussed above. Second, courts and litigants may take a more active role in overseeing the activities of the public bureaucracy. While administrative litigation is only a small component of a much larger set of governance institutions, and poor people are unlikely ever to be involved directly in a lawsuit against a bureaucratic agency, administrative law and litigation may nonetheless have an important role to play in expanding access to bureaucratic justice for the poor. Thus, in this area of administrative law reform, the issues of access to bureaucratic justice and access to legal justice overlap.

Legal Mechanisms to Facilitate Participation and Monitoring

Three major types of administrative law reform may enhance the efficacy of external monitoring mechanisms: freedom of information (FOI) laws, 'impact statement' requirements, and whistleblower protections.

FOI laws are meant to increase the transparency by giving citizens entitlement to information about bureaucratic rules, decisions, and practices. Traditionally, many governments resisted FOI legislation on grounds of privacy or secrecy, and certain private interests may oppose FOI legislation if these interests benefit from the ability to manipulate a relatively opaque administrative process for their own benefit. Despite this, recognition of the benefits of FOI legislation seems to be on the rise: 65 countries currently have some form of FOI legislation, with most of those laws enacted since 1990 (Kocaoglu and Figari 2006).

FOI laws do have some important costs. Firstly, the traditional objections based on privacy or secrecy concerns may have merit in some contexts. Therefore, certain exemptions to FOI laws related to issues like national security, ongoing court proceedings, and personal or commercial privacy may be appropriate, though these exemptions should be narrowly drafted and construed. Secondly, in poor countries with weak bureaucratic capacity, compliance with FOI requirements and responding to FOI requests can be extremely costly, and could end up paralysing the bureaucracy (Russell-Einhorn et al. 2002). This suggests that reformers should be careful not to simply lift FOI laws 'off the shelf' from wealthy countries; rather, FOI laws must be carefully tailored to the needs and capacities of particular countries.

Impact statement' legislation requires a government agency to provide a public report on the

impact of a proposed action on some important public value before the agency takes action. The most common legislation of this type is the 'environmental impact statement' requirement pioneered by the U.S. National Environmental Policy Act of 1970 and adopted by numerous other countries and some international organisations. Though the specifics of these laws vary, they all require that agencies prepare a report on the impact of major proposed actions on environmental quality. Other types of impact statement requirements have also been proposed, and a few have been implemented, though the environmental impact statement is still by far the most common version of this strategy. One approach that might be worth considering is the use of a 'poverty impact statement' that would require agencies, after consulting the poor community, to produce a report on how their initiatives are likely to affect the poor. The main advantages of impact statement laws are, first, that they increase public accountability and the efficacy of external oversight by disclosing potential adverse effects of agency action, and, second, that they may alter the agency's own internal decision-making process by drawing attention to issues that might otherwise be ignored or neglected. However, impact statement requirements, like FOI legislation, can be burdensome, especially for under-funded or low-capacity agencies. Saddling bureaucracies with too many impact statement requirements may induce 'paralysis by analysis'. The appropriate balance between these competing interests cannot be resolved in abstract or general terms.

Whistleblower protection statutes are a third form of administrative law reform that seeks to improve transparency and political accountability. Without credible protections, individuals within a bureaucratic organisation who learn about corruption or other forms of malfeasance will be reluctant to come forward because they fear retaliation. Effective whistleblower protection statutes typically enable individuals to make complaints anonymously or confidentially, imposing serious civil and criminal penalties on those who retaliate against whistleblowers, and (sometimes) giving potential whistleblowers a financial incentive to come forward either by offering them a set 'bounty' for useful information or by offering them a percentage of any money the government recovers from wrongdoers as a result of the whistleblower's report. Whistleblower protection statutes may not be effective in redressing endemic or high-level corruption, especially when the enforcement of the laws is unreliable, but these statutes may nonetheless be effective and important elements of a broader anti-corruption strategy.

Judicial Review of Administrative Decisions

FOI legislation, impact statement laws, and whistleblower protection statutes are all legal mechanisms through which courts enforce rules that enable other actors — NGOs, politicians, and the media — to monitor bureaucratic performance more effectively. Thus, increasing the ability of individuals and groups to make sure these laws are enforced may improve poor people's access to bureaucratic justice.

Litigation and judicial institutions may also play a more direct role in ensuring bureaucratic accountability. Such litigation can take two main forms. First, some litigants pursue what might be termed 'oversight' litigation. Individuals who believe that a government agency has taken, or is about to take, some illegal action that adversely affects their interests may file a legal challenge. The judiciary then assumes the role of public monitor, ensuring that the agency has acted lawfully.

The second form of litigation is so-called 'public interest litigation' (PIL). Citizen groups typically

bring PIL suits to effect broader legal change or institutional reform. PIL has played a significant role in the strategy of social reform movements in South Asia and South Africa in particular, and it is increasingly common in other parts of the world as well (NCLEP India 2007, Dembrowski 2000, Gloppen 2005, Hershkoff and McCrutcheon 2000). The distinction between oversight litigation and PIL is more a matter of degree than a difference in kind. Oversight litigation more closely resembles a traditional lawsuit alleging a private injury to a legally protected interest, while PIL seeks to involve the judiciary in a more overtly law-making or reformist role, but in practice many oversight suits seek institutional changes, and much PIL is directed toward the redress of widely-shared private grievances against bureaucratic institutions.

Litigation is not the most desirable form of improving administrative accountability and bureaucratic justice. In the first place, any strategy that relies on litigation and judicial review is likely to be expensive and time-consuming. 'Retail' administrative lawsuits may also put an enormous burden on the court system. For example, in many Latin American countries citizens who believe they have been wrongly denied a government benefit can file an *amparo* claim directly in the civil courts, thereby circumventing the administrative review process. These *amparo* claims clog the courts, and because they are focused only on the individual claim they tend not to address the root cause of bureaucratic failure.

Secondly, courts may lack the expertise needed to understand the complex, technical issues that often arise in administrative law or institutional reform cases. Judges, however, may overestimate their own competence in such matters. Some countries have attempted to address this problem by establishing specialised administrative courts, but even in these cases judges are at a comparative disadvantage compared to other institutions when considering issues of bureaucratic institutional design.

Finally, some observers have raised the concern that well-intentioned reformers, especially those with elite legal backgrounds, may be seduced by the appeal of litigation as a vehicle of social change and pursue this strategy at the expense of more valuable — but less visible and exciting — political organisation, lobbying, and education.

The three concerns cited are all valid, and litigation should generally not be the first line of defence (or offence) in dealing with an abusive, unaccountable, or underperforming bureaucracy. Nevertheless, having available litigation as a weapon of last resort may be vital in making the other mechanisms of bureaucratic justice function effectively. The principles that should apply to both to administrative oversight litigation and to PIL are the same as those discussed in the context of access to legal justice generally: reformers should work to eliminate failures in the market for legal services and litigation, and establish institutions that allocate scarce judicial resources to the cases where judicial intervention is most necessary and appropriate. Thus, desirable approaches may include broadening rules of standing, adopting one-way fee-shifting rules, facilitating representative or collective lawsuits, and targeting scarce legal aid resources at cases that affect large numbers of people, while at the same time reformer should provide more options and resources for non-judicial relief of administrative disputes, and should require exhaustion of administrative remedies as a precondition for judicial review.

5. Conclusions and Recommendations

In order to escape the poverty trap, poor people need a legal system that enables them to realise the full value of their physical and human capital. The three substantive cornerstones of the legal empowerment agenda are property law, labour law, and law for small business. Reform of the substantive law, however necessary, would not be sufficient to achieve true legal empowerment. For the legal system to play a role in empowering the poor to lift themselves out of poverty, they need more than laws conferring the appropriate mix of rights, powers, privileges, and immunities; they also need a legal and judicial system that can make these legal entitlements practical and meaningful. Empowering the poor and disadvantaged to seek remedies for injustice requires efforts to develop and/or strengthen linkages between formal and informal structures and to counter biases inherent in both systems. Our working group has examined the issues involved and has developed guidelines to provide ways of improving access to justice.

Summarising our main conclusions, we stress that access to justice requires granting all people an individual identity (see Section 2 of this chapter), and that realising this goal requires:

- Addressing the lack of bureaucratic capacity in states' identity registration systems by eliminating user fees, supporting outreach, working through non-governmental organisations, and bundling registration services with other social services or traditional practices and creating one stop shops.
- Counteracting politically-motivated legal exclusion by a combination of facilitation of political dialogue, legislative reform, international attention, engaging national human rights machineries, stakeholder consultations, and community involvement.
- Creating incentives to register one's legal identity with the state by providing information, working through trustworthy local intermediaries, and minimising the adverse consequences of formal registration.

In Section 3 of this chapter, we identified four strategies to improve access to justice, taking the justifiable problems of the poor as starting points. They build on the options poor people have available to address these problems and to enforce their rights: spontaneous ordering mechanisms, informal, faith-based and customary justice, as well as the formal legal system. The common aim of these strategies is to **lower costs** that may be involved and **increase justness and fairness** of the outcomes poor people may obtain. These strategies have proven their value in practice, or seem particularly promising in the light of a theoretical framework that emphasises **reduction of transaction costs** and **remedying market failure:**

- Empowering the poor through improved dissemination of legal information and formation of peer groups (self-help strategies). This can be done by strengthening information-sharing networks across consumer groups and organisations, by using information technology, non-formal legal education and media campaigns, tailored to the target population and their problems.
- Broadening the scope of legal services for the poor, in several directions: an orientation towards empowerment, coaching and learning; lower cost delivery-models (through paralegals, or otherwise); bundling with other services (health care, banking, insurance) and intro-

ducing the concept of one stop shop; use of the methods and skills of alternative dispute resolution, mediation and arbitration; and legal aid services that are capable of assistance with the informal system as well as the state system. Moreover, the market for legal services should gradually be liberalised by reducing regulatory entry barriers (such as 'unauthorised practice of law' restriction) for service providers, including non-lawyers, who are interested in offering legal services to the poor. Scarce legal aid resources should be targeted to cases where the legal claim produces public goods (such as general deterrence or legal reform) and to situations with very high stakes for the individual (such as criminal defence).

- Reducing aggregate legal transaction costs by adopting a combination of legal simplification and standardisation reforms, expanded opportunities for representative or aggregate legal claims, and improving the climate for fair settlements in the shadow of law, by ensuring a credible threat of a neutral intervention.
- Combining formal or tacit recognition of the informal justice system with education and awareness campaigns that promote evolution of the informal state system, targeted constraints on the informal system (in particular limits on practices that perpetuate the subordination of women), and appropriately structuring the relationship between state and non-state systems so that the informal system can provide an efficient means of resolving private disputes, but people are able to use the formal system when crime and fundamental public values are implicated.

Because many poor people have to rely on access to the (local) government hierarchy rather than the adjudicative system to resolve their disputes and obtain necessary services, access to justice reform may require not only improving access to adjudicative justice, but also improving **access to bureaucratic justice** (discussed in Section 4). Addressing the failures of the bureaucratic system may entail:

- Public administration reforms, including reforms that improve external monitoring and also structural reforms (such as improving bureaucratic adjudication and grievance procedures, expanding public participation in administrative decision-making, pursuing civil service reform to expand opportunities for performance incentives in government administration, and increasing decentralisation and redundancy in bureaucratic service provision to improve efficiency and combat corruption.
- Administrative law reforms, including appropriately-tailored expansions of freedom of information laws, impact statement requirements, and whistleblower protections, as well as appropriate but limited judicial review of administrative action.

Chapter 1 Endnotes

1 Excellent recent reports prepared by the Asian Development Bank (ADB) (2004, 2005, 2007), UNICEF (2002, 2005), and the Inter-American Development Bank (IADB) (2006) form the basis of much of the material in this section. These organisations have taken an important leadership role by bringing this problem to the attention of the international community - gathering vital information on the nature and scope of the problem and developing possible strategies for reform.

2 For example, the International Covenant on Civil and Political Rights, Arts. 16 and 24; International Covenant on Economic, Social, and Cultural Rights, Arts. 6 and 13; Convention on the Rights of the Child, Arts. 7—8; International Convention on the Protection of the Rights of All Migrant Workers, Art. 9; Convention on the Elimination of All Forms of Discrimination Against Women, Arts. 7—9; American Convention on Human Rights, Art. 20; European Convention on Nationality, Art. 6; African Charter on the Rights and Welfare of the Child, Arts. 6 and 11.

3 Sources discussing these and other groups include Lynch and Ali (2006), Lynch (2005), Amnesty International (2005), Sokoloff (2006), Refugees International (2006), Kalvaitis (1998), and Adam (2006).

4 Describing this barrier as a 'transaction cost' is not meant to trivialise the feelings of cultural and social exclusion this linguistic barrier may also engender. This phenomenon may create a type of psychological cost to using the legal system that is as significant, in practical terms, as the economic cost.

5 It is worth noting, however, that the issue of linguistic barriers to access, like the issue of legal identity discussed earlier, may implicate serious political conflicts. Sometimes linguistic barriers to access arise because of government policies designed specifically to disadvantage particular ethnic groups, or to advantage the wealthy relative to the poor. Thus, even if the financial costs of dealing with this particular obstacle may be relatively low, the political costs may be greater.

6 Much of this discussion is based on an excellent recent report prepared by Ewa Wojkowska (2006) of the UNDP's Oslo Governance Centre.

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Chapter
TWO

Empowering the Poor Through Property Rights

EXECUTIVE SUMMARY

Property Rights are Human Rights

'Everyone has the right to own property alone as well as in association with others … .
No one shall be arbitrarily deprived of his property.'[1]

Property rights must be understood as a fundamental human right.[2] The body and mind are the first and most immediate property of persons and thus respect for this property is related to the respect of the integrity of the individual.[3] Throughout history the idea of human rights has developed in close association with the idea of private property rights.[4] Early defenders of human rights considered property rights as important as freedom of religion and freedom of speech. But the majority of the world's population does not have adequate access to secure property rights, and their realisation remains an arena for social and political contestation.

Absence of Property Rights and Poverty

The absence or insecurity of property rights is a central and ubiquitous cause of poverty, not only in the very poorest states, but also in middle-income countries such as Brazil, Russia, India and China.[5] The relationship between absence of property rights and poverty is moving from argument and anecdote to comparative analysis and measurement. Secure property rights facilitate economic transactions, ensure efficient and sustainable resource use, allow for the evolution of effective credit markets, improve business climate and investment opportunities, and ensure economic accountability and transparency. Equally, the absence of such rights undermines economic development and hinders governance. Analysis of the World Bank's Country Performance and Institutional Assessment (CPIA) ratings for 2005 indicates that on a scale of 1 to 6 (with 1 being the lowest score), only five of 76 developing countries scored 4 on objective measurement of property rights and rule-based governance.[6] As all five are small island states, this indication confirms that property rights of the absolute majority of the people in developing countries are not protected in theory or practice, contracts are not enforced, and registries and other institutions required to protect property function poorly or not at all.[7]

Especially Vulnerable Groups

Certain groups are frequently and systematically disenfranchised through lack of access to property rights in many countries. Women, who constitute half of the world's population, own around 10 percent of the world's property.[8] Virginia Woolf eloquently expressed the long arch of history that has not only excluded women from property in

the West, but that has made entire state institutions masculine preserves.[9] Even when women have *de jure* property rights, their *de facto* control of land is tenuous, and men largely mediated access. In Imo and Abia states in Nigeria, for example, average household farms are 9.8 hectares, of which only 2.4 hectares are allocated to women. However, this land is not a claim, but rather a lease, which women must organise from their husbands. Further, widows cannot own land; their husband's family keep it in trust for their children.[10] As Robin Nielsen has pointed out: 'At various stages in women's lives, their rights to land are dependent on fathers, brothers, husbands and sons. A more precarious foundation for land rights is difficult to imagine.'[11] Ensuring that women's names appear on land records, that their rights are enshrined in communal property systems, and that inheritance rights of widows and daughters are established and protected, would go a long way towards improving their condition. This is essential to empowerment and the promotion of entrepreneurial activity and should be placed at the centre of property reform efforts.

Equally, indigenous people around the world tend to suffer from weak or prescribed property rights not adequately recognised by law. These groups often hold land collectively, so ownership and access patterns do not always fit easily into imported, non-indigenous property systems of absolute and individual nature. As they are largely disenfranchised, the customary land rights of the indigenous tend to be overlooked. The Abayanda Pygmies in Uganda, for example, have been entirely dispossessed of their land; they have endured persistent lack of recognition by the central government of legitimate claims to their property. Indeed, the problem is far from solved in developed countries. In 1902, Norway passed legislation requiring full knowledge of the Norwegian language for property ownership, effectively making it impossible for the indigenous Sami to own land.

In 2004 an International Labour Organisation (ILO) expert committee concluded that an Act passed in 2003 to rectify centuries of exclusionary practices still did not meet the minimum standards for the ILO convention on the rights of indigenous and tribal peoples.[12] Global reform of property rights regimes must allow for formal recognition of customary land rights as the basis for inclusive property systems that include indigenous peoples. There are some good examples in The Commonwealth Native Title Act of 1993 in Australia, and the landmark Te Ture Whenua Maori Act in New Zealand, both of which respect the customary land rights of indigenous groups. Although time will tell if laws of this nature can change deeply entrenched exclusionary practices, but legal empowerment for poor indigenous groups will certainly remain key to tackling this challenge in both OECD and developing countries.

Urban slum dwellers are also excluded from formal property systems. At least a third of the world's poor, or a billion people, are living in slums without legal protection of their assets.[13] Ironically, it is often insecurity of land tenure and wrongful loss of land in rural areas that encourage the poor to escape, while their property rights in urban areas are no less tenuous. The reality of urban slum dwellers is sub-standard housing conditions, forceful evictions, extortion, social exclusion, and environmental degradation, among other problems. The situation prevents development of adequate housing stock and the emergence of robust property and credit markets. Informal property systems are often perpetuated in conflict-affected countries by flows of refugees and Internally Displaced Persons (IDPs) from ru-

ral to urban areas, and this leads to further insecurity and overcrowding.

Legal access to property rights for various groups is clearly an over-arching and universal issue that should be at the centre of global efforts to empower the poor; but it has in fact received very little coherent analysis to date. To unpack the relationship between poverty and property rights we must understand that it is these rights that provide the basis for economic growth. The global economy grew very slowly until the beginning of the 19th Century. Before then, and for thousands of years, notes Jeffrey Sachs, 'there had been virtually no sustained economic growth in the world'.[14] However, with the advent of the industrial revolution and economic expansion, assets expanded and property rights evolved. Slowly the idea of private property ownership came to underpin economic development in the West. While social, economic and political stability was upset by two World Wars and the Great Depression, the GI Bill of Rights in the United States, the Marshall Plan and the incipient economic and political union in Europe, and rapid development in East Asia supported the growth of a middle-class that led to further consolidation of legal property systems in these regions. The transformation from predominantly extralegal property systems to formal property rights entrenched in law has since come to support functioning market economies and polities.

The Building Blocks of the Property System

This transition has reduced global poverty substantially, but as outlined above, billions of people around the world still lack secure property rights, which hinders their economic, political and social security. In order to examine how poverty can best be relieved, and why access to property rights is fundamental to the empowerment of the poor, it is necessary to identify building blocks of a fully-functional property system. Such a system operates in the following four ways:

1) ***As a system of rules that defines the bundle of rights and obligations between people and assets.***[15] Property ownership creates ties that bind individual citizens together through the formation of networks of economic and legal rights and corresponding obligations. The credible enforcement of these rights and obligations requires a judicial mechanism that allows for equitable, transparent and efficient dispute resolution.

2) ***As a system of governance.*** Property systems are a central facet of state functionality, and as such are an important measurement of fiduciary and administrative effectiveness. The institutional order of the state is based on technical rules and relationships which define interactions between stakeholders, ranging from direct ownership of land to promulgation of rules that govern security of land and house tenure, land planning, zoning, taxing and other aspects of property management. Technological innovation, which has radically reduced the cost of information, has generated the possibility for further transparency and accountability in property systems as an instrument of governance.

3) ***As a functioning market for the exchange of assets.*** A fully functional property system allows land, houses, moveable property, equity shares, and ideas to be transformed into assets to be bought and sold at rates determined by market forces. This subjects the exchange of property to a level of transparency and accountability, and allows for the development of financial mechanisms — including credit

and insurance — to facilitate transactions and improve economic outcomes. Land, houses and moveable property can thus be leveraged, and assets transformed from static investments into capital which can be bought and sold. However, property rights are a necessary but not sufficient precondition for the development of these financial mechanisms; they also develop through partnership between the market, special funds targeted at access to finance, and the state.

4) ***As an instrument of social policy.*** In the absence or failure of the market, the state often plays a direct role in addressing the needs of the poor. The state has at its disposal instruments that can be used to endow its citizens with assets as they relate to property, such as public housing, low interest loans and the distribution of state land. Such instruments help to overcome natural competition for assets. The state also supports social cohesion through the development of co-ownership of infrastructure and services by government and the citizen, supporting the equilibrium between individual and collective interests. Provision of infrastructure by the state critically affects the value and desirability of assets, and can therefore fundamentally affect opportunities for the poor.

Dysfunctionalities in Property Management

These four key building blocks can be viewed as a coherent framework through which to understand property rights. It follows that analysis of these blocks allows us to identify where dysfunctionalities in property management might arise and where there are disconnects within key elements of this framework. As far as the poor are concerned, they have trouble getting property in the first place (unfairly limited access). Where they have assets, their rights are often not adequately recognised, or enforced, or given full backing of the law, and are consequently vulnerable to being lost. Unfairly limited access to property and insecurity of assets are caused by dysfunctionalities in the property system that can be understood fourfold:

1) ***Misalignment of social practice and legal provision.*** Social practice and law reinforce each other when aligned towards common objectives, but when misaligned can undermine state legitimacy and accountability and weaken ties of citizenship. Law must evolve organically to suit the context in which it is to be applied and should not be perceived as the instrument through which a minority imposes its power. Legal aspects of property systems must grow from land practices on the ground and incorporate customary interactions and networks. There have been two common sources of misalignment. Firstly, some states, particularly during the colonial period, imposed property systems on vast tracts of land that were previously regulated through customary regimes of rights and obligations. The result was a major gap between daily practices of the people and requirements of formal law. Secondly, in urban areas, as de Soto has pointed out, ill-conceived laws have forced millions of people into informality, as gaining access to land for housing is a lengthy process, measured in terms of years if not decades.[16]

2) ***Misuse of rules governing property.*** While rules for property systems may be both appropriate and equitable, they may still be open to abuse by those in power. Rules are resources that can be subverted to serve the interests of the few, through corruption and lack of transparency, rather than acting as a framework

for empowerment of the many. Equally, land regulations, rather than providing a framework within which parameters for property management are set and transactions enabled, can become mechanisms for restriction of property rights and bureaucratic mismanagement.

3) ***Lack of access to information and justice.*** Even where cadastres, land registers and other repositories of property titles, records and documents exist, restriction of access to such information reduces the transparency and efficiency of property transactions. Governments must work to make information on property available to the general public and seek to collect further data and opinion in innovative ways through the promotion of opportunities for public debate on property and citizen resource rights, and strengthening of knowledge sharing and analysis on these issues.

4) ***Misuse of eminent domain.*** Corrupt governments can use the inherent power of the state to seize private property and thus confiscate assets of the poor in the name of the public good. The primary remedy against wrongful or unjust loss of property is a just policy of land acquisition and resettlement; it can include innovative approaches, such as offering partnerships to the poor in developing assets created from investment in infrastructure and services. International financial institutions, particularly the World Bank and the Asian Development Bank, moved systematically in this way in the 1990s to address the adverse impacts that developmental projects had on the standard of living of the poor. At the national level, however, practices differ widely and abuse, with regard to use of eminent domain (for depriving the poor of their assets), continues to be a problem. Reform of compulsory acquisition mechanisms is necessary, as demonstrated most palpably in Zimbabwe recently, one of the few countries today which constitutionally permits appropriation without payment of any compensation.[17] Review of 20 land acquisition laws in Sub-Saharan Africa[18] indicates three sources of this type of legal disempowerment: (1) process of acquisition, wherein, for example, compensation valuing billions of dollars remains unpaid in some regions without clear avenues of redress; (2) the basis for compensation payment, which routinely fails to take into account real costs to the loss of land, and (3) manipulation, through purposeful or poorly specified definition, of what constitutes 'public purpose'.[19]

Property Rights and Legal Empowerment

Property rights are defined through law, and therefore the Legal Empowerment of the poor, as citizens, can only come about through the protection of those rights. However, legal status can have strikingly different impacts upon citizenship: it can become an instrument for the creation of opportunities for exercising rights, create entitlements to rights for specific categories of people, or repress or deny contestation of those rights to others. H.L.A. Hart's distinction between internal and external views of the law shown in Table 1 is instructive.[20]

Since internal actors are positioned in a hierarchy, the extent to which legal status produces loyalty to the social order depends on feedback loops. 'Loops' between and among the actors affect the degree of efficiency and effectiveness of the administrators in delivering rights or enforcing obligations in a manner that incorporates accountability. The 'user' perspective is essential for the legitimacy of the system, as legitimacy is the outcome of the degree to which people, once granted

Table 1 **Mapping the dynamics of legal status**

External	Internal
The public, social movements	The authorizing environment for rule-making (Parliament, Congress, Cabinet Board of Corporations)
Legal community of practice	Composers/Drafters (Constitutions, primary, secondary legislation, by-laws, manuals)
Judicial Review, civil society and media	Administrators/Organisers
Excluded/ineligible people	Users/citizens

a particular legal status or set of rights, such as property rights, come to identify and endorse the social order so produced. External actors are positioned to push the frontiers of the existing social order by questioning the balance between solidarity and inequality. They catalyse changes to existing citizenship arrangements, in questioning the fairness or effectiveness of an existing legal status, and in the creation of new legal status for specific groups. The creation and expansion of citizenship rights is a process of contestation that can lead to new interpretations of old laws and the promulgation of new laws, or the creation of new mechanisms to deal with issues that do not fit into an existing framework. Thus, groups that question the status quo can prove that the law is malleable, just as indigenous groups have fought for, and won, recognition of customary land rights in Australia or New Zealand.

However, the provision of property rights in law does not always guarantee equality in practice. While states can attempt to balance inequality and solidarity, discrimination and social classifications remain entrenched in many societies. Inequality can stem from deep-rooted cultural distinctions such as caste, gender and race, and the challenge then is to create conditions for property rights not just at the legal level, but through mechanisms that can fundamentally change mental models and social practices at all levels of society. Even in the European Union, where equality of men and women is a fundamental axiom of policy, gender mainstreaming in social policy still remains a significant challenge, according to a recent European Commission report on social inclusion.[21]

The degree to which an order is open or closed, to extending legal status to new groups or to changing the status of existing groups, is an important test of its capacity for coping with change. Even when creation of status is open in theory, mechanisms are needed to create trust in the social order. If property rights are legally extended to a previously disenfranchised group, that group must believe that their property will not be seized through misuse of eminent domain.

Therefore, context-based legal reform is critical to governance in developing countries. There can be no blanket approach: expansion of property rights in a coherent manner requires understanding of trends and a tailoring of provisions to context. There must be a degree of coherence to laws based on fundamental rules, or those laws will not be respected. If *de jure* property rights do not correspond with *de facto* property practices and customs, the subsequent legal misalignment will undermine rather than strengthen the system. Disorder and dysfunction has its own stakeholders, and if resources are seen as zero-sum, change can be perceived as highly threatening by entrenched interests.

Property systems consist of a bundle of rights and obligations. In OECD countries, an entire series of legal innovations has evolved to allow for cooperative arrangements that underpin this dynamic and support transparent, effective property-based economies. The same type of thinking has not been applied to developing-country contexts to examine precisely how property arrangements could be modified, and interactions codified, in ways that would allow the poor to leverage their assets and become legitimate stakeholders in global property systems. Urban slums represent land that could be a valuable asset when conceptualized in a different way as part of coherent urban planning strategies. Latent assets must be leveraged and their stakeholders — the poor — brought into dynamic new partnerships to align law and practice in ways that allow for the systemic expansion of property rights.

Key Elements of a Reform Strategy

This process creates both a national and global public good, and to bring it about governments of developing countries must enter into a double compact - with their citizens and the international community. To level the playing field for the poor and operate in a manner that best serves the interests of the disenfranchised, international actors must develop long-term partnerships with national governments on property rights as part of the broader economic governance agenda. A reform strategy for effectively functioning property systems that empower the poor should be based on land tenure security, creation of opportunity for investment, and adequate management of risk. The elements of such a strategy must:

1) ***Promote Legitimacy by Adequate Participation and Deliberation.*** In general, future reform will require a legitimate state. For implementation at all levels, reforms must be based on deliberation and inputs from those that they are intended to affect. This will bring focus on relevant issues, engender acceptance by local communities, and reduce the cost of reform. In Peru between 1996 and 2000, for example, 3,500 meetings were held on land titling processes in different settlements around the country, helping to improve community satisfaction with property reform efforts.[22] In particular, the groups outlined above - women, indigenous groups, and urban slum dwellers - and other excluded groups, must be given special attention as part of this process. Support for initiatives such as the establishment of coalitions between urban and rural poor around common concerns including the effects of the rural exodus on rural economies and urban poverty are a productive starting point.[23]

2) ***Support Parallel Interventions.*** Implementation of rules that underpin a functioning system for access to, and registration of, property, do not automatically create the mechanisms necessary to support this system. By giving attention to the four building blocks of the property system, governments must carefully plan and sequence the interventions that will create the corollary financial and legal instruments that underpin effective property rights and facilitate access to managerial ability, technology, credit, and markets for new property owners to become competitive. The evolution of efficient financial markets will depend on the ability to use land, and other property, as collateral. In developed countries, more than two thirds of small business loans are secured against land and real estate. Experience in South Africa and Brazil demonstrates that unconventional avenues (e.g. partnerships and joint ventures with old land owners) may be a useful first step. Governments should also develop methods for in-

creasing finance for land reform and post-land acquisition services, including land banks, land-for-debt schemes and land for taxes.[24]

3) ***Facilitate Private Sector Involvement.*** The state needs to set the parameters within which private sector investment can take place, and remove any disincentives to this process. Fees for property transactions, which in some developing countries can be as high as 30 percent, act as an unnecessary form of taxation that inhibits the free exchange of land through market mechanisms and excludes the poor. Official land taxes must also be set at an affordable level for the poor and subsidies and tax provisions that provide distorting privileges to large-scale farmers should be removed. In Mexico, for example, certain groups 'prefer not to regularise the land for human settlement to evade having to paying land tax, which promotes informality in land markets.'[25] Investment climate surveys indicate that access to land was the main obstacle to conducting and expanding business by 57 percent of the enterprises interviewed in Ethiopia, 35 percent in Bangladesh and 25 percent in Tanzania and Kenya.

4) ***Promote Property Rights through Individual and Corporate Ownership.*** Property law should offer clear and simple options of legal personality and corporate ownership for small businesses and corporative associations of the poor. Legal personality so designed opens up a wide range of possibilities of ownership by human individuals, by members of collectives, and by collectives. Pro-poor property rights systems facilitate the ability of people to pool and leverage modest resources and limit liabilities in case of business failure or exit of partners. One of the keys to economic success of small entrepreneurs in the developing world is the limited liability of business owners, thus offering the possibility of controlled failure without disastrous economic consequences for the vulnerable individuals involved. This legal instrument of limited corporate liability has to be extended to the poor micro-entrepreneurs and rural producers. It constitutes one of the main advantages of formality of corporate ownership and can trump unavoidable disadvantages.

5) ***Create Systems for Collateralising Moveable and Intangible Property.*** Although many of the citizens of the developing world lack secure rights to use and transfer real property, most of them own some tangible (moveable) or intangible property.[26] To the extent that this type of property is held securely *and* can be used to access credit and to create and grow businesses, the poor will have increased opportunities. Experience in a variety of developing countries (Georgia, Madagascar, Colombia, Albania, Bosnia among them) suggests that there are important legal reforms that would allow the poor to leverage movable and intangible property.

6) ***Co-management of Natural Resources.*** The majority of the rural poor depend to a large extent on non-arable resources such as forests, pastures, swamplands, and fishing grounds. These resources require careful management to avoid rent-seeking and corrupt practices that result in environmental degradation and economic inefficiencies. The state should enhance the asset base of the poor by enabling community-based ownership and management of private commons, but it will have to play the role of conflict manager among the communities and among individuals. In the case of fossil energy resources requiring capital intensive extraction, treatment and distribution, the state should utilise transparent and fair auction procedures when involving the private sector, linked to

conditionality of local community development. These procedures could be regulated and implemented on the basis of multilateral charters.[27] In the case of state co-ownership of fossil energy reserves, the local populations should be included in the chain of value addition by tradable shares in general public funds. Distributing among the poor shares or other forms of ownership participation in state owned companies that exploit the natural resources will provide them with capital that, *inter alia,* can propel the expansion of small businesses. Another option is distributing titles to special funds created by governments to invest profits yielded by commodities.[28]

7) ***Utilise Modern Technology.*** Manual systems of land registration are highly labour intensive and lead to significant error and duplication. Moreover, the costs of manual land survey and registration processes are often prohibitive. Recent advances in technology, including the widespread availability of satellite imagery and handheld GPS devices, together with institutional arrangements that put local actors in charge of systematic adjudication, can significantly reduce the cost and effort of issuing land registration documents. Moreover, modern technology can help to improve transparency and at the same time make land administration more accessible.[29] There are caveats to this process, identified in the report.

Based on these principles, developing country governments, supported by the international community, must devise a series of innovative, pro-poor land reform policies that are distinctly focused on ensuring that more of the benefits of property systems accrue to those at the very bottom of the economic ladder. A careful stocktaking of such efforts already underway in various parts of the world, including analysis of conditions that gave rise to such efforts, and possibilities for their expansion, will be instructive. We can develop transitional reform mechanisms from experience in the Philippines, for example, where the national government employs intermediate instruments of land tenure, such as land proclamations, to assure the poor that they will not be evicted from land they occupy, and that social services will be improved while plot ownership is formalised.[30] Or we consider how the South African experience with Mzansi accounts, providing low-fee banking for poor people working in the informal sector, could be replicated elsewhere.[31] Modalities exist to empower the poor through property rights, but we must now scale up and catalyse them.

Conclusion

Legal Empowerment of the Poor through property rights requires sustained efforts. Property systems that exclude large segments of the global population from property rights have to be discontinued and we must expand the zone of legitimate land tenure through improved access and security. Developing country governments must enter into a compact with their own citizens and with the international community to support this reform. The aid community understands that property rights must be a central tenet of any efforts to reduce poverty, and allocates funding on this basis. Today, the key challenge is to consolidate thinking and draw good practice from effective interventions to date to improve pro-poor outcomes, develop effective land management institutions, establish clear rules for the management of public land, and strengthen the institutional framework and mechanisms for land transfer and access. Property rights are too central to human dignity and prosperity for current thinking and practice to continue. Only with empowerment through property rights can we truly seek to reduce global poverty and reduce inequality.

I. Introduction

As these lines are being written, close to 30,000 of India's roughly 170 million landless people are marching peacefully to Delhi on the highway. They demand not to be driven off their land just because it was declared state property; they demand property documents or the formal registration of documents in their possession; they demanded that unused state land be allocated to them, and they demand state protection against violent guerrilla movements. The fulfilment of these demands, and the solution to many other property-related problems identified in this report, requires strong, sustained and context-based reform. Such reform has to be founded in political will and the associational power of the poor, exemplified by the marchers in India.

Legal Empowerment of the Poor is a framework of action which takes such demands seriously. It recommends the promotion of domestic legal and administrative frameworks providing the poor opportunities to use their talents and to transform their impressive economic efforts into an increased and secured asset base. The agenda implies a general reform of the law from an instrument of domination into a system of effective protections and opportunities for the poor.[32]

On the input side, the emphasis of legal empowerment is placed on participatory and accountable forms of law-making and public administration, giving voice to the poor and increased ownership of the framing of their legal and social environment. Regarding the means, legal empowerment stresses the critical importance of the following: granting legal identity and access to justice to all human persons, small business corporations, and civil society associations (see Chapter 1 of this report); securing property rights of the poor as asset holders through comprehensive and context-based property rights systems; protecting the poor as workers (see Chapter 3), and creating an enabling business environment for small entrepreneurs and the self-employed (Chapter 4). On the output side, a result-oriented legal empowerment agenda stresses effective protection of livelihoods of the poor and, more originally, measurable creation of new opportunities for diversifying livelihoods, thereby improving lives. Escape from the poverty trap and creating a more decent life are seen as the principal aims.

Property rights stand for the bundle of liberties and claim rights tied to the allocation of a resource to a natural or legal person, corporation, collectivity, association, etc. The concept of property rights as human rights and as part of Legal Empowerment of the Poor implies two agendas: legally enforced protection of the assets of the poor, and general promotion of access to property by the poor.

Through sustainable ownership and/or security of tenure[33] individuals and communities become more autonomous. Even with modest assets, as holders of property rights, individuals and groups become more active as independent members of their communities and nations. Private property rights allow people to pool their assets into transparent structures of co-ownership with fair exit options. This is critical for the poor who have very few assets but who can achieve social and economic leverage by pooling assets into legally recognised common or community property. Reliable and equitable property rights systems help settle competing property claims and facilitate the identification of responsibilities and liabilities. The increased social stability and trust emanating from robust property rights systems create appropriate environments for business and investment. Secure rights to use and trade property provide strong incentives to maintain and conserve re-

sources. Individuals and groups with such rights tend to invest in the resources they hold. In general, property rights give people a horizon to plan the future for themselves and their communities.

Structure and Goal of this Chapter

None of the above-mentioned benefits can be achieved easily with one-size-fits-all models. This chapter elaborates the main features of reform with a special but non-exclusive emphasis on the poor. Section 2 identifies the most vulnerable segments of society and the relation of their poverty and exclusion to the problem of property rights protection. Section 3 briefly assesses the barriers and facilitators of change, drawing attention to social actors as well as structural conditions favouring status quo or change, while Section 4 contains a concise compilation of lessons and experienced consequences of past reform activities, and prepares the ground for the main discussion, in Section 5, on proposals within the four building blocks of the property system. The proposals aim at reforming the property system (viewed as an arrangement of rules defining or enabling bundles and bearers of property rights) in such a manner that it would enable the poor — especially women and indigenous communities — to access and to secure property. The suggestions should also help to reform the property system so it could serve as a form of governance, as a functioning market of assets (including the poor in the chains of value addition), and as a system of social policy with targeted measures of capacity building and access to property and housing.

Parallel reform work, sustained by constant monitoring in all four dimensions, is advocated in order to achieve real progress. Common formal features of policy design and prioritising are dealt with in a special paragraph of Section 5. The establishment of fully functional property systems and positive effects for the poor is first and foremost a national and local reform issue demanding the renegotiation of institutional, legal, and social relations at the national and local level. However, an additional section of this report also points to important subsidiary and stabilising action by donor countries and multilateral arrangements.

This chapter deals with the most general features of pro-poor property reform and is thus not to be read as a national or local implementation report. It builds, however, on lessons and practices that have proven beneficial in many different contexts and that have been highlighted in numerous national and grass roots consultations of the CLEP. Our recommendations, therefore, deserve to be seriously considered and further tailored to local-reality context by property rights reform in the developing world.

Although not repeatedly mentioned throughout this chapter, the members of our working group acknowledge the efforts of numerous governments, international organisations, and NGOs in the field of property rights. And as many members are themselves part of past and ongoing efforts in the field, our chapter was not written with any pretension to invent a 'wheel'. The intent is that it would serve to raise political awareness and communicate a set of selected policy options for decision makers in the hope of improving substantially equitable property rights protection for the poor and societies at large. The general treatment of such a sensitive and context-dependent issue implies an inevitable trade-off between simplicity and comprehensiveness.

It should be noted at the outset that the chair, rapporteur and contributors to this chapter (named at the beginning of this volume) have all

contributed to its substance. But as drafted and synthesised by the rapporteur, the content might not always represent all the viewpoints and priorities. Positions taken should thus not be directly attributed to all contributors — some positions, in fact, remain controversial among them. There are two general points in relation to which the contributors voiced conflicting views to the rapporteur: the first concerns the role of the state; the second, the role of the market. While some see the state as an indispensable part of the solution to the problem of faltering property rights for the poor, others emphasise that it is rather part of the problem or even the root cause. And, while some see the market as an opportunity for the poor to work themselves out of poverty, others stress the fact that market forces marginalize the poor and drive them into misery.

A closer look reveals that these diagnostic view points are often context-dependent. To realise property rights for the poor, both the state as enabler and lender of last resort in regulation and rule implementation, as well as the market as prime producer of resources, need close attention. Both state and market have indeed been neglecting or harming the poor, but in the fight against poverty there is no alternative to the dynamic relation between a reformed and more legitimate state and a functional market that includes the poor in the value chains. This chapter therefore stresses the dynamic interdependence of state and market and the equal importance of their reform in the efforts to empower the poor through property rights. There is consensus among the members of the working group which prepared this chapter that the state as such should not be the default owner of land property and natural resources. The state is, however, indispensable as regulator, enabler, and auctioneer of equitable property relations. Increasing the legitimacy of the state thus belongs at the centre of the national and multilateral agenda of property rights protection.

Realisation of property rights is about creating a positive feedback loop between the functionality of property governance by the state on the one side, and the meaning this systemic functionality has for the people in their everyday life and customs. Importantly, neither of these two elements is to be understood as rigid and unchangeable.[34] Culture and customs are subject to constant change due to urbanisation, population growth, migration, social differentiation, technological development, etc., and so are the state's institutional rules and formal procedures. If property rights are to bring substantial benefits to the global poor, the formalised property systems of poor countries and the social practices have to evolve together and in response to each other.

2. Faltering Property Rights: the Nature and Scale of the Problem

Absence, unjust allocation, or insecurity of property rights harm the poor and hinder sustainable development of a society.[35] Faltering property rights protection is related to the disenfranchisement of billions of poor people. In many cases, the inappropriate property rights system is the immediate cause of continued social, economic, and political disenfranchisement. This section will highlight the most critical areas as well as the most vulnerable groups of people affected by the dire consequences of the absence or dysfunction of property rights protection.

Growing Slums and Legal Voids

At least a third of the world's poor live in irregular settlements without coherent legal protection of their assets. Population and urban settlement growth projections predict an aggravation of the problem. The UN Human Settlements Programme holds that over the next 25 years more than 2 billion urban dwellers could be added to the close to 1 billion now living in slums, with some 2.825 billion requiring housing and urban services by 2030. If no action is taken most of this growth will occur outside the legally protected sector.[37] The consequences of the exclusion of the poor as a result of rapid urbanisation and modernisation are being acutely manifested around the world. In the final analysis, among all the causal factors for displacement, first and foremost is lack of security of tenure for the poor, who have no enforceable property rights or access to justice.

Box 1 The world's poor: a demographic note

Globally 53 percent of the population is defined as poor by the 'living under US$2 a day standard' or 3.4 billion people. The poor live in mainly six regions and particularly three: South Central Asia (which includes populous India), the even more populous China, and Sub-Saharan Africa. They represent the majority in South Central Asia (75 %) and Sub-Saharan Africa (75 %) and just under half of all Chinese (47 %). Together the poor in these three zones comprise 70 percent of the global poor.[36]

Dire Consequences and Missed Development Opportunities

Without enforceable property rights, residents of informal settlements are often subject to forceful eviction. They must fend for themselves or pay bribes to local landlords to defend their right to occupy land, protect it from harmful encroachment, and settle disputes. Lack of protection, of tenure and of legal leverage for economic activity, decreases productivity. It leads to social exclusion, reproduced over generations and visible in the spatial segregation of the poor in the urban housing environment. Environmental and behavioural degradation is closely linked to the vicious circles perpetuated by faltering property rights systems which fail the poor and slow down the development of society at large. Residents in extra-legal settlements have no legitimate way to transfer a home to a family member or heir nor to rent or sell to another. Illegal black land markets emerge and abusive practices become prevalent. Due to a lack of property rights guarantee, many assets in developing nations are not fungible. The poor and their potential business partners have no criteria to establish or realise the potential of their assets. There is no clear reciprocity for holding each other accountable and no sufficient ba-

sis to protect transactions or to pool assets with others. For the national economy, extra-legality sets off a cycle of disinvestment in housing; it represents a lost opportunity to stimulate productive economic activity.

Rural Poverty and Property Rights

Despite continuing urbanisation, two-thirds of the poor live in rural areas. Ninety-five percent live in China, South Central Asia and Sub Saharan Africa. Together these rural poor account for around half the world's total poor.

Rural Land Relations and Extreme Poverty

Insufficient land to live on, and insecure access or rights over land, are well recognised factors in sustaining poverty.[38] Rural landlessness is often the best predictor of extreme poverty and hunger. Inadequate rights regarding land often result in entrenched poverty and are significant impediments to rural development and to alleviation of hunger.[39] Elimination of the causes of tenure insecurity is thus imperative for fighting poverty.

Rural Land Relations and Armed Conflict

Conflict over rural land ownership and access is almost always near the centre of armed civil conflict.[40] With various degrees of prominence, war over land access has been a driver, such as between the land rights of farmers and pastoralists (Burkina Faso), citizens and strangers (Côte d'Ivoire), indigenous and proto-colonial groups (Namibia, Liberia, Mozambique), and ethnic groups (Rwanda, Burundi, Sudan, Uganda). Essentially, it is about conflicts of interest — and *legal* rights — between the rural rich and rural poor. Not surprisingly, attention to the legal rights of the majority of poor is often an early platform of post-conflict reforms, most recently in Sudan and Liberia,[41] quite aside from the need to address conflict-induced land losses and occupations.[42]

Natural Resources

Land is not the only aspect of rural property disorder. The majority of rural poor depend upon forests, pastures and swamplands. Forests alone account for 3.8 billion hectares, of which one billion grow in Asia and Africa, the two poorest regions.[43] Issues of who legally owns these resources, the land on which they grow, and to whom the rental (concession) and product values accrue is an urgent concern of the rural poor.[44] As the tenure and benefit share of foreshore and seedbed resources, fish-rich swamplands and (especially near-surface) minerals all deliver millions of dollars annually to non-customary owners and, notably, to governments, there are ownership issues to be considered.

The importance of water rights and their relation to land rights is likely to increase. Already today, close to one third of the world's population suffer from moderate to high water shortage. The World Commission on Water estimates that the demand for water will increase by around 50 percent in the next 30 years and that around 4 billion people will live in severe conditions of water shortage by 2025.[45] Increased pressure on water resources is a result of population increase as well as economic growth. The value of land and real property often depends directly on the existence of adequate water rights. In this situation property rights defining who has access to water will play a key role. Decisions about water rights will become increasingly important with direct impact on rights and opportunities concerning the use of land.[46]

Women Especially Affected

Women own less than 10 percent of the world's property:[47] They constitute half the world's popu-

Table 2 **The rural poor in the poorest regions of the world (Population figures in millions)**

Poorest Regions of the World**	Total Population 2005	Percent defined as poor*	Number of poor 2005	Percent in rural areas	**Est. number of rural poor**
Sub Saharan Africa	752	75	564	66	**372**
South Central Asia	1615	75	1211	70	**848**
China	1304	47	613	63	**386**
North Africa	194	29	56	53	**30**
Latin America and Caribbean	559	26	145	24	**35**
Eastern Europe	297	14	42	32	**13**
	4,721	56	2,631	64	1,684

* Excludes Europe, Oceania, North America, etc.
** The Population Reference Bureau uses the internationally-recognised criterion of living on less than $2 a day as the measure of poverty.

lation, they produce between 60 and 80 percent of the food in developing countries, and they are responsible for rural households in increasing numbers. Much of the misery in the developing world is due to statutory and customary property systems which disenfranchise women.[48] Where women have property rights, they often come in 'thin bundles' as compared with men.[49] Too frequently women face barriers to owning, using, and transferring or inheriting property. Women face forcible eviction from their homes and their land (over which they had customary or other rights) by family members, traditional authorities and/or neighbours.[50] Property grabbing exacerbates urbanisation trends, sending more women to informal settlements and slums from urban areas. The problem is intertwined with that of inheritance, as many widows are evicted from land and property. Barriers exist *de jure* if statutes or regulations prohibit women from using, owing, or inheriting property. Enacting formal laws that provide a woman with property rights does not necessarily mean that she will be able to exercise her rights. Often, barriers to the exercise of property rights are found to exist *de facto*, in consequence of poor enforcement of formal rights or of social norms.

Creating enforceable property rights is essential to empower women in both rural and urban settings.[51] Women who own property or otherwise control assets directly gain from such benefits as use of the land and higher incomes as well as having a secure place to live.[52] Empowering women with property rights does a great deal to alleviate poverty and malnutrition, as women who earn more spend a higher proportion of their income to keep their children healthy and well-fed.[53] Providing women with the right to use, own, and transfer moveable and immovable property is important to promote entrepreneurial activity and to provide women with a platform for building strong families and strong businesses.

Indigenous Peoples

Definition of Indigenous Peoples Has Yet to Reach Satisfactory Maturation: Indigenous peoples distinguish themselves by being historically, socially, economically, institutionally and politically marginalized. That they are usually[54] a minority

in their countries is added reason to take special steps to ensure that their interests are not ignored. Indigenous peoples are generally described as numbering around 300-370 million people within up to 5,000 distinctive groups. In June 2006, the UN Human Rights Council adopted *The Declaration on the Rights of Indigenous Peoples*, drafting of which had begun in the 1980s. The definition of indigenous peoples has seen repeated amendment[55] and remains contested, particularly on the African continent. This was a factor in the failure of the Declaration to meet UN General Assembly approval in November 2006.

Focus on Indigenous Tenure Systems

Many indigenous lands have been and still are declared public or unoccupied because they are held collectively according to conceptions of ownership and access that do not fit well with imported property systems. This lack of status has consequences for indigenous asset holders and society at large and is a critical issue, globally, for property rights reform. In addressing problems of land issues of indigenous peoples around the world, it is advantageous to focus upon indigenous land tenure systems rather than on the identification of indigenous *people per se*. This sidesteps the troubled definition as to who is and who is not 'indigenous' and has the added advantage of zeroing in on the systemic issues of indigenous or customary tenure regimes.

Where ethnic and indigenous minorities are identified and territorially placed, it may be unnecessary to belabour distinctions between the indigenous and their tenure systems. In such cases, it is advisable to simply promote their territorial autonomy and sovereignty. It should include their stewardship over natural resources, and extend to matters of property — and all with outside intervention kept to a minimum. Focus on indigenous or customary tenure systems is critical in the two regions where the poor are most numerous — Sub-Saharan Africa and Central Asia — and where delimitation and identification of indigenous peoples is difficult and contested.

Important Numbers of Customary Land Holders

Customary land holders comprise roughly two billion people in Africa, South East and South Central Asia and Latin America and the Caribbean. Given that around 80 percent of these rural dwellers are defined as 'poor' — i.e., living on

Table 3 Main Regions Where Customary Land Tenure Operates
(Population figures are in millions)

Regions	Population 2005	percent Rural	Number Rural	percent defined as poor*	Number of poor 2005	**Number of rural poor**
Sub Saharan Africa	752	66	496	75	564	**372**
North Africa	194	53	103	29	56	**30**
South Central Asia	1615	70	1130	75	1211	**848**
South East Asia	557	62	345	56	312	**345**
Latin America and Caribbean	559	24	134	26	145	**35**
	3,677	60	2,208	71	2,288	**1,630**

Source of base figures: Population Census Bureau, 2005.[56]

under US$2 a day standard — then 1.6 billion people may be defined as 'the customary poor'.

Refugees, Internally Displaced Persons

The disorder of property relations created by internal or interstate conflict deserves special attention.[57] Putting property relations back in order or providing adequate compensation to victims is at the heart of sustainable peace building.[58] The situation becomes more dramatic when natural disasters strike. In recent memory, the numbers displaced by the three major disasters since the end of 2004 (the tsunamis of 26 December 2004, Hurricane Katrina of 29 August 2005, and the earthquake of 8 October 2005 in northern Pakistan and adjoining areas in India and Afghanistan), is around 2 million, according to the Representative of the UN Secretary-General on the human rights of internally displaced persons.[59] Given the fact of global warming, and the increasing number of natural disasters, the number of displaced persons falling into uncertain property relations is likely to grow. Also, empowerment of the poor through property rights has to be seen as most urgent for orderly reestablishment of property relations after disasters and for the development of reliable insurance schemes.[60] Hurricane Katrina victims had property rights and insurance schemes that mitigated their losses. The poorest people of the world lack and desperately need such securities.

3. Barriers versus Facilitators of Change

There is evidence of enormous social and economic potential in the establishment of property rights systems for all societies.[61] This insight leads to the question as to what actors and structural barriers prevent societies from adopting generally beneficial property rights systems and what can be done to overcome these barriers.

Resistance of Powerful Social Actors

Private owners of illegally occupied property often resist allocating land to squatters against market value compensation.[62] Some business actors profiting from monopoly-like positions want to avoid competition. They resist legalisation and undermine good governance.[63] Lawyers and notaries profit from the complexity of legal property systems excluding the poor.[64] State officials profit from bureaucratic complexity of the system through gatekeeping and briberies. Entrepreneurs in the informal sector refrain from registering businesses and property to avoid taxes and costly regulations.[65]

Structural Obstacles and Facilitators of Change

Actors tackling the task of reform also have to be aware of structural causes of stagnation or change. The distribution of power plays an important role in determining the likelihood of the emergence of fair property rights systems. Land and income distribution is another factor in this regard. Indeed, it has been shown that the nature of the prevailing political regime and land and income inequality are important determinants of property rights structure.[66] When political power

is concentrated in the hands of the few, and/or land and income distribution is skewed resulting in extreme inequality, political authorities are unlikely to implement and enforce property rights in an equitable manner.[67] This indicates that the evolution of property rights systems is to a large extent determined by historical conditions, such as the distribution of factors of production.[68]

Realising Turnaround

Understanding the likely impact of reforms on non-poor groups with significant influence is critical to assess potential support and opposition for reforms.[69] Besides promoting pro-poor property rights it is therefore important to establish property rights systems that are beneficial for middle classes and groups with significant assets and political influence. The message to all is that in the absence of generalised and equitable property rights systems much of economic activity does not develop its full potential even for powerful actors[70]; there is a high likelihood of social unrest[71]; there may be under-accumulation of human capital resulting in a low quality labour force, and little demand for credit resulting in underdeveloped financial institutions and ultimately hindered growth. There is also less foreign investment or flight of capital when property rights are not guaranteed.

Provided that inequalities are not too extreme, equitable property rights may emerge precisely because of their beneficial consequences for groups with significant assets and political influence. They may also emerge out of the desire of elites to avoid adverse consequences from exceeding numbers of poor people not having access to property rights.[72] Indeed, several recent examples in Asia, where political leaders induced progressive reforms, including equitable property rights, are illustrative of precisely this scenario. The emergence of property rights and the distribution of resources may have mutual causal effect.[73] Examples of countries like China and Singapore teach us that an alternative route of political authorities consenting to reforms is a possibility where inequalities are less extreme. The issue of better understanding how to devise mechanisms for convincing the political authorities or circumventing their influence in order to induce the reform constitutes an important challenge. An important implication of this view is that a drastic one-time reform may have long lasting consequences, setting the process of ever improving distribution along side with more equitable property rights systems.

4. Learning from the Past

Learning from previous reforms in view of improving practices carries considerable burdens of judgment as one tries to measure the possible applicability of particular lessons to future reforms in very different contexts. What is provided in this section is a compressed selection of lessons to give actors on the ground better conditions to reach their own informed judgment.

Problematic Practices and Omissions

Six general lessons from past mistakes are presented as follows:

1) *Disregarding that effective property rights for the poor are the result of power relations and systemic interaction.* Many efforts to give the poor effective and enforceable property rights have focused on necessary technical and legal issues at the expense of paying attention to how power relations influence the property rights system in its impact on the most vulnerable members of society. This has hindered effective realisation of theoretically anticipated reform benefits for the poor. Associational power of the poor, more symmetric information, legal literacy, procedural assistance and institutional capacity building are as important as the formal legal instruments of property rights.[74]

2) *Failing to assess the credit market environment* of the property system and assuming that credit markets will evolve automatically from property rights. In general, rates of mortgaging remain very low in developing countries, partly due to low demand, partly due to availability of less risky alternative sources of loans than possible foreclosure threatens and in the past partly due to low values in a market.[75] Given the reluctance of banks to destroy the entire livelihood of a poor family in the event of foreclosure and the likelihood of local resistance to attempts to take or sell off the collateralised property, there is limited access to mortgages and credit, especially in rural areas.[76] Understanding the role of credit markets in relation to property rights formalisation has led to some important shifts in donor land policies in recent years. It is now accepted that for markets to move land and real property to the poor in a sustainable manner targeted credit must be provided.

3) *Assuming that the state is strong and trustworthy* and that therefore property titles and registries as well as the guarantee of transactions are reliable and corruption proof.[77] In many countries land administration is one of the most corrupt public services. The most egregious examples include irregularities and outright fraud in allocating and managing public lands. Even petty corruption in regular service delivery can involve large sums and have far-reaching economic consequences.[78]

4) *Failure to include moveable property and shareholder schemes of ownership and value addition* in policies promoting property rights. The asset base of the poor can be extended by innovative forms of non-real estate and non-credit based corporate shareholder ownership and by using moveable property as collateral. Unlike land and housing, the reproductive potential of non-tangible forms of property is potentially unlimited.

5) *Repressing Opportunities alongside with Risk.* Even a moderate increase in the liberties and entitlements that come with private property, be it owned by individuals or groups, can often create considerable benefits.[79] Thin bundles of property rights, reducing the fungibility of

property, contribute to the exclusion of the poor from the chain of value addition in case of land development, compensation payments, and general increase of property value. The risks of the land and financial market have invited special policy measures which are supposed to protect the poor from predators and harmful market forces. Such practices mainly include conditionality of forming collectives in order to register property under a single legal entity, restrictions on the right to transfer (moratoria) after land privatisation or titling, quantitative ceilings of ownership, special qualification to profit from land and real estate redistribution. The incentives to form collectives are beneficial where they are related to and protect existing communal structures.[80] They are often dysfunctional in contexts where a majority or a very active minority of people wants to act as individuals or small family groups and where the moratoria are too long and time is not used for capacity building.[81]

6) *Failure to conceive gender equitable property rights systems.* In many countries, formal statutory law operates in conjunction with customary law and cultural norms and practices based on patriarchal attitudes which make it difficult to enforce women's legal rights to land as wives and daughters. Individualistic statutory law favouring the male household head and customary practices and hierarchies combine into a mix that is harmful for women. Where customary law and more gender conscience statutory law conflict, oftentimes the customary law trumps. In some instances statutory law has erased customary practices favouring widows or women in general. Legal reform does not improve the precarious property rights situation of women if there are no enforcement mechanisms, and if legal assistance and support services are not affordable or accessible for women.[82]

Lessons from mistakes related to land and real property:

1) *Failure to address the problem of landlessness* and extremely unequal land distribution. Market based reforms are not the definite solution to this problem, but land purchase and redistribution of underused land by the state, multilateral donors or land-banks by private foundations can avoid the social unrest and withdrawal of private investment usually caused by compulsory acquisition and expropriation.[83]

2) *Retaining that customary tenure and interests in commons does not represent private property rights in and of themselves* and are therefore not eligible for registration without conversion into imported forms.[84] Sustaining versions of collective assets in particular as 'un-owned land' or default state-owned, instead of registering these as the private, group-owned property of communities has deprived millions of poor of a secure asset and income base. Customary tenure systems were thought to provide insufficient tenure security. They were assumed to impede farmers from making necessary investments in land and they were associated with the 'tragedy of the commons.' [85] Research has shown that such systems can be effective. By default and notwithstanding important qualifications, customary tenure systems are to be considered as providing an adequate framework for private group-owned property. They have been flexible and responsive to changing economic circumstances.[86] They limit the property rights bundle to a specific group of people as the bearers of those rights. The household, the village, and the kin group often provide insur-

ance against risks, access to informal credit, and security. Lineage rules of inheritance help enforce intergenerational transfers. The threat of social exclusion is a major instrument of enforcement of the rules. In other words, essential functions of the property rights system are fulfilled by customary systems and ought to be legally reinforced.[87]

3) *Assuming high demand for formal entitlement,* i.e. assuming that rural and remote landholders felt their rights to their house and farm plots are threatened or that they explicitly want to raise loans on the basis of formal titles to these assets.[88] Paying insufficient attention to the time and financial costs of titling, to both government and landholder.[89] In particular assuming that titling always has to be cadastre-based and rest upon expensive survey and mapping.[90]

4) *Assuming that titling is the precondition for property security* when other measures offer more immediate and simpler ways of securing the assets of the poor, especially in remote rural areas. Even in rural African contexts, where individual titling of land may not be desirable or feasible and the use of land as collateral for credit is only a remote possibility, providing poor land owners or users with documented rights can yield significant benefits.[91]

5) *Failing to pay attention to pro-poor land market development* and failing to assess the impact of the land market on the poor.[92]

6) *Failure to Simplify Land Administration for the Least Advantaged Customer.* In many countries, land administration functions are dispersed among many Ministries (justice, environment, agriculture, urban, finance, land reform, forest, mining, etc.). This creates grey zones of overlapping competencies as a breeding ground for non-transparent practices. Even if responsibilities are clearly assigned and overlaps avoided, this creates confusion among users, prevents realisation of economies of scale, and thus increases the cost of providing land administration services to the detriment of the poor.[93]

7) *Failing to Restrict Eminent Domain.* There should be a strict focus on using eminent domain as *ultima ratio* in providing essential public services rather than as a means to improve general public utility. The latter promotes illegitimate alliances of state ownership and powerful particular interest and severely damages the property rights of marginal land users by excluding them from adequate compensation or inclusion in chains of value addition through property development.

8) *Insufficient Revenue Sharing in Gains from Natural Resources.* There has been lack of attention to the possibility of community based natural resource management in the case of forests, fishery, and water. There has been insufficient participation of citizens in the revenues from the extraction, treatment, and distribution of natural resources.

Experienced Consequences

1) *Enduring extra-legality of the majority of asset holders* despite existing property systems and titling programmes is a persisting phenomenon. It is due to imperfect implementation in some cases but in many other settings it is the result of a mismatch of official institutions and local practices.

2) *Disruption of Existing Tenurial Arrangements.* Careless implementation of formal documentation may have the effect of inadvertently disrupting existing tenurial arrangements.

There may be sound policy reasons for seeking to modify or eliminate some existing tenurial practices. It is important, however, that any such reforms are the result of informed and participatory decision-making, and not the inadvertent result of poorly designed or implemented titling processes.

3) *Concentration and Discrimination*. In many countries, including the countries of the former Soviet Union, it has been observed that some people may be less well positioned to participate effectively in the documentation and registration process than others, with the effect that their rights are poorly protected. Individuals who loose in such contexts are usually women, absentee right holders or mortgagees, and in general people with less education and limited access to information becoming victim to manipulation and fraud.

4) *Increase in Disputes.* Registration of land is expected to reduce the incidence of land disputes, by clarifying boundaries, by resolving ambiguities about rights over land and by putting in place a registration system that is transparent, reliable and accessible. In the short term, however, the process of adjudication and formalisation of rights may bring to the surface latent disputes that may have otherwise remained below the surface. Such potential risk needs to be assessed in the planning phase of a reform project.

5) *Capitalisation: Difficult for the Poor in Absence of Adequate Land and Capital Markets.* State of the art analysis reveals only a modest positive effect of land titling on access to mortgage credit, and no impact on access to other forms of credit. It shows no effect on the labour income of the households holding new titles. However, it is shown that moving a poor household from uncertain usufructuary rights to a more complete bundle of property rights substantially increased investment in the family houses. Property registration and guarantee of the homes reduced the size of families and these smaller families invested more in the education of their children. Another study finds that formal property rights lead to more available time for productive activities of property holders who do no longer need to defend their assets.[94]

Property rights bring increased economic benefits when linked to a functional credit system and market, but they do not, by themselves, cause the emergence of a functional and pro-poor credit system.[95] Legal property rights effectively lead to credit and investment where robust financial markets exist and where there are further incentives for investment.[96] Even when in possession of titles and registered property, small-scale farmers and the urban poor most often do not put their land or modest dwellings at risk by using them as collateral for credit.[97] Tenure security and economic benefits other than capitalisation via collateral of land property seem to be primordial for the poor. Although they are efficient producers, small-scale farmers and business people tend to lose out in land and financial markets which are regulated with provisions that privilege consolidation. Market based land reforms therefore now tend to be accompanied with targeted credit for the poor.

6) *Costs and Benefits of Property Rights Protection.* From the perspective of the poor and the state, the costs of formal titles have to be weighed against the costs of insecurity of tenure, or against informal costs (bribes) in obtaining titles which harm the poor and the state.[98] In many unreformed contexts, only few

households can afford the cost of a title.[99] As will be discussed, adapting laws and procedures to the social context can considerably reduce the costs of titling and registration by reducing administrative inefficiencies and by the use of modern technology. Legally enforced property rights systems are not necessarily cost ineffective and expensive.[100]

7) *Fees and Taxes.* The integration of irregular settlements into legal property rights systems increases tax revenues to governments.[101] On the other hand it is obvious that inappropriate fees and taxes can push people back into extra-legality.[102] As far as the poor are concerned, registration fees and taxes have to be set at minimal levels. The key elements that have to be in place for property tax reform: existence of adequate technical expertise; appropriate land records and administration are required as the basis for the property lists; sufficient flexibility to allow the phasing in of major changes is essential to forestall challenges and resistance to changes; political understanding and will are perhaps the most critical preconditions if the substantial challenges of implementing a highly visible, difficult to evade, tax, are to be overcome.[103]

5. Recommendations for Reform and Improved Action

The diversity of contexts and stakeholders affected by problems of faltering property rights, as well as the high complexity of the issue, does not indicate that there will be a one time, one-size-fits-all solution. What is needed is a serious and continuously monitored reform process and parallel interventions inducing far-reaching and sustainable reforms of the four building blocks of the property rights system; that is: (1) reforming the property system as one of rules defining or enabling bundles and bearers of property rights allowing the poor to access and secure property alone, as members of communities, or as communities; (2) reforming it as a system of governance so that targeted actions securing the property rights of the poor can be taken effectively and legitimately; (3) reforming it as a functioning market of assets to include the poor in the chains of value addition enabling them to become capable market participants, and (4) reforming the property system as one of social policy with targeted measures of capacity building, information, and access to property and housing. Parallel reform work sustained by constant monitoring in all four dimensions is advocated to achieve real progress. Common features of policy design and prioritising are also dealt with in this section, and outlines are presented of important subsidiary and stabilising actions that either have or can be taken by donor countries and multilateral organisations.

Reforming Rules Regarding Bearers and Bundles of Property Rights

Property rights stand for the bundle of liberties and claim rights tied to the allocation of a resource to a natural or legal person. The property

system as a system of rules regarding the bundles and bearers of property rights determines who can legally own property, what is recognised as property and what can be done with property. Laws should promote rather than limit or discriminate against bearers of property rights; they should allow freedom to bestow sufficiently thick bundles of property rights on individuals or groups and should not unduly limit the scope of creative activity that can be invested in property.

Individual and common Private Property

Promote Individual and Corporate Legal Identity; Limited Corporate Liability. Property law should offer clear and simple options of legal personality and corporate ownership for small businesses and corporative associations of the poor. Legal personality so designed opens a range of possibilities of ownership by individuals, members of collectives, and by collectives. A legal person can hold property as an individual, but the definition of a legal person can also be extended to a collective or common property of a myriad of members, who in turn may own some property rights individually. Pro-poor property rights systems facilitate the ability of people to pool and leverage modest resources and limit liabilities in case of business failure or exit of partners. One key to economic success for small entrepreneurs in the developing world is the limited liability of business owners, allowing for controlled failure without disastrous consequences for the vulnerable individuals involved. This legal instrument of limited corporate liability has to be extended to the poor micro entrepreneurs and rural producers in the developing world in a simple, straightforward manner. Its main advantage is formality of business ownership that trumps disadvantages of formality such as tariffs and taxes, provided these are affordable.

Promote Associational Property Structures. Housing and land associations prove how individual and common property can be combined to favour people with limited assets without disenfranchising them to a collectivity. The association, as legal person, is owner of the real property and collectively responsible for mortgage loans, giving the association more leverage in negotiating loans and public services. Members, however, get tradable rights to plots, houses or apartments, and contribute to repayment of the overall loan through monthly rent. Apartments or plots are increasingly sold at open market prices, but association members have pre-emption rights to enter into the agreement at an agreed price.[104] The idea is to provide a form of ownership to balance the interests of the individual or family with those of a broader community. With this purpose, Australia introduced *Strata Title* in 1961 to better cope with apartment blocks. Other countries have adopted the Australian system of apartment ownership, including Canada, Singapore, Indonesia, Malaysia, Fiji and the Philippines, and still others have successfully created their own schemes. *Strata* title is not only applicable to vertical living but also to cluster living in slums. In many developing contexts, there has been a tendency for law to prescribe in too much detail the structure of local organisations and the rules by which they can operate. At the same time, injecting greater formality and accountability into local organisations is obviously important.

Simplified Property Rights Certification. Some countries have adopted simple, locally administered processes to confer legal land rights as alternatives to conventional land titling. They are practical, inclusive, benefiting growing populations of the rural poor,[105] and are being increasingly used to enhance urban land tenure security.[106] As many require no prior physical planning,

Box 2 Acquiring property rights for the poor

In **Pakistan**, incremental expansion of urban services allowed conversion of informal settlements *(katchi abadis)* in Hyderabad into legal housing neighbourhoods. In **Trinidad and Tobago** these alternative instruments have the advantage of being part of an incremental process of acquiring secure tenure. There, the State Land (Regularisation of Tenure) Law of 1998 paved the way for progressive issue of Certificates of Comfort, Statutory Leases and Deeds of Lease to informal settlers on state land. A similar model has been under development in **Namibia** since the late 1990s and proposes a continuum comprising Starter, Landhold and Freehold titles. In **Brazil**, the *usucapião* is a form of adverse possession over private land, so there is no need for authorities to issue a title: the judicial sentence declaring that a new real right over the land has been constituted over time is the legal document necessary to promote land registration and ownership transfer. This can be done individually or collectively, and people get freehold rights either individually or in a form of co-ownership. It is a form of prescriptive acquisition, a real right (in the legal sense), and not temporary. It can be sold, inherited, etc., and there is no reason for banks not to accept it (Fernandes 2005). In **India** it is common practice to issue pattas giving rights to the poor over government land. The patta, a document issued by the Land Revenue Department, may be freehold or leasehold (99/30/10/1yr), renewable or not. It specifies conditions for use, transfer and inheritance, and may be used to regularise occupation or assign new plots. The patta is usually given free of cost, or with a small fee, and needs no registration to avail of rights specified. In states like Madhya Pradesh, Andhra Pradesh, Rajasthan and West Bengal, it can be mortgaged against housing loans. If patta land is required for any 'public purpose', the holder has to be allotted alternate land. In Andhra Pradesh alone, more than 10 million pattas have been issued since 1962.

(Banerjee 2006)

infrastructure, or surveying, they offer widespread coverage at low cost, affordable by the poor.

Recognising Customary Tenure and Communities as Bearers of Property Rights to Land and Natural Resources

Individual titling and/or alternative measures for incremental consolidation of property claims are appropriate and beneficial in many urban contexts.[107] In rural contexts, especially in Africa and parts of Asia, they need to be phased in from other forms of tenure security or replaced by new approaches to securing tenure to more fully cover the spectrum of the local economic practices and conditions. The 1990s and early 2000s are replete with examples of legal reforms in the direction of recognising customary land rights (mainly in Africa, and notably in Tanzania, Uganda, Mozambique and some West African countries), and indigenous land rights (Philippines, Cambodia, Australia, and a number of countries in Latin America). These innovations come from different contexts that may limit comparability; nevertheless, one can extract common threads and identify common problems that will require attention in the years ahead.[108] Broadly speaking, these laws share some of the following characteristics or aspirations:

- They recognise that in many contexts the social and economic value of land is best realised by allowing land relations to be governed by rules of the community in which the land is located, rather than by imposed systems of property law.
- They reflect a conviction that community-based tenure regimes are often better at providing security of tenure to individual cultivators. Often, individual cultivators fear dis-

possession by government or outsiders, rather than by others within the community.

- They acknowledge that community-based systems are also often better at reflecting the complex rights that individuals, families and groups have over land, including secondary rights of access and use — rights that might be distorted or lost by titling according to a standardise format that is not adapted to local realities.
- They recognise that a community's relationship with land is more than an aggregate of individually occupied plots: it is a system that includes natural resources used in common.

Communal lands and common natural resources. Including grazing lands, forests, water, fisheries, in many poor countries are a special case of customary tenure and crucial for the improvement of the legal and economic status of the poor. They are vulnerable to degradation and appropriation by powerful chiefs, outsiders, or state bureaucrats unless common property resource management systems are reinforced by legal sanction.

Increasing access to, and the locally beneficial productivity of land and natural resources, can be achieved by:

- Reaffirming and codifying customary rules in participatory ways, reflecting diversity in the ethnic, historical, and social construction of land. Also setting legal boundaries, identifying existing rights that may overlap or be of a seasonal nature (e.g., between herders and sedentary agriculturalists), and registering them as appropriate and orderly tradable.
- Allowing communal land ownership as one legal option and regular management decisions in an accountable body that functions transparently — for example, as an incorporated user group — and having clear rules for conflict resolution that are respected by all involved. Arriving at culturally appropriate legal forms for such bodies is key.
- Ensuring that customary forms of tenure can evolve towards more formal types of tenure through well-defined and transparent processes, if and when, in the judgment of those concerned, the benefits from more individual ownership exceed the cost.[109]

Box 3 Namibian land reform

In **Namibia**, legal reforms in 1996 created a framework for community-based natural resource management (CBNRM). Namibians who form conservancies now have legal rights to manage wildlife and to benefit from tourism. With these secured rights, rural Namibians have reduced levels of poaching, have seen wildlife numbers increase substantially, and are seeing their ecosystems rebounding. A related benefit is that rural Namibians now have opportunities to pursue a new set of entrepreneurial ventures. They are empowered to build businesses based on eco-tourism and related activities. These businesses help to diversify livelihoods and provide valuable benefits for conservancy members. Namibia's experience with CBNRM may provide a strong model for other countries: devolving secure legal rights to local people is promoting positive outcomes, both in terms of conservation and economic development. *Source: Boudreaux 2007*

The status of informal rights has come strongly to the fore. Most derive from, and are sustained by, community-based arrangements — i.e. indigenous or customary regimes. If inroads made thus far evolve and expand, some 400 million Africans could benefit. No fewer than 40 million Indonesians, or 40 million South Americans — and millions of others globally — could also benefit, should comparable tentative shifts mature. The

implications promise socio-economic changes never quite achieved in previous reforms towards redistribution, collectivisation or conversionary titling. Obviously, where states are too weak to control local war and drug lords, devolving land ownership or management to local communities is not an option to empower the poor.

Critical Issues in the Recognition of Customary and Indigenous Tenure Systems

Drafting of laws that recognise customary tenure and that accommodate a number of such tenure systems within a national legal framework is a complex task. It is possible to identify a number of challenges that are likely to require attention from both drafters and implementers:

Identifying Communities and Evolving Practices. State recognition of customary or community-based tenure requires identifying, with some degree of precision, the community whose property rights are being recognised, the area over which it has legitimate claims and the institutions or decision-making processes whose decisions and outcomes are entitled to respect by formal legal institutions. If carelessly done, formal recognition may have the effect of unduly privileging one of several competing local visions of what constitutes a community, and what rules or authorities are legitimate.

Balancing Respect for Local Decision-making with Human Rights and Accountability. In some contexts, custom may run contrary to a vision of human rights enshrined in a national constitution, particularly where it comes to the treatment of women and minorities. A similar dilemma arises when it comes to ensuring minimum levels of accountability and transparency within customary structures. However, customs are not rigid and unchanging. It is thus possible to aim at a process in which customary practices evolve in response to social development and human rights principles.[110]

Protecting Customary or Indigenous Rights while Enhancing the Ability of Communities and Individual Households to Explore New Economic Opportunities. There is no inherent contradiction between giving increased legal recognition to customary or indigenous tenure systems and promoting economic growth — indeed, in some contexts it is argued that the former is a pre-requisite for the latter. But the choice of legal techniques may skew the balance between protection on the one hand and the ability to adapt to new opportunities or challenges on the other. Protecting the integrity of local systems against the incursions of richer and more sophisticated outsiders may, as a starting point, justify short-term restrictions on the alienability of land. The question is whether emphasis on protection reflects the needs and aspirations of local people in rapidly changing economic environments. Some laws provide avenues for communities or individuals to attract outside investment on their land, subject to an internal process of approval. There are in some cases opportunities for individuals or groups to 'opt out' of local tenure systems in favour of acquiring individualised titles under a state-sponsored scheme.

The Challenge of Capacity and Conflict. Devolving greater authority to local institutions — whether traditional bodies or local governments — has its justifications. The question to be asked in each case, however, is whether specific reforms assume the existence of greater capacities at various points in the system than in fact exist, or can be expected to exist in the near future. In many contexts, conflict-ridden areas will not allow for community based land and natural resource management and require tighter central control. The challenge of capacity and conflict extends

Box 4 Focus Africa

Customary rights may now be registered without conversion into introduced forms in Uganda, Tanzania and Mozambique; the same is proposed in Lesotho, Malawi and Madagascar. Customary properties other than common properties may be registered in Namibia and Botswana (since 1968). Although not defined as customary rights, given their abolition in 1975, existing occupancy may also be registered 'as is' in Ethiopia. Customary rights in Mali, Niger, Burkina Faso, Benin, Côte d'Ivoire, Ghana and South Africa may be certificated with substantial effect, but with required or implied conversion into existing statutory forms on final registration. Described incidents of customary rights reflect 'customary freehold' and/or as customarily agreed by the modern community. Most laws allow for customary rights to be held in perpetuity, raising their status above that of leasehold or similar statutory forms common to most of Africa. Freehold is available mainly in Southern Africa. Only Tanzania and Mozambique endow customary interests with unequivocal equivalency with imported tenure forms. Uganda proclaims this but also provides for conversion of customary certificates into freehold tenure. Lesotho and Malawi propose something similar. Mozambique does not practice what it preaches, giving investor interests in customary lands more support than customary interests.

The status of unregistered customary rights — more than 90 percent of all rural landholding — is often ambivalent and remains permissive, pending registration. Customary rights not registered are explicitly protected in Uganda, Tanzania Mozambique and in a different manner, in Ghana. Customary owners in Côte d'Ivoire have a short time limit within which rights must be registered to be sustained. The movement of customarily held land out of government land/public land classes is clearest in Uganda, where public land is abolished, and Tanzania, where it becomes 'village land'. More than individual title is recognised. Family title is widely provided for, especially in Ethiopian law and Malawian policy. Adoption of procedures, limiting transfers of family land without support of spouses, is provided in Uganda and Rwanda and proposed in Malawi and Lesotho. A presumption of spousal co-ownership exists in Tanzania land law. Efforts to secure such a presumption failed in Uganda. Ethiopia and Eritrea recognise male and female property rights distinctly.

Sources: Alden Wily and Mbaya 2001; Alden Wily 2003c

to education and awareness of property rights among the common people, which is discussed in a subsequent section.

Measures to Make Property Systems More Gender Equitable

The UN Research Institute for Social Development notes that there has been 'both considerable progress throughout the 1990s in making formal laws pertaining to land more gender equitable, as well as repeated failures in actually putting statutes to work.'[111] Developing countries have, in many cases, enacted laws and policies to provide women with greater rights to control and manage property. Promising practices combine institutional measures, legal prescriptions and social policy:

Special Units to Monitor Gender Issues. Policymakers should establish special units to constantly monitor gender issues and follow up on enforcement. In some environments, police services and court systems fail to enforce women's property rights. When property rights exist *de jure* but not *de facto*, policymakers face difficult choices: expend resources to better ensure enforcement or work to shift social norms. In countries with limited capacity the former route is difficult. In any country the latter is a major educational challenge. There is need for context-specific investigation of how best to shift social norms in ways that

welcome women holding secure rights to property. This may well be a time-consuming process of norms evolving. It is an area in which much additional research is needed.

Joint Titling Efforts and Common Property. Governments should register household property jointly in the name of both husband and wife. By virtue of marriage or sustained free union (domestic partnership) real and moveable property held or bought by the male partner should automatically be considered the co-property of the woman. Women usually do not have the means to contribute 50 percent to the purchase of property in marriage.

Inheritance. The primary way the poor acquire land is through the family and by inheritance.[112] Many formal or informal legal systems favour men in distributions made by inheritance.[113] In some cases, inheritance and succession laws provide widows with only temporary rights to use spousal property after their husbands die. These rules subject women to the potential of property grabbing. Many countries have amended constitutions or implemented legislation to guarantee the rights of women to inherit property on an equitable basis with men. However, in some countries may override these provisions by custom or family law, while a number still maintain discriminatory provisions in their legal codes.[114] Thus, for women, the existence of inheritance rules that call for male and female heirs to receive equal consideration in testamentary distributions are an important step on the path towards empowerment. There is some evidence that changing formal inheritance laws may have the unintended consequence of prompting men to specifically disinherit female heirs to avoid passing property to them.[115]

Education and Information. Women may be unaware of their legally guaranteed property rights. This on-the-ground reality suggests that there is a continued need to educate women and girls as to their legal rights to own, use and transfer property and to communicate to society broadly the nature of these rights.

Intellectual Property Rights and the Rights of Indigenous Peoples: The Task Ahead

In most cases intellectual property is only indirectly linked to the economic activities of the poor. However, in the case of indigenous people the issue of intellectual property is often related to forms of dispossession and property misuse. Discussions have focused on a wide range of issues, including moves to strengthen protection of traditional cultural expressions (TCEs), traditional knowledge (TK) and genetic resources (GR) against misappropriation and misuse.[116] In analogy to this report's focus on indigenous forms of tenure, rather than indigenous people as such, this section of the report pays attention to these forms of intellectual property rights rather than to the identification of their bearers. The UN Human Rights Council (Declaration on the Rights of Indigenous Peoples), the Convention on Biological Diversity[117], the WTO TRIPS Council, UNCTAD, UNESCO, the FAO and WIPO have paid increased attention to the protection of TCEs, TK, and GR.

Some view intellectual property rights as a useful instrument for the conservation of TK, GR and TCEs and as a tool for implementing a benefit-sharing. Others are more critical and fear a trivialisation of traditional cultures and possible misappropriation. Others still point to a fundamental conflict between the very notion of intellectual property and the cultural values and moral perception of many indigenous populations. While indigenous notions of collective ownership and trans-generational custodianship might be compatible with the overall idea of (intellectual)

property, some indigenous peoples aim to prevent appropriation of natural and cultural resources. In such cases, there is a fundamental conflict between indigenous rights and (intellectual) property. In fundamental opposition to some indigenous cultures, many intellectual property systems recognise rights on inventions pertaining to living matter. In conventional patent systems, matter known to the public belongs to the so-called public domain, thus preventing their protection and allowing their free use by anyone. Worse for some indigenous people, the concept of public domain associated with traditional intellectual property laws has allowed for the appropriation of GR and TK for the development of inventions that are subsequently patented.

Intellectual Property Rights in Context. The rights of indigenous peoples depend on and interact with a wide range of other measures and policies, such as land tenure, environmental laws and protection of endangered species, health, food and agriculture, water quality, cultural heritage protection, access to and exploitation of natural resources, environmental management, and soil conservation. Within this broader horizon, intellectual property rights may play a positive role in encouraging creation or protection of indigenous rights. Such a role includes, for example, the protection and disclosure of new intellectual creations through the laws of patents and industrial designs or avoiding confusion and deception and preventing unfair competition through the protection of trademarks and geographical indications. Equally relevant are the safeguarding of the integrity of, and rights of attribution to, certain works and creations through moral rights' protection in copyright, and the protection of undisclosed information from bad faith use or appropriation. An example of the use of intellectual property rights in the protection of traditional knowledge relates to traditional medicines in the People's Republic of China, in respect of which several thousand patents have been granted in past years.[118]

Way Forward. Notwithstanding useful aspects, many questions remain as well as important concerns:

1. Conventional intellectual property rights might not offer indigenous peoples adequate protection in situations where the resource, knowledge or cultural expression is already publicly known. In this case, the creation of *sui generis* systems of protection is needed.
2. The overall purpose of intellectual property rights for indigenous people in both positive protection and negative protection needs to be further evaluated.
3. Existing and future systems must ensure that they do not contribute to an undue misappropriation of certain intellectual assets of indigenous peoples.

International Dimension. In addition, because GR/TK and TCEs are often exploited in countries different from the countries of origin, there are calls to establish international instruments that take account of the intangible nature and cross-boundary nature of those components of indigenous life and heritage. This will require examination of complex issues, such as the question of ownership/custodianship of rights, form of protection to be granted, ways for ensuring nationals of one country to enjoy rights in foreign countries, question of fair and equitable benefit-sharing in the international context, recognition of personal or moral rights of indigenous people, ensuring that known resources or knowledge already in the public domain cannot be subject to intellectual property rights, and the need for enhanced international cooperation in areas such as mutual information, registration and management of rights, among others.

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional knowledge and folklore (IGC), established by WIPO Member States in 2000 has adopted an inclusive approach. The IGC has been exploring the potential of protecting rights of indigenous peoples through conventional intellectual property rights and through *sui generis* systems[119], working towards an understanding of how best to protect TK and TCEs against misappropriation, clarifying issues such as the positive and negative protection and working on a better understanding of the international dimension of such protection. The IGC process has resulted in draft objectives and principles for the legal protection of TK and TCEs against misappropriation and misuse.[120]

Reforming Property Governance in view of the Least Advantaged Customer

The property system is upheld by a system of governance which includes the institutional order of the state, procedural rules and relationships of interaction between state and stakeholders, ranging from property registration, spatial planning, zoning, taxing and other aspects of property management, and enforcement. Since a property system with general deficits will not produce beneficial results targeted to the poor, this section presents broader reform combined with measures that particularly promote the inclusion of the poor in effective property rights protection.[121]

Changing Legislation

Reforming the property system to produce tangible benefits for the poor might imply the need to change the law or introduce new legislation.[122] Such procedures are time consuming and hard to predict in their final outcome due to political contingencies. It is thus advisable to first design the most urgent policy measures needed to improve the property access and security for the poor, and then to assess if the legal basis for the measures is sufficient. If this is the case, it might be more efficient to seek improvement within a given legal framework. In many cases, however, the implementation of pro-poor property rights, especially for customary owners and women, requires legal (statutory or customary) or even constitutional reform.[123]

A government's large-scale ownership of land, its ability to impose planning restrictions and to expropriate without adequate compensation, contributes to tenure insecurity and often demands legal reform as well. Reform might be undertaken with clear goals of what the new pro-poor property law should look like: allowing private individual or group owned property of land under customary tenure; allowing the franchising of micro-enterprise with limited liability; allowing the use of moveable property as collateral; creating legal figures of associational property which allow the poor to pool and exit property; protecting women's property in and outside the marriage and in inheritance; restricting eminent domain, and introducing protective pro-poor zoning laws, among others. However, the inclusive procedure of making, implementing, and monitoring the consequences of the law by further regulations, as well as securing sustained support for the law from different stakeholders and agents, are as important as the content of the law itself. Political constellations might make sweeping and comprehensive reforms possible and hence advisable in some contexts. If not, it is also possible to approach the reform of property law in a more process-oriented manner. The following guiding principles have been useful in endeavours in different national contexts, where a one-time sweeping reform was politically impossible:

- Where consensus is hard to obtain and/or medium-term effects hard to anticipate, a pragmatic and incremental approach to legal reform is often the best approach.
- Legal and regulatory reforms can be obtained with the support of beneficiaries. But their short-term benefits have to be assessed in light of the provision of public goods and long term effects.[124]
- Legal and regulatory obstacles can be identified with the help of communities.[125]
- Applying a learning-by-doing approach to legal and regulatory change is beneficial for the progress of the reform project.[126]

In efforts to merge legality and legitimacy to solidify effective impact and equity of property law, communication and consensus-building measures have proven to be of vital importance. Given the political sensitivity of property issues, securing and maintaining high-level consensus and commitment to property reform is critical, especially as such support can falter during changes in the political administration, for example. Therefore, a consensus-building and communication strategy must be designed and implemented to sustain broad support.

Reform Priorities in Land and Real Property Administration

A land and real property administration system that is generally dysfunctional will not all of a sudden produce targeted measures that benefit the poor. It is therefore advisable to make the system as a whole more efficient and friendly to the least advantaged customer. The combination of organisational simplicity and accessibility significantly improves the efficiency of registration and administration, thereby increasing tenure security of broad sectors of the population and, as a result, public support. Effectiveness of legal provisions depends on availability of institutions for enforcement. In particular, many of the expected economic benefits (especially exchange and use of land as collateral) from secure land rights will not materialise unless a well-functioning, transparent, and accessible land administration system is in place.[127]

Simplicity. Every political entity should only have one or a strict minimum of well-coordinated property administration agencies. The integration of the cadastre, property, intellectual and commercial registries contributes to improved output legitimacy and investment climate. Experience worldwide shows that delays and tenure insecurity, due to rivalries and conflicting interests, are inevitable when a number of competing agencies are simultaneously responsible for the implementation of property rights.[128]

Accessibility. Local Presence. The locations of the agency should be as decentralised as possible and easily accessible for the poor who are unable to bear the costs of travelling long distances in order to register or transfer property.

Reduced Transaction Costs. Efforts to reduce the number of days it takes to formally register property can have a positive effect in terms of reducing transaction costs. So too can reducing the number of steps buyers and sellers must follow before formal transfers take place. However, in addition to such changes, countries should be encouraged to take additional steps to reduce transactions costs in property markets, mainly in organising public and private legal services in a pro-poor manner.[129] A key reason for land sales to be driven into informality, which can over time threaten the integrity of the registry information, is the desire to avoid high levels of taxation, mainly in the form of stamp duties, or the need to make informal payments. In

addition to setting clear fee structures that are well publicized, reduction of stamp duties, possibly by replacing them with a land tax to be assessed at the local level, would be desirable. Such a tax, complemented by a capital gains tax if necessary, could encourage productive land use and reduce incentives for speculative land accumulation, thus making productivity-enhancing outcomes from land sales markets more likely. Moreover, adjudication and dispute settlement can be embedded in a cost-saving, community-based participatory process. It is cost-effective for the state to invest in the capacity of a pool of potential conciliators at a community or district level of government.[130] For any first-time registration of land rights to have a lasting and pro-poor effect, it needs to be integrated with systems to maintain registry records up to date in a cost-effective way that is in line with what users are able and willing to pay.

Modern GPS and Information Technology. In many contexts of the developing world, the technical costs of titling and land registration have been considerably reduced by computerisation and GPS systems.[131] Modern technology can help to improve transparency and at the same time make administration more accessible.[132] As the purpose of land registries is to give public notice of land ownership and transactions, making registry information available publicly on the Internet and promoting Internet access can reduce transaction cost and by allowing independent cross-checks, greatly increase public confidence in them. The transition to an all-digital, internet-enabled land registration system is not without pitfalls. Corruption can easily increase in the early phase, because the opportunity for altering the records before digitisation is high. The introduction of all-digital and internet-based registry systems has to be carefully prepared and preemptive action to the altering of records taken. Corruption is reduced dramatically once the systems are operational.[133]

Financial Self-sustainability. Land administration institutions will be viable in the long term and independent from political pressure only if they can sustain their recurrent operations financially, without charging more than the poor are able to pay. This in turn is a precondition for all the other benefits from land administration to materialise.

Separation of Powers of Land Registration and Public Land Management. Land administration, i.e. all matters relating to land rights should be independent from the authorities in charge of state land management and use. This reduces the possibility of abusive practices where the state is only the means through which individuals pursue their particular interests and of which the poor are usually the first victims.

Increasing Transparency in Public Land Use and Planning

Governments' large-scale ownership of land, its ability to impose planning restrictions and to expropriate without adequate compensation also contributes to tenure insecurity of the poor who have no government lobby.[134]

Define Government's Land Rights and Duties and Establish an Inventory of Government Land: In virtually all countries, the government nominally owns large amounts of land. However, the extent of such claims and associated rights and obligations are often not well defined. At worst, this encourages sell-offs of public assets to the well-connected leading to a speculative accumulation of large non-productive land holdings or concessions. Keeping public land at the necessary minimum and defining the responsibilities of different levels of government in terms of managing public land would be a first step that should be followed by a inventorying and registering of state land

and the establishment of transparent administrative processes at all levels for granting, selling, and leasing of state lands.

Strictly Circumscribe Conditions for Expropriation of Land: As transferring land from agriculture to non-agricultural or urban uses is a corollary of economic development, an important issue that undermines tenure security in much of the developing world — and which has often caused great hardship to former land owners — is the government's far-reaching ability to expropriate land with real compensation often far below market rates. The threat of expropriation has served to undermine tenure security and investment and has also led to informal sales in anticipation of expropriation that often invited corruption and shady property deals involving state agencies. Productivity was impaired as the state apparatus had often neither the means nor the incentives to invest in or effectively use the land acquired, thereby often leaving the potentially most valuable land undeveloped. One reason for this is that, in many countries, even land for private uses will first have to be acquired by the state, something that can greatly increase the transaction cost faced by private investors. Eliminating such rules, constraining expropriation to cases where a narrowly defined public purpose is at stake, while allowing land owners or users to negotiate directly with interested parties in the remainder of the cases (with the possibility to draw on mediation if needed) can eliminate a key source of uncertainty and corruption.

Zoning and City Planning

Zoning and planning is one of the main causes of exclusion of the poor from legal and formal city and peri-urban development processes. On the other hand, the right use of zoning and spatial planning can become a formidable instrument of legal empowerment.[135] Although this is perhaps most commonly a feature of the rural-urban zone of transition, it is also a feature within urban areas, and within rural areas.[136] Especially changes in use from agriculture to urban residential or commercial purposes usually multiply the value of land significantly, and consequently augment the potential for abuse. Peri-urban areas need to be better planned if they are to be more effective in promoting sustainable pro-poor urban development. The ambit of interventions has to expand beyond slum upgrading and tenure regularisation to defining the urban development framework within which access to land and land development rights for the poor becomes possible.[137] Spatial and urban planning can be a major driving force behind higher living standards and wealth generation.[138] The relevance for urban planning is heightened in the idea that responsibility, incentives and ownership should be aligned to maximise desired ends.[139]

Eliminate Inappropriate Planning Regulations. Overcoming extra-legality in urban areas will be impossible without a careful review of planning regulations - some of which, such as minimum lot sizes, were designed with the explicit purpose of segregating property markets. While regulations may be introduced with more benevolent goals, they may nonetheless affect the poor negatively and, through their impacts on urban forms, be environmentally and socially harmful. While it will be dangerous to generalise, in practice the only reason for the continued existence of harmful regulations is either limited knowledge on alternatives or the fact that they benefit powerful vested interest groups who are generally not the poor.

Establish Transparent and Participatory Land Use Planning: Even if rules are well justified, in many countries, land use planning follows non-transparent and highly centralised processes. This

implies that rules often have little relevance for the reality of the poor. Focusing central efforts on defining clear performance criteria for land use and ways of enforcement while leaving detailed planning to the local level are likely to result in plans that focus on relevant issues, have higher local acceptance, and thus stand a better chance of actually being implemented.

Avoiding Ghetto-formation by Mixed Neighbourhoods. New and 'good old urbanism' defines alternatives for urban growth and communities based on concepts of mixed neighbourhoods, mixed land use, diversity and public identity. These concepts work towards integrating urbanism and environmentalism, and joining rather than segregating the poor and ethnic minorities in diverse communities.[140]

Special Social Interest Zones. Forming mixed neighbourhoods does not substitute for additional zoning and planning measures that can work to improve existing slums. Here, special interest zones can create protective and empowering environments of residence and business activity for the urban and peri-urban poor. In Brazil several planning measures have been taken to provide secure conditions of living and livelihood for the poor. For instance, urban zones which have favelas, corticos (collective housing, popular subdivisions), and other forms of housing and home-based economic activities on vacant lands, can be declared as ZEIS or Special Social Interest Zones under municipal law. Special rules are drafted and simplified procedures adopted for each ZEIS by a local committee for regularisation of land occupation and use of land by the poor. ZEIS have now been adopted relatively successfully by a number of Brazilian cities.[141]

Conditionality for Private Developers. One important provision, for instance of the progressive Urban Development and Housing Act of 1992 of the Philippines[142], is Balanced Housing Development whereby developers of proposed subdivisions are required to develop 20 percent of the land for housing low income communities. A similar provision of the Government of the Indian state of Madhya Pradesh enacted as part of the Colonisers' Act requires 15 percent of the land to be reserved for without shelter households or payment of a sum equivalent to the officially determined price of the land to be reserved. The policy has made land available for housing more than 6,000 poor households in central city locations in the city of Bhopal alone and substantial funds for land procurement and development.[143]

Density Mixed Use Zones legitimise densely built, small plots and home based businesses. The draft Nation Slum Policy of India[144] proposes to integrate informal settlements into city planning by designating them as high-density mixed use zones, to legitimise densely built, small plots and home-based businesses. It also proposes that only slums in environmental risk areas and land use zones for essential services and facilities should be relocated. All others should be regularised and their land use zoning should be changed to high-density mixed-use. The National Housing and Habitat Policy propose that land should be zoned for housing the poor in city master plans.[145]

Reversing the Development Sequence in Slum Upgrading. The strategy of reversing the development sequence by first allotting secured plots with only bare minimum services, with provision for incremental improvement gives the poor sustainable ownership and participation in the value increase of property. Such measures match the affordability of allottees and assure that even the poorest get access to secure land and housing,

which develop into a fully serviced neighbourhood in the longer term.[146]

Supporting Street Entrepreneurs. Many Indian states have adopted the Central Government's National Street Vendors' Policy of 2004, aimed at recognising and planning for the informal but widespread activity of hawking and vending in cities and to provide basic facilities such as space, water and sanitation and access to credit.[147] The policy itself was framed after more than a decade of lobbying by NGOs and street vendors federations. Under the policy local governments of cities such as Bhopal, Hyderabad, Kolkata and Delhi have delineated Hawkers' Zones. Initial indications are that this has ended harassment of the poor and provided them with security to carry out income earning activities.[148]

Involving Stakeholders in Spatial Planning. The strategy of using a survey to make claims and draw attention of the authorities to poor living conditions was first used in Mumbai in 1987 by pavement dwellers supported by *The Society for the Promotion of Area Resource Centres* (SPARC). This was followed by women pavement dwellers identifying potential vacant lands in the city for their relocation, and forcing the city government to act. This strategy paved the way for civic authorities to recognise the role of civil society organisations in developing responsive housing solutions for the poor, and later participating in framing the relocation and rehabilitation policy for the World Bank funded Mumbai Urban Transport Project. Similar initiatives are taking place in Thailand with the support of CODI (Community Organisations Development Institute), which is a government organisation created to facilitate local housing improvement and livelihood initiatives of community groups.[149]

Implementation and Dispute Settlement

Expand Options for Conflict Resolution. Implementation is a decisive element of property rights governance. Where it fails, it can nullify or considerably reduce the effectiveness of all other elements. Developing countries are often at loss of stable and predictable implementation and dispute settlement institutions. Traditional institutions can resolve some forms of localised disputes. But they are not well equipped to address disputes that cut across groups from different communities (e.g. nomads and sedentary agriculturalists), across ethnic boundaries, or that are between individuals and the state. Even so, expanding the range of options to resolve land conflicts systematically and out of court can have large benefits, especially for the poor and for women who otherwise are often unable to enforce their legal rights.[150] In many contexts, *Third Party Arbitration Courts* (TPACs) can be considered an economic and social success. These mechanisms offer effective protection of property rights and/or effective resolutions of disputes over contested property arrangements, especially for disenfranchised women.

Alternative dispute resolution is very promising but has its pitfalls. In general, success of alternative dispute resolution depends on certain standards and practices. An important condition is the right of poor people to appoint judges of their choice for dispute resolution. But it is equally imperative that the alternative dispute resolution mechanism be linked to formal enforcement and not operate totally outside the realm of the legal system. Rules have to be crafted in accordance with the formal legal and informal social context. If supported by aid, financial sustainability should be guaranteed for the time after donor support has stopped.[151]

Include Property Issues in Post-conflict Settle-

ments and Natural Disaster Management. In the many situations where land issues have often been at the root of broader civil strife, failure to devote proper attention to these issues, including ways of managing land access by returnees, can easily undermine their sustainability of such settlements and sow the seeds for violence. Learning from successful examples to address land-related grievances and settle large numbers of people in a rapid and decentralised way together with ways that will prevent limited conflicts from festering and escalating into larger ones can help to avoid much broader clashes, often with very damaging humanitarian and economic consequences.[152]

Reforming the Property System as a Market of Assets for the Poor

A functional property system allows for the transformation of assets into fungible property rights and for the exchange of those rights in open markets. In order to benefit the poor, real property and credit markets need to be developed and they need to be regulated where they systematically work against the poor. In general, reforms should aim at opening the door to the poor to a broadened asset base. Guaranteeing the poor the right to property and to leverage property in the market is a multi-stakeholder task best achieved by close partnerships between the state, the private sector and civil society.

Market Development

A Pro-poor Framework for Land Sale Markets. Historically, most land sales were due to distress that required defaulting landowners to cede control of their land to moneylenders, who amassed huge amounts of lands.[153] However, data on land sales over 20 years in India illustrate the importance of land sales markets and of being in the land markets: First, they transferred land to better cultivators and from land-abundant to land-scarce households, allowing the land-scarce to improve their welfare[154] without making sellers worse off. Sales markets were indeed thinner, more affected by life-cycle events, and less redistributive than those for rentals. Land sales markets helped purchasers, many of whom were formerly landless, to accumulate non-land assets and significantly enhance their welfare.[155] Efforts at redistributive land reform will need to aim at complementing what market forces are achieving. Market development with the poor in mind ought to be pursued by:

- Granting freedom of contract, definition of obligations, remedies for failing to fulfil obligations and for terminating obligations orderly, guidance on how to conclude a contract, definition of forms of contract (oral or written); identification of invalid transactions.
- Making land purchase and sale easier for the poor by minimising conditions such as formal education or experience in agriculture. Provide model sales contracts the poor can rely on.
- Keeping leasing rules simple and clear.
- Reducing transaction costs for the poor by avoiding overly precise mapping, avoiding repetition of platting parcels, not covering initial platting fees for the poor.
- Avoiding notary fees for small transactions; keeping registration fees and transaction taxes very low for small transactions and exempting new and small land owners from registration fees and tax; putting to severe need test and cost-benefit analysis every administrative intervention into land deals and eliminating interventions which do not stand the test.
- Granting preferential rights to buy to co-owners, neighbours, or leaseholders of land.

Ceilings of ownership work in some contexts for some time but have adverse consequences for the poor in the long run.[156] Sales moratoria are considered a successful practice, provided the time is used for public education on land values, financial literacy, and participation in land markets.[157] Where the moratoria extend over a longer amount of time, they install barriers which do not correspond to the needs and capabilities of the poor. Notwithstanding prohibitions, land pawning transactions, direct sales, sales through waiver of rights, sales through pawning, and sales through land conversion arrangements are sometimes widespread. Ultimately, these transfers augment the risk of losing land rights.

Bringing the Poor into the Market: Opportunities and Responsibilities of Medium and Large Companies. Large companies, regardless of their industry, can stimulate local markets and increase the value of the real, moveable, and equity property of the poor by enabling them to become active participants in their chains of value addition. Inclusion of the poor in the value chain creates business opportunities for the next decade. Designing business models to address this challenge opens new opportunities for company growth as well as for broadening the assets base for the poor. Many business leaders now believe that the planet's poor must become part of company growth strategy, and that the presence of their enterprise in a developing nation will be crucial to their long-term success, with the advantage going to early movers. To be successful, however, such projects must be based on the real needs, capabilities, and realities of low-income communities.[158]

The focus on business implies focus on profitability. If the projects realise the goal of profitability, this means that they have no limited, fixed budget. The new business can thus become replicable and lead to a remarkable empowering impact. Providing business solutions for the poor and with the poor can cover a multitude of activities. The guiding principle is that companies should engage the poor in a business relationship that relates directly to their core commercial operations.

The poor may be customers and can profit from more affordable products.[159] The poor may also be business partners, suppliers, and/or distributors. The poor can be considered as partners creating added value at every stage of the delivery of a service/product designed to serve their needs.[160] By bringing small entrepreneurs and local small

Box 5 Sale of land: examples of legal issues

In the collective certificate of land ownership award (CLOA) system of the **Philippines** not even a majority of the collective can decide to sell, mortgage or use the title as collateral to obtain formal credit. Under the Comprehensive Agrarian Reform Program of the same country, there was a prohibition on any form of transfer within 10 years of award. In addition, a five-hectare ceiling on ownership was set and only qualified farmers can buy awarded land. This did not stop but increase transfers and pushed them into extra-legality with adverse consequences for the poor (NCLEP Philippines 2006). In **Armenia**, a three-year moratorium was imposed after land privatisation in 1991. In **Ukraine**, a 6-year sales moratorium will expire in 2005, but many exemptions have circumvented this measure. A **Kyrgyz** moratorium on the sale of agricultural land was put into place when land was privatised and allocated, but it was subsequently lifted in September 2001. The **Moldovan** Land Code contained a 10-year moratorium on sales that was declared unconstitutional and lifted in late 1996. Some countries have attempted to protect new landowners from the danger of mortgage foreclosure by setting moratoria on mortgages; for example, a 1997 **Russian** law prohibited mortgages on agricultural land (Russian Law On Mortgage 1997).

and medium enterprises (SMEs) into their value chains, established international business can empower the poor and accelerate skill transfer.[161]

Companies addressing basic needs, such as utilities and health care providers, can contribute significantly to local development by expanding their services to more low-income communities.[162] Extractive companies often find themselves doing business with low income governments and communities through their drilling and mining contracts, licences, fees and royalties. They thus have a major influence on the paths of development of poor countries.[163]

Moveable and Intangible Property: A Missing Piece of the Development Puzzle

Although many of the citizens of the developing world lack secure rights to use and transfer real property, most of them actually do own some tangible (moveable) or intangible property (business skills and informational schemes).[164] Peasants and urban street entrepreneurs alike use moveable property as means of production. To the extent that this type of property is held securely and can be used to access credit to create and grow businesses, the poor will have increased opportunities.

Collateralising moveable and intangible property can play an important role in a nation's development strategy.[165] In many parts of the developed world, a broad array of personal property, both tangible and intangible, can be used legally as collateral to secure a loan, whereas in many parts of the developing world, only a small fraction of this property can be used as collateral.[166] There is evidence that expanding the number of items that can be used legally as collateral reduces the cost of credit. And because more people can borrow if more types of property can be used as collateral credit markets become more competitive. Lenders pass along their savings to customers, by reducing fees and offering lower interest rates and competitive forces also help to keep the price of credit lower than it otherwise would be.[167]

For small-scale enterprises, such cost savings can have a major positive impact. SME entrepreneurs of developing countries routinely list financing and access to credit as their major obstacle to growth.[168] To the extent that collateral law reform makes borrowing easier and less costly, it could very well serve to promote SME development in many countries.

Creating a public moveable and intangible property registry (or, more simply, a registry listing stolen items), and enacting legal reforms that make it easier to use moveable and intangible property as collateral, will expand access to credit for the poor. Experience in a variety of developing countries (one should include here Georgia, Madagascar, Colombia, Albania, and Bosnia, among others) suggests that there are at least three important legal reforms that would serve to allow the poor to leverage movable and intangible property. These are:

- Allowing for freedom of contract in loan agreements so that borrowers are free to use moveable and intangible property as collateral. Lenders and borrowers should be free to determine, between themselves, which property will be used as collateral for a loan.
- Provide secured creditors with first priority with pledged collateral. Evidence that a creditor is secured may be obtained from a collateral registry.
- Creditors should be empowered to enforce collateral agreements quickly by means of summary proceedings.

If developing nations allowed borrowers greater freedom to use moveable and intangible property

as collateral more of the poor would be able to create credit histories. For borrowers, the greatest risk is losing real property. With moveable property, the loss is proportionate and collateral can be better matched to the size of the loan.[169] The poor may be understandably hesitant to use the title to their home as collateral for a loan, but if they can use a refrigerator as collateral, they may be able to borrow smaller sums that will help them start or build a business or send a child to school.

Creating a moveable and intangible registry is less expensive than the creation of land registries — it may take as little as $500,000 and no more than two years of time to create a self-financing moveable and intangible property registry.[170] For developing countries, amending laws and regulations on collateral, in conjunction with the establishment of registry may be a feasible, cost-effective and pro-poor development strategy.

When conditions of instability and conflict exist, when the rule of law is absent, and when other institutional structures do not appear to be functioning, one should expect that reform aimed at improving the security and usefulness of moveable and intangible property would not, by itself, create economic growth.

Equity Based Asset-Building for the Poor

Creating Property Value for the Poor by Shareholder Systems

Innovative forms of non-real estate can extend the asset base of the poor and non-credit based shareholder ownership, enabled by the fungible nature of property rights. Unlike land and housing, the reproductive potential of non-tangible objects of property is potentially unlimited. While the private sector is at the heart of this enterprise, the state has an important role to play in guaranteeing contracts and transactions and in creating an overarching enabling framework for equity based pro-poor business and banking practices.

Natural Resources Requiring Capital Intensive Extraction, Treatment and Distribution. In the case of state co-ownership of fossil energy reserves, the local populations should be included in the chain of value addition by tradable shares in general public funds. Many of the poor people of the world live in lands rich in natural resources that are controlled through government ownership. Distributing shares to populations or other form of ownership participation in state owned companies exploiting natural resources will provide the poor with capital that can, among other things, propel the expansion of small businesses. An alternative option is distributing titles to special funds created by governments to invest profits yielded by commodities.

Recent experience in Kenya is illustrative of how the poor are willing to convert their rights into capital, given the right framework. The offering of Ken Gen State Owned Corporation intended to raise 8 billion Kenyan Schillings, but instead raised 26 billion Schillings and drew three times the number of anticipated investors, many of who immediately tripled their money. As a result investments in the stock market have grown since 2002 from 50,000 investors to more than 750,000 with much of the growth coming from rural areas. The exchange's total value jumped from 1 billion Schillings to 12 billion Schillings, an amount that is predicted to grow following the biggest initial public offering in Kenyan history of cell phone giant Safaricom. Natural resources rich countries such as Iraq, Venezuela, Chile, Peru, Congo and South Africa could easily empower their poor people by directly transferring property of their oil or minerals.[175]

Box 6 The Grameen Bank

Still the 7.06 million poor borrowers of the bank, of which 97 per cent are women, own the most illustrious example of a broadening of the asset base of the poor by shareholder strategies. Borrowers of Grameen Bank at present own 94 per cent of the total equity of the bank. The government owns the remaining 6 percent. The Grameen Bank is impressive in size and impact. It has 2,399 branches. It works in 76,848 villages. Total staff is 22,169.[171] Loan recovery rate is 98.28 per cent.[172] Grameen Bank finances 100 per cent of its outstanding loan from deposits of which over 60 per cent come from the bank's own borrowers. Many borrowers are moving ahead in businesses faster than others. Grameen Bank provides larger loans, called micro-enterprise loans, for these fast moving members. There is no restriction on the loan size. So far 1,085,959 members took micro-enterprise loans. A total of Tk 23.42 billion (US$364.91 million) has been disbursed under this category of loans. Average loan size is Tk 21,566 (US$313), maximum loan taken so far is Tk 1.2 million (US$19,897).

Scholarships: Scholarships are given to the high performing children of Grameen borrowers, with priority on girl children. Up to March 2007, scholarships amounting to US$550,000 have been awarded to 48,974 children. During 2007, US$775,000 will be awarded to about 30,000 children, at various levels of education. By March 2007, 15,754 students received higher education loans, of them 14,739 at various universities; 176 are studying in medical schools, 335 are studying to become engineers, and 504 are studying in other professional institutions.

Grameen Bank-Created Companies: A number of companies were created by Grameen Bank, as separate legal entities, to spin off some projects within Grameen Bank funded by donors. Donor funds transferred to Grameen Fund were given as a loan from Grameen Bank.[173] Grameen Bank created an internal fund called Social Advancement Fund (SAF) by imputing interest on all the grant money it received from various donors. SAF has been converted into a separate company to carry out its mandate to undertake social advance activities among the Grameen borrowers, such as, education, health, technology, etc.[174]

Banking for the Poor. As often mentioned, the poor still make relatively little use of titles as commercial credit. This is due to the perceived risks involved, as well as the difficulty or impossibility of accessing credit. One effort to begin to address the problem associated with low levels of banking activity among low-income earners are Mzansi accounts, low-fee bank accounts designed for people working in the informal sector. These accounts are offered by a group of South African commercial banks in conjunction with the South African Post Office, and they have been quite successful. They allow people to become 'banked', providing a means to establish a credit history while risking less than the title to real property.

Reforming the Property System as an Instrument of Social Policy

Property reform with the poor in mind can be an efficient instrument of social policy with benefits for society at large. The state can foster the social fabric through property rights, such as in housing and neighbourhood development, low interest loans and the low priced sale of state land tied to conditions of productivity and market based redistribution of private land. Local political authorities can also see the reform path towards more equitable property regimes as an opportunity to install participatory processes and broader social dialogue in order to promote self-responsibility and social cohesion via ownership not only of property but also of the policy processes that establish property rules.

Enhancing Access to Land and Real Property

Landlessness is one of the greatest predictors of poverty. Increasing security of property rights will have limited direct benefits for those who do not have any real assets at all. While land rental markets can, in rural areas, provide an important avenue for greater land access by the poor and landless, they need to be complemented by other measures to increase the asset endowment of the poor in situations where huge inequalities persist.

Create an Enabling Environment for Rental Markets. In most developing countries land and real property rental markets are underdeveloped. But land and real property rentals are increasing. Productivity-enhancing rental transactions will not fully materialise or the poor may be excluded, if leasehold tenure is insecure or restrictions constrain land leasing.[176] Replacing them with policies that facilitate renting will improve access to land by those remaining in the rural sector.[177] More robust and transparent guarantees should strengthen the position of slum dwellers in rental arrangements and protect them from arbitrary eviction.

Legal Recognition of Informal Settlements. Ensure the property rights of urban shanty-dwellers and rural state land squatters by granting them title to their already occupied lands or suitable alternatives (see Section 5 of this Chapter), and introduce anti-eviction rights, limitations of compulsory acquisitions, resettlement policies, adverse possession rights and family/group rights.[178]

Making Land Reform Effective for Increasing Productive Assets by the Poor. Land markets, or formalisation of existing land rights, are not a panacea for addressing structural inequalities which reduce productivity of land use and hold back development.[179] To overcome the legacy of such inequality, ways of redistributing assets such as land reform will be needed. While the post-war experiences of China, Japan, Korea and Taiwan show that land reform can improve equity and economic performance, many other cases where land reform could not be fully implemented or even had negative consequences illustrate the difficulties involved. Where redistributive land reform is found to be more cost-effective in overcoming structural inequalities than alternatives, it needs to be complemented by access to managerial ability, technology, credit, and markets for the new owners to become competitive. A possible alternative, the impact of which needs to be explored more systematically, is the distribution of small house and garden plots to the destitute to increase their food security and social status while at the same time allowing them to climb at least the first rung on the property rights ladder.

Community-Based Land Reform. As an alterna-

Box 7 Mexico: the poor rely on pawnshops instead of banks

Most **Mexican citizens** do not have access to banking and only 13 percent hold mortgage debt. In the absence of financial institutions, the poor and lower middle classes rely on pawn shops. As movable collateral valuation of consumer goods is difficult to establish, the value of the collateral typically shortchanges the consumer. The annualised rate charged by these pawnshops ranges from 48 percent charged by a non-profit pawnshop to 160 percent by a for-profit pawnshop. Some pawnshops will accept houses as collateral (whether the underlying land is legally owned or not) in exchange for three year loans.

(*La Crónica de Hoy,* El top ten de la usura: la casa de empeño Mister Money cobra 159.6 percent de interés anual; Prenda Fácil, 146 percent; Montepío 48 percent. Mexico City, October 9, 2006.)

tive to authoritative reallocation of land, community-based land reform projects provide funds to groups of beneficiaries to purchase land. While being market-based, the idea behind such measures is that land sale markets often do not move land to those who have none or to small efficient producers. The provision of funds is made available under the condition of a productive purpose and when land markets are sufficiently developed. The procedure is legally less complicated and politically less sensitive than in compulsory acquisition programmes. Legal reform might be required in the determination of legal personality of associations or incorporations for the groups eligible for funding, but it is probably best to let beneficiaries experiment with a number of possible associational forms. Legal conditionality regarding the groups of beneficiaries does, however, leave room for the pursuit of other social purposes. In Andhra Pradesh, for instance, purchased land is given in the name of women only.[180]

Limit Administrative Controls on Sales. Often there is little justification for policy measures to restrict land sales which drive land sales underground and undermine access to formal credit. If there is an issue of asymmetries in power, access to insurance, and information leading to undesirable land market outcomes or speculative land accumulation, safety nets and other measures, including ways of redistributing land, will be more appropriate to prevent distress sales. Moreover, land taxes with temporal and user-oriented conditionality can curb speculative demand and encourage better land use, while providing revenue for local governments.[181]

Make benefits from past land reform permanent: There are also many situations where those who have received land rights in the past are unable to enjoy the full benefits because they have not received full ownership rights or because transferability of their rights was restricted. As second generation problems can threaten to undermine earlier successes, it will be important to provide full ownership rights to those affected, if need be by identifying innovative approaches — e.g., a credit-financed purchase of residual ownership rights by one of the parties involved.

The Beneficial Effects of Property Related Education and Relevant Information.

Households' awareness and information of rights has a significant and large impact on the positive outcomes of property regimes.[182] There is evidence of a strong and positive relationship between households' objective knowledge of the law and land-related investments and, through such investments, on productivity and land values. The fact that often only a minority of land users is aware of relevant legal provisions implies that the lion's share of the associated productivity gains remains to be realised. Given their low cost, especially if compared to efforts to demarcate lands, programmes to disseminate the law and make households aware of their rights could thus have very high returns and should accompany any property rights reform policy. Scientific evidence as well as grass-roots consultations by the Commission on Legal Empowerment of the Poor demonstrates that social policy should promote legal literacy and procedural assistance to close the discrepancy between legal provisions and ground realities, and to help those who are given rights through the law to exercise them.[183]

Promoting Access to Housing

Urban Infrastructure projects, housing and property rights creation can be pursued together and are mutually reinforcing.[184] As a sector, housing is a local economic activity, generating income,

employing local labour, and re-circulating income into the local economy. Housing production produces spill over effects such as the development of skilled labour, and production of household goods.[185] Further, from a macroeconomic perspective, the housing sector has a broad impact on economic performance affecting prices, investment and employment, strengthening the financial sector and fiscal budget, and having a pervasive impact on the economy.[186]

Access to Housing as a Poverty Alleviation Strategy.[187] Decent and safe housing provides a stable place for family activities; it enables the storage, preservation, and preparation of food; it is a fixed location for delivery of services such as water and collection of household refuse for orderly disposal; and, it serves as a protected place to guard possessions from environmental damage or theft.[188] Loss of housing, tragic anywhere, can be catastrophic in the developing world.[189] Housing stability is a particularly important poverty alleviation strategy for women. In developing economies the home not only serves as shelter but also is frequently a place for business.

Housing Finance. Analysis by UN-Habitat reveals that the global housing needs cannot be met by aid or state subsidies alone. Meeting the housing needs of the world's poor will require economic growth (job and income generation) and housing finance. However, stimulating housing production and catalysing financial markets have other positive effects, that go beyond the development of the housing itself. In markets where financial institutions are not active because a market is untested, governments can leverage private sector financing by providing credit enhancement to support borrowers, developers or lenders; using subsidies judiciously to leverage financing, assuring transparency; and facilitating information. There are many models of specialized programs that provide incentives to financial institutions to lend to the poor as well as to those who serve them. The government can play a catalytic role in bringing together the private sector and other institutions.[190]

Despite the obvious importance of housing production and its reliance on finance, the existing financing instruments to address the shelter needs of the poor are at a nascent stage. Existing instruments do not fully respond to the reality of poverty or the need.[191] To meet the need, many countries adopt housing policies, known as 'filtering' strate-

Box 8 Example of Singapore: public housing as economic stimulant

Singapore's experience has shown that public housing construction expenditure can have a multiplier effect that stimulates the economy and contributes employment growth in the building and construction industry. The ratio of construction to the country's GDP has increased both absolutely and relatively over the past three decades, about 40 percent of GDP. The construction industry has a labour absorption capacity for skilled and unskilled workers. Estimates indicate that the construction of one unit of public housing at the time of the Housing and Development Board's (HDB) first building programme (1960-65) would generate employment for a person for nine months directly at the construction site, while a HDB building programme of 10,000 units per year would create 15,000 jobs. In addition with the policy of reserving about 10 percent of new town land for industrial development public housing investment has generated a significant number of new jobs near the homes of new town residents, especially for women who otherwise might not have entered the labour force. Over the 10-year period 1970-80 female participation rates increased from 29.5 percent to 44.3 percent. Thus, housing should not be viewed simply as a means of resolving shelter problems but also as a potentially leading sector of growth in national economy. *Source: Yuen 2002.*

Box 9 Singapore: importance of workers' Central Provident Fund

Under the scheme first instituted in 1955, employees in Singapore are required by law to save a proportion of their monthly income in a central provident fund (CPF) account. Employers also make monthly contributions to their employees' CPF account. Much of these savings are invested in government securities, providing a cheap and ready source of finance to the government for public housing construction and national capital formation. They also provide a source of mortgage financing at the individual level to help home buyers meet their mortgage payments without the need to dip into their cash reserves. For the average worker the monthly repayment for the flat is less than half of the CPF savings deposit.

Sources: Yuen 2002, 2005.

gies.[192] However, a key limitation of a mortgage-based filtering strategy is that it has a long time horizon at best; and, a market-based filtering strategy that is not matched with housing policies targeted to the poor, will result in inequalities and leave the poor behind.

Some countries have been extensively involved in setting housing goals and directly financing housing. Singapore, once characterised by vast squatter settlements, established a Housing and Development Board (HDB) to finance and subsidise housing developed by the state but constructed by the private sector and then sold to homebuyers. Over 85 percent of Singaporeans live in government-built housing. Singapore has emphasised a homeownership strategy that has played a key part in raising residents' sense of belonging to the new living environment.

There are also many examples of developing nations committed to meet their housing challenges and testing and developing a broad variety of housing policies. South Africa quickly started off with an impressive array of housing policy responses, such as housing plans, fixed interest loan products, micro-loan financing, a securitisation conduit, and partnerships with financial institutions. The country is still in the process of experimentation and evaluation, but the commitment to its housing sector is clear.[193]

Public Private Partnerships

Several forms of public private partnerships (PPPs) were developed in the last two decades with built-in provisions of housing for the poor. This period saw the economies of several developing countries booming and globalising, with a direct impact on cities like Sao Paolo, Mumbai, Delhi, Seoul, Kuala Lumpur, Manila and Jakarta. Economic opportunities created a huge demand for space for businesses and housing, in turn creating business opportunities for the real estate sector, for which it needed land in prime locations and land with trunk services in peripheral areas, both of which were scarce. The same economic opportunities meant a growing population of the poor who could afford only informal access to space in the city, with all its legal and environmental insecurities. Pressures placed upon city development institutions, therefore, gave birth to public-private partnerships as one approach to solving problems affecting both the real estate sector and the poor.

Successful PPPs from which the poor have benefited have tended to rely on instruments of the state for trunk infrastructure that would ensure adequate timing of project development, and for enforcement of new regulations and laws. There are several examples where a combination of these instruments has been used to ensure legal/formal access to land and housing for the poor. Guided Land Development has been implemented in the

Box 10 Slum upgrading initiative in Dalifort, Senegal

Upgrading of slums in Dalifort has provided dwellers there with new opportunities and better living environment. A formal land title has been granted to more than 500 head of households including women and their houses have been connected to the basic services. Because of its proximity to the city centre, rent and land price have steadily risen, and the settlement has seen rapid development of high-rise housing of good quality. Noticeable growth of new economic activities favoured by land security and microcredit facilities that have helped slum dwellers access start-up funding to initiate income generating activities that contributed to their economic empowerment. *Source: Diop 2007.*

periphery of cities like Seoul, Jakarta, Chennai, and Delhi, under conditions obliging private landowners to provide a certain percentage of small plots which poor families can afford.[194]

Transfer of Development Rights (TDR) is an effective instrument applied in such projects to generate low income housing on high value city land through the participation of private landowners and developers. Private landowners, or developers willing to build houses for existing informal dwellers, are given the right to build more than the permissible floor space index or floor area ratio specified in zoning regulations for the plot. If possible, they can build additional space on the same plot or be allowed to transfer the development right to other plots in specified zones.[195] TDR works where there is a high premium on land and where the permissible density is high enough to leave surplus land after building low-income housing.

Government as intermediary and facilitator between owners and low-income occupiers. In the case of Land Sharing as used extensively in the Indian city of Hyderabad and to some extent in Bangkok, Thailand, the Municipal Corporation of Hyderabad and the national Housing Authority of Thailand largely play the role of intermediaries. Government authorities in those places help to negotiate deals between owners of the land and its low-income occupiers. Once agreement is reached to share the land, the governments then help the occupants to gain access to finance for rebuilding housing in the portion of land they are to occupy under the shared arrangement. The fee for registering the new ownership and transfer of property is exempted by the government.[196] The arrangement works in situations where the original landowners have little hope of recovering their occupied property without prolonged litigation, and where getting even a part of the land back has major advantages.

Fostering Citizenship and Legal Empowerment through Consultation, Information and Participatory Property Reform

Offering public education and legal aid regarding market structures to the poor is of critical importance, otherwise the effectiveness for the poor of the above mentioned measures of legal reform, governance reform and market development can be nullified. Multiple consultations, involvement of social organisations in the contacting of property holders, well-publicised displays and provision of materials to communities all contribute to satisfaction and improved efficiency of property reform. In particular, active communication toward and participation by civil society are important to ensure the quality of systemic change in the property rights regime.

These mechanisms allow beneficiaries to have information about the reform's framework, strategies, implementation and targets as well as to

Box 11 Peru regularises the process of titling property within settlements

To initiate the regularisation process of property in each settlement, an informational assembly was held to explain details of the procedure, obtain approval of the assembly. Each assembly was required to designate its own representatives. At this stage, problems such as multiple or questionable leadership groups were resolved. These problems generally arose when there was evidence of lack of representation or when those having developed clientelistic links with municipal authorities assumed questionable leadership. The strategy employed by Peru's Commission for the Formalisation of Informal Property (COFOPRI) in breaking this pattern was to establish a direct link with the settler assemblies themselves. The assembly made it possible for the majority of the settlers to link directly with COFOPRI and to decide the best way to initiate the titling process and exercise their representation. To this end, 3,500 informative assemblies were held in 3,500 settlements between 1996 and 2000.

Between 1996 and 2001, some 2,274 settlements were regularised in all of Peru, which represented one million titled families. The 6,000 informative and preparatory assemblies held in this period are the clearest proof of the high level of citizen participation in the process. The meetings informed settlers of the kind of documentation needed by officials charged with creating the list of legal occupants. The officials would visit the homes of settlers to explain how conflicts and the lack of evidentiary documents might be resolved.

To promote responsibility among officials in charge of titling services, the parties responsible for delivering services to each settlement were clearly identified, so residents knew which officials were in charge. Unlike the previous titling process, when only certain directors had access to information such as changes in titling procedures and the identity of the officials responsible, COFOPRI guaranteed the right of any person to receive information about the titling process and to know the officials in charge. Studies developed in 2000 to evaluate the performance of the Peruvian project confirmed that these participatory mechanisms raised the community support and satisfaction with the project.

Source: Mosquiera, 2007.

participate in specific stages of the planning and implementation of reform. They expand the beneficiaries' capacity to participate, negotiate, influence, control and hold accountable the public institutions in charge of property rights reform and administration. On a broader scale, such measures integrate the positive elements of property rules, such as allocation of responsibility and liability with the fostering of citizenship and social cohesion.[197]

Recommendations for Policy Design and Sequencing

It is advisable to integrate action projects regarding the four building blocks of the property system into a design that pays attention to additional elements:

1. *Build-in Research and Policy Analysis as well as Piloting and Evaluation Schemes ahead of Full-scale Implementation.* A policy project with little policy analysis and research to compare methodologies, prioritise areas and special measures, pilot innovations or evaluate itself will suffer from a slow institutional learning process and will risk to detect dysfunctions late. The long-term sustainability of property reforms must be addressed early, alongside with potential for conflicts caused by reform processes.

2. *Pay Attention to Sequencing.* The content and sequence of a set of reform actions and the setting of priorities will have to be left to context-based analysis in national and local settings. Formally however, it is important to point to the fact that success of the reforms in each of the four building blocks of the property system will depend not only on the quality of the individual measures taken but on the sequence in which they are taken. Getting the phasing right is as important as the content of the individual measures.[198]

3. *Issues of Sovereignty and Territorial Autonomy*, e.g. regarding indigenous people, must be assessed and tackled prior to reform of property rights regimes, or restitution or privatisation in sensitive areas. Otherwise the envisioned process will be affected negatively, delayed or even nullified.[199]

4. *On-the-Ground Assessments.* Even if reform measures are carried out diligently they may be perceived as interventionist and top-down oriented by the poor. Property rights reform programmes have often been successful where also based on the ground assessment of ownership and family relations. Differences in family and community structures and spatial organisation have to be identified at the field level (informal marriages, de-facto headships, spontaneous organisation of public spaces, etc). In most contexts this planning measure facilitates the collection of reliable data about possessions and functioning customs, it gives the poor a sense of being taken seriously during the reform process, produces transparency in the property rights' definition processes, makes officials more accountable to the process, contributes to the reduction of conflicts among beneficiaries, and might even create bottom-up pressure for more legal and regulatory reforms.

5. *The Art of the Long Breath.* A full scale reform, including legal reform and parallel interventions in all four building blocks of the property rights system, cannot be carried out within the normal cycle of democratic elections and has to be sustained over several legislatures. Some individual reform benefits might be visible rapidly, but sustained beneficial effects only take hold if property rights reform is sustained and carried out over a long period of time. On the macro level, beneficial effects of property rights reform will take hold over 10-15 years. Given this need for long breath, enlightened authoritarian regimes seem to have an easier task in property reform than emerging or deficient democracies. However, there are several ways in which property rights reform can be sustained over the normal life cycle of a democratic government. One possibility is to promote reforms with broad support from several parties and to make property reform a general interest grounded in the constitution. In order to overcome formidable opposition from powerful social actors against property reform, broad popular demand for reform from civil society and the private sector and strong coalitions of change are needed. Need assessment, awareness and information campaigns among civil society and grass-roots movements need to be fostered to marginalize the powerful gatekeepers of the status quo of vast extra-legality. This ought to be conceived as a multi-stakeholder effort including media, business groups and associations of the poor, academia, and government agencies favourable to change.

What can Donor Countries and Multilateralism do for the Promotion of Property Rights of the Global Poor?

The establishment of fully functional property systems and pro-poor reform is first and foremost a national and local issue. It demands the renegotiation of institutional, legal and social relations at national and local levels. Assisting countries and multilateral organisations are obligated not to disrupt ongoing processes of renegotiation. Further efforts of donor countries are required to design their own laws so that they do not aggravate the problems of the world's poorest. Donor countries, for example, need to deny giving safe haven to bank deposits by elites having looted resources from the world's poorest societies, and they should actively work to prevent payment of domestic company bribes to public officials of developing countries.[200] Some advocate for an active role of international organisations in domestic governance, circumventing domestic elites and institutionalising the necessary governance reforms.[201] To date, there is little evidence to suggest that it can make a noticeable difference. A better option is to make reforms more sustainable by coordinating and supporting broad reform measures multilaterally. Concern for longer-term endurance of reforms is an important consideration, given that the concerns of individual governments may be short-lived due to the fact that they are limited to short cycles of legislation. This should help to ensure that the reforms will endure over the long term, something that individual governments, limited to short cycles of legislation, may not normally be able to accomplish.

A System of Multilateral Charters. One of the most important development economists has proposed a system of charters to legally empower the world's poor. The charters would set minimum standards for natural resource revenues to states, for checks and balances in governance, budget transparency, post conflict management, and for investment.[202] Property rights are present and deserve central attention in all these charters, since they could be decisive in making systemic property reform sustainable.

The charter for natural resource revenue, for example, would set minimum standards of transparency and fair competition for the auctioning of extraction rights, diminish the price risk for government of poor countries, honestly broker information about money flows to government by extraction companies, and set standards for public expenditure of natural resource revenue — channelling it to domestic market development and citizen-owned equity funds. The charter for checks and balances would set limits to government and/or private monopolies in the ownership and control of media companies and regulate financing and spending in election campaigns. The charter for budget transparency would commit governments to the monthly publication of allocation of assets to government institutions in order to allow scrutiny from below and install intergovernmental peer review mechanisms. The charter for post-conflict situations would commit external security and legal enforcement forces for the long haul, set up transparent budgetary processes and participatory government, regulate property restitution and the work reconciliation commissions. The investment charter would establish credibility by precluding governments from strategies of confiscation and limit extreme manipulation of exchange rates, prices, and public utility charges. Instead of pushing reform processes individually, like minded countries might also agree on some essential points of a property systems reform listed in this report and commit to such reform in a charter, complementing the other charters needed to link the world's most poor to the chains of value addition.

Foster Coalitions of Change in Favour of Equitable Property Systems. Donors and international organisations can engage with domestic groups — such as businesses, NGOs and grassroots movements of peasants and small-business owners — and enlist their support for property rights reforms in contact with governments. Depending on the circumstances, fostering coalitions of change by such practices may potentially bear fruit. Success requires long-term commitment by the parties, a strong local ownership, wide stakeholder participation and good local management capacity. Donor countries and multilateral institutions have an important subsidiary role to play in areas of transnational information gathering and distribution, education, and technical assistance. Multilateral organisations have an important role to play in making the engagements of donor countries more coherent and coordinated and in providing standards for intergovernmental peer review. Although there is now considerable awareness of the importance of property rights for the poor, failure to appreciate the historical roots, complexity, and political nature of the underlying issues can give rise to recommendations that may not only fail to do justice to the topic but could also prove to be unsustainable.

Capacity Building and Technical Assistance. Given the context-specificity and politically sensitive nature of property issues and to make services in this area accessible to a majority of the population, there is a significant need for building capacity on both the technical and analytical levels within the public sector as well as among other agents who can be mobilised. In this domain, the international community and donor countries can provide trans-governmental or multilaterally coordinated assistance in capacity building leading to greater sustainability of reform programmes.

Seed-financing of Property Reform. Functional property systems are self-sustainable. Long standing injection of aid from abroad would be seen as harmful to this goal or a symptom of systemic inadequacy. However, in the early stages, and depending on the context, many of the above mentioned reforms might be triggered by a combination of technical assistance and seed-financing from abroad. Such projects should be accompanied by clear terms of reference as to the timetable and phases on the path to self-sustainability.

Cross-country Land Policy Indicators. Although the importance is widely recognised, it is often difficult to integrate land rights into policy dialogue or to demonstrate the seriousness of an issue due to the lack of comparable indicators. Experience in other sectors has shown that defining a simple set of indicators, some of which could be generated by the land administration system on a routine basis, could make it much easier to steer the policy dialogue towards critical issues and at the same time to measure progress over time. Such indicators should include: (1) coverage and accessibility of the system, potential and actual; (2) cost-effectiveness of service provision; (3) extent to which government holds or acquires land rights and the way in which they are exercised, and (4) ways to access property through market and non-market channels.

Ranking Systems of Property Rights Afforded to Women. In the multilateral sphere, one possible approach to addressing the problem of discrimination of women in property matters would be to formulate a rigorous ranking system of property rights protection afforded to women. Such an index/ranking may focus attention on how different countries score in terms of enforcement, protection, scope and depth of rights. Ranking

efforts have proved useful in the 'doing business' environment. Property rights are a component of World Bank rankings, but the property rights' components are not gender-specific. A separate ranking may draw more attention to the issue and prompt improvement in the property-rights environment for women.

6. Concluding Message

The relevance of fair access to property rights goes way beyond their role as economic assets. Secure and accessible property rights provide a sense of identity, dignity, and belonging to people of very different economic means. They create reliable ties of rights and obligations among community members as well as a system of mutual recognition of rights and responsibilities beyond the local community. For many poor individuals and the communities in which they live, the relationship with property is more than just an aggregate of occupied and used plots. It is the very expression of a way of life, and one that they should have the opportunity to improve by virtue of their own efforts.

Chapter 2 Endnotes

Universal Declaration of Human Rights, Article 17, Provisions (1) and (2). Securing agreement on this formulation required omitting the word private before property. See Glendon 2001: 182-3.

2 See Cheneval 2006.

3 See Locke 1988; Wheeler 1980.

4 See Cavallar 2002. This report understands private property rights as a spectrum of ownership and usufruct rights that are not held by the state and allocated to a an individual bearer or a corporate group of bearers. In customary as well as advanced capitalist systems, private property rights can be owned individually and in common by individual and corporative legal persons. The working group for this Chapter is aware that this understanding runs contrary to a notion restricting the use of the term 'private property' to individual freehold.

5 Sachs (2006: 18) estimates that 2.5 billion people currently live in poverty in developing countries.

6 These countries were Dominica, Grenada, Samoa, St. Lucia and St. Vincent and the Grenadines, all tiny island states in which issues of property rights are significantly smaller in scale than those in much larger countries. Of the 76 countries measured within the CPIA, only Samoa scored an aggregate 4 out of 6 over the total 16 governance indicators. *2005 IDA Resource Allocation Index*, Available at www.worldbank.org.

7 World Bank, CPIA 2005 Assessment Questionnaire: 33, available at www.worldbank.org.

8 United Nations 1980.

9 Woolf 1938.

10 IFAD 2001: 86.

11 Nielsen 2006: 204-219.

12 Ravna 2006: 77.

13 Estimates by the UN Human Settlements Program indicate that over the next 25 years this figure will increase by more than 2 billion people.

14 Sachs 2006: 27.

15 Building on a body of recent literature, the 2005 IFAD report on rural development defines an asset (also called 'capital', 'stock', or 'endowment') as 'anything that can be used, without being used up, to increase regular returns above receipts from labour, whether hired or self-employed, and thus enhance producers' income of consumers' welfare. Typical assets are land, wells, cattle, tools, houses, shares, skills, health and roads.'

16 de Soto 2000.

17 Detailed in Alden Wily and Mbaya 2001.

18 Alden Wily and Mbaya 2001.

19 Even in countries where government may be relied upon to stay within the boundaries of the law, overly flexible terminology leads to opportunity for public purpose to turn into private purpose as recent cases in the US Supreme Court illustrate. This is even more important for the global poor who often live where there is limited residual faith in governments keeping to the spirit of the law.

20 Hart 1961.

21 European Commission 2007: 4.

22 Mosqueira 2007: 7.

23 IFAD 2001: 88.

24 IFAD 2001: 88.

25 UN-HABITAT 2005a: 107.

26 CLEP Informal Businesses India: 10.

27 See Collier 2007: 140-146.

28 See Garcia-Bolivar 2007.

29 See Prahalda 2005: 87-88.

30 See Mendoza 2006: 17.

31 South African Institute of International Affairs 2005.

32 USAID 2007 terms it the 'substantive dimensions of legal empowerment'.

33 Terminology is never unified. Definitional guidance, also beyond Africa, is given in: Land Tenure Lexicon 2000.

34 See Cotula 2007.

35 See World Development Report 2002: 9.

36 Population Reference Bureau 2005.

37 UN-HABITAT 2005b: Chapter 1.

38 Alden Wily 2006c: 17

39 FAO 2007.

40 This has been largely the case for the thirty or so wars of the last several decades from Cambodia to Chile, Bosnia to Zimbabwe, Afghanistan to Peru. It has been uniformly the case in the region where civil wars have been most numerous over the last two decades, Sub-Saharan Africa. (Richards 2005; Currey 2004)

41 Sudan Comprehensive Peace Agreement, January 2005 and Interim National Constitution, Sudan, 2005. Alden Wily 2007.

42 Hurwitz et al. 2005

43 The land and product values of forest resources is immense, mildly indicative in only the recorded global timber trading values of US$354 billion in 2000, the US$5.56 trillion import value of non-timber forest products in 2002 (from brazil nuts to gum arabica) and the already millions of dollars being expended that year in trading carbon credits from forest stocks. FAO 2005.

44 Their share of income capture from commercial logging and paper production for example has been minimal to non-existent to date (e.g. Liberia, Papua New Guinea, Nepal, Brazil). FAO 2005; Colchester et al. 2001.

45 Conditions are particularly severe in Africa, the Middle East and South Asia. See World Bank 2004a: 1.

46 See Hodgson 2004.

47 United Nations 1980: 8. This old figure is not based on rigorous measurement. In some more recent studies even lower percentages are indicated. See FAO 1999. *Women's right to land and natural resources: some implications for a human-rights based approach*. SD Dimensions

(on file at FAO: http://www.fao.org/sd/LTdirect/LTan0025.htm).

48 Nielsen 2006: 206; CLEP Uganda: 21, CLEP Indonesia, CLEP Philippines, CLEP Sri Lanka: 13.

49 Ann Whitehead and Dzodzi Tsikata 2003: 77.

50 Izumi 2007.

51 Agarwal 1994.

52 ICRW 2005: 3.

53 Quisumbing and Maluccio 2000.

54 Not always, for example, Inuit are 85 percent of the semi-autonomous Greenland region of Denmark. Indigenous people represent half or more citizens of Guatemala, Peru and especially Bolivia.

55 In 1972 the UN Working Group on Indigenous Populations accepted a definition, amended in 1983 and 1986. The ILO Convention No. 169 in 1989 accepted a broader definition, embodied in the UN Declaration on the Rights of Indigenous Peoples.

56 There are people in other regions regulating their land relations through indigenous norms. They are mainly members of indigenous minorities, such as Native Americans in North America, Sami in the northern polar areas of Europe and Russia and native peoples of Australia and New Zealand. They are excluded here mainly because comparatively extremely few of their number are definitively 'poor'.

57 Kaelin 2006: 175.

58 An estimated 25 million persons have been displaced by armed conflict in more than 40 countries. In Africa, the number of IDPs reaches 13.2 million, in Central and South America 3.7 million, in Asia 3.3 million, in Europe 3 million, and in the Middle East 2.1 million. In 2004, the largest internal displacement situations were Sudan (5-6 million IDPs), Colombia (2 - 3 million), DRC (2.3 million), Uganda (up to 2 million), and Iraq (over 1 million). Sudan, Uganda, Colombia, Iraq, Somalia, and Nepal were the scene of major new displacement during the same year, whereas DRC, Angola, Southern Sudan, Liberia, Burundi, and Central African Republic saw major return movements. (Norwegian Refugee Council, Global IDP Project, Internal Displacement — Global Overview of Trends and Developments in 2004, Geneva March 2005: 5-6, 10.)

59 Drawn from Kaelin 2006.

60 See Handbook on Housing and Property Restitution for Refugees and Displaced Persons 2007.

61 Acemoglu et al. 2004; Acemoglu and Johnson 2005; de Soto 1989, 2000; Roll and Talbott 2001.

62 The proportion of owners resisting expropriation against market value compensation is high. In a case reported by Galiani and Schargrodsky (2004: 5) the proportion is 5 resisting to 8 agreeing.

63 See Chapter 1, Section 2; de Soto 1989: 201-230.

64 See de Soto 2000: 200-202.

65 See USAID 2007: 21-23.

66 Gradstein 2006.

67 Chong and Gradstein 2007b show that inequality subverts egalitarian property rights systems.

68 '…the initial conditions had lingering effects, not only because certain fundamental characteristics of New World economies were difficult to change, but also because government policies and institutions tended to reproduce them. Specifically, in those societies that began with extreme inequality, elites were better able to establish a legal framework that insured them disproportionate shares of political power, and to use that greater influence to establish rules, laws, and other government policies that advantaged members of the elites relative to non-members — contributing to persistence over time of the high degree of inequality.' (Sokoloff and Engerman 2000).

69 Coudouel et al. 2007: 6.

70 Chong and Gradstein 2007a; Dabla-Norris et al. 2007.

71 Acemoglu and Robinson 2005.

72 Gradstein 2006; Deininger and Squire 1998.

73 Chong and Gradstein 2007.

74 USAID 2007.

75 Jacoby and Minten 2005.

76 Major comparative reviews of evidence of impacts on investment and access to credit suggest that titling and registration of land is most likely to be effective where robust formal financial markets already exist and where there are incentives for investment created by factors such as proximity to urban markets and good quality land (Bruce and Migot-Adholla 1994; Feder and Nishio (1996). Studies that particularly focus on the poor suggest that credit and other benefits may be heavily skewed toward large landholders (Carter and Olinto 2003).

77 Almost never occurs outside developed countries: Okoth Ogendo 1999; Alden Wily and Mbaya 2001; Hunt 2004.

78 For example, in India, the amount of bribes paid every year by users of land administration services is estimated at US$700 million (Transparency International India 2005), three-quarters of the public spending on science, technology, and environment.

79 China was the first centrally planned economy to link the collective system to household size farms. Households were allowed to contract their share of the collective land and cultivate it individually, in return paying to the collective a fixed amount of produce, taxes and fees (Household Responsibility System). In a first stage, results were impressive as China's grain production increased from 321.2 million tons in 1979 to 407.1 million tons in 1984 (a five-year increase of 27 percent, or 5.4 percent a year). The increase slowed down afterwards to 469.5 million tons in 2004. Further gains seem more difficult to achieve. More investment and access to credit is required in order to improve irrigation, drainage, land terracing, soil upgrades, etc. Today, the Chinese farmers' use rights suffer from land grabbing by officials or by frequent and unpredictable readjustments of land rights. The number of sticks in farmer's property rights bundle is still insufficient; the practice of land readjustment has been the main source of land tenure insecurity in China since the decollectivisation of agriculture. Farmers are therefore unwilling to make productivity-enhancing investments that would require several years to recover, such as irrigation, drainage, or land terracing. See Prosterman 2006: 113. In 1998 the Government of Tajikistan, with the support of the World Bank, began the implementation of the Farm Privatization Support Project (FPSP). Ten farms covering an area of 17,000 hectares were privatised to individual families. First, farms were divided into their constituent brigades and per capita land was divided among farmers. Inheritable but not tradable land use certificates were provided by the state land committee to individual farm-

ers, reflecting the allocation of lands. Second, water user associations were formed and a community-managed water provision system, a water charge collection mechanism, and maintenance of the intra-farm water distribution system were established. Third, a grant of US$300 per hectare was provided to farmers to obtain crop inputs or any farm needs to start farming as an independent family farmer. Fourth, technical assistance was provided to farmers by using demonstration plots. In Tajikistan the government owns the land, but its use right is vested with the Tajik citizen, family, individual, or group of individuals. The land use right is inheritable but this right cannot be rented, leased, transferred to non-family members, mortgaged, or sold. The land use right is registered and is backed by the government. In the case of the FPSP, land tenure rights are now vested with the farmer; in case of former privatisation programmes, land use rights are collective, with the farm manager making decisions on behalf of the members. This difference results in different incentive structures and differential impacts of individual land tenure and collective land tenure on the incentives for and incomes of farmers. Sattar and Mohib 2007: 463-465.

80 Alden Wily 2006.

81 See Mendoza 2006.

82 Izumi 2007: 14.

83 Bruce et al. 2006: 47-51.

84 Alden Wily and Mbaya 2001; Alden Wily 2003; Alden Wily 2006 passim.

85 Hardin 1968.

86 Bruce and Migot-Adholla 1994; Mighot-Adholla et al. 1994a; Collier and Gunning 1999.

87 Alden Wily 2006.

88 Alden Wily 2002.

89 Bruce and Migto-Adholla 1994; Deininger 2003; Augustinus 2003.

90 Alden Wily 2002, 2006b, 2006c.

91 Deininger et al. 2007.

92 See Bruce et al. 2006: 107-142.

93 CLEP Kenya; CLEP Pakistan; CLEP Philippines; CLEP Uganda.

94 Field 2004.

95 Deininger and Chamorro 2004; Bruce and Migot-Adholla 1994; Jacoby and Minten 2005.

96 Bruce and Migot-Adholla 1994; Feder and Nishio 1996.

97 Feder, Onchan and Raparia 1988; Galiani and Schargrodsky 2004

98 In Cambodia, people pay US$200 to $300 and more in informal fees for title to land in urban areas. See World Bank 2002: 7.

99 Augustinus 2003: 25.

100 Palmer 1998: 87.

101 Burns 2006: 3.

102 In Mexico, 'some *ejido*s prefer not to regularize the land for human settlements to evade paying the land tax, which obviously promotes informality in land markets' (UN-Habitat 2005a: 107). A similar outcome is reported from Pakistan, reinforcing the need for taxes to be set at affordable levels and for the revenue to finance services people want and are willing to pay for (Payne 1997: 8).

103 In Indonesia, property tax reform increased revenues under reduced administrative and compliance costs. Careful introduction of the changes minimized resistance. Political will was a paramount requirement. Although there were pre-existing property taxes, dramatic adjustments were required to deliver the changes. These were carefully piloted to test and improve procedures, to train staff and identify taxpayer responses to the changes. Indonesia's tertiary educational institutions now train about 600 property tax administrators a year. Colombia's use of the self-assessment method has resulted in an increased tax base and revenues and has allowed the cadastre to be updated. In Kenya, the primary obstacles to property tax reform have been lack of political will and weak administration. Taxpayers need to perceive the linkage with improved local services and also need to be confident of fair administration. For an overview see Bird and Slack 2002

104 *Condominium* is another form of housing tenure. It is the legal term used in the United States and in most provinces of Canada for a type of joint ownership of real property in which portions of the property are commonly owned and other portions are individually owned. In Australia and the Canadian province of British Columbia, the legal term for this is 'strata title'. In Quebec, it is known as syndicates of co-ownership. In the United Kingdom, the equivalent is commonhold, but this form of ownership was only introduced in 2004.

105 See Deininger et al. 2007.

106 See e.g. Payne 2002; Durand-Lasserve 2003.

107 See Galiani and Schargrodsky 2004. The authors study a natural experiment whereby land titling was ex post granted to a large group of individual squatters. The analysis reveals marked changes in economic responses of this group relatively to the controlled group of squatters. The study shows only modest positive effect of land titling on access to mortgage credit, and no impact on access to other forms of credit. It shows no effect on the labour income of the households holding new titles. However, it is shown that moving a poor household from uncertain usufructuary rights to a more complete bundle of property rights substantially increased investment in the family houses. Land titling reduced the size of families. These smaller families invested more in the education of their children. In sum, entitling the poor increases their investment both in the house and in the human capital of their children. This is a very concrete example of legal empowerment with positive long term effects. Property rights contribute to human development under an intergenerational and behavioural perspective.

108 On Africa see a series of reports by IIED at: http://www.iied.org/NR/drylands/projects/landregistration.html

109 Ejido land in Mexico, which can be transformed into fully alienable freehold land based on a qualified vote by the assembly, is a good example. The fact that only about a tenth of *ejidos* chose to go this route illustrates that, even at high levels of per capita income, many users see benefits from maintaining communal relations to be greater than those from full individualisation of rights.

110 Cotula 2007

111 'Land Tenure Reform and Gender Equality,' UNRISD *Research and Policy Brief* 4 (January, 2006) 1. In most Indian states the *patta*, or leasehold right over government land occupied by the poor is given jointly in the name of the husband and wife. In Andhra Pradesh, the *patta* is in the name of women only. There have not been any studies on

the outcomes or impacts of this practice. Banerjee 1999..

112 UN-HABITAT 2006; Strickland 2004.

113 Deere and Leon 2003.

114 UN-HABITAT 2006.

115 Agarwal 1994: 272.

116 Drawn from Baechtold 2006.

117 Convention on Biological Diversity (CBD) of June 5, 1992, http://www.biodiv.org/convention/articles.asp

118 http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf

119 http://www.wipo.int/tk/en/laws/pdf/suigeneris_folklore.pdf

120 http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_inf_4.pdf

121 For related aspects of bureaucratic justice for the poor see Chapter 1, Section 3.

122 Ibid.

123 CLEP Indonesia; CLEP Sri Lanka: 27; CLEP Philippines.

124 In Peru, reforms, particularly those that required congressional approval of laws, were promoted with the active participation of beneficiaries. The proposal to modify the Civil Code to permit the administrative, rather than judicial, declaration of adverse possession was met with a political debate based on different academic positions. To the extent to which the definition depended on a legislative option and required political support, COFOPRI disseminated the reform proposal among the leaders of the settlements who would benefit from it and facilitated the organisation of the leadership to defend the reform proposals before Congress. A group of leaders lobbied members of Congress of diverse political sectors in order to demonstrate that the reforms would benefit more than 100,000 families only in Lima, which was incentive enough to obtain congressional approval.

125 Through the intervention of COFOPRI it was determined that the leaders would work with the technical staff of the institution to obtain the technical and legal information needed to carry out the required actions. In this stage legal obstacles to the regularisation of property in favour of its occupants would be identified, such as cases of private property, archaeological land, or in a risk zone. The participation of leaders enabled the settlers to appreciate the difficulties that COFOPRI confronted in regularising properties, made their expectations more realistic regarding the time required to conclude the delivery of titling services, and made them aware about the need for reforms and complementary actions.

126 In Peru, COFOPRI developed the capacity to continuously improve reforms through a series of incremental changes based on a learning-by-doing approach. The drafting of new laws was linked to formalisation processes (0, 1 and 2) which ensured that experiences and lessons learned at the field level were incorporated into the normative framework. For example, as the formalisation process advanced, COFOPRI, through inputs from field staff and community representatives, uncovered new forms of informality that were not identified in the pilot project, like '*pueblos tradicionales*' (ancient informal settlements in Arequipa). COFOPRI and RPU worked together to develop legally sound and efficient solutions to these problems. New procedures were developed and tested at the organisational level and once validated, incorporated into the legal framework.

127 See FAO 2007. For general issues of public administration reform see Chapter 1, Section 3.

128 Also recommended in CLEP Philippines, Ethiopia, Kenya, Uganda, Indonesia, Tanzania, Sri Lanka.

129 See Chapter 1, passim.

130 Center of Advanced Study 2007: 122.

131 World Bank, World Development Report 2002: 14.

132 Computerising records in the Indian state of Karnataka under a PPP model is estimated to have saved users US$16 million in bribes (Lobo and Balakrishnan 2002). Automating registration and the associated land valuation allowed outsourcing to the private sector which significantly improved access and resulted in cuts in stamp duty from 14 percent to 8 percent while quadrupling tax revenue from US$120 to US$480 million.

133 See Prahalad 2005: 87-88.

134 See FAO 2007: 25. See e.g. CLEP Uganda, Grassroots Academy, Property Section; CLEP Ethiopia (p.11 ss.) analyses how the current land system with state ownership gives the state (i.e. the individuals controlling the state) immense power over peasants.

135 Fernandes 2006.

136 FAO 2007: 50.

137 The Singapore urban planning experience demonstrates that given the will and efficiency of implementation, it is possible to plan ahead and promote organised growth. The unauthorized settlements of Delhi, India, that are regularised in the late 1970s offer another example. These settlements have seen significant improvement following regularisation due to implementation of layout plans and extension of civic services by government agencies. Residents there have come to acquire full tenurial security, resulting in their making further investments at individual and community levels and improving the quality of the micro-environment. In Malaysia, the government sets a ceiling price for low cost housing, at RM25,000 per unit for people with household income of less than RM750 per month and requires the private sector to construct low cost housing (30 percent quota provision) in every residential development. These urban planning efforts need to be made more widely replicated at the community and city level. Yuen 2002, 2004, 2005.

138 Jacobs 1961; Newman 1972.

139 Barzel 1997; Alexander 2001.

140 Steuteville 2005; Congress for the New Urbanism 1999.

141 CLEP Report from South America (Brazil).

142 Santiago 2004.

143 Banerjee 2005.

144 Government of India 1998.

145 Government of India 1998.

146 An external evaluation of the scheme showed that the 2,800 families have improved their housing situation considerably and have organised themselves to procure infrastructure incrementally. 600 families have been gainfully employed in the home-based carpet weav-

ing industry through the scheme. (Siddiqui and Khan 1994; UN-HABITAT 1991).

147 Govt. of India 2004.

148 See Chapter 4, which covers this topic.

149 For instance, in the city of Uttaradit, the initiative started with survey mapping of all the slums and small pockets of squatters, identifying landowners and those slums that could stay and that needed to be relocated. This helped link community organisations and began building a community network supported by young architects, a group of monks and the mayor. Together, they sought to find housing solutions for 1000 families within the existing city fabric through different techniques such as land sharing, re-blocking, in-situ upgrading and relocation. Their city-wide housing plan became the basis for the city upgrading programme under Baan Mankong and now includes infrastructure improvements, urban regeneration, canal cleaning, wasteland reclamation and park development. Boonyabancha 2005.

150 For a broader discussion of this issue see Chapter 1, section 4.

151 Brustinow 2006.

152 Handbook on Housing and Property Restitution for Refugees and Displaced Persons 2007.

153 Kranton and Swamy 1999; World Bank 2003.

154 Although their initial level of income and assets was not significantly different from the average, their level of assets and income in 1999 was more than 50 percent above the mean while their level of consumption was about 20 percent above the average.

155 Deininger et al. 2007b.

156 Rolfes 2006: 127-128.

157 Bledsoe 2006.

158 See Prahalad 2005; Kasturi Rangan et al. 2007.

159 *Apasco*, a Mexican subsidiary of *Holcim*, realised that selling cement through a chain of middlemen dramatically raises prices. By opening new distribution centres in remote areas where cement could be purchased bag-by-bag and providing technical and safety advice to builders, *Apasco* was able to sell responsibly to the poor. The benefits to the local communities included a facilitated access to building materials at affordable prices. *Apasco* staff also offered consulting services on do-it-yourself building techniques. Lessons learned in Mexico are being studied at headquarters to see if this model can be replicated elsewhere. (Source: WBCSD 2005: 47)

160 WBCSD 2005.

161 *Delta Café* buys raw materials from poor communities in East Timor, creating sustainable livelihoods and gaining market rewards for producing a socially responsible product. *Delta Café* is part of the Nabeiro Group of food companies, and is the market leader for coffee in Portugal, with a market share of 38 percent. The company developed the Delta Timor brand and marketed it as socially responsible coffee after getting involved with the growing communities in the remote hills of East Timor, a former Portuguese colony. This project is already turning a profit, thanks to the popularity of the new Delta Timor brand among Portuguese consumers, promoted strongly by its partner *Sonae*, the country's biggest retailer. *Delta* welcomes competition in the region from other coffee-producing companies, as this will improve the coffee producing techniques of all farmers. (Source: WBCSD 2005: 50.)

162 Through its Solar Rural Operations, *Shell Solar* is bringing solar electricity and equipment directly to remote households in six developing countries (India, Sri Lanka, Philippines, South Africa, China, and Morocco). In Sri Lanka a typical solar electricity system powers seven lights and sells for around $550-600. With 10,000 units sold by *Shell Solar*, benefits have included: 300 new jobs, mostly in rural areas; significant reduction in undesirable emissions by replacing kerosene lamps and diesel generators; bright light, making reading, cooking, and education easier; and convenient power to connect with the world via television and radio. This distribution model works, reaching break-even in 2001. Two barriers were overcome: availability of systems and the ability of householders to pay. (Source: WBCSD 2005: 58.)

163 *BP:* Focusing on the macroeconomic impact of its operations, *BP* is working with the government in Trinidad and Tobago to encourage wider business ownership. The aim is both to promote good governance and to create a pool of businesses that can not only supply *BP's* operations there but also compete on a world scale, beyond the present gas boom. Trinidad and Tobago is the largest liquefied natural gas (LNG) exporter to the United States, and *BP* aims to double its share of global LNG business by 2010. Helping locally-owned contractors develop global scale capabilities and become significant part of *BP's* current supply chain contributes to the government's aim of achieving a dynamic and sustainable economy through the building of knowledge-based skills. This will in turn allow the overall economy to continually evolve and recreate itself beyond oil and gas. Success will also allow the government and people to see themselves, perhaps for the first time, not merely as exporters of gas, but exporters of intellectual capital. This could become reality as a result of local learning institutions, workforce and companies becoming global experts in the industry. Source: WBCSD 2005: 53.

164 CLEP Informal Businesses India: 10.

165 See also CLEP Uganda: 22; Guyers 2005; Chanell 2006.

166 USAID 2006. In Nigeria, for instance, only 10 percent of what can be used as collateral in the US can legally be used as collateral. This means that Nigerians have a thinner and less valuable bundle of property rights in moveable and intangible property. A poor woman in Cambodia may well have a crop in the field or a pig or cow in a pasture. If she is able to use these to obtain a lawful loan she has one additional credit option. If she can use the moveable property she owns as collateral she is likely to be offered a lower interest rate and better terms from the lender than if the loan was unsecured. If lenders are legally able to accept such property as collateral she is also less likely to have to resort to an informal moneylender when she needs credit.

167 Savafian, Fleisig and Steinbuks 2006. For example, in Bolivia, Bancosol offers borrowers who use collateral larger loans, longer loan terms, and lower interest rates than they do borrowers without collateral. In Romania, after a new collateral law was enacted in 2000 the interest rate dropped by 6 percent and the interest rate on lending dropped by 20 percent.

168 IADB 2005, Unlocking Credit.

169 USAID 2006: 4.

170 USAID 2006: 5.

171 Source: Grameen Bank.

172 Critics are sceptical about the repayment figure and charge that

the system leads to the borrower becoming dependent on the loans. The bank has also been criticised for the level of interest rates that climb as high as 20 percent for loans to businesses that generate income. (International Herald Tribune, Asia-Pacific, Oct 13, 2006). Current amount of outstanding loans stands at TK 33.42 billion (US$484.29 million). During the past 12 months (April 06 to March 07) Grameen Bank disbursed Tk. 50.42billion (US$727.85 million). Projected disbursement for 2007 is Tk 65.00 billion (US$930 million), i.e. monthly disbursement of Tk 5.42 billion (US$77.50 million). End of the year outstanding loan is projected to be at Tk. 40.00 billion (US$572 million).

173 These companies have the following loan liability to Grameen Bank :Grameen Fund : Tk 373.2 million (US$6.38 million); Grameen Krishi Foundation : Tk 19 million (US$.33 million); Grameen Motsho (Fisheries) Foundation : Tk 15 million (US$.26 million); Grameen Bank provided guarantees in favour of the following organisations while they were receiving loans from the government and the financial organisations. These guarantees are still in effect. Grameen Shakti : Tk 9 million (US$0.12 million); Grameen Motsho (Fisheries) Foundation : Tk 8 million (US$0.11 million); Grameen Kalyan; Grameen Kalyan (well-being) is a spin off company created by Grameen Bank.

174 Source: Grameen Bank.

175 Drawn from Garcia-Bolivar 2007.

176 Studies in the Dominican Republic, Nicaragua, and Vietnam show that insecure land ownership reduced the propensity to rent and limited transactions to pre-existing social networks, despite the associated inefficiency. See Macours/de Janvry and Sadoulet 2005; Deininger and Chamorro 2004; Deininger and Jin 2003. Fear of losing the land, together with explicit rental restrictions, was the main reason for suboptimal performance of rental markets in Ethiopia (Deininger, Ayalew and Alemu 2006).

177 The case of China illustrates that, in the context of broad-based land access, guaranteed long term rent can provide greatly enhance efficiency while at the same time providing a basic social safety net at a cost that is much below alternative government programems, thereby allowing government to spend scarce resources on provision of productive infrastructure instead of safety nets. Also, having their basic subsistence ensured allows Chinese households to take on greater risks in non-agricultural businesses and, with policies to foster lease markets for land, contributes significantly to the emergence of a vibrant non-farm economy.

178 See also CLEP Sri Lanka: 27-28; CLEP Tanzania.

179 Banerjee and Iyer 2005; Nugent and Robinson 2002.

180 Bruce 2006: 47-51.

181 Bird and Slack 2006.

182 CLEP Kenya, CLEP Uganda, CLEP Indonesia, CLEP Philippines; Deininger et al. 2006.

183 For a more detailed analysis and recommendations see Chapter 1, Section 2 of this report. Evidence from Uganda suggests that greater knowledge of laws providing tenure security to customary tenure leads to higher land-related investment but that, with less than a third of households — normally the better off — being well-informed, efforts to disseminate information could significantly impact productivity and equity (Deininger et al. 2006.)

184 Eighty-nine neighbourhoods were upgraded or created under the program in Ceara, Brazil, to the benefit of 25,300 families (more than 100,000 people) using an intergovernmental/community partnership of self-help housing, whereby the state financed infrastructure and housing materials, the municipality furnished the land and the beneficiaries constructed their own housing, with technical assistance. 100,000 people got access to housing and property rights. Importantly, these investments were achieved with a per-family investment of US$2,100, including project, works, land and social mobilisation. The main lessons from this programme are that Government programmes for housing can become a mechanism for property rights creation or regularization, raising strong incentives for communities' contribution to the upgrade of living conditions through investments in services and houses construction. (Ceara, Brazil: Urban Development and Water Resources Management Project).

185 In the 1960s, Singapore faced a serious problem of housing shortage. In response, the government set clear targets for housing provision and reorganised the housing industry. It passed the Housing and Development ordinance in 1960 which created the Housing and Development Board (HDB) with a strong mandate and resources to deliver housing units. The first priority of the agency was to build as many low-cost housing units as quickly as possible. The housing that was initially built was largely for rental by low-income groups. Forty years on, approximately 85 percent of Singapore's 3.4m resident population is currently living in HDB housing. The majority of these people own their homes. In 1964 the government introduced the Home Ownership for the People scheme to help all citizens to buy homes up to their capability as consumers. The aim is to give citizens including the poor an asset in the country. The lowest income citizens are not excluded from the housing system. This has encouraged the formulation of policies aimed at reducing the cost of housing and easing access to owner occupation in public housing for all including the lower income residents. The consequence of formal housing titles is increased housing investment, a greater sense of stakeholding and interest in the maintenance, quality and design of the public housing. After more than 4 decades of public housing development, an increasing number of people have personally chosen high-rise living and 82.5 percent of households in public housing have expressed contentment at the idea of always living in public housing flats.

186 World Bank 2003a.

187 For the most part of the following passages see Martinez 2007.

188 Satterthwaite 2005.

189 McKeon 1962; Harris 2004; Krieger and Higgins 2002; Von Hoffman 1998.

190 Since 1984, Grameen Bank is giving housing loans, the maximum being fixed at Tk 15,000 (US$217) at an interest rate of 8 percent. It is to be repaid over a period of 5 years in weekly installments. 644,965 houses have been constructed with the housing loans averaging Tk 13,194 (US$191). A total amount of Tk 8.51 billion (US$203.98 million) has been disbursed for housing loans. During the past 12 months (from April'06 to March'07) 13,590 houses have been built with housing loans amounting to Tk 143.86 million (US$2.07 million) (Grameen Bank).

191 Buckley and Kalarichal 2006.

192 For Eastern European countries see Palacin and Shelbourne, 2005: 7. Struyk and Turner, 1986, the study of South Korea and the Philippines, noted that occupants with formal sector titles, across all income categories, enjoyed better quality housing in both countries.

193 See Tomlinson 2007.

194 UN-ESCAP 1994; Banerjee, 1995. Haryana Urban Development Authority (HUDA) in India enters into partnership with private developers to develop townships in the highly sought-after periphery of Delhi. This land is under agricultural land ceiling and not available for urban use, except with the permission of HUDA with the condition that 20 percent of the housing should go to the poor.

195 TDR is included as part of the national urban policy in Brazil. Implementation started with 10,000 houses for 120 co-operatives of the poor between 1989 and 1992 in Sao Paolo. (Fernandes, 2002.) NGOs like *Instituto Polis* continue to provide advocacy and technical and legal assistance to slum communities and land owners to implement the approach in several cities of Brazil. In Mumbai TDR is linked with the government's policy of 1999 of providing houses free of cost to 4 million slum dwellers in five years. (Burra, 2005.)

196 UN-ESCAP, 1994.

197 See Panaritis, 2007.

198 Guidance can be found in Alden Wily 2002. See also Deininger et al. 2007; see ILD 1994, 2002, 2004.

199 Mosqueira, 2007.

200 See Collier 2007: 135-140.

201 Rajan, 2005.

202 Collier 2007: 140-156.

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Chapter
THREE

Towards a Global Social Contract: Labour Rights for Legal Empowerment of The Poor

EXECUTIVE SUMMARY

Purpose of this chapter

Chapter 3 is about labour rights for the fight against poverty. Based on our review of employment and working conditions in the informal economy, we present two essential messages.

The first is that governments and international organisations must address the decent work deficits of those who work informally, since the informal economy, characterised by low productivity, low earnings and high risks, has been growing worldwide, emerging in many new guises and in unexpected places. The second message is one of hope. It is about the new departure in international development strategies, in which we find broad coalitions being formed among governments, international organisations, trade unions, employers and non-governmental organisations that are willing to take on the challenge of creating and implementing policies for decent work and empowerment of the poor.

We describe this new departure in international development strategies as an emerging 'Global Social Contract' and propose that the Commission on Legal Empowerment of the Poor (sometimes referred to by its acronym, CLEP) further develop the concept into a framework integrating access to justice, property rights, labour rights and business rights.

Labour rights, informal economy, empowerment and decent work: what do we mean?

In Section 2, we define concepts used in this report. **Labour rights** include internationally agreed fundamental principles and rights at work, as well as rights to social protection, income protection, workplace safety, decent working conditions and participation through representative organisations of workers, in national policy fora. This concept also takes into account and supports commitments and policies for the creation of full, productive and freely-chosen employment and training. **Informal economy** refers to economic activities by workers and economic units that are — in law or in practice — not covered or insufficiently covered by formal arrangements governing both enterprise and employment relationships. **Legal empowerment** is that process through which people are provided rights in an appropriate legal framework, which they can claim and understand, and which they can find useful in improving income and employment opportunities. It is a process recognised both formally (legally) and informally (legitimately). We define **decent work** as that available to all men and women,

and grounded in conditions of freedom, security and dignity. It has four pillars (a) fundamental principles and rights at work under international labour standards; (b) employment and income opportunities; (c) social protection and social security, and (d) social dialogue and tripartism.

Informal workforce: who are we talking about?

The vast majority of the poor earn their living in the informal economy where average earnings are low, productivity poor, working conditions hazardous, and risks high. Section 3 provides a global picture of the informal economy, highlighting its size, segmentation, and vulnerabilities. Women dominate the most-disadvantaged categories of informal work, notably industrial outwork and home-based production. It is also in the informal economy where child labour and bonded labour are most prevalent, and where indigenous and tribal peoples are marginalized largely by discrimination. Despite early predictions of its eventual demise, the informal economy continues to grow.

Poverty and labour rights: Towards a Global Social Contract

Section 4 describes a new departure in the international community regarding labour rights and the informal economy; it features three noteworthy elements: the Fundamental Principles and Rights at Work from 1998; the Decent Work Agenda, first introduced in 1999, and the 2002 Strategy for Labour Rights in the informal economy. These elements are gaining increasing support from a broad coalition of governments, international organisations, various employers and trade unions, as well as from non-governmental organisations.

As part of efforts to achieve the Millennium Development Goals (MDGs), the 2005 World Summit of Heads of States agreed to make full and productive employment and decent work for all a central objective of both national and international policies and national development and poverty reduction strategies. In 2006 this was followed by the UN Economic and Social Council's Ministerial Declaration, which emphasised full and productive employment and decent work for all as an end in itself and a means to achieve the MDGs. The Decent Work Agenda has therefore been accepted as a global aim; it no longer remains an ILO agenda alone. Decent work has been declared a goal not only for the formal wage sector, but also for the informal economy. Growing recognition of the need for labour rights to catalyse employment creation in the informal economy, while protecting its workers, has led to an emerging global social contract, creating a broad agenda for reform and for empowerment.

The economics of informality and the debate on labour regulations

For the working poor, it is not the absence of economic activity that is the source of their poverty, but the nature of their economic activities. The link between work of low quality, or productivity, and poverty is clear: if people earned more, poverty would decline. In Section 5, we review research on the role of labour regulation in setting economic and social goals, and we draw two major conclusions. First, we suggest caution in interpreting this research, particularly the cross-country studies. Caution should also be exercised before translating the findings into country-level policy interventions without first considering country-specific conditions, the heterogeneity in the regulatory environment and employment arrangements. Secondly, as a policy conclusion, we suggest a shift of focus from the prevailing ideological question on regulation-versus-deregulation to questions about how regula-

tion can be used to promote decent work for the working poor. The debate, we suggest, should focus on the quality of regulation, and determining the right balance between security, supportive structures, and flexibility in both the formal and informal economy.

Principles and practices of labour rights and legal empowerment

Our proposed strategy for legal empowerment, introduced in Section 6, is based on common core principles, while remaining flexible to fit different economic, social and political conditions. It is participatory, inclusive and gender-sensitive. Some of the principles are basic: they include the need to combine promotion of change with management of change, labour rights with property rights, and flexibility with security. Examples are presented to show that reform is underway; they illustrate how different policies can be used to provide working people with legal identity (India, the Philippines and Thailand), voice and representation (India), social protection (Brazil, Chile, Ghana, India, Mexico, the Philippines), and new ways to resolve disputes (Tajikistan). They also show how different policies can be used to improve the functioning of labour market institutions (Chile and Thailand), and to strike a balance between protection and flexibility in response to changing realities (Spain). Implications are drawn for other countries.

Our recommendations

We propose that the Commission accepts the following recommendations:

Policy recommendations

Strengthen identity, voice, representation and dialogue: For the poor, labour and human capital are the greatest assets, and these must be effectively recognised and supported to help the poor work their way out of poverty. First and foremost, the State must recognise their legal identity as workers — the initial condition through which they can engage in legal reforms. Rights to freedom of association and collective bargaining are also essential to strengthen the voice of the working poor and to facilitate their dialogue with formal economy operators and public authorities.

Improve the quality of labour regulation and the function of institutions: There is also need to improve the quality of labour regulation and to enforce fundamental principles and rights at work. The aim is to create synergies between protection and productivity of the working poor and their assets. Critical and self-critical reviews of the quality of institutions and regulations should examine impacts on prosperity and labour protection.

Support application of a minimum package of labour rights for the informal economy: Rights should be established in the informal economy that upholds the Declaration on Fundamental Principles and Rights at Work and the three crucial aspects related to working conditions: health and safety at work, hours of work, and minimum income. Such a minimum floor for empowerment should be realistic and enforceable. Progressive compliance — towards a fuller set of labour rights building upon this minimum floor - would be expected.

Strengthen access to opportunities: Key to the legal empowerment process is the promotion of change and dynamism. This may be achieved by forging links between private initiative and public policy to encourage expansion of employment in a growing and inclusive economy. Opportunities for decent work are also advanced by provision for education, training and retraining, as well as by efforts to combat discrimination and promote efficient labour markets.

Support inclusive social protection: Universally accepted instruments, such as the Universal Declaration on Human Rights, recognise social security as a fundamental societal right for all. Laws, institutions and responsive mechanisms protecting the poor from economic shocks, as well as guaranteed access to medical care, health insurance, old age pensions, and social services, must be upheld. Social protection mechanisms must be open to all types of workers and not solely on the basis of formal evidence of employment. From a systemic perspective, rights to pensions and health protection should be granted on the principle of universality to people as citizens rather than as workers.

Promote legal empowerment as driver for gender equality: A key challenge is to ensure that ILO labour standards, promoting equality of opportunity and treatment, are effectively extended to all working poor, especially women, in the informal economy. This requires knowledge of where working poor women are concentrated in the labour force, how they are inserted into the global production and with what consequences. There is a growing international movement, inspired by the Self-Employed Women's Association (SEWA) of India, to increase the visibility and voice of female informal workers and to address their particular disadvantages, in terms of opportunities, rights, protection and voice.

Support legal empowerment for indigenous peoples: Although indigenous peoples are disproportionately represented among the poor, their needs and priorities are generally not reflected in efforts to combat poverty. ILO's Indigenous and Tribal Peoples Convention provides guidance and strategies for legal empowerment with respect to labour rights and protection of employment.

Process recommendations

Promote national development frameworks for legal empowerment and decent work: The decent work agenda is best defined at national level through social dialogue. Its aim is to make employment a central goal of economic policies, recognising that progressive improvement in the quality of work, including labour rights and returns to labour, is a main route out of poverty and of informality. Decent Work Country Programmes (DWCPs) are major tools for driving this reform process forward in partnership with relevant national and international institutions.

Mobilise the regional levels to support national reform programmes: Reform strategies addressing employment and labour rights will need to be adapted to regional and local priorities. Regional Development Banks, regional organisations, like the African Union, as well as the UN and its agencies, funds and programmes can be tapped as institutional champions for an integrated reform agenda on legal empowerment for the poor.

Mobilise the principal actors of the global system, particularly the World Bank and the ILO, to work better together for decent work: The World Bank's Poverty Reduction Strategies and ILO's DWCPs are crucial instruments for reform. Legal empowerment through labour rights requires close cooperation between governments, employers and workers, both nationally and locally. Capacity building support from the leading global institutions will strengthen the ability of traditional social partners to reach out to workers in the informal economy. A key to a successful reform process at national level is better policy coherence at global level.

Support voluntary initiatives for legal empowerment through labour rights: The ILO's Fundamental Principles and Rights at Work inspires many

voluntary code-of-conduct initiatives. They are pursuing important strategies for motivating improvements in the performance of multinational corporations, and in encouraging businesses to become more sensitive to ethical consumer reactions. Such initiatives should be strengthened and coherence between them promoted so as to avoid dangers of proliferation. Voluntary initiatives should be seen as stepping stones for legal empowerment, rather than a means to avoid legal obligations.

Mobilise donor countries to promote legal empowerment and decent work: Donor countries have many opportunities to support legal empowerment and the inclusion of a decent work agenda in regional and national strategies.

Promote better understanding of costs and benefits of legal empowerment through decent work: Expected benefits of reform from legal empowerment through decent work require further study, particularly their effects on productivity and prosperity. The costs of policy initiatives to start and sustain reform processes also need to be better understood.

Strengthen the statistical base for legal empowerment: Better national statistics and indicators on size, composition, and contribution of the informal economy would improve visibility and facilitate planning, particularly for formulating policies promoting Legal Empowerment of the Poor.

Recommendations to further develop the Global Social Contract

There is a tripartite consensus from employer, worker and government representatives on the need for a formal and effective legal system which guarantees all citizens and enterprises that contracts are honoured and upheld, the rule of law is respected and property rights are secured. This is a key condition not only for attracting investment, but also for generating certainty and nurturing trust and fairness in society.[1] The growing recognition of the need for labour rights to catalyse employment creation in the informal economy, while protecting its workers, has led to an emerging global social contract; effectively, it is a broad agenda for reform and for empowerment. Labour rights, business rights, property rights and business rights, taken together, can form the basis of this new social contract.

Five fundamental areas of action could underpin the new social contract: (1) Strengthen identity, voice, representation and dialogue; (2) Strengthen quality of labour regulation and effective enforcement of fundamental principles and rights at work; (3) Support application of a minimum package of labour rights for the informal economy; (4) Strengthen access to opportunities for decent work, education, training and retraining, while combating discrimination to ensure efficient labour markets, and (5) Support inclusive social protection.

We describe the new departure in international development strategies, centred on the Decent Work Agenda, as a *Global Social Contract* and propose that the Commission (or CLEP) further develop the concept by integrating access to justice, property rights, labour rights and business rights into a framework for Legal Empowerment of the Poor. Our proposals are firmly based in the international human rights tradition, which the State, as primary duty bearer, is obliged to protect and promote.

Finally, we reflect on the words that form the concept Global Social Contract. 'Contract' suggests an emphasis on mutual responsibility. The state, for example, has a duty to protect, and citizens have the right to protection. But there are obliga-

tions that follow from this, and employers and employees are also tied by mutual obligations. Similarly, large businesses have a duty not to exploit smaller ones with which they have production or distribution ties. Our inclusion of the word 'global' places a focus on the role and responsibility of the actors at international, regional, national and local levels, while 'social' calls attention to the aim of this initiative, which is to improve the social conditions of people in poor countries. Importantly, we have placed the word 'towards' before 'a global social contract' in the title of our chapter to emphasise development, process and time horizons.

1. Introduction: Purpose of our focus on Labour Rights

The Commission has identified the issue of labour rights as one of four elements of Legal Empowerment of the Poor. Almost half the world's population of 6 billion lives on less than US$2 a day, while a fifth survives on US$1 a day or less. For most people mired in poverty, the only asset they own is their own labour. The World Bank estimates that for over 70 percent of the poor, finding work — either wage work or self-employment — is the main pathway out of poverty; [2] but the stark reality, according to the ILO, is that some 500 million of the working poor are currently unable to achieve this goal.

Informality in the workforce has always been predominant in developing countries — but it is also growing in developed economies. For the poor, informal employment is the predominant form of employment, in which they have no legal identity as entrepreneurs or as workers. Also, the wider policy environment and institutional landscape, including systems of legal and social protection, are biased towards formal incorporated firms and formal organised workers. Often, the poor are shut out of the legally recognised systems that would allow them to benefit from their hard work. They are mostly excluded from the legal mechanisms that protect their assets related to property or labour. They lack access to a fully-functioning justice system that protects their rights regardless of status in life.

The ILO notes that informality is mainly a governance issue;[3] it is traced to laws and institutional frameworks that are not responsive to the conditions in which the working poor have always been or are increasingly found. The boundaries of laws and institutional frameworks remain unyielding to the growing number of poor who are found

outside their protective reach. The World Bank has shown that, while informality is strongly correlated with low productivity and a high degree of poverty,[4] governance and quality of regulation can play an important role in engendering prosperity and protection for the informal workforce.

Our aim is to suggest how to address the vicious circle of informality, lack of legal protection, and poverty. Our point of departure is that poverty is both a market failure and a public policy failure, which the international community has begun to recognise. Within the past 10 years, for example, attempts have been made to obtain global consensus on the Fundamental Principles and Rights of Work, and to gain widespread endorsement of the Decent Work Agenda. Furthermore, there is evidence of growing recognition of the need to extend labour rights to the workforce in the informal economy.

These are strategic priorities and they constitute the three pillars of an emerging global social contract with wide support in the international community, including governments in rich and poor countries, the UN family, international financial institutions, employers, trade unions, and NGOs.

Our recommendations are aimed at taking this agenda forward in a manner coordinated with the other working groups of the Commission on Legal Empowerment that are focused on access to justice, property rights and business rights. We argue that is it important to merge the free market approach with a human rights approach by combining: (a) **promotion of economic growth** to improve productivity and job creation stimulated by competition, specialisation and free trade, and (b) **management of economic growth** to obtain widely-shared prosperity through the advancement of decent work, social dialogue, inclusion, and social protection of all workers.

This chapter contains seven sections. Section 2 defines labour rights, informal economy, empowerment and decent work, while Section 3 explains who we are talking about — the size and composition of the informal workforce and the many segments found therein. Next, Section 4 highlights new initiatives for labour rights in the fight against poverty and describes the international consensus that has developed around this new agenda — Legal Empowerment of the Poor through labour rights. Following this, Section 5 examines the economic rationale for legal empowerment through labour rights, and summarizes the economic debates surrounding labour regulations. In Section 6 we provide recommendations on the principles and practices of reform, as well as case materials on selected country experiences reflecting appropriate responses to the extension of labour rights and standards to all forms of employment or work arrangements. Finally, Section 7 sets out our recommendations on policies and processes needed to carry out the proposed plan of action.

2. Labour Rights, Informal Economy, Empowerment and Decent Work: What do we mean?

In this section we define the key terms and concepts that underpin our discussions; namely, labour rights, informal economy, legal empowerment and decent work.

Labour Rights

The concept of labour rights includes the internationally agreed-upon Fundamental Principles and Rights at Work[5] as well as rights to social protection and income protection, workplace safety, decent working conditions and the participation through representative organisations in national policy forums. This concept also takes into account and supports commitments and policies for the creation of full, productive and freely chosen employment as well as workforce development. These rights can be expressed through different mechanisms at the international, national and local levels, such as those relating to international labour standards, national labour law, national and local regulations and labour agreements between employers and workers. Socially responsible corporations and other organisations may also express them in a voluntary way.

Informal Economy

The informal economy is defined as comprising *'all economic activities by workers and economic units that are — in law or in practice — not covered or insufficiently covered by formal arrangements'* regulating both enterprise and employment relationships.[6] Informal employment[7] consists of two broad categories, the self-employed in informal (small unregistered) enterprises and wageworkers in informal (unprotected) jobs, including disguised wageworkers. Under this expanded international statistical framework, the specific criteria used for determining what is (or is not) an informal enterprise and what is (or is not) an informal job are set by countries, including: what size of enterprise and what type of registration should be used for determining what is an informal enterprise; and what type of contract or social protection coverage should be used for determining what is an informal job.

Legal Empowerment

Legal empowerment is defined as a process through which people are provided rights in an appropriate legal framework, which they understand, can claim, find useful in improving their income and livelihoods, and which are recognised both formally (legally) and informally (legitimately). Thus, legal empowerment requires that information is available and appropriate institutions are established to ensure that commercial and employment contracts are respected, property titles and businesses are registered, and access to social protection and justice is at hand. By this, people are able to engage public and private sector agents and participate in fully functioning market institutions.

All too often, the poor do not know of, or are not able to understand regulations. Moreover, they do not have contracts, and lack resort to dispute mediation. The absence of information and of appropriate institutions curtails the exercise of choice. Yet, the existence of choice, the exercise of choice, and the achievement of choice in the different domains of a person's life (including work) lie at the heart of legal empowerment.[8]

It is important to emphasise that empowerment is both a process and a goal. It is a process whereby key stakeholders are involved in framing coherent

and sustainable solutions and people are engaged in a continuous effort to find responses to evolving issues. However, it is a goal in that social dialogue and participation is an objective in and of itself — one of the four pillars of decent work as defined below.

According to one definition, empowerment is based on four conditions, namely, access to information, systems of accountability, venues for inclusion/participation and local organisational capacity.[9]

In the domain of ***labour rights,*** empowerment is secured when the fundamental principles and rights at work are respected. These so-called 'enabling rights' can be considered avenues to empowerment.[10] They constitute the basic right to participation and freedom of choice in the arena of work that everyone should enjoy.

Decent Work

The International Labour Organisation introduced the notion of ***decent work*** in 1999.[11] Its premise: *opportunities for all women and men to work in conditions of freedom, security and dignity,* has become a global goal endorsed by the international community. Decent work rests on four pillars: (a) fundamental principles and rights at work and international labour standards; (b) employment and income opportunities; (c) social protection and social security; and (d) social dialogue and tripartism.

3. Informality and Poverty: Whom are we talking about? What is their identity?

This section presents an overview of the informal economy, including its size and structure as well as the workers in it. The Commission (CLEP) has chosen to focus on the informal economy because of the strong link between informality and poverty. Also, as the World Bank has found in a study of 75 countries, informality is correlated with low productivity and low GDP growth.[12]

According to ILO estimates, there are some 500 million working people living in households that earn less than US$1 per capita per day. The vast majority of these 'working poor' earn their living in the informal economy. The informal economy is associated not only with low productivity but also low earnings, poor working conditions, high risks, and little (if any) legal or social protections. While there is not a complete overlap between working in the informal economy and being poor, or working in the formal economy and escaping poverty, the link between informality and poverty is quite significant and stark.

What follows is a summary of recent estimates of the size of the informal economy in 25 developing countries[13] and recent analyses of changes in informal employment over time in 20 of these countries.[14] Official national data were used to estimate informal employment in each of the countries.[15]

Size and significance in developing countries

Informal employment, broadly defined, comprises one-half to three-quarters of *non-agricultural* em-

ployment in developing countries: specifically, 47 percent in the Middle East and North Africa; 51 percent in Latin America; 71 percent in Asia, and 72 percent in sub-Saharan Africa. If South Africa is excluded, the share of informal employment in non-agricultural employment rises to 78 percent in sub-Saharan Africa; and if comparable data were available for countries (other than India), in South Asia, the regional average for Asia would likely be much higher.

Some countries include informal employment in *agriculture* in their estimates. This significantly increases the proportion of informal employment: from 83 percent of *non-agricultural* employment to 93 percent of *total* employment in India; from 55 to 62 percent in Mexico, and from 28 to 34 percent in South Africa.[16]

The two main segments of informal employment, classified by employment status, are the ***self-employed*** and the ***wageworkers***. The ***self-employed*** include *employers,* or owner-operators of informal enterprises who hire others; *own-account workers,* or owner-operators in single-person units or family businesses/farms who do not hire others, and *unpaid contributing family workers,* who are family workers in family businesses or farms without pay.

The ***wageworker*** segment consists largely of *informal employees* — those who are unprotected in their work with a known employer that could be an informal or formal enterprise, a contracting agency, or a household; *casual wage worker,* or those wage workers with no fixed employer who sell their labour on a daily or seasonal basis, and *industrial outworkers,* who are sub-contracted to produce for a piece-rate from their homes or small workshops.

Composition of the Informal Economy

In all developing regions, self-employment comprises a greater share of informal employment (outside of agriculture) than wage employment: specifically, self-employment represents 70 percent of informal employment in sub-Saharan Africa, 62 percent in North Africa, 60 percent in Latin America, and 59 percent in Asia. In China, it is estimated that between 1990 and 2004, urban informal employment increased by 125.55 million people, which was 133 percent of all increased employment. [17] Excluding South Africa, where black-owned businesses were prohibited during the apartheid era and have only recently begun to be recognised and reported, the share of self-employment in informal employment increased to 81 percent in sub-Saharan Africa.

Self-employment represents nearly one-third of *total* non-agricultural employment worldwide. It is less important in developed countries (12 percent of total non-agricultural employment) than in developing countries where it comprises as much as 53 percent of non-agricultural employment in sub-Saharan Africa, 44 percent in Latin America, 32 percent in Asia, and 31 percent in North Africa.

Informal wage employment, including disguised wage employment, is also significant in the developing world: comprising 30 to 40 percent of informal employment (outside of agriculture).[18]

Home-based workers and street vendors are two of the largest sub-groups of the informal workforce: with home-based workers being the more numerous but street vendors the more visible of the two. Together they represent 10-25 percent of the non-agricultural workforce in developing countries and over five percent of the total workforce in developed countries.

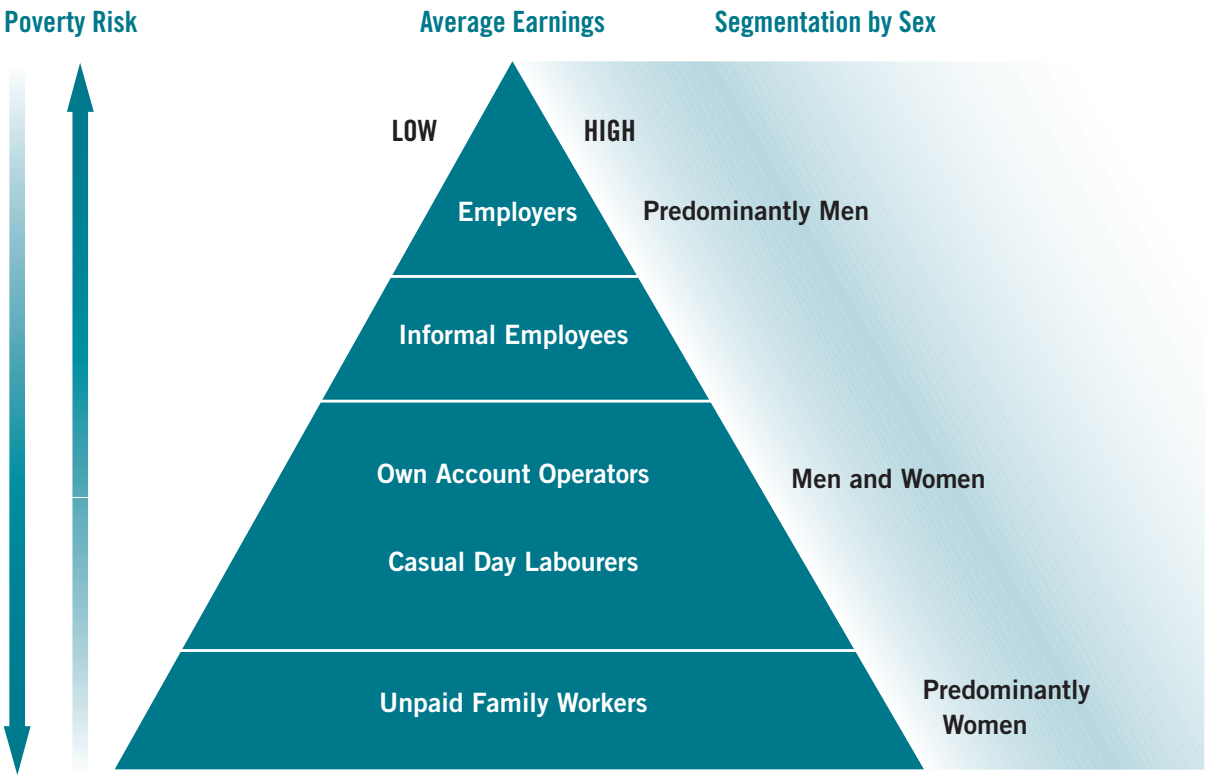
Segmentation in the Informal Labour Market[19]

Available evidence suggests that there is marked segmentation within informal labour markets in terms of average earnings across the different employment statuses. Specifically, informal employers have the highest earnings on average; followed by their employees and informal employees of formal firms; then own account operators followed by casual wage workers, and industrial outworkers: see Figure 1. An inverse hierarchy is observed for the risk of being from a poor household: employers are least likely to be from poor households and, especially if they are the primary breadwinners, industrial outworkers are the most likely to be from poor households.

In Tunisia, for example, informal employers earn four times the minimum wage and over two times (2.2) the formal wage. Their employees earn roughly the minimum wage, while industrial outworkers — mostly women home-workers — earn less than one-third (30 percent) of the minimum wage. In Columbia and India, informal employers earn four-to-five times the minimum wage, while own account operators earn only one-and-a-half times the minimum wage.[20]

Research findings suggest that it is difficult to move up these segments due to structural barriers (state, market, and social) and/or cumulative disadvantages. Many workers, especially women, remain trapped in the lower-earning and more risky segments.

Figure 1 Segmentation of the Informal Economy: By Sex, Average Earnings and Poverty Risk



Note: The informal economy may also be segmented by race, ethnicity, caste or religion.
Source: Chen et al 2004, 2005.

Box 1 Different Categories of Informal Workers and Corresponding Challenges

Categories of Workers	Conceptual/Practical Challenges
Employees of informal enterprises	Ability of employers to comply Cost of compliance Zero-cost of non-compliance
Casual day labourers	Episodic/seasonal work No fixed employer
Homeworkers or Home-based producers	Ambiguous employment status: neither dependent nor independent Ambiguous relationship with contractor: commercial vs. employment Uncertainty as to who is principally responsible: contractor or lead firm?
Domestic workers	Household as employer Multiple employers
Contract labour for formal firms	Uncertainty re who is principally responsible: contractor or formal firm?
Migrant labourers	Intersection of immigration status/regime and labour status/regime

Source: Martha Chen, 'Labour standards and informal workers: The nature of the challenge.' Paper prepared for the Commission on Legal Empowerment of the Poor, November 2006.

Another type of segmentation is based on differences between women and men within the informal economy reflecting gender norms which influence both the supply of and the demand for labour. As a general rule in developing countries, men tend to be over-represented in the top segments of the informal economy; women tend to be over-represented in the bottom segment.

More specifically, relatively high shares of informal employers are men and relatively high shares of industrial outworkers are women. In India, for example, 6 percent of informal employers, 19 percent of own account operators, 16 percent of informal wage workers, and 59 percent of industrial outworkers are women.[21] These stylised facts are depicted graphically in Figure 1.

A legal empowerment agenda for workers in the informal economy must take into account the different categories of informal workers and the specific realities of their work arrangements. In Box 1, below, there are illustrations of the conceptual and practical challenges in considering labour rights and protections for the different categories of informal workers. A proper understanding of the nuances and challenges should lead not only to appropriate legal responses but also to a wider set of policy tools and institutional strategies.[22]

Informalisation of Labour Markets

There is a widespread assumption that the informal economy is counter-cyclical: that is, it expands during economic down turns and contracts during periods of economic growth. To be sure, empirical evidence from a set of developed and developing countries indicates that the level of informal employment, taking self-employment as a proxy indicator, decreases when GDP per capita goes up and vice versa.[23] However, as shown above, the informal economy is made up of both self-employed and wage workers, thereby demonstrating limitations to the use of self-employment alone as a proxy indicator. Furthermore, the co-relationship between informal employment and growth is not straightforward. Recent analyses of data over time from different developing countries suggest a more complex and dynamic relationship between informality and economic growth. While economic downturns are almost invariably associated with an expansion of employment in the informal economy (due to the growth in survival activities), steady rates of economic growth may be accompanied, *not* by a reduction, but actually an expansion of employment in the informal economy. This is because during economic upswings, certain forms of informal employment may expand, such as the more entrepreneurial small firms as well as sub-contracted and outsourced activities linked to the global production system.[24] This may well demonstrate that increasingly the formal economy is entering into a symbiotic relationship with the informal, where the former makes use of the latter to improve profits and growth strategies, perhaps even to avoid respecting labour standards and regulations. In these countries, it was only after a sustained period of higher levels of growth that aggregate informalisation declined.[25] This important finding is further elaborated in Box 2.

Box 2 Relationship between informality and growth: Cross-country evidence

Consider the findings from 20 countries in Asia, Africa, and Latin America at two points in time — generally in the 1980s and the 1990s. For each of the countries, the rate of change in informalisation is compared to the average per capita GDP growth (Heintz and Pollin 2003). Most of the countries (14 out of 20) experienced growth in informalisation, while four experienced a decline and two experienced little, if any, change. What is interesting to note is that informalisation increased in three countries with respectable per capita growth rates (>2 percent) and declined in two countries with poor per capita growth rates (<1percent).

Based on these patterns, the authors stated that, contrary to common assumptions that informal employment results from underdevelopment and poor economic performance:

- 'Informal employment has been increasing faster than formal employment, even in countries with strong rates of growth.'
- 'Higher rates of growth are generally associated with smaller increases in the rate of informalisation.'
- 'At very high levels of growth, informalisation may decline.' (Heintz, 2006.)

This pattern could be explained by the fact that high levels of growth driven by export production may increase certain types of informal employment: notably, industrial outwork for global supply chains (as in Tunisia during the 1990s). Sub-contracted work linked to the global production system — expands during periods of economic growth, especially when growth is driven by trade and financial liberalisation. 2007

In North American, European Union, and other OECD countries, available evidence suggests that non-standard employment is on the rise. The term 'non-standard work' as commonly used, includes: a) jobs entailing an employment arrangement that diverges from regular, year-round, full-time employment with a single employer but without security; and b) self-employment, with or without employees. (Carré and Herranz 2002.) The common categories of non-standard wage work are temporary, fixed-term and part-time. Increasingly, inter-firm sub-contracted work in the service sector (for example, janitorial services and home care) and the manufacturing sector (garment making, electronic assembly) is also included.

What follows is a brief summary of trends in three categories of non-standard work — part-time work, temporary work, and self-employment — in Europe, including differences by sex. (Carré and Herranz 2002, Carré 2006.)

Part-Time Work: Since the early 1970s, there has been a marked growth in the proportion of part-time workers in total employment. By 1998, part-time workers accounted for 16 percent of total employment in EU countries and 14 percent of total employment in OECD countries.

Temporary Employment: For the EU as a whole, and in a majority of EU nations, the share of workers in temporary employment, including both direct hire and agency hire, increased from the mid-1980s to the late 1990s. By 1998, temporary employment accounted for around 10 percent of total employment in EU countries.

Self-Employment: Self-employment, including both employers and own account workers, has increased in many OECD countries over the past 25 years.[26] Indeed, outside of agriculture, self-employment has grown at a faster rate than total employment in 14 (out of 24) OECD countries where data were available. Also, as self-employment has been growing, so has the share of own account self-employment within total self-employment. As a result, in OECD countries today, more self-employed persons are own account workers, rather than employers.

In addition to these common forms of non-standard work in OECD countries, there are other forms of non-standard work — notably, casual day labour, industrial outwork, and other forms of sub-contracted work — for which data are not so readily available.

In sum, the purely counter-cyclical model of informality does not hold. At least in the short term, countries demonstrate significant variation in their patterns of informalisation even under conditions of steady economic growth. Also, different segments of the informal economy demonstrate substantial variation in their cyclical patterns. Certain segments of the informal economy expand during downturns in the economy: particularly survival activities and sub-contracted activities for firms trying to cope with the downturn. Certain other segments of the informal economy expand during upturns in the economy: notably, dynamic independent enterprises and sub-contracted activities linked to global value chains.

Gendered patterns

Informalisation of Labour Markets by Sex

The last two decades have seen a marked increase in women's labour force participation: most significantly in the Americas and Western Europe and more modestly in Sub-Saharan Africa, Southeast Asia, and East Asia.[27] Only in two regions — Eastern Europe and South Asia — has the women's labour force participation rate actually fallen. The marked increase in women's labour force partici-

pation worldwide has given rise to the notion of the 'feminisation of the labour force'. But this notion has been defined and used in two distinct ways. First, to refer to the situation in which the ratio of women's labour force participation rate to men's labour force participation rate increases over time. Second, to refer to a situation in which the structure of the labour force itself is 'feminised': that is, when jobs take on features associated with women's work such as low pay, drudgery, uncertainty, and precariousness.[28]

Whether or not there is a causal link between the increase in women's labour force participation and the growing precariousness or informality of work is not clear — and has been hotly debated. The pervasive segmentation of labour markets by gender, which we discussed above, suggests that women's labour did not simply substitute for men's labour. Rather, that there has been some parallel process at work creating low-paid and poor quality informal employment opportunities for (primarily) women.[29]

Estimates of changes over time in the degree of informalisation within the female and male labour force are not available. However, we have seen above that growth in certain forms of informal employment — notably, sub-contracted work linked to the global production system — expands during periods of economic growth, especially when growth is driven by trade and financial liberalisation. What is important to note here is that women workers tend to be overrepresented in global production systems, at least in the early stages of trade liberalisation when a premium is placed on export-oriented light manufacturing and low-skilled (and low-paid) workers.[30]

Informal Employment in Developing Countries

Informal employment is generally a larger source of employment for women than for men in the developing world. Other than in the Middle East and North Africa, where 42 percent of women workers (and 48 percent of male workers) are in informal employment, 60 percent or more of women non-agricultural workers in the developing world are informally employed. Among non-agricultural workers, in sub-Saharan Africa, 84 percent of women workers are informally employed compared to 63 percent of male workers; in Latin America, 58 percent of women workers compared to 48 percent of men; and in Asia, 73 percent of women workers compared to 70 percent of male workers.

Non-Standard Employment in Developed Countries

In virtually all EU and OECD countries, the incidence of part-time work is much higher among women than men: in some countries it is twice as high. By 1998, women represented 82 percent of all part-time workers in EU countries. Further, rates of part-time work are high for women, but not men, in their prime working years.

Temporary employment, like part-time work, is primarily a female phenomenon, although there is wide variation among EU countries. In all countries except Austria, the incidence of temporary employment among females is higher than among all workers. And, like part-time work, temporary employment is concentrated in the service-producing industries. Interestingly, women account for the majority of agency temps in countries where such employment concentrates in services, while men account for the majority of agency temps in countries where such employment concentrates in manufacturing and construction. Effectively, 'the gender composition of employment mirrors that of the sectors in which temporary agency assignments take place.'[31]

In 1997, women comprised one in three of

self-employed persons in OECD countries and their proportion is growing. For EU countries as a whole, the incidence of own-account work is greater for men (11 percent) than for women (7 percent). But, in some countries, a higher proportion of women than men are own-account workers. Age is a factor in own-account work: those aged 45 and above are more likely than younger persons to be working on their own account.[32]

Indigenous and Tribal Peoples

Finally, one specific group in society that has often suffered from abject poverty and profound discrimination consists of indigenous and tribal peoples. It is estimated that there are 350 million indigenous and tribal peoples (ITPs) representing 5000 ethnic groups. While they represent five percent of the world's population, they account for 15 percent of the world's poor. Poverty, inequality, and various types of injustices have plagued ethnic societies around the world.[33]

The ILO has defined indigenous and tribal peoples as those who have (a) traditional lifestyles, (b) culture, economic conditions and way of life that is different from the other segments of the national population (e.g., in their ways of making a living, language and customs), and (c) their own social organisation and traditional customs and laws. Indigenous peoples are, furthermore, distinguished from tribal peoples by the fact that they live in historical continuity in a certain area, or before others occupied or came to their area.[34]

The definition of 'indigenous' as provided by the United Nations shares features with that provided by ILO: it highlights the 'historical continuity of these peoples with pre-colonial societies; their strong attachment to their traditional territories; their distinct social, economic and political institutions as well as distinct languages and beliefs; their non-dominant position in national societies and their wish to identify themselves as different from the rest of society.'[35]

At the root of the poverty and social exclusion facing ITPs everywhere is discrimination. Whether implicitly or explicitly, ITPs have faced discrimination aimed at wiping out their cultural identity

Box 3 ILO's Convention on Indigenous and Tribal Peoples 1989 (No. 169)

ILO adopted the Indigenous and Tribal Peoples Convention (No. 169) to include the fundamental concept that the ways of life of indigenous and tribal peoples should and will survive. It also stressed that these peoples and their traditional organisations must be closely involved in the planning, design and implementation of development policies that affect them. It sets the minimum international standards while opening the ground for higher standards in countries that can go further. Convention No. 169 adopts a general attitude of respect for the cultures and ways of life of indigenous and tribal peoples, placing emphasis on their right to a continued existence and to development according to their own priorities.

It is a comprehensive instrument covering a range of issues pertaining to indigenous and tribal peoples, including land rights, recruitment and conditions of employment, access to natural resources, social security and health, education and means of communication, vocational training, conditions of employment and cooperation and contacts across borders.
Protection is still the main objective but it is based on respect for indigenous and tribal people's cultures, their distinct ways of life and their traditions and customs. It is also based on the belief that indigenous and tribal peoples have the right to continue to exist with their own identities and the right to determine their own way and pace of development.

through a variety of legal instruments and policies. They have ranged from outright exclusion to inclusion at very inferior conditions.

The typical outcomes involved are dispossession of their traditional lands, relocation without compensation and basic support services; underinvestment in education and health; ill-adapted educational systems and materials — all of which translate, among others, into disadvantageous status in labour markets. ITPs expelled from their ancestral domains become seasonal, migrant, bonded or home-based labourers; they are exposed to various forms of exploitation. Discrimination in wage is common practice and there is high incidence of forced labour. Unemployment, especially youth unemployment, is higher among ITPs compared to the national average.[36]

The challenge lies in how to improve living and working conditions among ITPs so that they can continue to exist as distinct peoples, if they wish to do so. Specific efforts for legal empowerment of indigenous people have to be made. The ILO's Indigenous and Tribal Peoples Convention (see Box 3) provides guidance and strategies for legal empowerment with respect not only to labour rights and protection of employment, but also to land and property rights.

Special efforts for their legal empowerment are demonstrated in an 'ethnic audit' of 14 Poverty Reduction Strategy Papers (PRSPs) as well as case studies of country processes in Bolivia, Cambodia, Cameroon, Guatemala and Nepal. The research clearly showed that while indigenous peoples are disproportionately represented among the poor, their needs and priorities are generally not reflected in the strategies employed to combat poverty.

Legal empowerment of indigenous and tribal peoples must address the structural causes of their disenfranchisement and social exclusion through:

- Legal frameworks that recognise individual and group rights.
- Institutions and policies that respect and accommodate cultural diversity.
- Organisation and mobilisation of indigenous people for participation and political change.[37]

Conclusions

The vast majority of the working poor earn their living in the informal economy where average earnings are low, productivity is poor, working conditions are hazardous, and risks are high. Any attempt to formulate policies and approaches for the informal economy must understand its characteristics, including the deep segmentation found in it. This section provided a global picture of the informal economy, highlighting its size, segmentation, and the vulnerabilities of its particular segments. Women dominate the most-disadvantaged categories of informal work,[38] notably industrial outwork and home-based production. It is also in the informal economy that child labour and bonded labour are most prevalent and most difficult to address. Indigenous and tribal peoples are marginalized largely due to discrimination. Their cultural identity is suppressed and they are excluded from social services that should prepare them for the labour market; furthermore, when at work, they face many forms of discrimination.

Despite early predictions of its eventual demise, the informal economy has not only grown worldwide but also emerged in new guises and unexpected places. Though understood to be counter-cyclical, different segments of the informal economy are seen to have different cyclical patterns leading to different patterns of informalisation across countries. In virtually

all cases, the informal economy expands during economic slumps or downturns, as expected. In some cases, the informal economy expands during periods of economic growth. Economic growth has been accompanied by an increase in the more dynamic micro-enterprise activities and subcontracted work for larger supply chains especially those linked to the global economy. Thus, the growing significance of the informal economy — and its apparent endurance as a feature of the labour market — leads us to examine how labour rights can be applicable to the workers found in it and what role legal empowerment of the informal workforce can play in breaking the vicious cycle of low productivity and poverty.

4. Poverty and Labour Rights: a new departure

Poverty: A market failure and a public policy failure

There is a broad consensus around the notion that labour is not a commodity[39] and, therefore, that labour markets are different from other markets. The labour market has a double function: it is a mechanism for both the creation of new resources and for the distribution of income and prosperity. While enterprises should be subject to competition, which means that some will succeed and grow while others will disappear, people or workers have to be treated in a completely different way. Public policies for workers and their families have to be focused on inclusion, on new opportunities for decent work and on shared prosperity (See Box 4 for an elaboration of the social case for labour regulation).

In addition to their intrinsic value for the working poor, labour rights standards are *fundamental* to upholding the human rights obligations of states and other 'organs of society' as set out in the Universal Declaration of Human Rights and many other international covenants, conventions, and treaties, as well as set out in national legislation around the globe. From the perspective of this Commission, labour rights and regulations are also *fundamental* to achieving legal employment of the poor.

Labour rights and labour standards have been an issue for international promotion and regulation for almost a hundred years. All countries, including the poorest countries, in principle provide their workforce with labour rights. Labour laws and labour protection models are traditionally designed with the presumption of a formal employer-employee relationship. This relation-

Box 4 Social case for labour regulation

The social case for labour market regulations emanates, first and foremost, from the principle that labour is not a commodity. The distinction lies in the human aspect of labour. As such, its behaviour is affected by the work environment and by the incentives that are given. While machines operate according to technical specifications, labour has to be motivated based on what they care about. They are contracted to perform a certain job and are paid when they complete the job. The completion of the contract is not as straightforward as it would be for non-human means of production as this requires a complex range of information on both sides and incentives to ensure compliance.[42]

ship has been the cornerstone around which labour law, collective bargaining agreements and social security systems are framed. Whatever its precise definition in different national contexts, the employment relationship has represented 'a universal notion which creates a link between a person, called the employee (frequently referred to as the 'worker') with another person, called the employer to whom she or he provides labour or services under certain conditions in return for remuneration.'[40]

Despite the long-standing and wide-spread commitment to labour rights, a large majority of workers are excluded from labour rights and social protection. Thus, informality and poverty is not only a market failure, it is also a failure of public policies. Several factors, in the form of historic traditions, structural failures and conflicting political interests, help explain the persistence and growth of informality.

- One explanation is the history of labour law and regulation. Labour rights were historically designed with the presumption of a formal employment relationship thus excluding those without a formal employment relationship.
- Another explanation is a lack of confidence in laws and law enforcement. Some political regimes have further undermined public confidence due to poor governance, causing many enterprises to operate in the informal economy.
- A third explanation is a lack of public policy attention. Governments, employers, and workers — the three social partners in the ILO standard-setting systems — have focused on the formal economy and the formal organised labour force. The informal sector and informal employment have been studied and discussed since the 1970s. A first discussion of the informal sector took place at the International Labour Conference in 1991 and subsequently the International Labour Conference reached policy conclusions regarding informal employment in 2002.[41]
- Another factor is weak and poorly-designed enforcement mechanisms. Countries that have improved the design and reach of their enforcement mechanisms to match the circumstances of workers and units in the informal economy have been able to reduce informality.

The relationship between informal employment and poverty had not, until recently, received the attention they deserve, much less reached the top of the development policy agenda. The interest to bring about reform is quite new and the reform strategies, discussed by the ILO, World Bank, the international trade union movement and others, and the efforts to develop feasible solutions by countries with large informal economies, are still in their early stages of development.

A New Departure: Fundamental Principles and Rights at Work, the Decent Work Agenda, and Legal Empowerment of the Working Poor

The recognition that productive employment and decent work are key pathways to poverty reduction, and that informality represents both a market failure and a public policy failure, have led to a reassessment of development strategies of the 20th century, including the ILO labour standard strategy. Over the past decade, tripartite discussions on key related themes at the annual international labour conferences have contributed to this review process, as have the activism, scholarship, and policy analysis of other stakeholders. What has emerged from this rethinking is an international consensus around an agenda of fundamental principles and rights at work, also known as core labour standards, decent work and legal empowerment of the working poor in the informal economy.

The First Step: Fundamental Principles and Rights at Work: A first step in the development of new international strategies to fight poverty and social injustice through labour rights was the establishment by the International Labour Conference in 1998 of a set of fundamental principles and rights at work; they include:

- The right to freedom of association and collective bargaining.
- The elimination of all forms of forced or compulsory labour.
- The abolition of child labour.
- The elimination of discrimination in employment and occupation.

Endorsed by the international community, these core labour standards constitute a 'minimum floor', necessary both for the respect of fundamental human rights and for the effective functioning of labour markets. They are applicable to all workers and economic units.

The Second Step: The Decent Work Agenda: A second step in the rethinking of traditional approaches was the introduction at the International Labour Conference in 1999 of the Decent Work Agenda. Decent work is central to efforts to fight poverty. It is captured in four strategic objectives: fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism. These objectives hold for all workers, women and men, in both formal and informal economies; engaged in wage employment or working on their own account; and working on the streets or in fields, factories, small workshops, or offices; in their homes or in their neighbourhoods.

Legal empowerment through labour rights is not only a means for preventing a race to the bottom. Such legal empowerment can also be designed to create confidence, to facilitate change and to maintain cohesion, as shown by many of the more prosperous countries. Labour standards, collective agreements and social protection in these countries contribute to defining minimum levels of income and productivity. In other words, effective application of labour standards can contribute to giving a positive incentive for enterprises in the informal economy to increase their productivity and incomes and to formal firms to extend labour rights to all of their workers: both core and peripheral, both direct and contracted hires, up and down their supply chains.

Labour standards are not only about the protection of worker rights. They also include promotional measures, such as access to skills upgrading, life long learning and productive employment.

Box 5 ILO Conventions and Recommendations Pertinent to the Informal Economy

Human capabilities and empowerment	Labour market policy frameworks for better governance	Protection of people
Core labour standards • Freedom of association and collective bargaining (C87 and 98) • Equality (C 100 and 111) • Forced Labour (C 29 and 105) • Child Labour (C 138 and 182) (The Indigenous and Tribal Peoples Convention, C 169, must also be mentioned, in view of its provisions on educational measures to eliminate prejudices and to combat discrimination and full realisation of their rights.)	**Employment policy** • Employment Policy (C 122 and R169) • Job Creation in SMEs (C 189) • Human Resource Development (C 142 and R 195) **Institutions of governance** • LabourAdministration Convention (C 150) • Protection of Wages (C 95 and R 85) • Right to Organise and Collective Bargaining (C 98 and 154) • Consultation (Industrial, National, and Tripartite (C 113 and 114)	**Social security instruments** • Social Security (Minimum Standards) (C 102) • Indigenous and Tribal Peoples Convention (C 169) • Maternity Protection (C 183) **Safety and health instruments** • Occupational Safety and Health (C 155 and R 164) • Guarding of Machinery (C 119) and Working Environment (Air, Pollution, Noise and Vibration; C 148) • Safety and Health in Agriculture (C 184) • Rural Workers' Organisation (C 141) • Various safety and health conventions in specific sectors such as mining, construction, work involving asbestos and benzene.

Source: Anne Trebilcock 2004.

The Third Step: Empower People in the Informal Economy: This step was taken in 2002 when the International Labour Conference discussed and adopted a resolution on Decent Work and the Informal Economy, representing a new departure in addressing the topic. The new conceptual framework depicts a continuum of production and employment relations. It does away with the idea that there are distinct formal and informal 'sectors' without direct links and instead stresses that there are 'linkages, grey areas and interdependencies between formal and informal activities.' The framework views formal and informal enterprises and workers as co-existing along a *continuum*, with decent work deficits most serious at the bottom, unprotected, unregulated, survivalist end, but also existing in some formal jobs as well, and with increasingly decent conditions moving up towards the formal protected end. By highlighting the dynamic linkages between formal and informal activities, the policy issue can more realistically be framed: the issue is not whether informal workers or informal units have direct ties with the informal economy but whether those ties are benign, exploitative or mutually beneficial. The policy concern must enhance the positive linkages and ensure that there is decent work all along the continuum.[43]

The conclusions stressed the need to 'eliminate the negative aspects of informality while at the same time ensuring that opportunities for livelihood and entrepreneurship are not destroyed, and promoting the protection and incorporation of workers and economic units in the informal economy into the mainstream economy.' With a special focus on countries struggling with abject poverty and with a rapidly growing labour force, the ILO resolution urged that measures taken 'should not restrict opportunities for those who have no other means of livelihood. However, it should not be a job at any price or under any circumstances.' A clear challenge for follow-up is to demonstrate how job quantity and quality can go together and how respect for basic labour rights might promote productivity growth. A related challenge is to ensure that activities targeting the informal economy do not lead to the growth of poor quality employment, but rather to the upgrading of working conditions. The conclusions also call for an upward transition, not a downward pull along the continuum of decent work.

Beyond the four core labour standards there is a range of standards, including minimum wages, occupational safety and health, working hours, and maternity protection, which directly impact working conditions. These are determined nationally and their application varies with the level of development of the country and its capacity to enforce these standards.[44] One convention of direct relevance to the informal economy is the ILO Home Work Convention, adopted in 1996, which works to extend legal empowerment to home workers (industrial outworkers who work from their homes), who are predominantly women.

Compliance with these standards can be viewed as progressive, where different segments of the labour market experience different degrees of protection. In reality, 'the formal shades into the informal' and people move between work opportunities with different degrees of protection.[45] The goal is to progressively achieve compliance with a broader range of standards throughout the whole economy, leading to gradual formalisation of the informal economy.

It is instructive to highlight provisions in ILO Conventions and Recommendations that may be applicable to the informal economy. These international labour standards provide guidance to national economic and social policies, including how such policies can be applied to decent work and the informal economy. These Conventions and Recommendations may be understood under the following broad objectives: (a) human capabilities and empowerment, which relate to the core labour standards, (b) labour market policy frameworks for better governance, and (c) protection of people.[46] These standards form the backbone of ILO's Decent Work agenda, and cover not only the formal sector but also, most importantly, the informal economy. For it is in the informal economy where decent work deficits are found to be most challenging and disturbing.

Towards a Global Social Contract

As noted above, the international community has endorsed three outcomes of the ILO's international labour conferences over the past decade, which, taken together, provide a strategic framework for advancing the realisation of labour rights, reducing poverty, and expanding equity worldwide. The 1998 Declaration of Fundamental Principles and Rights at Work, the 1999 Decent Work Agenda, and the 2002 Resolution on the Informal Economy have made significant contributions to what is now a widely-shared commitment to universally ensure a minimum floor of fundamental labour rights; they have also recognised that the final objective should be the

provision of full, productive, freely-chosen and protected employment in a democratic context of freedom of voice, organisation and social dialogue. Furthermore, the extension of this commitment to include the informal workforce provides a comprehensive framework for inclusion of those among the poorer segments of the population who are employed but register significant deficits in regard to decent work.

The 2005 World Summit of Heads of States strongly supported the goal of fair globalization and 'resolved to make the goals of full and productive employment and decent work for all, including for women and young people, a central objective of our relevant national and international policies as well as our national development strategies, including poverty reduction strategies, as part of our efforts to achieve the Millennium Development Goals.'[47] This was followed by the UN Economic and Social Council (ECOSOC) 2006 Ministerial Declaration, which emphasised full and productive employment and decent work for all as an end in itself and as a means to achieve the Millennium Development Goals (MDGs), including poverty eradication. On this occasion, the multilateral system[48] was enjoined to mainstream the goals of full and productive employment and decent work in all their policies, programmes and activities. [49]

The Decent Work agenda has therefore been accepted as a global goal and is no longer an ILO agenda alone. Decent work has been declared as a goal not only for the formal wage sector, but also for the informal economy. A decade-long process of rethinking international labour standards has now led to an emerging global social contract, a broad agenda for reform and for empowerment.

The Working Group on Labour Rights, in preparing this chapter, saw an opportunity to move one step further and provide additional elements to this emerging global social contract. We suggest advancing simultaneously on labour rights, job creation and social protection, focusing particularly on the working poor in the informal economy.

Labour rights for informal workers: what is an achievable minimum floor?

All workers in the informal economy should be covered at least by a 'minimum floor' as contained in the 1998 Declaration of Principles and Rights at Work. This Declaration established the application of core human rights to the arena of labour or work; included in its provisions are calls for no use of forced or child labour, no discrimination, and the freedom of voice, organisation and bargaining. The Declaration also constitutes the foundations for implementing other labour rights and providing enabling conditions to exercise them and, thus, achieving the objective of providing employment opportunities while ensuring protection.[50] This minimum floor could include three additional labour standards for determinants of working conditions: hours of work, diseases and accidents at work, and minimum wage.[51]

What we are proposing here — an enlarged minimum floor — has already gained international acceptance, notably during the last generation of free trade agreements of the United States and countries of Asia and Latin America. The adoption of such a minimum floor would ensure the rights to rest, to health coverage of work-related risks, and to fair remuneration — all according to standards established by national legislation. Enforcement of such rights and provisions should be required for all workers in the informal economy, independently of the size or form of the economic unit in which they work. This would justify rein-

forcement and, eventually, a redesign of labour inspection institutions.

For informal workers outside formal enterprises, full compliance of labour rights as established by national legislation needs to be enforced. This should go beyond the minimum floor, requiring eventually reforms to the labour legislation for the facilitation of compliance. Advances in this direction would lead to full achievement of the Decent Work objectives.

Unfortunately, not all employment relationships are explicit, where rights and obligations can be clearly identified. Many workers are employed under diffuse employment relations where the relation is hidden or where there are problems in the application or interpretation of the law. There is need for additional policies to determine if an employment relation exists and to clarify the responsibilities for compliance among those enterprises involving multi-parties.[52] The latter kinds of arrangements are continuing to expand and are serving to decentralise the labour system in efforts, apparently, to reduce labour costs. In the process, however, they are often bypassing labour regulations and collective bargaining agreements and eroding the power of unions.

Interpretation of existing laws as well as new legislation will be needed to regulate these disguised employment arrangements, and to determine whether an employment relationship exists and who is primarily responsible for obligations to workers. This essential first step in moving towards compliance should be followed by appropriately adapting labour laws and the labour inspection system.[53]

The situation of workers in informal enterprises poses additional challenges, since the capacity of many informal enterprises to absorb the cost of compliance is restricted by low productivity and income.[54] As employment opportunities could be destroyed in such cases, a strategy is needed for increasing compliance and promoting progressive enforcement without legally adopting a dual system. An expanded minimum floor should, however, be enforced even in these enterprises, since cost concern cannot be accepted as an argument for non-compliance given the nature of the rights involved and the fact that compliance does not necessarily involve significant costs.

Most standards require abstinence from discriminatory or unlawful behaviour rather than financial expenditure. A strategy could, however, recognise constraints where they exist in addition to the obligation to comply with a minimum floor; basically, it should commit to gradual convergence to full compliance and to verification of progress towards this goal. This also requires adapting the labour inspection procedures and practices to move from sanctions to training in the early stages and to progressive compliance, as recommended by the ILO in a recent paper.[55]

A broad category that deserves special treatment is that of home work (production or service work in a worker's home) and domestic work (house cleaning, cooking for others). Included in this category are significant numbers of workers. Work might involve producing for intermediaries in subcontracting arrangements as well as selling or producing directly for employers. There is also a concentration of women and use of family work that may involve children in these activities. National labour laws do not usually cover domestic workers; they have no rights and little capacity to organise. Most are poor and experience significant deficits of decent work. Employment relations, where they exist, justify the application of rules covering other workers in the informal economy. The convention (177) and a recommendation (184) adopted by the International

Labour Conference in 1996, in recognition and support of home workers, calls for their equal treatment with other workers: in particular, it calls for freedom of association in organisations of their own choosing and protection against discrimination, minimum age for work, remuneration and protection in safety and health at work, social security and maternity. This minimum floor for home workers, mandated in the 1996 Convention and Recommendation, coincides with what is proposed above for all workers of the informal economy, with the addition of social protection and maternity.

Business and labour rights at work

There are, in addition, a proportion of independent home workers that perform a double role of entrepreneur and worker and involve other family members in the production process. Independent workers are also found beyond those who work at home and constitute around half of employment in the informal economy. Their identity is unclear, since they are both employers and workers, and their ways of organising should be open to their preferences. Their voice and their claims are usually directed against local governments and their behaviour in a highly competitive environment is to operate in isolation to other producers or workers in similar situations. In spite of these characteristics, the minimum floor is relevant and could enable these independents to organise, empowering them to exercise both their labour and business rights. On the latter, improvements in the regulatory environment and in processing will result in increasing the opportunities to develop businesses and in diminishing the barriers to grow. This should result in higher productivity and incomes.

The International Labour Conference, in its 2007 discussion on Sustainable Enterprises,[56] argues that 'emphasis needs to be placed on the transition of informal economy operators to the formal economy and ensuring that laws and regulations cover all enterprises and workers.' The ILO Resolution on the Promotion of Sustainable Enterprises, endorsed by employer, worker and government representatives, argues that 'poorly designed and unnecessary bureaucratic burdens on businesses limit enterprise start-ups and the ongoing operations of existing companies, and lead to informality, corruption and efficiency costs.' Well-designed transparent, accountable and well-communicated regulations, including those that uphold labour and environmental standards, are good for markets and society. They facilitate formalisation and boost systemic competitiveness. Regulatory reform and the removal of business contracts should not undermine such standards.

Social protection for informal workers

The extension of social protection — health and pensions, as well as maternity — to informal workers requires a strategy that considers different options, from expanding coverage of existing systems to the development of new mechanisms by the excluded, through pooling, of resources or insurances. Alternatives should be considered, while examples of different schemes for the provision of protection need to be evaluated. India recently introduced a bill to regulate employment and service conditions of unorganised workers and to provide for their safety, social security, health and welfare and introduced a Welfare Fund financed by government and registered employers with this purpose.[57] In the Philippines, the Statutory Social Security system and the health insurance plans have increased their coverage through voluntary schemes open to self-employed workers.[58]

From a systemic perspective, these rights should

be granted to people as citizens rather than as workers, and they should be awarded on the principle of universality. This has already been reflected in Latin America, where some 'traditional models' have been redesigned, by the addition of a publicly-financed 'solidarity pillar' to private contribution pension systems. In its recently published report on informality in Latin America,[59] the World Bank fully supports this change for both health and pension coverage. In the case of health care, shocks that go uncovered impose significant costs to society. Therefore, there is a case for providing minimum essential health coverage, de-linked from the labour contract and financed through general taxation. Similarly, in the case of insufficient incomes in old age, there are social costs involved that justify minimum income support not linked to the labour contract.

Chile, which pioneered the privatisation of the pension and health systems, is taking the lead in introducing a non-contributory pillar that guarantees a solidarity pension to all citizens above 65 years old who receive a pension of 50 percent of the minimum wage. It will be universally granted, but efficiency is ensured by gradually reducing the subsidy for those who receive other pensions, thus reducing the need for public funds and providing incentives to contribute to the system. In fact, the resulting model establishes a mid-way for non-contributory pensions, since it is universal for all citizens, but it recovers partly the fiscal contribution from high-income pensioners. Bolivia is the only country in Latin America that has introduced a universal non-contributory pension (BONOSOL) and Brazil has a similar system for rural workers (FUNRURAL).[60] Health is covered to a larger extent than pensions and reaches universality by a combination of different systems: a social insurance system in Costa Rica that covers contributors and non-contributors; a public-funded system in Cuba, and a mix of public institutions, social security and private insurances in Uruguay, Brazil and Chile, among others. Chile has strengthened access to public health for all citizens by introducing an attention guarantee of 56 basic pathologies (AUGE) in addition to the existing national health insurance (FONASA).

De-linking health and pension coverage from the labour market would create opportunities to increase employment and improve businesses, while guaranteeing security. It will help decrease the existing protection deficits but it will require sound fiscal policies and, particularly, the adequate funding of decent health and pensions coverage. A similar approach should be used in the case of child care and maternity given the potential effect, respectively, on the early development of cognitive abilities in children and the participation of women, particularly those from poor households, in the labour market.

The Role and Limitations of Voluntary Codes of Conduct

Multinational corporations and non-government organisations have also taken forward the core labour standards and the decent work agenda by establishing voluntary codes of conduct, involving in some cases subcontractors and outworkers. Codes of conduct constitute a strategy for motivating improvements in the performance of multinational corporations. Among the many important initiatives are the Fair Labour Association, SA8000, the Clean Clothes Campaign Foundation and the Ethical Trading Initiative. While the codes advanced through these programmes vary, most of them tend to be based on ILO's core standards, particularly the prohibition of forced labour, child labour, and discrimination in the workplace. These organisations take

different paths to enforcement, with some taking a centralised approach in overseeing and controlling payments for monitoring, while others follow a 'consulting firm approach' which allows companies to choose and pay for their own monitors. There is a need to move towards unified codes in the interest of promoting good governance in the business sector.

Labour Rights, Social Protection, Employment Creation: trade-offs or complementarities?

The emerging global social contract should include the promotion of more and better employment opportunities and aim to reduce the existing gaps in protection, particularly concentrated in poorer population. It has to open opportunities as well as to provide protection. There are trade-offs involved, but there are also strong complementarities. The experience accumulated during the last decades could contribute to enhance the latter effects, without ignoring the lessons learnt to diminish unnecessary costs introduced by ill-designed policies. Security provides incentives for learning and innovation and both are requirements for growth and employment creation. There is also need to facilitate adaptation of firms to the new competitive conditions, and this is particularly relevant in matters involving labour contracts and regulations.

One of the lessons learnt is that the prescription for flexibility, through the introduction of temporary or atypical labour contracts, has serious draw backs, affecting more than the lives of workers and their families. The rigidity of the permanent contract and, particularly, the costs involved in terminating this type of contract, could constitute a barrier in times of adjustment. On the other hand, such contracts also provide a simple way of protection in countries where other mechanisms, like unemployment insurance, do not exist or are very limited. The erosion of the permanent contract can be changed by going back to a modified version; for example, by introducing longer trial periods, reducing or increasing the severance payments in case of termination of employment, etc. The availability of temporary and fixed-term contracts will still be needed, particularly to open wider opportunities for those more affected by unemployment and for those who wish to reconcile education or house-family care responsibilities. At the same time, temporary or fixed-term jobs should not replace permanent jobs and the limits of their use should be established through consultation and dialogue.

The legal recognition of hidden employment relations or those without contracts will provide identity to the affected workers and constitute enabling conditions for them to exercise their labour rights, particularly labour and social protection. At the same time, the formalisation of employment relations, even if gradually achieved, opens opportunities and provides incentives for improving business management. A cultural change in the management of micro-enterprises and, particularly, of family businesses is induced, since compliance with labour obligations requires the introduction of accountancy and cost benefits analysis to ensure viability of the enterprise. The right of association is also conducive to developing alliances between producers, thus reinforcing their voice and their ability to negotiate with local authorities; it is also enabling for potential price reduction of their inputs and for easier access to concentrated markets. This also represents a major cultural change since it means shifting from individualistic to collective behaviour. There has been international tripartite consensus on the need to combat disguised employment relationships. National policy could serve to ensure effective protection to workers especially affected by

uncertainty as to the existence of an employment relationship (workers in the informal economy, for example).[61]

Conclusions

This review of development strategies and of international labour standard setting shows that there is a growing political understanding of the fundamental importance of employment and work conditions for the fight against poverty. It also shows that there is a new departure in the international community regarding labour rights and that work in the informal economy now is addressed. The three elements of this new departure — Fundamental Principles and Rights at Work, the Decent Work Agenda and the rights in the informal economy — are now supported by a broad coalition of governments, international organisations, trade unions and employers and non-governmental organisations.

5. The economics of informality and the debate on Labour Regulations

There is now a broad recognition of a decent work deficit in the global labour market - from the absence of social protection to the absence of basic rights at work. A key economic indicator of that deficit, as explained by the ILO World Employment report of 2004/2005, is whether men and women can earn enough from their work to lift themselves and their families out of poverty. For the estimated 500 million working poor who live in households with daily incomes of less than US$1 per capita, the answer is 'no'. In their case, it is not the absence of economic activity that is the source of their poverty, but the nature of their economic activities. The link between work of low quality or productivity and poverty is starkly clear: if people were able to earn more from their work, then poverty would decline. Thus, it is not just any work *per se* which can raise individuals out of poverty; but rather productive and decent work.

Taking this view as point of departure, the purpose of this section is to provide a brief overview of the role of labour regulations in economic performance. We examine, firstly, some broad cross-country evidence about the impact of labour regulations on growth and employment, making references to a number of individual country studies. We then proceed to what we would argue is an important addendum to reinterpreting prior assumptions regarding the nature, role and impact of labour market regulations for the working poor of the world. Our recommendations are presented at the end of this section.

Table 1 **Mean Measures of Regulation, by Income Level**

Area of Regulation	Low Income	LMI	UMI	HI - non OECD	HI - OECD	Total
Rigidity of Hiring	44.28	33.68	29.91	27.00	20.60	34.33
Rigidity of Hours	47.60	39.64	40.57	45.22	32.00	42.40
Rigidity of Firing	40.00	33.04	33.43	27.39	14.00	33.26
Aggreg. Employment Index	***43.96***	***35.45***	***34.64***	***33.20***	***22.20***	***36.66***
Hiring Costs	12.40	16.01	17.31	21.43	10.17	15.62
Firing Costs	65.32	50.91	44.63	31.32	54.64	51.34

Source: Doing Business, 2006 and authors' own calculations

1. 'LMI' refers to Lower Middle Income countries; UMI to Upper Middle Income countries and HI to High Income economies. These are standard classifications drawn from the World Bank's World Development Report (2005).
2. All indices are normalised to 100, with the italicised, composite indices the arithmetic mean of the preceding sub-indices.

The economic impact of Labour Regulation: an overview of key results

This section provides an overview of some of the key measures and results from the Investment Climate Assessment (ICA) surveys and the Doing Business Survey (DBS) both run under the auspices of the World Bank with a focus on summary measures of labour market regulation and worker protection.[62] In turn, we raise some caution about the interpretative value and policy relevance of these results.

Most studies of labour regulation are based on the assumption that such regulations are, in one form or another, obstacles to business operation, and hence, to productivity and prosperity. These studies rarely address the intrinsic value of regulations, or the perceived need or political economic circumstances that gave rise to the regulations in the first place.[63] A first question is what role labour regulations play relative to other forms of regulation in hindering the growth of firms. This question was addressed recently in an ICA survey. The conclusion of this survey was that the top ten most frequently reported obstacles to growing business operation were: policy uncertainty, macro instability, tax rates, corruption, cost and access to finance, crime, regulation and tax administration, skills, court and legal systems, and electricity.

Labour regulation came in at eleventh place, reported by 16 percent of the respondents. More pointed evidence from the Business Enterprise Survey Unit of the World Bank, which includes the ICA surveys, suggests that firms around the world do not necessarily view labour regulations as a dominant determinant of, nor obstacles to, growing their businesses. The evidence suggests that less than six percent of all firms, irrespective of size, view labour regulations as a 'severe' or 'major' obstacle to business expansion. This figure is between 2.5 and 5.5 percent for low income, lower middle-income and upper middle-income economies. In the case of high-income (OECD) economies, the estimate is about 10.5 percent (World Bank, 2007). No significantly different estimates are derived by size of the enterprise. Therefore, and notwithstanding their overall limited relevance to business growth, the perception of the relevance of labour regulations to business growth increases with the level of development. Therefore, in contrast to the DBS

surveys discussed below, the ICA surveys indicate that labour regulations appear to be of even more limited relevance to low-income countries

In contrast to the ICA surveys, the DBS is focused on a detailed assessment of the regulatory environment in individual economies. It has an extensive labour regulation module, which is based very closely on the methodology of the Botero *et al* (2004) study.[64] In addition, the DBS is the most recent, and indeed, possibly the most widely used measure of labour regulation and worker protection within an international context. Hence, despite some reservations expressed regarding the DBS, it continues to be a central information base for policymakers and investors alike. For this reason, our working group for Chapter 3 of this report has made review of the methodology of the DBS and the debate on the DBS the basis for policy recommendations.

The table above presents a snapshot of the key measures available to the public user, from the dataset. We present the data by country income level. All measures are converted to an index ranging between 0 and 100. Values closer to 100 indicate higher levels of rigidity or protection. The 'difficulty-of-hiring' index measures restrictions on part-time and temporary contracts, together with the wages of trainees relative to worker value-added. The rigidity of hours measures the various restrictions around weekend, Sunday public holiday work, as well as limits on overtime, and so on. The 'firing' index examines specific redundancy clauses within the relevant legislation in detail. What the DBS refers to as hiring costs, are in effect social protection costs, measuring all social security and health costs associated with hiring a worker. Finally, the cost of firing, measures the costs of terminating the employment of an individual in terms of legislated notice-period requirements, severance pay, and so on.

From the aggregate cross-country data, there is an interesting bifurcation in the regulation and protection measures. Hence, the data indicate that the highest measures for any area of regulation relating to rigidity in hiring, firing and hours of work are found in low income economies, with the lowest level of employment regulation amongst high income OECD economies. In addition, the data show that firing costs are also the highest amongst low income countries, although notably hiring costs are the highest in non-OECD high income economies.

The Consequences of Labour Market Regulation

There are two important questions on policy issues that are of relevance to the debate around labour regulation and worker protection. The first revolves around the consequences of labour regulation, in all its different manifestations, for economic growth: do we find evidence that labour market regulation hinders economic growth? The second issue is related, but more concerned with the specific outcomes in the labour market, as a consequence of this regulatory regime: does the evidence suggest for example, that higher levels of labour regulation are correlated with higher rates of youth unemployment, larger informal employment and so on?

A number of studies suggest that regulation in general, and labour regulation in particular, is negatively and significantly associated with growth in per capita GDP (Loayza *et al*, 2006; Forteza and Rama, 2001; Heckman and Pagés, 2003). On the other hand, Botero *et al* (2004) find that *'There is no evidence that employment laws or collective relations laws vary with the level of economic development.'*[65] Loayza et al show that the effect of regulation is gradually mitigated as governance — and thus regulatory quality — improves.

However, a more detailed examination of the above literature suggests that the cross-country growth regressions often reflect either on the specific components of the labour regulatory regime that may be hindering growth, or indeed represent the entire gamut of labour legislation as one index. Both these approaches and subsequent results suggest that there is a heterogeneity in the labour regulatory regime that needs to be grasped, and furthermore that this heterogeneity can have a differential impact on economic growth. For example, Forteza and Rama (2001) find in one of their set of results, that over the period 1970-86, the number of ILO Conventions ratified is insignificantly related to GDP growth, but that the minimum wage indicator is negative and significant. Loayza *et al* (2006), in turn, find a significant and negative relationship between economic growth and the labour regulation index, but this index is represented as an aggregate measure, and is not expanded into the components noted in Table 1.

The evidence on the impact of the labour regulatory regime on specific labour market indicators, in addition, suggests similar outcomes and consequent concerns. Hence higher levels of labour regulation appear to be significantly associated with a larger informal economy, higher informal employment, reduced male participation rates and higher unemployment rates particularly amongst the youth (Botero et al. 2004; Loayza et al. 2006; Lazear 1990). However, once again, these results are either too aggregated in their measure of labour regulation, or indeed, do reflect on the heterogeneous impact of labour regulation on these labour market indicators. Specifically, then, it is not clear whether all components of labour regulation and worker protection encourage growth of informal employment, or some components do so more than others. This would seem to be a critical avenue of enquiry — in order to better assist the current policy debate. In addition, where such specificity is isolated, as in the Botero et al (2004) study, one finds that certain components of the labour regime are more important than others in shaping labour market outcomes. Hence, protective collective relations laws, but no other components of the labour regulatory architecture, are shown to be associated with a larger informal economy.

A cross-country growth regression analysis (using the ordinary least squares approach) serves to illustrate the problem of aggregating across indices to arrive at firm conclusions. If such a regression is run on the DBS 2006 results, and simply includes most of the *individual* regulation indices — rather than the composite measures often utilised - the regulatory effects including those for the labour market are muted. Hence, of the individual labour regulatory measures in this admittedly very simplistic specification, two of the five (hiring costs and hours rigidity) are significant at the five percent level. Notably however, the signs on both these coefficients are *positive*, indicating, for example, that higher hiring costs (and hours of rigidity) are associated with higher GNI per capita economies. This does not mean, however, that regulation in general and labour regulation in particular, are not important in the growth debate. Instead, it does suggest some caution in our interpretation of the published results and, more importantly, their translation into country-level policy interventions without due consideration both to the heterogeneity in the regulatory environment, and to country-specific conditions.

Two additional caveats to the debate relating to the impact of labour regulation are worth noting. Firstly, that the absolute impact of labour regulation may, even when using composite measures,

be lower than that created by other regulatory indices. Hence, Loayza et al (2006) note that while GDP growth declines by 0.42 percentage points for every one standard deviation increase in an economy's (composite) labour regulation index, this estimate for product market regulations is over four times as large, at 1.86 percentage points. The fact is that the negative correlation of labour regulation with average income is not statistically significant.

Secondly, (and again drawing on Loayza *et al* [2006]), good governance and the quality of regulations, noted below, do make a difference. Hence, specifications controlling for quality of regulation, do appear to erode some of the negative impact of labour and product market regulations on growth. For labour market regulations, the threshold of governance quality required is relatively low and comparable to Ireland and Portugal. For product market regulations, the threshold is quite high and comparable to the quality of governance in Switzerland, United States and England. Hence, the notion that labour regulations can and do interact with the quality of their application in explaining growth outcomes and does so in a non-linear manner, is a nuance that should not be lost.

Thirdly, one of the indicators in the DBS, the 'employing workers indicator' (EWI), is now subject to a debate between the ILO and the World Bank. While the Bank recently has revised its policy to require that its contractors respect core labour standards, the ILO claims that recommendations based on EWI are contrary to that policy. In a review of the EWI the ILO states that the index does not take into account the reasons of labour legislation. The ILO in fact argues that 'the narrow and limited methodological foundations for the EWI are insufficient and possibly damaging as a guide to policy formulation.'[66]

On the general aspect of regulation and informality some studies focus on the voluntary aspects of informality.[67] By avoiding taxes and regulatory obligations, it is believed that informal companies gain a substantial cost advantage that allows them to stay in business despite their small scale and low productivity. More productive, formal companies are prevented from gaining market share. The result is slower economic growth and job creation.[68]

The International Organisation of Employers (IOE)[69] describes the informal economy as 'largely negative,' trapping individuals and enterprises in a spiral of low productivity and poverty. For governments it entails the loss of revenue, 'and for workers it can mean inferior working conditions, job insecurity, lack of access to state benefits and social security.'

The Impact of Labour Market Regulation: Country Studies

A recent OECD[70] study found that making firing more expensive for older workers will protect them against dismissal while severance payments allow workers to smooth consumption during unemployment periods. They also increase the incentive for longer-lasting employment relationships, which may increase worker satisfaction and productivity. At the aggregate level, more stable employment-relations foster technological progress and skill upgrading[71] and, in an argument frequently used in Latin America, worker protection, they correct potential power asymmetries between employees and firms.[72]

Yet, various studies have shown that firing costs can lead to greater informality. They increase costs by forcing firms to keep non-productive workers in the firm, or to remain overstaffed for significant periods of time. Thus it makes it more difficult for firms to fire, but also to hire. In developed

countries this translates into unemployment, and in Latin America (which, however, is often over-regulated), it translates into lower formal labour demand and larger informality. For instance:

- A recent study that explicitly models the impact of firing costs over labour demand in Peru shows that an increase in expected severance payments has a negative correlation with formal labour demand.[73]
- Kugler et al.[74] found that in Spain a reduction in payroll taxes and firing costs increased the demand for permanent workers.
- Acemoglu and Angrist, in an interesting study about the effects of the American Disability Act, found that outlawing the firing of disabled workers actually reduced labour demand for disabled workers, precisely the opposite effect that the law intended.[75]

The recent work on the Indian labour regulatory regime (Besley and Burgess, 2004; Ahsan and Pagés 2007) suggests that the clauses linked to firm size within the industrial disputes regulatory architecture may have had a deleterious impact on the growth of the economy's manufacturing industry (Ahmed and Devarajan, 2007). However, once again, these conclusions are incomplete: Firstly, the Indian experience indicates that while the regulations are a part of the problem, in some cases the operational and logistical inefficiencies as well complexities associated with settling disputes (Ahmed and Devarajan, 2007) are significant in explaining the lack of expansion within manufacturing. Secondly, while amending parts of the regulatory framework is necessary it is also true that active labour market programmes and policies, such as those recommended by the ILO for India, must be part of any attempt at encouraging secure employment creation and reducing poverty levels.

Towards a More Nuanced Understanding of Labour Regulations

The above has suggested that, on the basis of the assembled evidence, the labour regulatory environment is important in the debate around output expansion and employment growth in domestic economies. This fact however, should not translate into too blunt an interpretation, and consequent policy advice, on reforming the labour legislative environment at the individual country level.

Some caveats need to be introduced here if a more informed debate around labour regulation and policy reform in the developing world is to ensue. They may help to ensure progress in dealing appropriately and intelligibly with the labour market in the event that policy reform packages are tabled at country level. Perhaps economists, who are often at the forefront of such reform processes, should understand the most important of these cautionary notes. The caveat is that labour regulation as a reform issue, is not to be viewed as a binary variable. The choice within any policy reform package in most economies is never between no labour regulation at all and complete, comprehensive legislation. Undue focus by economists on extreme deregulation of the labour market often results in no reform at all. The notion that a labour market, like any product market, needs to be as deregulated as far as is theoretically possible, can result in contentious and not very productive policy debates. In the conclusions of the study on Impact of Regulation and Growth and Informality, Loayza et al. bring a similar message. They emphasise that their study 'does not intend to assess the impact of regulation on social goals that could be beyond the strict sphere of economic growth — broad goals such as social equity and peace, or narrow ones as worker safety, environmental conserva-

tion, and civil security, which typically motivates specific regulations. Thus, our conclusions on the role of regulation must necessarily be evaluated in a more comprehensive context before drawing definitive social welfare implications.'

One specific manifestation of this problematic paradigm lies in the area of union power. For economists, this is a standard sub-measure of rigidity in the labour market. Within the Botero *et al* study (2004), for example, it is captured under the collective rights index. However, for many legal experts the right to join a union and the freedom of association are viewed as universal rights issues and not by any means as matters touching on labour market regulation. Such experts would also view positively the idea that the greater the number of unionised individuals in a society the stronger the indication of a thriving democratic society with enshrined individual rights and interests. The notion that union membership is somehow coupled with labour market rigidity is anathema to a significant proportion of the legal community. Indeed, policy consistency is required when stressing the importance of democracy and good governance to economic growth on the one hand, while reflecting on rigidity induced by high levels of union power on the other.

Interpretation of Regulations

The standard measures of regulation found in the DBS are, as noted above, numeric conversions of country-level legislative provisions. The DBS does not proclaim to do any more than this. However, it is worth reiterating the importance of how such legislation is interpreted by both the courts of law and the relevant institutions of authority (such as, for example, dispute resolution bodies). Legislative provisions are more often than not, subject to interpretation by the relevant legal authority. How judges, for example, interpret the notion of 'fair dismissal' falls to a variety of different variables including the subjective opinion of the judge; the merits of the particular case; the evolution of jurisprudence on relevant issues raised in the case; the resources available to the parties and so on. The simultaneous impact of these variables would therefore then lead to a specific interpretation of the law. The outcome, as a consequence of these factors, may be an over-regulation or indeed under-regulation of specific labour market activities such as reasons for dismissal; unfair labour practices; probation rights and so on.

Simply put, the interpretation of labour legislation by the vested authorities may in fact yield a measure of regulation that is at odds with those produced by surveys such as the DBS and ICAs. The reality, however, is that attempting to extend the DBS measure into the realm of court judgements and their orientation is almost impossible. However, it is essential to note them in any discussion that measures labour regulation within a country. Implicitly, legislative provisions represent an incomplete and less than satisfying measure of labour regulation in an economy.

There is another layer to understanding the legislative environment in relation to the labour market: In many countries, its labour law architecture flows from, and is intricately and deliberately linked to, both its international and complementary domestic legal obligations. Hence, drastic policy interventions designed to deregulate an economy's labour market, may require due recognition of the ILO Conventions that a country has already ratified. In addition, rights of an individual enshrined in the country's constitution serve as the bedrock from which specific labour law provisions are made. Tampering with the latter in a substantive manner may indeed be unconstitutional. The generic point, however, is that should deregulating a labour market involve significant,

legislative changes, it will critically impact on the broader legal environment of most countries. In sum, the notion of deregulating a labour market may indeed have significant and possibly intractable legal outcomes.

The Institutional Environment

The extent to which the institutional environment reinforces or hinders legislative provisions is often under-appreciated in debates around labour market regulation. In most economies, institutions govern and manage the labour market. These include employer and employee organisations; the courts of law including specialist courts; institutions of dispute resolution; ministries of labour or employment; collective bargaining institutions; tripartite institutions and so on. These institutions will be differentially resourced in human and physical terms; will yield contrasting performances according to pre-set objectives; will have different governance structures, parameters of influence and ultimately power within the society and so on. Simply put, these range of factors, all of which are time and context-dependent, can and will fundamentally alter the manner in which labour regulatory provisions impact on the economy.

Two examples would suffice: Firstly, a sectoral minimum wage regulation mandated by government will have little impact on either wages or employment, if enforcement and oversight of this regulation through the relevant institutions is of a poor quality. In such a case, economic outcomes could potentially be relatively benign if the institutional oversight is weak and poor in quality. Secondly, in many developing countries, the court system is poorly resourced and inefficient. The rule of law takes a long time to be implemented in economies with an inefficient judicial system. For labour law cases, this could mean that rigidity in the labour market is more about an inefficient judiciary than any aspect of wages, union power or indeed the labour legislation itself. Ultimately however, the almost obvious point is that institutions matter, and nowhere more so than within the labour regulatory environment.

Institutions should also matter to economists when examining the issue of labour regulation. Apart from the binary variable issue noted above, or the idea that perfectly competitive output and factor markets are the optimal outcomes, the importance of institutions is often overlooked in these debates. In our view, institutions that are efficient and complement the interaction between individuals are good for growth, and this fits within the classic understanding of an efficiently functioning labour market. Especially high quality institutions can help to ensure that this market functions efficiently and competitively. It is not clear that malfunctioning or non-existent, institutions are an appropriate and acceptable condition for an optimally functioning labour market.

Heterogeneity in the Regulatory Architecture

Perhaps one of the key elements of this debate around labour regulation, growth and informality is to acknowledge the distinction between grades, types and levels of labour regulation. This is an allusion to the key, albeit obvious, point that there is a distinction between the establishment and protection of core labour standards on the one hand, and the more detailed specifications around the nature of hiring and firing clauses for example. It is often around the latter that much useful debate is to be had. However, it is important that the protection and promotion of labour standards remains at the core of any in-country labour market policy programme. This is critical to ensuring that the labour rights agenda is *complementary* to a wider set of actions to improve both the quality of work

and the quantity of employment opportunities in the developing world. The securing of core labour standards we believe is at the core of promoting the Legal Empowerment of the Poor and indeed the kernel of a decent work agenda.

Some recognition, however, needs to be given to the possibility that labour regulation beyond core labour standards may, under certain conditions, exacerbate segmentation in the labour market. Aspects of labour regulation may reinforce the insider-outsider divide by promoting barriers to hiring and firing. While this can reduce turnover, it may also affect employment growth.

Conclusions

This review of the economic impact of labour regulation has led us to draw the following policy conclusions:

- First, a methodological conclusion: we suggest caution in interpretation of the published results, particularly from cross-country studies, and more importantly, their translation into country-level policy interventions without due consideration both to the heterogeneity in the regulatory environment, and country-specific conditions. This is confirmed both by the findings in the Investment Climate Assessment, presented in the beginning of this section, and of the conclusions in the cross country analysis made by Loayza et al.
- Secondly, we suggest a shift of focus from the ideological question on regulation or deregulation, to the question how such regulation can be used to promote decent work for the working poor. Thus, the debate on labour regulations should focus on what is the right balance between security, supportive structures, and flexibility for firms in both the formal and informal economy.
- Thirdly, we are of the opinion that more attention should be given to critical factors such as the nature and quality of legal institutions and the interpretation of the law. Better governance is strongly correlated with economic growth and prosperity.

6. Principles and practices of Labour Rights and Legal Empowerment

The task of the Commission for Legal Empowerment of the Poor is to identify how legal instruments can be used to empower the poor. In this chapter we addresses one of the key areas of legal empowerment, namely how international and national systems of labour standards and labour rights can become more inclusive and promote more productive and decent work in the fight against poverty. There is - in this arena as in other arenas of legal empowerment - no quick fix for shifting from informal and low productive employment to decent and productive employment. There is no single solution, which can be applied in all countries. A strategy for empowerment has to have common core principles but remain flexible enough in design to fit many different economic, social and political conditions. It has to be participatory, inclusive and gender sensitive. Some principles are basic for any reform strategy in this field and they are introduced in Section 6.1. There are many lessons to learn from recent national and local initiatives for empowerment, which will be presented in Section 6.2. Some conclusions are drawn in 6.3. On the basis of these principles and practices, policy recommendations are introduced in Section 7.

The basic principles for inclusive reform

Both promotion of change - and management of change

The most successful countries, in terms of productive employment, are using a mix of economic and social policies, implemented with flexibility and designed for security. Within the context of competition, specialisation and free trade, this approach helps to promote change and productivity; it also helps in the management of change and in the creation of decent work opportunities, a sense of inclusion and a widely shared prosperity. The mix has varied from country to country, and the different policies are adjusted occasionally to improve the synergy between economic and social policies, decent work and inclusion.

Both property rights - and labour rights

The report from World Commission on the Social Dimension of Globalisation argued that informal activities should be transformed and integrated into a growing formal sector that provides decent jobs, incomes and protection. A balanced approach to upgrading the informal economy would require the systematic extension of property rights, accompanied by similar action on core labour rights for all persons engaged in informal activities. The report argues that such a transformation is an essential part of a national strategy to reduce poverty and promote inclusion. While it suggests that the key to empowering the poor through property rights is the provision of legal identity to their assets, it also advances the understanding that the key to their empowerment through labour rights lies in conferring upon them a legal identity as workers or entrepreneurs, thereby making disguised commercial or employment relationships visible.

Both protection - and flexibility

The World Development Report 2006, entitled *Equity and Development*, recognises the intrinsic value of equity and makes the case for investing in people, expanding access to justice, land, and infrastructure, and promoting fairness in markets. The report asks whether labour market institutions can be designed to be pro-growth and pro-

equity. The key to success is to link employment creation with protection. This requires building broad societal consensus for coordinated reforms across a variety of labour market institutions and provision for support to workers in re-entering the labour market following investments in education and training, in incentives that would encourage mobility, and in job creation, among other measures.

Lessons from national reform practice

There are lessons to be learned from countries which recently have introduced policies aimed at empowering workers and entrepreneurs in the informal economy.

Legal identity

Legal identity, as worker or entrepreneur, is of fundamental importance for legal empowerment. Some countries have tried to establish these identities and make the employment relationships explicit (in labour laws or in their extensions). Thailand provides an example of how the labour law has been extended to home workers through a ministerial regulation. In this case, home workers are considered 'employees' those who use raw materials and tools that come from the employer. The Ministerial Regulation also affirms the application of the Fundamental principles and rights at work to these workers (See Case 1, Annex 2). Employment relationships have also been determined through judicial decisions. In the Philippines, the Supreme Court has applied a four-fold test in determining the existence of an employer-employee relationship:[76] '(1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employee's conduct.' Furthermore, the evidence of payment — through a pay slip — has been accepted as proof of employer-employee relationship (See Case 2, Annex 2). India offers an example of a welfare fund where the trade unions provide a certification of the eligibility of the worker. The identity therefore comes from membership in a trade union (See Case 3).

Voice and representation

The right to voice and representation is as important as legal identity. Throughout the world, trade unions are launching and supporting campaigns for the representation and protection of informal workers. For example, the Inter-American Regional Organisation of Workers has issued guidelines and manuals to enhance organisation and representation of workers in the informal economy. The Alliance for Zambia Informal Economy Associations was launched in 2002 in partnership with the Zambia Congress of Trade Unions.[77]

The Self-Employed Women's Association (SEWA), India, is the well-known and very promising trade union of women informal workers who actively engage in collective bargaining and otherwise leverage influence over the environment in which they work (See Case 4). Over the past two decades, SEWA has co-founded and inspired a number of organisations of informal workers which individually and collectively are gaining voice and representation in relevant policymaking fora.

In **Ghana**, the ILO's Decent Work programme has worked with local government to promote social dialogue by creating District Assembly Sub-Committees on Productive and Gainful Employment that include representatives of informal enterprises, informal workers, the private sector, and government. In **the Philippines**, local development councils are mandated on the regional, provincial, municipal and village-level where different interest groups, including registered and accredited local organisations, are represented.

The Homeless People's Federation Philippines, HPFP, participates in various municipal and village-level development councils, including a few local housing councils (See Case 5).

Social protection reform

Reform of the social protection system is a strategic way to empower people. In **India** in 2002, the National Commission on Labour proposed a national bill for workers in the unorganised (informal) sector with the objective of regulating 'the employment and conditions of service of unorganised sector workers and to provide for their safety, social security, health and welfare'. The bill provides for the establishment of Workers' Facilitation Centres to support and assist unorganised workers, provides for the setting up in the states of an Unorganised Sector Workers' Welfare Fund, with funds from government and contributions by employers and registered workers; and sets out minimum conditions of service, including hours of work and minimum wages (See Case 6). In **India** in 2007, the National Commission on Enterprises in the Unorganised Sector (NCEUS) has drafted and proposed two national bills on the conditions of work and social security of workers in the unorganised (informal) sector: one for agricultural workers, the other for non-agricultural workers. Both bills incorporate provisions for regulating the conditions of work and social security of informal workers. The statutory National Social Security Scheme proposed by the NCEUS consists of the following package of minimum benefits: illness, hospitalisation, maternity, disability and life insurance, and old age pension.

Other promising examples of extending social protection to informal workers are from Ghana and the Philippines. In **Ghana**, with joint support from the government and ILO's Decent Work programme, associations and individuals who have joined local credit unions are encouraged to enrol in the National Health Insurance Programme. In the **Philippines**, the statutory social security system (SSS) and the health insurance schemes have been progressively made universal through voluntary schemes that are open to self-employed workers through lower-priced packages and a wider network of collection units, including banks and organised groups (See Case 7). Notable examples are also found in Latin America; they include efforts in **Mexico** to extend social security coverage to the informal sector; innovations in social coverage of the Solidario programme in **Chile**; first rights-based health coverage in **Chile**, and conditional cash transfers in some 14 countries beginning with **Brazil** and **Mexico**.

Improvement of the quality of labour market institutions

Several countries have introduced reforms to improve the quality of labour market institutions. In 2006, **Chile** introduced a reform in subcontracting procedures to include more workers in formal labour rights arrangements. The objective is to promote subcontracting, while at the same time ensuring compliance with all the labour obligations. The law introduced a formal arrangement between subcontractors and the main firms to meet a set of labour obligations. Direct responsibility lies with the subcontractor, but the main firm has the right to demand from the subcontractor a certificate of compliance issued by the labour inspectorate agency and has the right to withhold payments from subcontractors in cases in which there are pending obligations vis-à-vis their workers (See Case 8).

Spain has over the last 20-25 years introduced a series of reforms of its once highly-regulated system in an attempt to better balance the demands of an open market economy with the needs of

works, first by allowing for an increase in the use of fixed-term contracts, then by reintroducing constraints in the use of temporary contracts while easing employment protection legislation for permanent workers. More recently Spanish trade unions, employer organisations and government signed an agreement to bring the use of fixed-term work contracts more in line with the European social model (See Case 9).

Legal empowerment through alternative dispute resolution

For poor people around the world, getting access to courts and legal support to protect their rights is often impossible. In many cases, the reason for this is straightforward — they cannot afford to pay the legal fees. In **Tajikistan**, the UK has helped to solve this problem by supporting Third Party Arbitration Courts. These courts are an alternative way of resolving disputes: two sides to a dispute agree to nominate a third party who they both trust to mediate their disagreement and come to a decision. Although they operate independently of the formal legal system, decisions are recognised by Tajikistan's official courts. Third Party Arbitration Courts provide poor people with a cheap, fair and accessible way of resolving disputes and protecting their rights. Third Party Arbitration has helped to make legal services available to 800,000 people in Tajikistan. The approach has also been used successfully in **Russia**, **Kyrgyzstan**, **Moldova**, **Ukraine** and **Georgia** (See Case 10).

There are also lessons to be learned from countries that have recently introduced policies aimed at empowering workers and entrepreneurs in the informal economy through business rights (See Chapter 4).

Improved business environment

The World Bank Investment Climate Survey illustrates the need to improve the business environment to encourage investment, entrepreneurship and workers rights. Many countries have found new ways to support SMEs through various initiatives with the aim of upgrading them into the formal economy (See Chapter 4 for examples).

Simplification of contracting procedures

The Senegalese Government provides an example of a pro-active policy of contracting out public infrastructure projects to small scale contractors. In this case, bidding procedures and documents have been substantially simplified in order to permit smaller contractors to participate in the bidding process. Bureaucratic documentation is also minimised and bidding documents contain official unit cost estimate in order to guide the less sophisticated contractor. A general session is held wherein contractors are told about the existence of the implementing agency and informed about procedures, from the bidding to the awarding and implementation. Simplification of the process goes as far as making the name of the winner very clear in the announcement so that even an illiterate contractor's representative can readily determine who was awarded the contract (See Case 11).

Conclusions for national strategies for legal empowerment

The examples noted above illustrate how different policies can be used to provide working people with: Identity (India, the Philippines, Thailand); Voice and representation (India); Social protection (Brazil, Chile, Ghana, India, Mexico, the Philippines), and New ways to resolve disputes (Tajikistan).

These examples also demonstrate how different policies can be used to improve the functioning of labour market institutions (Chile and Thailand), and how they can work to adjust the balance between protection and flexibility in response to changing realities (Spain).

These and many other illustrations show that reform is under way. Other countries can use the examples and principles presented can be used by other countries in their effort to design strategies for Legal Empowerment of the Poor. There is a need for global action to convert these 'good news' approaches into a global movement.

7. Towards a new social contract: Policies and Processes for Legal Empowerment

Policy recommendations

Building on an emerging global social contract — the broad support for the Fundamental Principles and Rights at Work and the Decent Work agenda — we recommend that the Commission endorse the following ***priorities for legal empowerment*** of those living and working in poverty:

- **Strengthen identity, voice, representation and dialogue.** The process of legal empowerment starts with identity. Just as property and physical assets of the poor are recognised, so also must the greatest asset of the poor, namely their labour and human capital, be effectively recognised. There is a particular need to ensure that workers and entrepreneurs in the informal economy have the right to freedom of association through organisations of their own choosing and to collective bargaining, particularly women and youth who are over-represented in the informal economy. Emphasis should be placed on building up representative organisations of the working poor, particularly wage workers and self-employed operating in the informal economy, to have voice, representation and dialogue with formal economy operators and with public authorities in order to defend their rights.
- Strengthen the quality of labour **regulation and the effective enforcement of fundamental principles and rights at work.** The purpose is to create synergies between protection and productivity of the working poor and of their assets. Reviewing the quality of institutions

and of regulations should involve a critical and self-critical review of legal instruments from the point of view of their impacts on productivity and on the protection of labour.

- **Support application of a minimum package of labour rights for the informal economy.** The aim should be that every country strives for a minimum floor for empowerment that is realistic and enforceable, as a basis to gradually strengthen and extend application of standards, taking into account productivity levels and other national circumstances. To this aim a package of labour rights is proposed for the informal economy that upholds the Declaration on Fundamental Principles and Rights at Work and three crucial aspects related to working conditions: (1) health and safety at work; (2) hours of work, and (3) minimum income. It must be recognised that labour standards at this minimum level constitute a basic floor for empowerment beyond which progressive, rather than full, compliance is expected. That is, we propose to build up progressively from this basic floor through institutional approaches that are feasible even for production units with limited capacity for compliance. Strategies can aim at progressive compliance and gradual convergence into a unified set of working conditions, as a goal. Some of the standards such as occupational safety and health can be improved immediately at a low cost. Others can be achieved gradually through a developmental process of awareness raising and capacity building.

- **Strengthen access to opportunities for decent work and to opportunities for education, training and retraining, as well as combating discrimination to ensure efficient labour markets.** This priority aims to promote change and dynamism, linking private initiative with public policy so as to expand employment in a growing and inclusive economy. Labour rights, to be effective, should not exclude the working poor, nor constrain their creative and entrepreneurial potential. Opportunities for education and capacity building as well as measures for combating discrimination help increase legal recognition of the poor and bring them closer to such economic opportunities. The reorganisation of production and distribution through sub-contracting and outsourcing is associated with the expansion of informal employment in the supply chains. Private and public procurement represents, therefore, a practical yet strategic policy lever through which to upgrade the productivity, incomes and working conditions of the working poor. Integrating employment creation, labour rights and decent work into public and private procurement practices is therefore a key mechanism to legally empower the poor. Often solutions to poverty and informality can be found outside as well as within the informal economy. Policies to create and provide improved access of the poor to new opportunities for full, productive and freely chosen employment, as promoted in ILO Convention 122, can provide a key mechanism for empowering the poor in the informal economy and facilitating their transition to formality.

- **Support inclusive social protection.** The recognition of the rights to social security has been developed through universally accepted instruments, such as the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights, which proclaim that social security is a fundamental societal right to which every human is entitled. This promise must be upheld by all countries through laws, institu-

tions and responsive mechanisms that could protect the poor from shocks and contingencies that can impoverish, and measures that guarantee access to medical care, health insurance, old age pensions, and social services. These mechanisms must not be solely dependent on the evidence of employment status but must be open to all types of workers. From a systemic perspective, rights to pensions and health protection should be granted to the people as citizens rather than as workers, and they should be awarded on universality principles.

We also recommend the following specific actions favouring legal empowerment:

- **Ensure that legal empowerment becomes a driver for gender equality.** Poverty has a gender dimension, and legal empowerment can help drive gender equality. A key challenge is to ensure that ILO labour standards which promote equality of opportunity and treatment are effectively extended to informal sector workers.[78] The starting point for this process may be found in the core labour standards on gender equality, namely, the Equal Remuneration Convention, no.100, 1951; the Convention on Discrimination (Employment and Occupation), no. 111, 1958. Much useful guidance can be found in the 1996 ILO Home Work Convention[79] which mandates the extension of legal protection and legal empowerment to home workers, who are predominantly women. Gender is already a mainstream priority in the integration of Decent Work in the PRSP work. Specific capacity-building efforts have in particular been made in Bolivia, Brazil, Ecuador, Ethiopia, Honduras, Paraguay, Peru, Uruguay and Yemen to influence Poverty Reduction Strategies (PRSs) at the formulation stage. A more in-depth process has been recently launched to further consolidate gender and employment in three country PRS processes, namely in Burkina Faso, Liberia and the United Republic of Tanzania. This integrated approach includes enhancing the capacity of constituents for mainstreaming gender equality in employment; facilitating gender budgeting of projected employment programmes in the PRS action plans; building partnerships with other organisations at national and international levels, which are involved in promoting gender equality in PRS.
- **Support legal empowerment for indigenous people.** The ILO Indigenous and Tribal Peoples Convention provides guidance and strategies for legal empowerment with respect not only to labour rights and protection of employment, but also with respect to land and property rights. Special efforts for their legal empowerment are demonstrated in an 'ethnic audit' undertaken of 14 PRSPs as well as case studies of country processes in Bolivia, Cambodia, Cameroon, Guatemala and Nepal. The research clearly showed that, although indigenous peoples are disproportionately represented among the poor, their needs and priorities are generally not reflected in the strategies employed to combat poverty. Another contribution is research produced by the ILO and debated at the United Nations Permanent Forum on Indigenous Issues and within the Inter-Agency Support Group. Subsequently, the World Bank organised an International Conference on Indigenous Peoples and Poverty Reduction (New York, May 2006) and committed to work towards the practical inclusion of indigenous peoples' concerns in the PRSPs in a selected number of pilot countries in Africa, Asia and Latin America.

Process recommendations

Our working group recommends that the Commission consider the following ***policy processes and institutional champions*** for the implementation of its recommendations on legal empowerment through labour rights.

- **Promote national development framework for legal empowerment and decent work.** National governments and parliaments are responsible for labour rights and social conditions and bear a major responsibility for the reform and effectiveness of national labour market institutions. The Decent Work Agenda proposes a value-based framework that is best defined at the national level through social dialogue. It does not propose a one-size-fits-all solution, nor imply conditionality of any type. The mix and sequencing of policy actions are to be defined locally, taking account of diversity in the level of development, including financial, human, and institutional capacities, and implemented through cooperation between government, business, workers and society. The intrinsic value of the Decent Work Agenda is to make employment a central goal of economic policies and progressive improvement in the quality of work, including labour rights and returns to labour as the main strategy for moving people out of poverty. Decent Work Country Programmes (DWCPs) are the main tool for driving this reform process forward in partnership with all national and international institutions. DWCPs contribute to international development frameworks such as poverty reduction strategies, national Millennium Development Goal strategies, the United Nations Development Assistance Framework (UNDAF), and other integrated development plans.

- **Mobilise the Development Banks to support national reform programmes.** Reform strategies to include employment and labour rights will need to be adapted to regional and local priorities. Therefore the Regional Development Banks, Political Organisations and UN organisations can be tapped as institutional champions for the reform agenda on legal empowerment. Development Banks need to make legal empowerment a top priority, integrating access to justice, property rights, labour rights and business rights in one comprehensive strategy for good governance of markets, to support national reform processes. They need to seek the support from regional political authorities and from the UN regional organisations.

- **Mobilise the principal actors of the global system, particularly the World Bank and the ILO, to work better together for decent work.** Two of the main global actors in the field of work and development, the ILO and the World Bank, have both contributed by developing instruments for reform, the World Bank's PRSs and the ILO DWCPs. A key to a successful reform process at the national level is better policy coherence at the global level. Legal empowerment and reform of labour rights require close co-operation between governments, employers and workers, nationally and locally. They will need support in many forms from the leading global institutions to build capacity. The common goal should be to make labour markets work better — more efficient and more equitable — for both workers and small businesses.

- **Support voluntary initiatives for legal empowerment through labour rights.** Codes of conduct constitute a strategy for motivating improvements of the performance of multinational corporations. An increasing number of them, including that of the Ethical Trade Initiative, are based on ILO's core labour standards, par-

ticularly the prohibition of forced labour, child labour and discrimination in the work place. These codes of conduct initiatives are already playing an important role, as businesses have become more sensitive and responsive to the concerns of ethical consumers.

- **Mobilise donor countries to promote legal empowerment and decent work.** Donor countries could do a lot to support legal empowerment and the inclusion of a decent work agenda in regional and national strategies. For example, the EU is supporting the integration of decent work goals in national PRS processes in 60 countries.

- **Promote a better understanding of the costs and benefits of legal empowerment through decent work.** The costs and benefits of undertaking reforming legal empowerment through labour rights and decent work need to be addressed. The first basic question is what are the expected benefits of such reform on productivity and thereby on prosperity. The main purpose of reform is to improve the quality of labour market institutions and thereby the functioning of labour markets. Such reforms, provided they are well designed, should be seen as likely to enhance productivity. Non-action, or maintaining the status quo, should be seen as leaving a burden on the economy. With income inequality growing ever larger with worrying implications for sustainable societies, an ambitious reform programme integrating Legal Empowerment of the Poor should be seen as a necessity, not a luxury. The second basic question is the cost of starting and sustaining the reform process and the affordability of related policy initiatives. There is no simple answer to that question. There will be initial costs that have to be funded mainly through restructuring of public expenditure programmes. The amount of costs and the pay-back in the form of higher quality of labour market institutions will probably vary between states, depending on policy design and the success of the reform process. A successful strategy for integrating workers in the informal economy — through, for example, integrating employment creation programmes with social protection systems - will broaden the tax base and decrease unemployment, underemployment, decent work deficits, and other social costs, so that initial costs will soon be outweighed by benefits.

- **Strengthen the statistical base for legal empowerment.**[80] Labour force and other economic statistics need to be improved to fully capture the size and contribution of the informal economy. Although estimates of the size and (less so) contribution of the informal economy are available in a growing number of countries, all forms of informal employment - especially women's home-based production and disguised wage employment - are not yet fully visible in the official national statistics used to informal national policies. The legal empowerment strategy must, therefore, include efforts to make visible all forms of informal employment. This should include making disguised employment relationships more explicit; it should also make more visible both the invisible supply chain and home-based production. Our working group recommends that improved labour force and economic statistics be a priority goal for national statistical services and be incorporated into the Millennium Development Indicators.

Towards a New Social Contract.

There is a tripartite consensus from employer, worker and government representatives on the need for a formal and effective legal system with guarantees for all citizens and enterprises that contracts are honoured and upheld, the rule of the law is respected and property rights are secure. Such a legal system is a key condition not only for attracting investment, but also for generating certainty, and nurturing trust and fairness in society.[81] The growing recognition of the need for labour rights to catalyse employment creation in the informal economy, while protecting its workers, has now led to an emerging global social contract, a broad agenda for reform and for empowerment. Labour rights, business rights, property rights and business rights taken together can form the basis of this new social contract.

Our Working Group for Chapter 3 suggests that the underpinnings of the new social contract on labour rights include five fundamental areas of action, namely:

- Strengthen identity, voice, representation and dialogue.
- Strengthen the quality of labour regulation and the effective enforcement of fundamental principles and rights at work.
- Support application of a minimum package of labour rights for the informal economy.
- Strengthen access to opportunities for decent work and to opportunities for education, training and retraining, as well as combating discrimination to ensure efficient labour markets.
- Support inclusive social protection.

We recommend a new departure in international development strategies, centred on the Decent Work agenda as a Global Social Contract. Our proposals are firmly based in the international human rights tradition. Human rights are the basis for the Social contract. It is the obligation of the state as the primary duty bearer to protect and promote these rights.

- We use the word 'contract' to emphasise mutual responsibility. The state has a duty to protect and the citizens have the right to protection — and obligations, which follow thereof. Employers and employees are also tied by mutual obligations. And large businesses have a duty not to exploit smaller businesses with which they have production or distribution ties.
- We use the word 'global' to emphasise the role and responsibility of the actors at the international, regional, national and local levels.
- We use the word 'social' to emphasise that the aim of this initiative is to improve the social conditions of people in poor countries, including: income, health, education, working conditions.
- We have put 'Towards' before a Global Social Contract in the title of this report to emphasis development, process and time horizons.

Annex 1:

Recent and current initiatives to improve statistics on the informal economy

What is clear from the statistics presented in this Report is that the informal economy is far larger than most people recognise. However, the informal economy is still undercounted and undervalued in most countries. Few countries collect the statistics needed to fully capture all forms of informal employment, both self-employment and wage employment. Reflecting the assumptions underlying labour regulations and labour economics, - notably, the presumption of an explicit employer-employee relationship — labour force and other economic statistics do not always reflect the full range of work arrangements and employment statuses.

To generate more accurate and comprehensive statistics on informal employment and labour markets more generally, it is necessary to improve statistical concepts and methods, including:

- An expanded set of **place of work indicators**, including work at home, on the street, in fields, in forests, in waterways, or in the open air;
- An expanded set of **employment status indicators**, including all types of self-employment, wage employment, and intermediary ambiguous categories (such as independent contractors and industrial outworkers);
- Data on the **socio-economic status** of different categories of workers, including: level of earnings; legal status: contract versus no contract, registered versus non-registered; working conditions; and social protection coverage by type and source (health insurance, old age pensions, disability insurance, unemployment insurance, life insurance, maternity, child care);

Improved statistics would help to focus the attention of policymakers on the economic contributions of the informal economy and the linkages between informal employment and poverty. More specifically, improved labour-force statistics that capture all forms of informal employment would serve to:

- Increase the visibility of those who work in the informal economy, especially the least visible and most vulnerable workers;
- Advance understanding of the informal economy, including its contribution to economic growth and its links with poverty;
- Inform the design of appropriate legal reforms and policies for the working poor in the informal economy.

Ideally, a unified framework for data collection would be developed — one that allows for the classification, comparison, and analysis of the full set of employment statuses and work arrangements that exist in both developed and developing countries.

Fortunately, there are a number of recent and current initiatives to improve statistics on the informal economy. The 2002 International Labour Conference and the 2003 International Conference of Labour Statisticians have endorsed an expanded statistical definition of informal employment that includes self-employment in informal (small unregistered) enterprises and wage employment in informal (unprotected) jobs, The ILO Bureau of Statistics, the International Expert Group on Informal Sector Statistics (Delhi Group), and the global network Women in Informal Employment: Globalising and Organising (WIEGO) are jointly producing a manual on surveys of informal employment so defined (forthcoming in 2008). The Sub-Group

on Gender Indicators of the Inter-Agency and Expert Group (IAEG) on MDG Indicators and the Task Force on MDG #3 (Education and Gender Equality) have endorsed an indicator on the 'structure of employment by type and sex' developed by the ILO Bureau of Statistics and WIEGO and a growing number of countries are using this indicator to compile and present their national labour force data. The System of National Accounts is currently revising its chapter on measuring the informal sector contribution to GDP.

The donor community should support these initiatives to improve labour force and economic statistics and national governments should use the expanded statistical definition and related statistical methods in their collection of labour force and other economic statistics.

Annex 2: Country case experiences

Case 1:

Extending Thailand's labour law through the Ministerial Regulation for home workers[82]

In Thailand, in 2004-05, the Ministry of Labour took the initiative of drawing up ministerial regulations to extend the reach of the labour law to home workers and agricultural workers. Home-based workers are defined as having the following characteristics:

1. They receive contracts from an employer to produce, assemble, repair or process;
2. They work at a location that is not the establishment of the employer;
3. They work to earn a wage;
4. They use all or part of raw materials or production instruments of the employer;
5. They are contracted to work at home, and the work they do is a part or all of the production process or business of the employer.

Case 2:

Judicial ruling on employment relationship in the Philippines

The Supreme Court in the Philippines, in landmark decisions, recognised an employer-employee relationship in situations where this is ambiguous. The said Supreme Court rulings upheld the status of workers on commission, boundary,[83] piece-rate or task base and workers hired through a third party such as a recruitment agency.

In determining the existence of an employer-employee relationship, the Supreme Court[84] applied

the following four-fold test: '(1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employee's conduct.'

The Supreme Court insisted that, in the case of transport operators, the owner of the public vehicle has supervision and control over the driver. The management of the business is in the owner's hands. The owner as holder of the certificate of public convenience must see to it that the driver follows the route prescribed by the franchising authority and the rules promulgated as regards its operation. The fact that the drivers do not receive fixed wages but get only that in excess of the so-called 'boundary' they pay to the owner/operator is not sufficient to withdraw the relationship between them from that of employer and employee.

Case 3:
Welfare fund in India

There are workers who would not be able to participate in a contributory, voluntary scheme, no matter how well designed such schemes are. Workers who earn very little income or have seasonal work would not likely be able to keep up with the required contributions.

Recognising this constraint, several states in India found a solution in taxing the revenue that the sector generates, rather than the employers or the workers. The funds raised from these levies, which are Termed 'welfare funds', used on the welfare of the workers who produce the taxed products.

India uses this system for the benefit of those who produce *bidis* (hand-rolled cigarettes), mine workers, cine workers and workers in the building industry.

The Bidi Workers Welfare Act (1976), for instance, provides the national labour legislation that taxes the revenue generated by the sector (but not employers) to create a welfare fund administered by government. There are estimated to be over four million bide workers in India, 90 percent of whom are women. Most of them work under a sub-contract from their homes for a low piece rate and without access to health insurance or social security.

Taxes of 50 paise (or half a rupee) per 1,000 *bidis* are levied. The welfare fund operates hospitals and dispensaries, awards scholarships and provides school supplies and uniforms. Initially, the fund did not cover standard aspects of social protection such as sickness, occupational injury, maternity, disability, old age or survivors and unemployment coverage, but it has now been extended into group insurance for which the welfare fund pays half. The Life Insurance Corporation Insurance Scheme subsidises the other half.[85]

Welfare funds have also been set up also for workers in building and construction. In Tamil Nadu, a tax of 0.1 to 0.3 percent is levied on the cost of all building or construction projects. This tax finances the Tamil Nadu Scheme issued in 1994 which prescribes the procedure for registering manual workers and the supply of identity cards. It also provides for crèches to look after the babies of women construction workers, a group accident insurance scheme, educational assistance for sons or daughters of registered workers, assistance for marriage of the son or daughter of the worker, assistance to meet expenses towards the delivery of a child, assistance to families of manual workers who died due to accident or natural causes, and pension to cover every worker who has reached 60 years and has been a member continuously for five years.

A bill is also now pending that seeks to create a similar welfare fund to cover the 'unorganised sector' more broadly.

Case 4:
Collective identity, collective bargaining and global impact

Industrial outworkers, whether in the garment, shoe, or electronic sectors, face a number of common problems, among them: low piece-rates and earnings; irregularity of work; irregular and (often) delayed payments and the costs of providing/maintaining workspace, utilities, and equipment.

In addition, some endure harsh or dangerous working conditions — for example, shoe makers are exposed to toxic glues and many other workers suffer sore backs and deteriorating eye sight from working in badly-equipped and poorly-lit workplaces (often their own homes).

SEWA has a long history of working with garment workers focusing primarily on negotiating higher piece-rates and fairer working conditions for garment *industrial outworkers*, many of whom are Muslim. These organizing efforts have involved negotiations with the Labour Commissioner — as well as rallies in front of his office — to demand minimum wage, identity cards, and welfare schemes (childcare, health care, and school scholarships) for subcontracted garment workers.

In 1986, SEWA was able to get a minimum wage for garment stitching (89.60 rupees per day) included in the official Gujarat state Schedule of minimum wages under the Minimum Wages Act.[86] Over the years, SEWA has also helped '*own account*' garment makers to acquire new skills, improved equipment, and market information to try to compete in the fast-changing local garment market. This has included loans for improved sewing machines and related gadgets, training at the National Institute of Fashion Technology (NIFT), and installing electricity in the homes of SEWA members (to avoid the high costs of tapping electricity illegally).

In recent years, as export-oriented, factory-based garment production has expanded in Ahmadabad City, SEWA has begun to organise *waged workers* in garment factories as well.

During the 1980s, SEWA began establishing linkages with membership-based organisations of home-based workers and street vendors and NGOs working with these groups. In the mid-1990s, at two separate meetings in Europe, these organisations came together under SEWA's leadership to form two international alliances — one of organisations of home-based workers, the other of organisations of street vendors.

From its inception, the alliance of home-based worker organisations was centrally involved in the campaign to pass an International Labour Organization (ILO) convention on home work. To help with the campaign, SEWA and its allies promoted research efforts to compile and analyse existing data on home workers worldwide, and UNIFEM was asked to convene an Asia region policy dialogue on home workers that included government representatives. With the passage of the ILO Convention on Home Work in 1996, SEWA and HomeNet recognised the power of statistics and of 'joint action' of activists, researchers, and policymakers. This recognition led to the 1997 global action-research-policy network called WIEGO which serves as a think-tank for the growing global movement of informal workers.

In 1995, SEWA organised a meeting of representatives of street vendor organisations from a dozen of cities around the world as well as activists and lawyers working with them at the Rockefeller Foundation Study and Conference Centre in Bellagio, Italy. At that meeting, the participants drafted the Bellagio International Declaration of Street Vendors which calls for action by individual traders, traders' associations, city governments, and international organisations including the United

Nations, the ILO and the World Bank. The participants also called for the establishment of an international network of street vendor organisations to be called StreetNet. In early 2000, a StreetNet office was set up in Durban, South Africa. In November 2002, after several regional meetings of street vendor organisations, StreetNet International was officially launched. The aim of StreetNet is to promote the exchange of information and ideas on critical issues facing street vendors, market vendors and hawkers (i.e. mobile vendors) and on practical organising and advocacy strategies.

Membership-based organisations (unions, co-operatives or associations) directly organising street vendors, market vendors and/or hawkers among their members, are entitled to become affiliated to StreetNet International. As of late 2007, StreetNet International had 34 affiliates in 30 countries, including: local associations or trade unions, national federations or associations, and regional alliances.

Over the past decade, SEWA has also co-founded or inspired national and regional branches of home workers and their allies (called HomeNets) in South-East and South Asia, and national alliances of street vendors in India and Kenya. It also serves on an international coordinating committee that has organised three regional and two international conferences of organisations of informal workers; and as advisor to an international steering committee that is planning the first international conference of organisations of waste collectors to be held in Columbia in early 2008.

Together, these organisations have helped foster a global movement of workers in the informal economy that now includes local trade unions and other membership-based organisations of informal workers, national and global trade union federations that have begun organising informal workers, several national federations of workers' education associations, the International Federation of Workers' Education Associations (IFWEA), eight national and two regional HomeNets, StreetNet International, and the WIEGO network. Drawing inspiration and guidance from SEWA, this movement continues to identify and network with organisations of informal workers and to enlighten and influence policy debates on the informal economy.

Case 5:
Federation of urban poor participating in governance

The Homeless People's Federation Philippines (HPFP) is a self-help, community-based federation that promotes savings mobilisation in low-income communities as a way of building their financial capacity to invest in their own development. HPFP works towards securing land tenure, upgrading settlements and uplifting the economic status of its members. It uses savings mainly as a strategy, not only to finance community investments but also to bring people together to work towards their common goals. HPFP is thus not only a financial tool but also a social mechanism, which builds networks of communities that foster continuous learning and innovation, partnerships and support systems. This network of communities opens up new possibilities for negotiations with the state and, among other things, the realisation of new forms of partnership.

In relation to its partnerships with public institutions, the federation deems it important to be recognised as a partner of *barangays* — village level governance units that are the first line of engagement with communities — and to participate in one important mechanism available to people's organisations and NGOs, namely the *barangay* development council, where *barangay* physical, eco-

nomic and social development plans and budgets are prepared and approved. *Barangay* plans and projects have a palpable impact on communities. Road projects, for example, can lead to dislocation of some communities, and health-related projects may overlap rather than complement community-initiated facilities.

In general, local development councils are mandated at all levels, from the *barangays* up to the cities and provinces. They were created to encourage people's participation in governance and thereby to promote transparency in all local government transactions. The *barangay* development council, in particular, is a vehicle that ensures the participation of civil society groups in the choice of development projects and in the appropriation and use of funds, so that these are not the sole responsibility of *barangay* officials. HPFP leaders lobbied successfully for the activation of a *barangay* development council in Quezon City, on which there are as HPFP representatives, and HPFP leaders are also members of the city development council of General Santos City. However, the experience of the federation is that without local pressure, these councils may not operate effectively and may exist only in name.

Engaging government and private agencies did not come easily to the HPFP. Communities still struggle as they interact with government and private entities that are not accustomed to dealing with the poor on an equal footing. Below are some strategies that the HPFP has learned to adopt through years of engagement with public and private agencies.

Alignment with electoral cycles: One of the lessons from previous engagement experiences is that any projects or concessions approved by elected officials should be completed within the electoral period. Thus, planning must also be aligned with electoral cycles.

Establishing relationships with career officials: Despite changes in elected officials, the HPFP can maintain relationships with career officials, who retain their positions even after changes in political leadership. The HPFP continues to receive support from career officials, some of whom endorse the officials.

Show of numbers and a broad network: The HPFP also uses its national and international network to obtain concessions from public agencies, and there have been instances where government officials and landowners have agreed to certain concessions when these were requested in the presence of large numbers of people. The federation has used its international connections and its membership in international groups (for example, the Shack/Slum Dwellers International) to force closer relationships with important public officials. It has also invited public officials to participate in multilateral projects and international exchanges, thus helping to consolidate individual relationships and identify win—win strategies.

Capitalising on its track record and the HPFP name to bolster local efforts: The HPFP has earned credibility with government and private organisations through its self-help efforts in mobilising savings and securing land tenure. Government functionaries and private agencies usually ignore HPFP communities until they find out about the financial stake members have invested in their work, the gains they have achieved through their own initiative and the networks that they have been able to establish.

Strengthening technical know-how. Needless to say, good technical know-how is critical to taking a principled and informed position when negotiating. Unless community associations know how to express their interests in operational terms, they will not be

able to go beyond general statements of intent, and may inevitably fall prey to unscrupulous parties who can conceal their intent behind complex terminology, legalese, mathematical formulae and unverified documents. Building technical skills is therefore an important component of successful engagement with the state. The HPFP makes it a point to share information and transfer their knowledge to a wide range of communities.[87]

Case 6:
Legislative Initiatives for Unorganised Workers

Two legal initiatives in India are described below concerning Unorganised Workers.[88]

Unorganised Sector Workers (Employment and Welfare) Bill, India

At present, the Government of India is actively reviewing a national bill on workers in the unorganised sector, which was drafted by the National Commission on Labour and submitted to Parliament in 2002. This Bill has the objectives of regulating 'the employment and conditions of service of unorganised sector workers and to provide for their safety, social security, health and welfare.'[89] It defines a worker as 'a person engaged in Scheduled Employment whether for any remuneration or otherwise.' (Some 122 occupations are listed as Scheduled Employment.) The bill, furthermore, provides for the establishment of Workers' Facilitation Centres to support and assist unorganised workers, who: 1) are responsible for registration of workers and for guidance on a range of issues, such as dispute resolution, self-help groups and schemes available for their benefit; 2) will maintain a register of workers and provide an identity card and social security number and 3) will be responsible for formulating safety and social security schemes, including health and medical care, employment injury benefit, maternity benefit, old age pension and safety measures.

Additionally, the bill provides for the setting up, at state level, of an Unorganised Sector Workers' Welfare Fund, supported with funds from government, employers and registered workers. It also sets out minimum conditions of service, including hours of work and minimum wages.

There is an attempt as well to safeguard the rights of women. Wage discrimination on the grounds of gender is prohibited and a female worker is entitled to 'such maternity benefits with wages as prescribed.' Employers are also liable to pay compensation for injury on duty. (Source: Government of India, 2003)

Unorganised Sector Workers' Social Security Scheme, India

Over 90 percent of India's workers are in the informal economy (including agricultural workers), with little, if any, statutory social security. Most are casual labourers, contract and piece-rate workers and self-employed own-account workers. The Government of India recently launched the Unorganised Sector Workers' Social Security Scheme on a pilot basis in 50 districts. The scheme provides for three basic protections: old age pension, personal accident insurance, and medical insurance. It is compulsory for registered employees and voluntary for self-employed workers. Workers contribute to the scheme, as do employers. Where self-employed workers join the scheme, they pay worker and employer contributions. Government also contributes. Workers Facilitation Centres are being set up to assist workers (see above under Securing Rights of Informal Workers). The scheme will be administered through the already existing Employee Provident Fund Organisation offices around the country (Source: Government of India, 2004).

Case 7:

Social security for all in the Philippines

In the Philippines, two complementary facilities - the statutory social security system and the health insurance scheme — are being made progressively accessible to everyone through voluntary schemes that are open to self-employed workers, lower-priced packages and a wider network of collection units, including banks and organised groups.

The Philippines Social Security System (SSS) offers a comprehensive range of cash benefits as insurance for retirement, death, disability, maternity, sickness, old age, death and work-related injuries. In 1995, it extended membership to the informal sector under its self-employed and voluntary membership scheme. Under this scheme, the minimum monthly salary to qualify as an SSS member was lowered to P1,000 and the definition of self-employed was expanded to 'all self-employed persons regardless of trade, business or occupation, with a monthly net income of at least P1,000.' This definition would include household help, individual farmers, fisher folk and other small entrepreneurs who may join the scheme as voluntary members.[90]

As of December 2002, SSS covered about 24.3 million members, of whom 4.5 million are self-employed or working in the informal economy. However, the scheme continues to have problems with compliance, and workers often blame non-membership on lack of time, lack of information, lack of regular employment, cost of contributions, and difficulties trying to contact SSS representatives.

The Philippine Health Insurance Corporation (Phil-Health) used to be integrated with the Social Security System, but was separated, in part, to lower the cost of medical insurance package for households that set their priorities for immediate rather than the longer-term medical needs covered by the SSS. Phil-Health administers health insurance and provides hospitalisation as well as out-patient benefits to its members and their beneficiaries in times of need and illness.

Phil-Health has expanded its programme to include those working in the informal economy through the 'Individually Paying Programme' (IPP). In 2002, Phil-Health covered 54.6 million Filipinos, or 64 percent of the country's projected population for December 2005. Of the total covered, 54 percent are employed; 15 percent are individual payers; sponsor 22 percent by third parties, and 0.6 are non-paying members. Individual payers include the self-employed (market vendors, farmers, fisherfolk), private practitioners and professionals (doctors, lawyers), and those separated from work. With 2.9 million members as of March 2006, it is calculated that IPP membership grows by an average of 30 percent each year.

Under the IPP, household heads pay a monthly contribution of only P100 (currently just over $2) to have their families covered by health insurance. This entitles members and their dependents to limited hospital coverage for room and board, laboratory tests, medicines and doctors' fees when confined in a hospital. Phil-Health has further pilot-tested a partnership with organised groups such as cooperatives to facilitate its reach to those who are difficult to reach individually.

Lowering the cost of insurance packages, allowing more frequent collection, and partnering with organised groups, could serve to make such voluntary schemes available to all.

Case 8:

Minimum Living Standard Security System in China

In 1993, the Chinese government began to reform the social relief system in cities, at the same time seeking to try out a minimum living standard security system. In 1999, this security system was established in all cities and county towns throughout the country. In the same year, the Chinese government officially promulgated the Regulations on Guaranteeing Urban Residents' Minimum Standard of Living to ensure the basic livelihood of all urban residents. This has been decided 'primarily on the basis of urban residents' average income and consumption level per capita, the price level of the previous year, the consumption price index, the local cost necessary for maintaining the basic livelihood, other connected social security standards, the materials for the basic needs of food, clothing and housing, and the expenditure on under-age children's compulsory education.'[91]

Funds for this purpose are included in the fiscal budgets of the local people's governments, which determine the minimum living standard according to the cost necessary for maintaining the basic livelihood of the local urbanites. Urban residents with an average family income lower than the minimum living standard can apply for the minimum living allowance. Investigation of the family's income shall be conducted before issuance of the minimum living allowance, the level of which is calculated in terms of the difference between the family per-capita income and the minimum living standard.

Case 9:

Labour protection for subcontracts in Chile

In 2006, a law regulating subcontracting was introduced in Chile. According to the Ministry of Labour, 35 percent of workers in Chile are not directly hired by large firms finding work instead through subcontractors or other providers of personnel. At present, responsibility for labour obligations rests with the hiring firm. Compliance is often low and capacity to pay limited, particularly in the case of personnel suppliers who can operate with little capital. In this way, labour obligations are thoroughly diluted. The situation is such that some hiring firms are themselves creations of the principal firms.

The law introduced in Chile regulates both types of arrangements, but the objective is to limit the supply of labour to only short-term replacement workers. In the case of subcontracting, the objective is to promote it but to ensure compliance with all the labour obligations, as follows:

- A deposit of a re-adjustable guarantee (nearly US$9000 at recent exchange rates) is required for the providers of labour, and the deposit can be used in cases of non-compliance and a time limit of six months has been introduced for the contracts.
- In the case of subcontracting, provisions were introduced on responsibility for the labour obligations, which affect both subcontractors and the main firms regarding responsibility for the labour obligations. Direct responsibility lies with the subcontractors, but the main firms have the right to request from the subcontractor a certificate of compliance (issued by the labour inspectorate agency), and they also have the right to withhold payments for subcontractors in cases of obligations still pending. In fact, the law transforms the principal firm into an instrument of la-

bour inspection and sanction and it ensures that compliance will increase.[92]

Case 10:
Spain: Flexibility at the margin[93]

In Spain, a two-tiered hierarchy of standards was applied to different categories of workers — with flexibility allowed for new entrants and unemployed persons (to encourage firms to hire them) and a continued level of protection kept for permanent workers (to avoid threatening the entire workforce with job insecurity).

High unemployment rates during the first half of the 1980s in Spain triggered the adoption measures to regulate contracts of limited duration (or fixed term contracts) to ensure that they met minimum standards of employment contracts while leaving employment protection legislation for permanent workers untouched. These contracts have lower dismissal costs and offer social security rebates for the first two years of the contract. It is applicable only to workers below 30 years or over 45 years, long-term unemployed and disabled workers.

Overall, fixed-term contracts have been instrumental in increasing employment in Spain while maintaining a certain degree of labour rights. This has benefited some specific groups of workers, mainly low skilled, and is clearly a better option than remaining unemployed.[94]

In 2006, Spanish trade unions, employers' organisations and government signed an agreement to provide additional safeguards within these contracts, and to bring contractual arrangements more into line with the European social model. The main points of the agreement are as follows:

- After more than 24 months on a fixed-term contract in the same enterprise and doing the same job, over a reference period of 30 months, the worker's contract becomes one of indefinite duration;
- Employer bonuses for four years when target groups (women, youngsters, and longer-term unemployed) are offered an open-ended contract;
- Precise definition of and action against illegal posting of workers between firms;
- Cuts in employer social security contribution;
- Extended unemployment benefits for older workers, and measures to increase protection of flexible fixed-term workers.

The success of fixed-term contracts in Spain is still a matter of discussion. Given the strict regulations on permanent employment, the main attractiveness of fixed term contracts is the flexibility and low firing costs they entail. This kind of contracts allows for a quick adaptation of the staff to changing economic conditions.

An important element in the assessment of fixed-term contracts is whether workers with temporary arrangements are trapped in this situation for a long time or, on the contrary, can obtain a permanent job after a relatively short period. It is said that fixed-term contracts could serve as screening devices that allow employers to observe workers' performance. Skilful workers would thus obtain a permanent contract after a probation period holding a fixed-term contract.[95] However, this transition from a temporary to a permanent post in Spain is, in general, rather slow and takes longer at present than in the past.[96]

The disadvantages of this measure must also be noted. There is, for example, little incentive as a result either for employers or workers to invest in human capital and reduced overall labour mobility, due to inherent uncertainty, lower remuneration and high housing costs.

Case 11:

China's positive responses to growing market economy

Since the founding of the People's Republic of China in 1949, a planned economic system has been adopted, whereby highly concentrated employment and wage and labour systems guaranteed the livelihood of employees, and also promoted social security.

However, this system has had to adapt with the changes in economic and social development, particularly since 1978, when China began its policy of reform and opening up. This period was marked by a focus on economic construction that swiftly moved towards what has been called a 'socialist market economy system.'

As a result, labour and social security structures underwent many changes. Most obviously, China experienced unprecedented economic growth of between eight to 12 percent, far exceeding the centralised and collective growth patterns. This in turn affected employment patterns in cities with large urban migration from rural areas, un-contracted hires, long working hours, and low wages, with little or no job security or safety protection. Meanwhile, rural unemployment was also on the increase and the gulf between classes was widening. It is estimated that there are more than 150 million redundant rural labourers, with an unemployment rate in urban areas and townships standing at over four percent.

However, the most far reaching efforts to change the law were announced in March 2006 by Premier Wen Jiabao in his annual speech at the National People's Congress. The wide ranging economic reform package includes a new labour law addressing working conditions in China. With some amendments, influenced to some extent by the ILO, the new labour ruling has become law taking effect 1 January 2008. The State is now declared to have obligations, good governance, better public institutions, protection clauses, contracts, regulations and legal arbitrations. The reform package indicates that the State will play a crucial role by rethinking development strategies and having solid policies in place. The following features are the most important of the new labour initiatives:

- Most industrial employees, including migrant workers are covered;
- Provisions are clarified for collective contracts that apply to groups of workers and employers industry-wide or within a given region;
- The employer must account for any deviation from the labour standards imposed by law, which also includes a requirement for them to provide written contracts;
- The courts will take a more stringent approach to labour violations as per the new laws. In fact, should the employer be found in violation of either the law or even 'administrative regulations', the labour administration has the power to issue warnings or 'rectifications' depending on the severity of the violation. There are also provisions within the law for damages and even criminal liability in those cases where labour rights are grossly infringed. The law strictly limits tacking on probationary periods during which the employer can arbitrarily terminate an employee. This feature is designed to overcome an abusive practice that deprives employees of protections from arbitrary discharge and requires 'just cause' before an employee is dismissed;
- This proposed law regulates for the first time the new industry of labour brokers or 'labour dispatchers,' which has grown up to furnish export industries with 'just-in-time' workers who have dubious legal status as employees under

the law and therefore are often unprotected;

- If employers keep using a temporary employee for more than two fixed — term contracts, the contract has to be converted into an indefinite term contract, thus ending the practice of 'casualising' employment;
- This draft law regulates abuses of 'non-compete' clauses, whereby employers saddle skilled workers in IT and other sectors with excessive restrictions on who they can work for in the future and severely hamper future job mobility with legal entanglements.

To correct a predisposition in Chinese courts and among labour arbitrators to exalt form over substance and facts, the proposed changes make the facts and realities of the employment relationship the key. Employees would no longer be confronted with the dilemma of enforcing a contract where the employer has illegally withheld one.

Case 12:
Out-of-court dispute resolution as a practical tool for legal empowerment

For poor people around the world, getting access to courts and legal support to protect their rights is often impossible. In many cases, the reason for this is straightforward — they cannot afford to pay the legal fees. In Tajikistan, the UK has helped to solve this problem by supporting Third Party Arbitration Courts. These courts are an alternative way of resolving disputes: two sides of a dispute agree to nominate a third party who they both trust to mediate their disagreement and come to a decision. Although they operate independently of the formal legal system, decisions are recognised by Tajikistan's official courts. This means that where parties do not comply with a decision, the state can step in to enforce it.

Third Party Arbitration Courts provide poor people with a cheap, fair and accessible way of resolving disputes and protecting their rights. They are particularly effective at protecting the rights of women to land and property.

Third Party Arbitration has helped to make legal services available to 800,000 people in Tajikistan (12 percent of the population). The approach has also been used successfully in Russia, Kyrgyzstan, Moldova, Ukraine and Georgia.[100]

Case 13:
Revising bidding and procurement practices in Senegal

Government can have a direct role to play in expanding opportunities for the informal sector through affirmative action to purchase the goods and services of the sector. In view of the weaknesses of the sector, government must change contracting procedures, reduce barriers and make government purchases more accessible to the informal sector. There should also be improved channels of information between government and the informal sector so that the government would know what products are available while those in the informal scetor would know what government is buying. With regard to simplifying requirements, the following actions are proposed:

- Break large requirements into smaller sizes that are more manageable by small suppliers.
- Simplify bidding procedures for smaller requirements.
- Reassess existing regulations with a view to giving priority to internal sourcing of products.
- Reassess procedures with a view to ensuring that payments are made promptly to the suppli-

er, perhaps even prepaid, to ease the financial requirements of the informal sector suppliers.

- Establish effective control systems to ensure that these affirmative actions do not compromise the need for a reasonable price, good quality and timeliness.[101]

The Senegalese Government provides an example of a proactive policy of contracting out public infrastructure projects to small scale contractors. Bidding procedures and documents have been substantially simplified to permit smaller contractors to participate in the bidding process. Bureaucratic documentation was also minimised while bidding documents now contain official unit cost estimates as a guide to the less sophisticated contractor. A general session is held wherein contractors are informed about the existence of the implementing agency and are apprised of the entire procedure, from the bidding to the awarding and implementation. Simplification of the process goes as far as making the name of the winner very clear in the announcement, so that even an illiterate contractor's representative can readily determine who was awarded the contract.

The contract that the successful bidder has to sign is basic and contains only essential elements, with superfluous or general content removed. The model contract used for all such projects is written in language that is understandable to the layperson, avoiding legal jargon and complicated terminology.

During the implementation of the contract, technical assistance is provided to the awarded contractor regarding productivity improvement and basic management. The technical assistance programme comprises the following components: 1) short courses on basic management covering recordkeeping, accounting, stock control, and sub-project management; 2) short courses and on-site technical assistance for contractors' managers, site supervisors and foremen to improve technical management of the construction jobs to improve productivity; and 3) ad hoc training for foremen and construction workers on specific construction techniques related to the job on hand. By its second year of operation in 1992, the programme had reached approximately 720 individuals representing over 500 firms.[12]

Chapter 3 Endnotes

1 See Resolution concerning the promotion of sustainable enterprises, International Labour Conference, June 2007.

2 World Bank, 2002a.

3 Anne Trebilcock, 2005.

4 Loayza, 2007.

5 Declaration on Fundamental Principles and Rights at Work, ILO, 1998.

6 'Decent Work and the Informal Economy,' Report of the Director-General, International Labour Conference, ILO, Geneva, 2002.

7 In 2003, the International Conference of Labour Statisticians endorsed a statistical framework for measuring informal economy.

8 Alsop and Heinsohn, 2005.

9 World Bank 2002b.

10 Trebilcock, A., 2006.

11 ILO, 1999.

12 Loayza and Rigolini ,2006.

13 ILO, 2002b.

14 Heintz and Pollin, 2003.

15 This summary is based on recent analyses of available national data (using the indirect measure of estimating informal employment as the difference between total employment [estimated by labour force surveys or population censuses] and formal employment [estimated by enterprise surveys or economic censuses]) as well as earlier summaries of these analyses in Chen et al 2005. The authors of ILO 2002 as well as Heintz and Pollin (2003) analysed a common set of official national data collected and compiled by Jacques Charmes.

16 National labour force data do not capture all forms of informal employment for a variety of reasons. One reason is that some lawful paid activities are not declared to public authorities. The extent and characteristics of lawful but undeclared work differ widely between countries. A 2004 study for the European Commission found that undeclared work represented as much as 20 percent of GDP in some southern and eastern European countries ('Undeclared Work in an Enlarged Union' 2004.) Of course, criminal activities are also not declared to public authorities. But the definition of the informal economy used by the Commission and in this Report excludes criminal activities.

17 See, Hu, A., *The Emergence of Informal Sector and the Development of Informal Economy in China's Transition: A Historical Perspective (1952-2004)* —(pdf version, slide 4) Available: *http://ccs.tinghua.edu.cn and http://siteresources.worldbank.org/INTDECABCTOK2006/Resources/H_Angang.ppt*

18 Informal wage employment is comprised of employees of informal enterprises as well as various types of informal wage workers who work for formal enterprises, households, or no fixed employer. These include casual day labourers, domestic workers, industrial outworkers (notably homeworkers), undeclared workers, and part-time or temporary workers without secure contracts, worker benefits, or social protection.

19 Chen et al., 2005.

20 Analysis of national data by Jacques Charmes, cited in Chen et al., 2005.

21 These figures were computed by Jeemol Unni using the individual records of the Employment and Unemployment Survey, 1999-2000, 55th Round of the National Sample Survey Organisation, New Delhi.

22 Heintz ,2006.

23 Loayza and Rigolini, 2006. For figures on China, also see Hu, Angang, *The Emergence of Informal Sector and the Development of Informal Economy in China's Transition: A Historical Perspective (1952-2004).* Available: http://ccs.tinghua.edu.cn

and at: http://siteresources.worldbank.org/INTDECABCTOK2006/Resources/H_Angang.ppt

24 Chen *et al.* 2005.

25 Heintz 2006. Blunch *et al.* 2001.

26 Statisticians distinguish three main sub-categories of self-employment: 1) 'employers', the self-employed who hire others; 2) 'own account workers', who do not hire others; 2'; and 3) 'unpaid contributing family workers'. However, many statistical analyses, such as those by the OECD reported by Carré 2006, exclude unpaid family members because they are considered 'assistants', not 'entrepreneurs'. Since the majority of unpaid family workers in most contexts are women, this exclusion understates the real level of women's labour force participation and entrepreneurship (Carré 2006).

27 UNRISD 2005, Heintz 2005

28 Heintz 2005.

29 *ibid.*

30 Chen *et al* 2005.

31 Carré 2006:13

32 Ibid.

33 Tomei 2005.

34 ILO 2003b.

35 Based on conception provided by the United Nations Rapporteur, Martinez-Cobo, in the Study on the Problem of Discrimination against Indigenous Populations. Cited in Tomei 2005.

36 Tomei, 2005.

37 *ibid.*

38 Chen 2006b.

39 Article I of the Declaration of Philadelphia, International Labour Conference, 1944, Annex to the Constitution of the International Labour Organisation.

40 ILO 2006.

41 Although a number of ILO labour standards addressed workers outside of the formal economy (e.g., indigenous and tribal peoples, rural workers, etc.) since the 1960s, these did not previously result in international policy conclusions on the informalisation as a growing global trend.

42 Stiglitz 2001.

43 ILO 2002b.

44 Freeman 1996.

45 Tokman 2007a.

46 Anne Trebilcock 2004.

47 Paragraph 47 of the 2005 Summit Outcome Document.

48 Including the UN funds, programmes and agencies, regional economic commissions and development banks, as well as the international financial institutions and the World Trade Organisation (WTO)

49 Summit Outcome Document, ECOSOC 2006 Declaration.

50 See Marty Chen, 'Legal Empowerment of the Poor: Process and Outcomes', Harvard, July 20, 2007.

51

52 This could be guided by the Employment Relationship Recommendations, 2006, adopted by the 91st session of the International Labour Conference.

53 Chile adopted a new law in 2006 to regulate these arrangements, allocating solidarity responsibilities to sub-contractor and subcontracting firms involved. It also introduced the right of the latter to control the compliance of the former and to convert its responsibility into subsidiary. It also adapted the Labour Inspection to be able to certify the degree of enforcement on line and up dated.

54 See V. Tokman, "Informality, insecurity and social cohesion in Latin America', International Labour Review, vol. 126 (2007), number 1-2, ILO, Geneva. In Bogota, Colombia a survey of micro enterprises indicates that 76 percent among them could not pay all the labour contributions required by law, and in Lima, Peru this percentage reached to 85 percent.

55 ILO, 'Business environment, labour law and micro and small enterprises', Committee on Employment and Social Policy, Governing Body 297th session, Geneva, 2006. Another specific experience is the change of pecuniary sanctions by using the resources for improving the knowledge of micro-entrepreneurs on their obligations in Chile. Although ignorance cannot be claimed as an excuse for lack of compliance, there is need for support when levels of education are low and access to costly professional services cannot be afforded.

56 See Resolution concerning the promotion of sustainable enterprises, 96th Session of the International Labour Conference, June 2007.

57 See Case 6, annexed to this chapter.

58 See Case 7.

59 World Bank, 'Informality: Exit and Exclusion', Washington , 2007.

60 The public funds involved are the highest in Bolivia (1,2percent of GNP) and are estimated for the quasi-universal pension of Chile at 1,0 percent compared to the focused pensions in the Region that are usually below 0,5 percent of GNP.

61 See International Labour Conference, Resolution on the employment relationship, Geneva, 2006.

62 The current, dominant rubric for understanding and analysing the impact of regulation on economic growth is through the use of multi-country surveys, whose core function is to provide measures of the costs of business regulation within an economy. These multi-country surveys have, over a fairly short space of time, come to dominate global, regional and country-level policy discussions around the potential economic consequences of labour market regulation. Two of these surveys loom large for analytical work on the developing world, namely the Investment Climate Assessment (ICA) surveys and the Doing Business Survey (DBS) — both run under the auspices of the World Bank. The ICA measures firms' perceptions of the investment climate in their country and are based on a standard core module (See *http://rru.worldbank.org/InvestmentClimate/About.aspx* for this standard questionnaire). The questionnaire covers senior manager's perceptions of obstacles to growth and investment, as well as information on firm performance. The data is organised according to a series of topics including infrastructure and services; finance; government policies and services; labour relations and innovation (World Bank, 2007). Currently the ICA includes data on 58 countries (World Bank, 2007). The Doing Business Survey (DBS) has been ongoing since 2004, and in the most recent round in 2007, covered close to 180 countries. The DBS deals with issues such as contract enforcement; property rights regulation; business licensing and of particular interest to us here — labour market regulation. The method of data collection is a combination of studying individual country laws and regulations and surveys of local lawyers.

63 For further background on these questions, see Berg and Kucera (eds.), In Defence of Labour Market Institutions: Cultivating Justice in the Developing World (forthcoming).

64 Botero *et al* (2004) undertook a seminal study on the impact of labour regulation around the world. The data covers 85 countries and is very deliberate in its construction of indices of labour regulation ranging from, for example, laws on overtime and part-time work to those on dismissals, notice periods and the right to strike activity and collective bargaining. The information is representative of country-level information for the late 1990s, and in most cases reflects data for 1997. It was, as far is known, the first exhaustive, comprehensive measure of labour regulation that is cross-country in nature and not perception-based.

65 Botero et al (2004), p. 1364, shows that of all the labour regulation measures, only dismissal procedures in their cross-country regressions are a significant and negative determinant of the log of GNP per capita, while social security provisions are positively associated with growth.

66 ILO Governing Body 'The United Nations and Reform' 300th Session Geneva, November 2007 GB.300/4/1

67 Maloney 2003.

68 McKinesey Quarterly, 'The hidden dangers of the informal economy.'

69 IOE 2006.

70 OECD 2006.

71 Nickell and Layard 1998; and Levine and Tyson 1990.

72 Gregg and Manning 1997.

73 Saavedra and Torero 2004.

74 Kugler *et al.* 2003.

75 Acemoglu and Angrist 2001

76 In the case of Sara, et al., vs. Agarrado, et al. G.R. No. 73199, 26 October 1988.

77 See ILO,'The informal economy: enabling transition to formalisation,' Tripartite Interregional Symposium on the Informal Economy, Geneva, November 2007.

78 See also Convention 156, Workers with Family Responsibilities.

79 No. 177, 1966.

80 See Annex 1 for more details.

81 See Resolution concerning the promotion of sustainable enterprises, International Labour Conference, June 2007.

82 Thanachaisethavut and Charoenlert 2006.

83 Boundary: a cab driver, for example, pays a fixed amount to the owner for the use of the vehicle, retaining the fares above this amount for his expenses and keeping the balance as his actual earnings.

84 In the case of Sara, et al., vs. Agarrado, et al. G.R. No. 73199, 26 October 1988.

85 Chen 2006c.

86 As in other minimum wage negotiations, SEWA seeks to have the minimum wage fixed in a tripartite negotiation with the Labour Commissioner's Office, the employer, and the workers so it will be acceptable to all concerned. Also, SEWA does not expect that the minimum wage will be enforced but uses it as a benchmark or target in on-going negotiations.

87 Yu, S. and Karaos, A. 2004; UN-Habitat 2006.

88 Chen 2006d.

89 As noted earlier, 'unorganised worker' is the term used in India for workers in informal employment and does not imply that such workers are not organised into unions or other organisations

90 Previously, the definition of the *regular self-employed* was limited only to 'all self-employed professionals, partners and single proprietors of businesses, actors and actresses, directors, scriptwriters and news correspondents, who do not fall within the definition of the term 'employee,' professional athletes, coaches, trainers and jockeys' (Section 9-A, Social Security Act of 1997). Under the new resolution, the definition of self-employed has now been expanded to include low income earners.

91 Government White Paper, 2004 at: *http://www.china.org.cn/e-white/20040907/8.htm*

92 Tokman 2006.

93 Larsson 2006.

94 Estrada, and Izquierdo 2002.

95 Guell-Rotllan and Petrongolo 2000.

96 Dorantes, 2000.

97 'China to train 60 million rural labourers before 2010' in *People's Daily* at : *http//english.peopledaily.com.cn/200309/27/eng20030927_125088.shtml*

98 Wen Jiabao, Report of the Work of the Government. Delivered at the Fourth Session of the Tenth National People's Congress. 5 March 2006. Available: *http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/english/2006-03/14/content_4303943.htm*

99 *ibid.*

100 DFID, 2006.

101 Grierson and Mead 1995.

102 Pean and Watson 1993.

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Chapter
FOUR

Business Rights

EXECUTIVE SUMMARY

'The opposite of poverty is not wealth — it is justice. The objective…is to create a more just society, not necessarily a wealthier one. And the great question is how do we do this?'

Leonardo Boff, Franciscan Theologian, Brazil

Work is central to our lives. Earning a livelihood is not only a basic need, it is a requirement for enriching our sense of well-being and the quality of life in general. Underpinning a system that contributes to employment generation and to the ability to earn a living are the savings, investment and innovation undertaken largely by businesses.[1]

Persistent poverty is the result of both public policy failure and market failure. The two are related as prevalent policies and the resulting system of governance, institutional structure and legal rights tend to characterise and limit the function of the economy, markets and businesses, and define what they can do and what they are allowed to do.

This report attempts to outline how legal mechanisms can empower millions of working poor who apply initiative and entrepreneurship to earn their living in the informal sector of economies across the world. It begins by outlining the barriers that entrepreneurs face in accessing opportunities in the formal economic system. Case studies are presented to illustrate some solutions and innovations; they are intended to be studied, adapted and scaled up. The report concludes by underlining essential principles and key considerations in moving reform frontiers towards more inclusive, gender responsive and integrated economies.

After examining current policy reform in private sector development as well as innovation in institutional design and business linkages, our working group for this chapter concluded that legal empowerment of informal businesses can serve to promote **rights-based economic empowerment**. Legal recognition of labour and commercial rights of business and its incorporation into governance institutions should be at the core of legal mechanisms to empower informal business.

Productivity and protection can and should be promoted together. This two-pronged approach could help to remove barriers in the wider legal/regulatory/market environment; it could do this by changing or simplifying registration and licensing procedures and extending greater legal rights to the working poor. This would serve to empower the working poor to know and demand their legal rights, negotiate with officials, bargain more effectively in market transactions, and enforce contracts or seek redress when contracts are violated. It would also permit them to be represented in relevant policymaking and rule-setting bodies.

Informal and formal businesses are inextricably linked. There are a variety of reasons for lack of adherence to legal and regulatory requirements by informal businesses. Non-compliance means greater profits for informal businesses, or it could be that the requirements are irrelevant, inappropriate, or non-existent for informal businesses. Possibly, informal businesses cannot afford to comply with the regulations. Also, many do not know what is required, or they may be unsure as to what advantages there could be under 'formal' status. Because of the uncertainties, informal businesses continue to chart out for their own operational support, building networks and informal contractual arrangements grounded more on social mores than on any legal basis. Legal, policy and regulatory reform and innovation, derived from what works for the poor and what would guarantee their fundamental rights, is long overdue. Millions of working poor men and women have no knowledge of what rights they are guaranteed under national and international law, or of government obligations to provide or facilitate infrastructure, as well as financial, technical, and business services. With support of civil society organisations, or through their own associations, they are beginning to demand some form of legal identity or protection for themselves and their livelihood activities.

The response is a reform agenda that prioritises approaches to achieving the objectives, and determines the order in which the selected measures are to be introduced. This would serve to optimise the productive potential of informal entrepreneurs and facilitate the protection of their businesses. As for the objectives, they are broadly listed as follows: reducing regulatory burdens; removing unnecessary barriers to formal markets and institutions; increasing opportunities for business linkages; increasing benefits and protections for all working in the informal sector; strengthening the organisation and representation of the informal entrepreneurs, and providing equal access of working poor women and men to all of the above.

Additionally, improvement in the quality of institutions in an economy has to proceed simultaneously with the transformation of the nature and efficiency of its informal economy. Learning from institution-building experiences of industrialised countries and those in transition as well from other developing countries, can be valuable. There are some good-practice examples from around the world that illustrate how the constraints of informal businesses have been successfully addressed through successful institutional and policy changes. At the same time, national and local level institutional changes can be initiated implicitly with the introduction of new economic activities that may well provide direct and measurable benefits.

The Informal Entrepreneur

Street vendors, rural milk hawkers, millers and ginners, small food cart pushers, shoe shiners, the itinerant fix-it technician, the roadside hairdresser and food caterer — these are the informal entrepreneurs who are vibrant visible economic players in the poorer countries of the world. As an observer suggests, they are 'the true entrepreneurs — more flexible, efficient and resilient than the over-regulated and overprotected dinosaurs of the formal sector....'[2] These entrepreneurs are called informal because they operate to some extent outside the realm of formal legal regulation and protection, and without easy or full access to the advantages of formal financial and business support systems.

There are some 500 million working poor earning less than one dollar per day (ILO 2004). The

vast majority earn their living in the informal economy, occupying land they do not own, working in small, informal businesses, and relying on family or friends for informal moneylenders for loans. Often, they have limited access to broader economic opportunities and are especially vulnerable to the uncertainties, the corruption and even the violence prevalent outside the rule of law. They have little or no access to settling disputes using the legal machinery. Without legal rights or protections, they are in a continual state of legal and political vulnerability. Informality, therefore, limits the opportunity for economic and social development for individuals, families, businesses, communities, and even entire nations.

The ILO defines the informal economy as accommodating 'all economic activities that are —in law or practice- not covered or insufficiently covered by formal arrangements.' [3] It includes wage workers and own-account workers and contributing family members. Informal entrepreneurs are the working poor who run very small enterprises. These include micro-entrepreneurs who hire workers and two kinds of own-account operators, namely, heads-of-family businesses and single-person operators.

Around the developing world, women tend to be concentrated in the low-end forms of own-account work, and they are under-represented among micro-entrepreneurs. On average, earnings in informal enterprises are low while costs and risks are high, particularly for own-account operators, but especially for women operators.

Legal Empowerment and Legal Identity

Legal Empowerment of the Poor, such that their entrepreneurship is linked to greater economic opportunity, means not only reform in legal codes but also policies to correct asymmetries in access to information, education and training, and access to financial, technical and business services. Additionally, the vast assortments of legal and regulatory rules and administrative systems, in which businesses are embedded, have to be examined. A fundamental premise to all change is that the legal identity of individuals as citizens and as entrepreneurs or workers must be clearly established. For example, identity verification is essential to commercial dispute resolution procedures and to local governance concerns. Similarly, property rights have 'to be given to actual people, who themselves — in order to advance and defend their access to and possession of such rights — first must be able to formally verify their personal status and identity. A crucial pre-requisite, then, to enhancing the quality of property rights is ensuring that residents/citizens have recognised documents (such as birth, death, marriage and divorce certificates) verifying such basic information as their name, age, sex and marital status.'[4]

Based on evidence, we argue that there is need for an effective and enabling environment, regulatory regime, commercial law and good economic governance for allowing business to operate with equitable economic rights and guaranteeing greater accountability in the government's ability to issue laws and the capacity to implement and enforce them. This process should empower the poor to use law and legal tools to prevail over poverty, while persuading the government to equitably enforce its policies and regulations and reinforce the role of the civil society in implementing greater accountability of all actors and at all levels. Sound economic governance is built upon principles of equity and equality of opportunities. Public policies and action therefore must support access to and distribution of assets, economic opportunities, and political voice participa-

tion in decision making that promote sustainable enterprises. In order to effectively address the challenge to 'level the playing field,' governance structures have to emphasise greater investment in the human resources of the poor, guarantees on business rights for all and fairness in markets. Countries with pervasive inequalities in wealth, resources, weak institutions, and power typically experience narrow financial sectors that meet the needs of the privileged and the influential. Among the many market failures in developing countries, notable are those in the financial markets including those for credit, insurance, land, and human capital. With the consolidation of market power in a limited number of large banks, lending tends to get biased in the favour of enterprises that are low risk and may exclude those with the highest expected risk-adjusted returns. Access to finance is essential for businesses; however businesses in the informal economy lack access to financial markets and the capacity to compete in product markets.

The higher the levels of inequities, the greater would be the propensity of the institutions and social arrangements to favour the interests of the influential and the privileged. Inequitable institutions generate economic costs, which are avoidable. It is therefore important to make sure that business rights do not provide exclusive benefits and are not enforced selectively so that, both middle and poorer groups end up with unexploited capacity.

An Integrated Economy Approach

Legal empowerment measures have to take place within a policy and regulatory approach which recognises that the two parts of the economy — formal and informal — do not exist independently of each other. There is a constant exchange of ideas, people, skills, goods and services between the two parts. At the base of the private sector are millions of small, micro, and mini entrepreneurs, who provide the bulk of the raw material for formal sector production, engage intermittently as labour in the formal enterprises, and use products made in the formal sector. Those who have been employees in the formal sector and have acquired new techniques, capabilities and business contacts, often move into the more flexible informal sector and set up their own businesses. If relationships between different levels of economic activity are to be anticipated, made strategic and optimized, policy and institutional change for sustained business linkages and skills development has to take place. Those who work in the micro-enterprises, and own-account workers within supply chains that lead into the formal sector, have to be accorded legal protection on a par with enterprises and workers in the formal sector.

Successful design and support of appropriate policies and institutions for an integrated economy must begin with analysis of innovations emerging at the interface between the informal and formal. Small producers and micro-entrepreneurs are daily developing strategies for dealing with the demands of formal institutions, while the latter have also developed ways of managing their inevitable encounter with those who are the majority in the poorer countries of the world. These coping strategies hold clues as to what development interventions can and should build upon, within the context of particular cultures, economies and industries. Contextual specificity and lessons from on-the-ground experience, are important principles for policy and institutional innovations for an integrated and inclusive economy.

Analysis of current practice could provide guidance for the move from a bifurcated to an integrated, cohesive approach to entrepreneurship

and economic activity. First, in order to encourage greater engagement between established formal businesses and the smaller enterprises, transaction costs and risks of such engagement have to be reduced. Second, the public sector has to develop and implement participatory processes so that support is relevant to those on the fringes of formal activity. Third, change has to be negotiated through iterative dialogue and partnerships spanning across central and local governments, the private sector, domestic capital markets, producer groups and their social and economic organisations. Fourth, the function in micro and small scale entrepreneurial activity of 'immediate and direct reciprocities'[5] has to be recognised; in many low-income communities, economic activities and arrangements are embedded in social relationships. How social relations and values, not just market forces, affect the modus operandi of millions of entrepreneurs has to be brought into economic reform considerations. How social and cultural norms condition the modes of production and overall situation of women entrepreneurs and indigenous peoples is particularly pertinent to this consideration.

The Reform Agenda

Our working group for Chapter 4 of this report recommends the following as **key messages** in the legal empowerment of informal businesses:

1. Policy Stance

- Legally empowering small informal businesses run by poor individuals or households should be seen as a central pillar of a just society and a central strategy for reducing poverty and inequality.
- Most policies and the global economy currently accord privilege to large firms/enterprises over small firms/enterprises.
- Informality is here to stay and is an essential feature of the global economy.
- Poverty and exclusion go hand in hand. The poor have no choice but to accept insecurity and instability as a way of life. Our reform agenda reflects the realities of poverty and exclusion experienced by poor people, and therefore focuses on removing the barriers that hold the poor back, and building a framework of laws and institutions to provide genuine protection and opportunity for all. This will require wholesale systemic changes to all facets of the legal framework, including: the **political process, economic policy, law making, public administration**, and **law enforcement**.
- While national governments and the international community should seek to create as many formal jobs as possible and formalise as many informal enterprises and jobs as possible, informality is not going to disappear. The real challenge will be to reduce the 'decent work *deficits'* of those who work informally, especially the working poor.
- Poor people's enterprise does play a vital role in the economies of many countries, and the poor therefore have a right to earn a living free from harassment, extortion, beating, wrongful eviction, expropriation and exploitation. They must be offered equal opportunity to access local, national and international markets.
- Commercial rights for informal entrepreneurs/operators should be seen as an essential part of a package of rights for the working poor in the informal economy. This would include property rights, labour rights, the right to social protection, and the right to organise and to be represented in policymaking and rule-setting institutions and processes.
- Other than social protection (property, health, life, disability, old age) that is relevant for wage

workers as well as the self-employed in the informal economy, commercial rights are relevant to the half of the working poor in the informal economy who are self-employed.

- Of the half of the working poor who are self-employed, the larger and more vulnerable group are own-account operators, including both single person operators and those who work in family businesses or on family farms.
- Productivity and protection can and should be promoted together.
- Economic policies should address issues of redistribution.
- Legal empowerment will stimulate growth which is on its turn a pre-condition to reduce poverty.

2. **Policy Positions**

- On basic commercial rights: right to work, including right to vend; right to a work space (including public land and private residences) and to related basic infrastructure (shelter, electricity, water, sanitation).
- On intermediary commercial rights: right to government incentives and support (including procurement, tax holidays, export licensing, export promotion), and right to public infrastructure (transport and communication).
- On advanced commercial rights: entity shielding rules, limited liability and capital lock-in rights, mechanisms for perpetual succession of the firm and transferring its value, mechanisms to allow the use of standardised accounting, mechanisms to establish firm, manager and employee liability rights, protect minority shareholders and default rules.

3. **Policy Process**

- Seeks to reduce the 'decent work deficits' of those who run informal businesses.
- Includes representative voices of the working poor in the informal economy.
- Recognises and addresses bias in existing commercial policies, regulations, laws, and procedures that favour larger firms/enterprises.
- Seeks to extend government incentives and procurements to the smallest informal enterprises.
- Seeks to build backward and forward linkages on fair terms between larger and smaller firms.
- Promotes social protection for informal operators (property, health, life, disability insurance), and does retraining, life-long learning and other support to mobility.

4. **Practical Strategies**

Good practice examples from around the world could help in devising local needs-based models to address local issues and constraints.

5. **Policy Debates**

Debates on formalisation of informal businesses. Formalisation could take on different forms, including:

- Expanding formal employment opportunities.
- Creating incentives for informal enterprises to formalise, such as:
  - Simplified registration procedures and progressive registration fees.
  - Supportive investment climate.
  - Fair commercial transactions between informal enterprises and formal firms.
  - Appropriate legal and regulatory frameworks, including enforceable commercial contracts, property rights and use of public space.
  - Tax-funded incentives, including: govern-

ment procurement, tax rebates, and tax-funded subsidies and incentive packages.
    - Provision of financial, business and marketing services.
- Creating mechanisms and financial arrangements to provide social protection for informal producers.
- Promoting participatory policy processes and inclusive rule-setting institutions that involve representatives of associations of informal entrepreneurs.

The broad effect of reform in attaining legal empowerment will not only improve the well-being and livelihoods of individual entrepreneurs; it will also result in enhanced social protection, as well as increased productivity and asset base of poor people and of the nation as a whole.

I. Introduction and Framework

Since the phrase 'informal sector' was coined in the early 1970s [6] to describe the range of subsistence activities of the urban poor, there has been considerable debate about its definition. The informal sector is not homogenous; it encompasses different types of economic activities, different labour relations that range from the self-employed, paid and unpaid, to disguised wage workers and economies with different economic potential that includes survivalist economies and successful micro and small enterprises. In effect, the term 'informal economy' is more appropriate as it comprises the informal sector while not excluding possible linkages of informal operators with the formal sector.[7]

Generally speaking, informal economy encompasses the expanding an increasingly diverse groups of workers and businesses in both rural and urban areas, operating informally — i.e., they are not recognised or protected under the legal and regulatory frameworks. The national and local economies continue to be a continuum that ranges from informal to formal. The informal economy has been growing at a rapid rate throughout the world, including in the industrialised countries. In recent years, much of the employment potential within the developing countries has been found in the informal economies and, hence, in the informal enterprises. In these countries, a much higher proportion of those working in the informal economy are poor, with the share of women relative to men being much higher.

Accordingly, the legal empowerment agenda for business rights emphasises reforms, creating mechanisms and financial arrangements to provide social protection for informal producers.

Good initiatives have been undertaken by ILO, the World Bank, USAID, among other organisations, to provide the poor and the disadvantaged with the legal and institutional environment and the rule of law in order that they might better develop their capacity to use their own talents, energy and initiative for accessing livelihood resources, and assets to generate efficient and productive enterprises. The ultimate goal is to guarantee sustainable livelihoods for all — along the continuum from the informal to the formal economy. The approach: reorienting gender-based development strategies to eradicate poverty. This requires 1) a better understanding of the informal businesses and enterprises within the context of the formal and informal continuum, and 2) an integrative strategy to design a system of business rights that provides solutions to the lack of social protection, lack of representation and voice, and leads to more efficient economic functioning, greater trust and reduction in conflict, and improved institutions with dynamic benefits for equitable investment and growth.

This chapter on Business Rights presents evidence to demonstrate that the inequality of business opportunities available to the poor is uneconomical and detrimental to sustainable development and poverty reduction. It will also provide policy and rule of law implications emerging from removal of bureaucratic and administrative inefficiencies in the life cycle of businesses and the study of market failures, particularly at the local levels, while building upon the broad concept of levelling the playing field — politically and economically — in the domestic and global arenas.

Why Business Rights? And why now?

We live in world of increasing inequities. The richest two percent of adults own more than 50 percent of global assets. The poorest half of the population holds only one percent of wealth.[8] Unprecedented affluence co-exists with astonishing deprivation, persistence of poverty and unmet basic needs, violation of fundamental political freedoms, and neglect or even absence of lawful privileges that uphold basic civil liberties for a significant proportion of the population. Nearly 40 percent of the world's 6.5 billion people live in poverty of which, a sixth live in extreme poverty.[9] The number of people living in extreme poverty in Africa has nearly doubled from 164 million in 1981 to 316 million in 2001. Even for the rest of the world, extreme poverty today has increased by nearly three percent from 1981.[10] While the deprivations indicated above are more common in the less wealthy countries, they exist in, one form or another, in rich countries too.[11]

Work, being central to our lives, is a basic requirement to enriching human well-being and the quality of life in general. Work empowers people to enhance their ability to attain and sustain livelihoods, while it is largely left to business to create savings, investment and innovation that contribute to livelihoods and to employment generation.[12] Persistent poverty may be blamed on both public policy failure and market failure. Interestingly, the two are related in that prevalent policies and resulting systems of governance structure and legal rights have largely served to characterise the function of the economy, markets and businesses, and to define what they can do and what they are allowed to do. Therefore, an integral constituent of poverty reduction must have to do with empowering the working poor to access opportunities that could be created by reducing economic, legal and social inequalities.

Businesses, generally speaking, constitute the private sector; they are usually led private individuals, communities and corporations. In many

developing countries, however, informal enterprises overshadow the private sector and their number is increasing. Creation of good quality jobs is determined to a large extent by enterprise creation, innovation and expansion. Where the potential for entrepreneurship, creativity, dynamic and productive job creation is stifled, either through onerous legal procedures and institutions or through inequities represented by vested interests and inadequate enforcement, entrepreneurs will gravitate towards the informal economy.

Informal firms and enterprises account for more than 50 percent of all economic activities and some estimates conclude that over 30 percent of the developing world's GDP and 70 percent of it workers are outside the official economy.[13] The size of the informal economy is inversely related to economic development and, while, at the same time, there is a significant correspondence between working in the informal economy and being poor. However, a large number of informal businesses in an economy are not per se a sign of its underdevelopment; they are, rather, a reflection of the fact that these enterprises are confined to subsistence and insufficiently productive activities.

Informal Economy and Informal Businesses

The informal economy in Africa is estimated to have been 42 percent of GDP in 2000. While Zimbabwe, Tanzania and Nigeria were at the high end with the informal sector representing 59.4 percent, 58.3 percent and 57.9 percent of respective GDP, Botswana and Cameroon were at the lower end, with 33.4 percent and 32.8 percent respectively. At the turn of the century, 93 percent of the jobs created in Sub-Saharan Africa were in the informal economy,[14] with almost 80 percent of non-agricultural employment and over 60 percent of urban employment.[15] In Latin America, the average size of the informal economy was 41 percent of GDP with Bolivia as the largest informal economy at 67.1 percent, and Chile as the smallest at 19.8 percent. In Asia, the range varied from Thailand at 52.6 percent, to Singapore with 13.1 percent. In transition countries, by far the largest informal economy was in Georgia with 67.3 percent, and at the lower end were the Czech Republic with 19.1 percent and the Slovak Republic with 18.9 percent.

In the recent years, the lion's share of new employment in developing countries has been in the informal economy. Activities in the informal economy provide certain benefits to a marginal few. Also, while some activities in the informal economy provide viable livelihoods with reasonable incomes for some, most informal workers earn insecure incomes under conditions that are not on par with decent work standards.[16]They do not, for example, receive medical or other benefits.[17] In effect, the decent work deficits are most pronounced in the informal economy where most workers have little or no social protection and receive little or no social security. Also, poor respect and lack of freedom of association make it difficult for these workers and their employers to organise.[18] In addition, working conditions in the informal economy are often unsafe, uncertain, and poor in terms of remuneration. Other concerns are poor occupational health and safety arrangements, and real fears for sexual harassment and violence against women. Furthermore, wages are suppressed below adequate levels and fail to reward productivity or long service.[19] Finally, the lack of social protection measures, such as rights and representation, leave many in the informal work force trapped in poverty.[20] Nearly all informal workers are among the poorest citizens of their respective countries, and they lack education, money and the ability to

obtain formal, permanent work.[21] It is important to add that a larger proportion of women relative to men work in the informal economy and suffers from poverty.

Legal Empowerment and Business Rights

The informal economy includes a growing and increasingly diverse group of workers and rural and urban enterprises operating informally. While the informal economy comprises both production units of various kinds and elements of employment status, this paper will focus mainly on business rights relating to small entrepreneurs and the self-employed. Business rights are integral components of the strength of an economy. While millions in the informal economy may be wage labourers, consisting of paid, unpaid and disguised wage recipients in 'value chains', engaged in survival-type activities, there are nevertheless a significant proportion of poor people who are self-employed in micro-enterprises, operating their own business ventures, or contributing family workers, or employees.

The problems and needs under each of these categories may be different, but they nevertheless fall into the 'informal' category because they lack recognition or protection under the legal, institutional and regulatory, judicial and dispute resolution frameworks. They also lack access to the advantages of formal financial and business support systems. In addition, they are excluded from, or have limited access to, public infrastructure and other benefits of the public goods as well as to markets and they are therefore unable to be competitive or efficient in managing their activities. This, in turn increases their vulnerability to natural, social and political shocks and stresses and places doubt on the sustainability of their livelihoods.

It is argued that prevalence and increase in informal business is a consequence of inequitable policies and discriminatory enforcement that fail to give support to those businesses and entrepreneurial opportunities in which tangible benefits might accrue to the poor. Accordingly, for most small entrepreneurs and self-employed people, working in the informal economy is a survival strategy rather than an option.

Balancing Human Rights and Market-Based Approach

Legal empowerment aims to address relative deprivation in all forms, including social, political and economic dimensions in the pursuit of a life of choice, freedom, respect and dignity. The issue of equity, in having rights and being able to enforce them, is critical, as it relates to the disparities in capabilities which reflects on access to wealth and resources as well as to ownership of assets. While the rich and privileged can protect themselves and their rights by legal means as well as by influence and connections, the poor must rely on legally enforceable rights. The recognition of human rights is therefore necessary. Equally necessary are the legal means and capacities to enforce those rights through accessible and effective institutions and processes that are transparent, participatory and accountable. At the same time, institutional reforms designed to eradicate poverty need to be put into place to ensure that state and public policies work, that regulation to create greater equity is in place, and that the system will work to help the poor and the disadvantaged to create wealth — even through entrepreneurship.

Public investments are crucial for developing that kind of 'private based economy' that could allow the private sector to create employment and sustain long- term economic growth. In the absence

of the provision of adequate infrastructure, health services and education, market forces alone can accomplish little. Existence of markets is a prerequisite for survival and sustainability of businesses and entrepreneurs. While the freedom to enter a market[22] is a vital constituent of development, the level of access and representation in those markets determines the formal or informal character of an enterprise and what it can accomplish. Again, the markets cannot function in the absence of effective and equitable public policy, rule of law, regulation, social support and political freedoms. In principle, the markets, in addition to creating economic efficiency, can also encourage greater economic equity. This would, however, depend on the structure of markets, their governance and associated legal rights, and the nature and extent of their inclusiveness as reflected through active business enterprises.

Private institutions are willing to develop innovative partnership models to provide greater access to goods and services by the poor. But they require assistance through appropriate policies and strengthened capacities to remove barriers to the market creation and provide greater market access to the entrepreneurs in the informal economies. At the same time, governments should not hesitate to step in, possibly in the form of public-private partnerships, that would encourage private institutions to meet the demands of the poor and enhance market access in rural and underserved areas[23].

Economic success requires getting the balance right between the government and the market, in terms of who should provide the goods and services and how they should be provided. Any successful development strategy demands the existence of equitable access to markets by all and requires involvement of government, markets and the private sector, and the civil society.

Voice, Representation and Effective Economic Governance

It is essential to build upon and refine the above issues in the context of the work of the Commission on Legal Empowerment of the Poor (CLEP) and reform the development agenda by broadening the discussion of business rights and the informal economy in a comprehensive manner that goes beyond formalisation *per se*. It will emphasise that the Legal Empowerment of the Poor to create and operate their enterprises and generate sustainable livelihoods sustainably requires them to have a voice in all aspects of policymaking, implementation and enforcement, and to have the ability to work with governments and other stakeholders to create new rights, capacities, and opportunities.

The adverse effects of unequal opportunities of representation and political voice and power for the poorer people on human development are particularly harmful because economic, political, and social inequalities tend to reproduce themselves over time and across generations, setting into motion a poverty trap that does not allow for improvements in the quality of their lives.

Business rights should result in the creation of an efficient and inclusive private sector with a sound domestic macro environment, having trade policies, institutional foundations and adequate capacity for maximising benefits from the macro global environment and promoting distributional equity.

There is evidence, we believe, to argue the case for an effective and enabling environment, for a regulatory regime and for commercial law, as well as good economic governance that would allow business to operate with equitable economic rights and guarantee greater accountability in

the government's ability to issue, implement and enforce laws. This would empower the poor to use law and legal tools to prevail over poverty, while persuading the government to equitably enforce its policies and regulations and reinforce the role of the civil society in implementing greater accountability of all actors and at all levels. Sound economic governance is built upon principles of equity and equality of opportunities. Public policies and action, therefore, must support access to and distribution of assets, economic opportunities, and political voice participation in decision-making that works to promote sustainable enterprises. In order to effectively address the challenge of 'levelling the playing field', governance structures have to emphasise greater investment in the human resources of the poor, guarantees for business rights for all, and fairness in markets.

Greater Access to Markets, Goods and Services, and Infrastructure

It is vital to have functional legal principles and mechanisms that will enable entrepreneurs and businesses in the informal economy to have greater access to goods and services and markets so they can build productive and efficient business enterprises. At the minimum, this requires the existence of equitable opportunities for the poor to create, run and manage a business. In turn, it translates into strengthened capabilities of the poor to access and effectively use resources, infrastructure, and *constituent components*[24] of a business and factors of production. With such assurances, they could efficiently transform their labour into a successful business. They could manage it to obtain certain profit, and use the secure asset base to expand that business successfully. For a business to be sustainable, the entrepreneur should have the ability to manage a high level of personal, professional and financial risk, as well as the risk of physical, environmental and socially adverse impacts, in addition to the capacity to recover from those shocks.

In the presence of missing or imperfect markets, the distribution of wealth and power affects the allocation of investment opportunities. Achieving economic efficiency would necessitate the combination of actions relating to correction of the market failure as well as measures to provide greater access to services, assets, and political influence by the disenfranchised suffering from adverse impacts of inequitable development strategies.

Inclusive Financial Services

Countries with pervasive inequalities in wealth, resources, weak institutions, and power typically experience narrow financial sectors that meet the needs of the privileged and the influential. Among the many market failures in developing countries, the most notable are those in the financial markets, including those in the areas of credit, insurance, land, and human capital. With the consolidation of market power in a limited number of large banks, lending tends to get biased in the favour of enterprises that are low risk. This may exclude those with the highest expected risk-adjusted returns. Access to finance is essential for businesses; however businesses in the informal economy lack access to financial markets and the capacity to compete in product markets.

Over 4 billion people globally are currently irrelevant to the banking system. Normally, access to commercial banks by the low income and rural populations is limited in terms of physical distance to the closest branch of the bank and also because of thresholds in account fees or minimum required balances. While large companies are well served by existing banking system, low income and rural individuals, micro-entre-

preneurs and small sector enterprises are particularly under-serviced by the financial industry. For instance, nearly 741 million Indians in rural areas are poorly served, despite a huge demand for financial services, including an estimated annual credit demand exceeding US$10 billion.[25] Similarly, those in the informal economy are not covered by safety and health regulations and are not, therefore, eligible for social security benefits, pensions or other forms of social protection.

Enhanced access to basic financial services — savings, credit, insurance, pensions and tools for risk management — is a critical input for emerging and potential entrepreneurs to leverage economic opportunities and improve their quality of life. The ability and willingness of private financial institutions to provide access to inclusive financial services would depend on appropriate policies, existence of relevant human and institutional capacities that would remove barriers to the market creation, as well as incentives to partner with the private sector to provide broader market access to the entrepreneurs who require greater facilitation and empowerment. At the same time, the government should not hesitate to step in through policies, regulations and incentives to encourage private financial institutions to garner savings, long term credit and market-based social protection instruments in rural and underserved areas.[26] The regulatory structures, therefore, have to ensure broader access to financial services, particularly for the poor, as well as a deepening of the financial sector and establishment of greater accountability.

Institutional Changes

The higher the levels of inequities, the greater would be the propensity of the institutions and social arrangements to favour the interests of the influential and the privileged. Inequitable institutions generate economic costs, which are avoidable. It is therefore important to make sure that the business rights do not provide exclusive benefits and are not enforced selectively, which would leave both middle and poorer groups with unexploited capacity.

As the realms of institutional and economic development are reciprocally related, knowledge of national and local contexts is critical. Therefore, international comparisons of 'ease of doing business' need to take into account the reality of the nature, quality and experience of different countries. Although the private sector in developing countries is largely comprised of informal businesses, the character and attributes of the informal sector will most certainly vary from one country to the next. It would therefore appear that the effectiveness of recommendations on the convenience of doing business should be measured by the extent to which the proposed changes are mainstreamed and translated into improved performance of the institutions and their operating environment. Without such measure, the expected increase in foreign investment would be illusory.

Because the informal economy and informal businesses are predominantly local, the criteria determining ease of doing business must incorporate the needs of the informal businesses. Subsequent recommendations should therefore encompass and be judged by the ability of the macro-level changes to the business climate to impact local-level institutions and, therefore, businesses in the informal economy.

Improvement in the quality of institutions in an economy has to proceed simultaneously with the transformation of its informal economy. Valuable lessons can be learned from the institution-building experience of the industrialised countries

and those in transition, as well as from other developing countries. There are good-practice examples from around the world that illustrate how constraints of informal businesses have been successfully addressed through institutional and policy change. At the same time, national and local level institutional changes can be initiated implicitly by launching new economic activities that provide direct and measurable benefits to those who will be influenced by institutional change. As the process continues, the ability of a population, impacted by institutional change, to realise tangible benefits will provide proof of their ownership. Over time, the economic activity becomes an agent for and a catalyst of demand for appropriate institutions.[27] For instance, economic empowerment based on economic activity is a step towards gender equality,[28] even if they are not synonymous. Linking creative economic activities with business rights in the informal economy has an added advantage in that it allows learning-by-doing in implementing institutional reforms. It also allows for synergistic linkages between reforms from above (including those initiated by governments or promoted by international organisations) with effective action from below (by civil society organisations and organisations of the poor themselves).

Pursuing the Agenda for Change

The emphasis of the document is placed on creating larger options and opportunities for entrepreneurs and businesses in the informal economies to operate proficiently and equipping them with capabilities, enabling environment and equitable governance systems to make correct choices to maximise their welfare.[29] The Legal Empowerment Framework does not look to formalising economies as the desired outcome; instead, it urges the creation of circumstances in which the ultimate benefits of the development interventions will accrue in equitable manner to the poor on a sustainable basis.

An important focus of the paper on Business Rights is the use of an evidence-based approach. It is anticipated that the analysis will establish empirical linkages to illustrate legal rights and empowerment of the poor by tackling the intricacy of the informal economy and proposing a methodology and sequence of actions to address the underlying complex issues of informal businesses and poverty alleviation.

The 'agenda for change' proposes a comprehensive strategy to address three inter-related components that run the continuum from the informal to the formal end of the economy; they include:

- Creating more entrepreneurship and business opportunities by ensuring that those in the informal economy are legally recognised; they should have legal social protection and risk management options, equitable representation and voice, as well as and assurances that the new enterprises do not have an incentive to be in the informal sector simply because of lower cost.
- Enabling those enterprises currently in the informal economy to move upwards along the continuum, through a context-specific mix of legal policy frameworks that include incentives and regulations, as well as assurances that the entrepreneurs have the capacity and flexibility to do so.
- Improving productivity, efficiencies and conditions, and increasing the returns for the businesses in the informal sector.

It is obvious that the interventions under the three categories will have common characteristics. The guiding principle would be to tackle the root causes of informal businesses rather than

negative manifestations of informal businesses and informalisation. Also, the changes have to occur at the local level, which basically defines the informal economy. Successful mobilisation of businesses at local level, whether by the efforts of government, private sector or NGO, is a great promoter of equitable economic growth. While such interventions would be local in nature, their implementation recognises the global (universal) context that influences all development activities. In the end, the success and sustainability of any reform will depend on public recognition and ownership of evidence-based transformation within the cultural, social and political milieu.[30]

To Sum Up

This introduction provided an overall framework on the legal empowerment agenda for business rights and sets the stage for the sections that follow. We proposed that reforms can help the poor and the disadvantaged with the legal and institutional environment and the rule of law. People would then be encouraged to develop their capacities, energies and initiatives and to access livelihood resources, build assets and generate efficient and productive enterprises. The next section will look at informal businesses and enterprises within the context of the informal-formal continuum; it will examine the relationship between the informal economy, poverty and productivity, and it will map the informal economies that involve women and indigenous people.

2. Informal Economy and Informal Businesses

Informal-Formal Continuum

Even though any debate on 'informality' centres on the dichotomy between formal and informal, the concept is a lesser representative of dualism and embodies a continuum when viewed from any of the perspectives of activities, institutions or contracts. The definition of informality, however, is ambiguous and informal economy denotes a plurality of activities that are also contextual. The term 'informal sector' is inadequate because it fails to represent the inherent heterogeneity, complexity and dynamism of this economy and its constituent activities. Also, the gender bias in the informal economy is probably underestimated and women are more likely to be in those informal activities that are under-counted, including production for own consumption and paid domestic activities in private households. Based on the ILO's classification,[31] the term 'informal economy' has come to be widely used to include the expanding and increasingly diverse group of workers and enterprises in both rural and urban areas, operating without recognition under legal and protective frameworks, and characterised by a high degree of vulnerability.

The informal economy is differentiated in terms of production units as well as employment status. Informal may therefore refer to firm features of types of firms, or it may refer to employment. It may also be characterised as an activity or a type of activity. On the one hand, it includes own-account workers in survival type activities, ranging from street vendors, cobblers and shoe shiners, garbage collectors and rag pickers, to the self-employed entrepreneurs. On the other hand, the range of wage earners — from aid domestic work-

ers employed by households, to 'disguised wage workers' employed by sweatshops in production chains — are also included as important constituents of the informal economy.

Not surprisingly, any discussion of the informal economy would include 'small' enterprises not regulated, as well as employment relationships that are not legally recognised and that leave much to be desired (in terms of providing social protection and reduction of vulnerability). We may note here that issues relating to employability, productivity and flexibility of the labour force and to their upward movement along the informal-formal continuum are the subject of Chapter 3 of this report on Labour Rights. The thrust of this discussion, therefore, will maintain the focus on informal businesses and enterprises which, for the purpose of analysis, include own-account operators. We examine legal measures that include the presence of, and equitable access to, effective judicial, political and economic, market and non-market institutions. These, we have observed, make it easier for micro and small enterprises to start up and grow in a manner that allows them to adopt 'high road' strategies to enhance efficiency and productivity and provide decent jobs for its employees.

Poverty and Informal Economy

Increasing poverty spurs growth of the informal economy. In turn, the informal economy promotes economic growth, serving to reduce poverty. The problem here is that any reduction in poverty is inefficient, and lacks legal recognition, regulation and protection. Studies of countries that have successfully delivered pro-poor growth suggest that even though economic growth is extremely important, it is unable, by itself, to address the eventual disparity in poverty reduction. It is necessary to address the nature of inequalities while accounting for the resulting change, if any, in inequality from this kind of economic growth.[32]

Information and data on the informal economy in developing countries is sketchy since very few countries undertake survey of employment and engagement in the informal economy on a regular basis. Even though nearly 75 percent of the poor people in developing countries live in rural areas and engage in informal economic activities related to agriculture, many countries exclude agriculture from their measurement of the informal economy.[33]

An informal sector survey carried out by ILO in 1995 found that 41 percent of the workers were in the informal economy because they could not find any other work (including those who became involved following their retrenchment), 30 percent because their family needed additional income, 10 percent because of the freedom to determine their hours or place of work, and 9 percent because of good income opportunities.[34] Although not all poor are in the informal economy, almost all those who are informal are poor. Urban areas of most developing countries expose the contemporaneous existence of informal workers' shacks with the formal workers' more affluent homes. In the name of economic development and enforcement of property rights, the former are first to be destroyed by government even though the services provided to the formal settlements by them are perfectly legal.

Informal Enterprises

Despite the fact that the self-employed and employers face many barriers to setting up and operating informal enterprises, they account for 70 percent of the jobs in sub-Saharan Africa and about 60 percent in the other developing regions. In India, nearly 93 percent of the workforce is in the self-organised informal sector, with nearly 10

million persons and their dependents relying on street vending for their livelihood.[35] Studies also indicate that in the absence of informal economies, a majority of private sector households would have fallen deeper into poverty.[36]

There is a prevalent assumption that informal enterprises exist by choice because of the owners' preference to curtail labour costs and avoid payment of taxes. While this is true, it is not the entire story. Many businesses in the informal economy have limited output, employment or income to even be at the level of taxable entities. The root causes of the manifestation of informal enterprises encompass the legal and institutional hurdles that make it difficult to become or stay formal. For instance, the regulatory environment may be excessively burdensome, overly punitive and especially, in the cases of crises countries, non-existent. In addition, informal businesses have little access to public infrastructure and depend on informal and unfair institutional arrangements for their essentials. Essentials could range broadly from credit, markets and non-market institutions, training, developing skills and knowledge, to social protection, and even information on demographic trends (including rural-urban migration and cross-border labour migration), and national policies that constrain or limit employment generation in the formal economy.

Lack of registration and regulation of informal businesses and enterprises prevents informal workers from enjoying the rights of the decent work that may be accorded under their national labour legislation. The use of the term 'informal' does not mean an absence of norms or rules for operations of the enterprises. Businesses in the informal economy have their own institutions, mechanisms, rules, financial arrangements, and systems for accessing technology and markets, but they lack a common framework and it is unclear if they observe the fundamental and human rights of the labour. Also a number of criminal activities — money laundering, human and drug trafficking, tax evasion, etc. — are in the informal economy, as they operate on the fringes of the law. This area, however, is beyond the scope of our chapter.

Informal Enterprises and Productivity

A large informal sector can be an indication of high regulatory costs on business, raising doubts on the value of the regulations themselves. Studies[37] have found that the size of the informal sector, also termed 'shadow economy', could be inversely related to Gross Development Product (See Figure 1). Informality restrains efficient use of resources and productivity. The inefficiency or sub-optimal productivity of the informal economy is therefore linked in part, to the absence of legal protection, inability to enforce contracts and the need for security that comes from the dearth of property rights and decent work attributes. Their ability to organise for social protection is weak, with little or no voice to make their business recognised or protected. The lack of voice and participation in decision-making leads to non-existence of economic rights or opportunities to achieve their full economic potential.

An economy with a large proportion of informal businesses functions below its potential, with a lower rate of economic growth.[38] It also serves to point up systemic inequities in the ability of entrepreneurs to access markets, resources, technology, information, public infrastructure and social services. However, the large number of small firms in developing countries is not in itself a sign of their underdevelopment, but, rather, a reflection of their confinement to insufficiently productive activities.

It is important to design policies and mechanisms

Figure 1 GDP Per Capita and the Size of the Shadow Economy

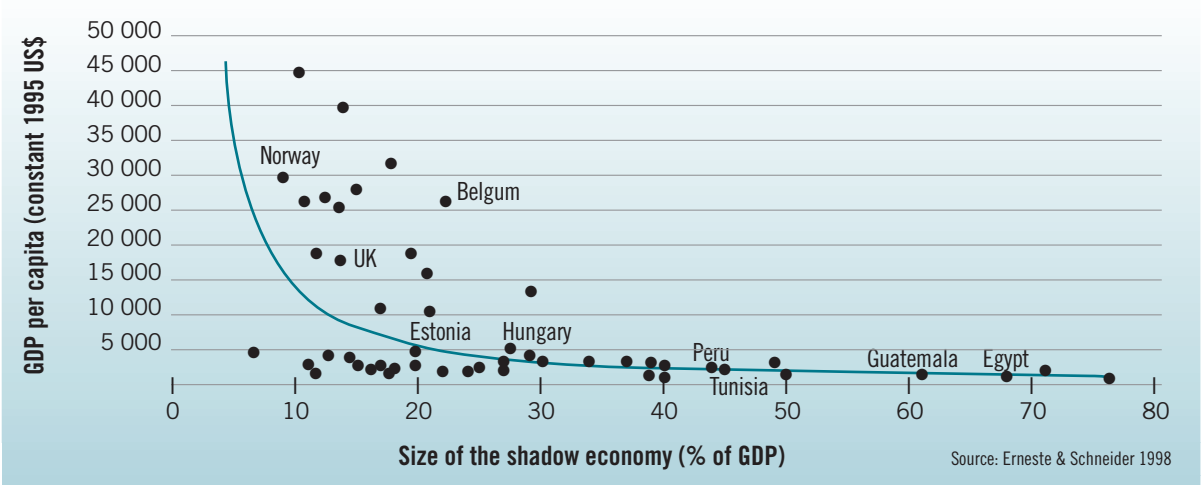
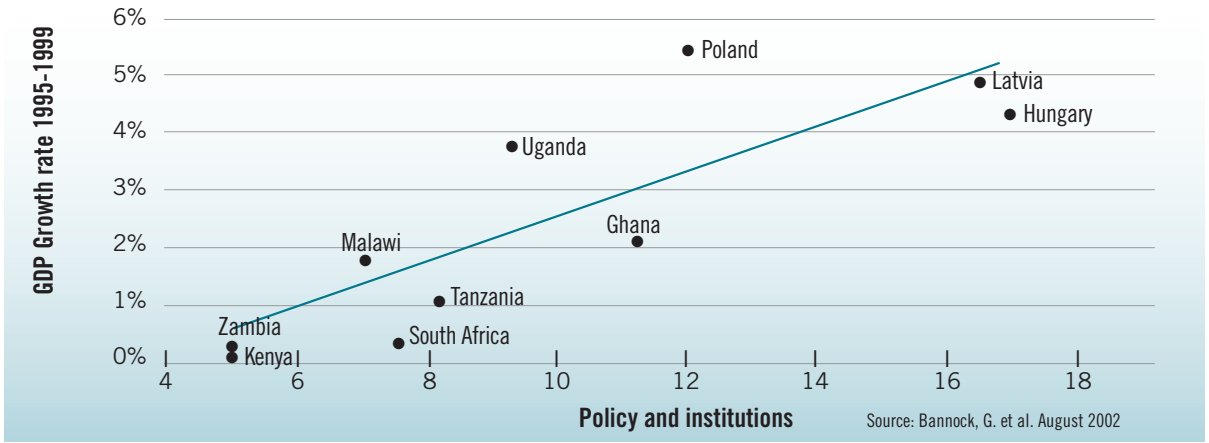


Figure 2 Indigenous private sector development and regulation in Africa and Central Europe: a 10-country study

GDP Per Capita growth rate against sum of policy and institutions to improve the enabling environment: 1995-1999



that enable the participation and access to benefits from growth by the poor people. This requires a conscious and sustained effort by governments to create necessary conditions for broad-based growth in regions and sectors where the poor live and work.[39] While it is not guaranteed that the adoption of the favoured institutional and policy mix will bring higher GDP growth, studies show that differences in policy and policy implementation are reflected in dramatically different rates of growth of GDP per capita achieved. Appropriate regulatory and institutional environment has been found to be the single most important element in an economic growth strategy. Even though a country's level of skills, especially technical skills, is also strongly correlated with *per capita* economic growth, interventions to improve the national regulatory and institutional environment

within which business operates offer far more rapid impact scenarios than those based on longer term education and skills strategies

A Mapping of Informal Economies[40]

Although, the studies that describe country level patterns and changes have at best been sketchy, given the complexity of measuring the informal economies precisely, they are certainly indicative. Over the last fifteen years or so, the informal sector in Sub-Saharan Africa has apparently increased from about two-thirds to nearly three-quarters of non-agricultural employment.[41] Street vending predominates, with women traders forming the majority in many of the countries in the region. Former retailing establishments often encourage informal economy operators to expand their markets to low income groups and rural areas who can be reached most easily by itinerant traders and street vendors.

Informal enterprises are small-scale enterprises with 80 percent classified as a one-person business. Businesses with more that one person were mainly found to be in transportation and construction. For women in this region, the informal economy presents 92 percent of the total job opportunities outside of agriculture compared to 71 percent for men. Almost 75 percent of these jobs are performed as self-employed and own-account workers, and only 5 percent as paid employees. Most small scale enterprises are without a formal establishment: over 33 percent of the informal activities take place within or beside the home of the business operator; 20 percent are without a fixed location; 10 percent are at a market, and 10 percent are in the street or in an open space.

The major sources of livelihoods, especially for women engaged in informal activities (food processing, handicrafts, hawking and vending), have been affected by trade liberalisation and by cross-border trading. Cross-border trading is very significant in the informal economy and is prevalent in South Africa and West Africa. For instance, a large number of temporary immigrants purchase goods in South Africa to take back to their own countries for sale. While normally the informal trade is within the region itself, traders from West Africa travel as far as Dubai and China to purchase higher quality goods that are cheap.[42] Also, vendors in Africa now have opportunities to link up with bigger enterprises and transnational corporations to become a part of their value chain.[43]

In Latin America, urban informal employment increased from 52 percent in 1990 to 58 percent in 1997 as a proportion of the total urban employment.[44] Not surprisingly, the increase was also observed in employment in micro and small enterprises as well as growth in self-employment. A proportion of self-employment or own-account workers is an indicator of low job growth in the formal economy and a high rate of employment creation in the informal economy. Self-employment represents nearly 32 percent of total non-agricultural employment worldwide, with 44 percent in Latin America.[45] In poor countries like Bangladesh and Pakistan, the proportion of self-employment accounts for nearly 70 percent of the total employment.

In the transition countries of Central and Eastern Europe and the countries of the Commonwealth of Independent States (CIS), the informal economy ranges from subsistence farming, petty trade, undeclared and unregistered labour, unregulated and unlicensed enterprises, the shuttle trade with neighbouring countries, to tax evasion. With the transition of the region to a market economy, the informal economy has expanded rapidly because of economics and social transformations, closure of many state- owned enterprises, increased privatisation, labour retrenchment and collapse of

social insurance, and need for institutional, business and labour reforms that have lacked enforcement and failed to keep in touch with changing economic realities.

The expansion of manufacturing and industry has led to a relative decline in the informal economy in China, Japan, the Republic of Korea and Singapore. While the informal economy had also declined from 60 to 57 percent in Thailand from 1980 and 1994 because of the economic boom, with the effect of the economic recession of 1997 it grew again to 60 percent.[46] Although economic recession leads to an increase in 'survivalist' economic activities suggesting the poverty mitigating role of the informal economy, economic prosperity has also been directly related to an increase in the informal economy, as in Indonesia, because of increased opportunities and the ability of the informal enterprises to respond to new market opportunities. An expansion of the informal economy in the former circumstances reflects marginalization of economic activities characterised by low productivity, low incomes and low standards of living.[47] On the other hand, expansion of the informal economy during an economic boom is related to the expediency of bypassing over-bearing bureaucratic processes and business practices that can constrain firms in the formal economy from responding quickly to market signals and increasing demand.

Women in the Informal Economy

Worldwide, women's share of informal economy employment has remained between 60 percent and 80 percent. Moreover, the number of females in the labour force is continuously on the rise and women in the informal economy most probably number much more than reflected in available statistics. (Girls, too, would be among their numbers.) They comprise most of the unpaid labour, are often home-based workers, and thus fall easily through gaps in enumeration as data and statistics on household level is still difficult to measure. In many countries, women are also drawn to the informal economy because they lack the right to own and inherit property and are therefore obstructed from activity in the formal economy, as they do not have assets to use as security for credits, etc. A statistical snapshot of women in the informal economy around the world reveals:[48]

1) **Informal employment is generally a larger source of employment for women than for men in the developing world.** Other than in the Middle East and North Africa, where 42 percent of women workers are in informal employment, 60 percent or more of women workers in the developing world are in informal employment (outside agriculture). The comparative figures for informal employment, as share of non-agricultural employment by sex and region, are as follow: in sub-Saharan Africa, 84 percent of women workers compared to 63 percent of men workers; in Latin America, 58 percent of women workers, 48 percent of men workers, and in Asia, 73 percent of women to 70 percent of men.

2) **Although women's labour-force participation rates are lower than men's, the limited data available points to the importance of women in home-based work and street vending in developing countries**: 30-90 percent of street vendors, except in societies that restrict women's mobility; 35-80 per-cent of all home-based workers, including both self-employed and home workers; and 80 percent or more of home workers — industrial outworkers who work at home).

3) **Although women's labour force participation rates are lower than men's, women represent the vast majority of part-time workers in many**

developed countries. In 1998, women were 60 percent or more of part-time workers in all OECD countries reporting data. Women's share of part-time work for specific countries was as high as 98 percent in Sweden, 80 percent in the United Kingdom, and 68 percent in both Japan and the United States.

Indigenous Peoples and Informal Businesses

Although the concept of social exclusion has gained wide currency, over 370 million indigenous peoples continue to be marginalized from the benefits of mainstream social and economic development. Indigenous peoples are over-represented among the poor in over 70 countries.

Lacking secure property rights hinders indigenous peoples in obtaining compensation from government in cases of eviction and displacement. Usually, this is due to lack of evidence to support their property rights. They also face huge barriers in obtaining legal protection (through enforcement opportunities), access to resources and wealth creation. Due to past experiences of bias and discrimination, many indigenous peoples forgo formal justice systems; also, legal aid services are often not provided to those living outside the mainstream justice system. Lack of title to property is another barrier to economic empowerment. Traditional property rights systems are being eroded as a result of neo-liberal, macro-economic policies. Indigenous peoples must therefore resort to finding employment in occupations that are not formally paid, as might be the case in rotational farming, fishing and weaving. Illiteracy and impoverishment further limit employment opportunities in low paid jobs. Indigenous women carry the burden of reproductive work, domestic work, child care and working in the field.

Distinct cultural identity and values: The indigenous people's perspectives on property, poverty and development are different from mainstream thinking and are not based solely on a market cash-based economy. Many indigenous societies exchange value (rather than money) by forms of barter, gift exchange, and other forms of reciprocal exchange. A better understanding of these 'principles of reciprocity' would be needed to underpin the work of the Commission. This may pose a number of binary oppositions, many of which may be challenged and contested, including: spirituality vs. rationality, collectivity vs. individuality (competition, intellectual property claims), sustainability vs. optimal productivity, traditional knowledge (e.g. trial and error) vs. empirical scientific methodology, subsistence vs. commerciality or markets, custom vs. state, rights vs. poverty, and inclusion vs. exclusion (or assimilation vs. integration).

Indigenous peoples often employ innovative methods to subsist, using traditional knowledge systems. With the onset of globalisation, it at first appeared that a new environment would be opened to developing new approaches, but barriers to entrepreneurship remain.

Micro-credit and micro-finance institutions are often the only source of capital for indigenous peoples and women in the informal and home-based sectors. However, indigenous peoples' perceptions of credit and loans are often compromised in the interests of entering the global economy. Efforts to promote innovation and entrepreneurship in indigenous peoples' territories should seek to understand and assess the systems of exchanging value in the society, sometimes based on complex kinship, cultural and other social networks.

Box 1 Empowering Indigenous peoples through Entrepreneurship

The ILO-INDISCO Programme was launched in the Philippines in 1994 in collaboration with the Philippine Government. It is a multi-bilateral technical cooperation aimed at strengthening the self-reliance of indigenous and tribal peoples through entrepreneurial activity. It has facilitated the operation of 12 pilot projects in different parts of the country, which involve indigenous communities in various stages of development. Financial and technical assistance has been provided to indigenous communities to engage in entrepreneurship.

The main window of opportunity for income and employment generation opened to community members was the Revolving Loan Fund, which provides assistance to groups and individuals for their livelihoods activities. Together with skills training on a particular trade the community wanted to pursue, plus appropriate equipment bought from project funds, members of several indigenous communities managed to improve their market access and economic status. Twelve communities with a combined population of approximately 90,000 people have benefited directly or indirectly from these projects. An estimated 2,500 jobs in agriculture, traditional handicraft, fishery, weaving and community services were created. As a result of the new revenue-generating activities, the income levels of partner communities have increased by an average of 44 percent. In recent years, the ILO has been providing technical assistance to some projects funded through the Small Grant Fund from the Embassy of Finland. The fund has supported various projects proposed by the Indigenous communities.

Source: ILO

Empowering Informal Businesses

Clearly, the informal business economy also links formal sectors to consumers. In fact it provides many low and middle-income employees of the formal sector with goods and services and contributes to economic growth. Economic growth, while a necessary condition, is not a sufficient condition for creating productive employment and poverty reduction. As discussed earlier, an increase in economic growth does not usually result in the alleviation of an informal economy or the transition from informal to formal unless it also brings greater equity. A positive outcome would reflect an approach that regards people living in poverty as creators of growth rather than merely as recipients of benefits.[49] We should, therefore, focus on empowering the poor and the disadvantaged, whether as self-employed producers and entrepreneurs or as employees of a firm. It is important that these economic actors participate fully and on an equal basis in the economic development

Some of the critical barriers faced by firms in the informal economy include limited human and working capital, limited access to markets, goods and services and to financial and business support services, obsolete technology, complex and burdensome government regulations with poor enforcement, lack of economic infrastructure and a poor supply of public services. Given the impediments to operate businesses in most developing countries, the opportunity costs of informality appear to be much lower compared to operating formally. It is therefore not surprising that informal networks also coordinate many transactions among the formal enterprises. Emphasis must fall on improving the business environment, and in a manner that it is particularly beneficial for enterprise at local level, including the rural areas. For instance, India's economic reforms, which also cover the business environment, have generally focused on the corporate and the organised sector that provides employment to nearly three percent of the country's work force, with another three to

four percent employed in the public sector and government. The balance, or roughly 93 percent of the workforce, which is essentially the self-organised informal economy, remains untouched by those economic reforms.[50]

Accordingly, it is important to improve the economic governance structure that could allow smaller formal enterprises to grow with greater efficiency, productivity and quality working conditions. It is equally necessary to facilitate the problems faced by informal enterprises in accessing products offered by financial institutions, such as the incorporation of security insurance and the establishment of limited liability institutions that might encourage high return-high risk investment. Informal enterprises also need to be sensitised to the requirements for improving employment and working conditions so that they are able to access dual labour regulations and safety nets in meeting part of their own labour contributions while sustaining the business and generating decent employment.[51]

Similarly, efficiency among the formal enterprises should be improved comprehensively and in an integrated manner by enforcing the rule of law. This would cover property rights and the reduction of corruption by lowering transaction costs of various activities. It would include reducing entry and operating formal costs, reducing growth barriers and implementing cost-efficient and proficient policies, guidelines and procedures for enforcement of compliance. If a one-stop shop is a solution for reducing registration procedures and costs, then it is vital that such facilities are organised and available at different levels (local, municipal, district, national and regional). This would not only facilitate the availability of relevant information, but would also be a disincentive to operate informally if cost was the sole rationale for such an action.

A well-structured tax system that is understandable and transparent would also dissuade firms from adopting the inefficiencies of informality simply to avoid taxes. Also, if local levies translate into fees for enhancing access to community resources as well as public services with greater accountability, the attractiveness and lower opportunity cost of informal sector would diminish significantly.

It would also be helpful to introduce property rights registration, contract enforcement mechanisms and clear policy guidelines to encourage market participation of street vendors, etc., in a manner that is participative, and incorporates informal and popular rules. By bringing diverse governance structures within the purview of the formal judicial system in a manner that is accessible and simple, it would increase the reach of rule of law to all business operators and encourage the efficient creation of informal-formal forward and backward linkages.

Given suitable conditions, including provision for capacity development, vocational training, and skill building, many informal enterprises may effortlessly glide into formal ones. This empowerment programme has to be an integral component of poverty reduction strategies using incentives based on participation, a level playing field of regulations, and enforcements thereof that, *inter alia*, enhances efficient, affordable and reliable access to public infrastructure services.

While legal identity has been linked to a greater access to basic goods and services and opportunities, it could catalyse inclusive development once it becomes a constituent of a larger reform agenda. So, legal identity must be internalised in policies and actions that target the integration of markets of the poor with other formal markets, thereby enabling them to meet the unmet de-

mand for affordable financial services. But, in the absence of legal documents, it is very unlikely that emphasis on legal identity would reduce exclusion.[52] Accordingly, the challenge to comprehensively address the inter-related components of the continuum from the informal to the formal end of the economy is not technological; it is in structuring institutions, capacities, incentives and regulations to provide certainty to economic exchange and therefore to equitable economic growth.[53]

Economic growth draws upon activities that are complex, fluid and geographically dispersed. They require an elaborate and ever evolving division of labour ranging from owners of formal and informal enterprises, producers, managers, and their employees, who are an integral component of the value chain. Such a large-scale division of labour requires state-like institutions for public enforcement of laws and contracts[54] and for its efficient sustainability. Although the government takes the lead in creating regulations, it is important to engage other stakeholders, including the poor people as economic actors, as well as NGOs, local public governance structures, and informal labour associations. This would ensure ownership by all relevant actors and create inexpensive approaches to enforce compliance with the regulations. It is the inclusive partnerships and a shared agenda between small and large firms, governments at all levels, civil society and the development agencies that will unlock new opportunities.[55]

To Sum Up

Increasing poverty is a key reason for growth of the informal economy and a main cause of the blossoming of informal enterprises struggling to overcome legal and institutional hurdles that make it difficult prevent for businesses to become or stay formal. These are some of the broad issues highlighted in this section, which also provided an overview of informal economies around the globe. The next section on legal identity and business rights discusses, among other issues, the need for an effective enabling environment, regulatory regime, commercial law and good economic governance that is required for business to operate with equitable economic rights and with guarantees of greater accountability in the government's ability to issue laws with the capacity to implement and enforce them.

3.Business Rights: Unlocking Barriers/ Constraints to Empower Informal Enterprises

The adverse effects upon the poor of living under a system of unequal opportunities of representation, political voice and power tend to reproduce themselves over time and across generations, setting into motion a classical poverty trap from which relatively few can escape. In this chapter, the position is taken that promoting business rights in the informal economy could help to unlock pent-up talents and energies among the working poor and create an efficient and inclusive private sector. The view is that a key to improving the quality of life of the poor and the disadvantaged is the creation of an efficient private sector with a sound domestic macro environment, and replete with trade policies, institutional foundations and adequate capacity to maximise benefits within a broader macro global environment. Such a creation would depend upon good economic governance, enforceable laws and regulations, effective institutions, practices and dedicated people to support inclusive and equitable development of the domestic private sector.

This chapter therefore argues for effective and enabling environments, a regulatory regime, commercial law and good economic governance. It is expected that this process will empower the poor to use law and legal tools to prevail over poverty, while persuading government to equitably enforce policies and regulations. This would reinforce the role of the civil society in implementing greater accountability of all actors and at all levels. Sound economic governance is built upon principles of equity and equality of opportunities. With public policies and supporting action, assurances could be given about access to and distribution of assets, economic opportunities, and political voice participation in decision-making — all of which can help to promote the creation of sustainable enterprises. This is the path to address the often-heard demands to 'level the playing field.'

It is therefore essential to build upon and refine the above issues in the context of the work of the Commission and reform the development agenda by broadening the discussion of business rights and the informal economy in a comprehensive manner that goes beyond formalisation *per se*. In other words, the legal empowerment of the informal business can generate sustainable livelihoods only by first addressing the constraints and barriers that stifle their productive potential and encourage them to have a voice in all aspects of policy making, implementing and enforcing and have the ability to work with governments and other stakeholders to create new rights, capacities, and opportunities.

The core set of legal enforcement components are presented in Box 2, below.

Empowerment has to be specific to context, the social reality of different groups, location etc. Policymakers and practitioners must tailor the various elements from the framework to meet local circumstances. The example, below, demonstrates how LE could address the specific conditions of street vendors.

Different levels of commercial rights are appropriate to the circumstances of different types of informal businesses: notably, street vendors, informal manufacturers, informal transport providers, and small farmers. Commercial rights for informal businesses can be stratified as follows:

- *Basic commercial rights:* right to work, in-

Box 2 Unlocking Barriers: Legal Mechanisms to Empower Informal Businesses

1) Legal and bureaucratic procedures that allow informal operators or businesses to operate:
- Simplified registration procedures;
- Simplified licensing and permit procedures;
- Identification devices, including: ID cards for individual operators, and business identification;
- Legislation — e.g., municipal by-laws — that allow street vendors to operate in public spaces.

2) Appropriate legal frameworks that enshrine the following as economic rights:
- Access to finance, raw material, and product markets at fair prices ;
- Access to transport and communication infrastructure;
- Access to improved skills and technology;
- Access to business development services;
- Access to business incentive and trade promotion packages: tax deferrals, subsidies, trade fairs.

3) Legal property rights:
- Private land;
- Intellectual property.

4) Use rights to public resources and appropriate zoning regulations:
- Use rights to urban public land;
- Use to common and public resources: pastures, forests, and waterways;
- appropriate zoning regulations where governing and under what conditions informal operators or businesses can operate in central business districts, suburban areas, and/or industrial zones.

5) Appropriate legal frameworks and standards for what informal operators and businesses are allowed to buy and sell:
- Appropriate laws and regulations regarding what are legal vs. illegal goods and services;
- Appropriate product and process standards: for example, public health and sanitation concerns re street food;
- Marketing licenses for products and services.

6) Appropriate legal tools to govern the transaction and contractual relationships of informal operators or businesses including:
- Bargaining and negotiating mechanisms/power;
- Legal and enforceable contracts;
- Grievance mechanisms;
- Conflict resolution mechanisms;
- Possibility of issuing shares, right to issue shares;
- Right to advertise and protect brands and trademarks.

7) Legal rights and mechanisms to provide informal operators and businesses with the following:
- Temporary unemployment relief;
- Insurance of various kinds, including of land, house, equipment, and other means of production;
- Bankruptcy rules and default rules;
- Limited liability, asset and capital protection;
- Capital withdrawal and transfer rules.

8) Legal right for informal operators and businesses to join or form organisations, legal recognition of such and legal right of the organisations to be represented in relevant policymaking and rule-setting institutions
- Membership in mainstream business associations;
- Membership in guilds or other associations of similar types of entrepreneurs;
- Representation in relevant planning and rule-setting bodies.

Street Vendors

Common issues and challenges face	What Legal Empowerment can do for them
Insecure place of work due to competition for urban space.	Secure vending sites.
Capital on unfair terms due to dependence on wholesale traders	Provide access to capital on fair terms: a loan product tailored to their daily need for working capital.
Uncertain quantity, quality, and price of goods due to dependence on wholesale traders.	Boost bargaining power with wholesale traders.
Lack of infrastructure i.e. shelter, water, sanitation.	Infrastructure services at vending sites i.e. shelter, water, sanitation.
Ambiguous legal status leading to harassment.	Licence to sell issue identity cards.
Evictions and bribes.	Freedom from harassment, evictions, and bribes.
Negative public image.	Positive public image.

cluding right to vend; right to a work space

- *Intermediary commercial rights*: right to government incentives and support including procurement and the right to public infrastructure
- *Advanced commercial rights*: those that are relevant for larger, more advanced informal enterprises.

These rights would then apply in different ways to different types of street vendors including:

- *Those who sell fruit and vegetables*: they need basic and intermediate commercial rights;
- *Those who sell cooked food*: they need basic commercial rights and intermediate commercial rights but also need to be regulated for public safety concerns;
- *Those who sell small domestically-produced manufactured goods* need basic and intermediate commercial rights and may also need to be regulated to ensure the goods are not pirated;
- *Those who sell more valuable imported manufactured goods* need basic and intermediate commercial rights and may also need to be regulated to ensure that the goods are not smuggled or pirated.

The illustrations shown above would suggest concerns about advanced commercial rights are essentially relevant only after the basic and intermediate commercial rights are taken care of.

Barriers and Constraints to Business Rights

Addressing the issue of legally empowering informal businesses is critical to unlocking the productive potential of individuals, communities and countries. There are significant barriers to basic business rights, including the cost of, and difficulty with repsect to accessing and obtaining licenses or permits, the cost of forming legal entities or, in some countries, even of registering as a person engaged in commerce. And, and of course, there is also the weight of taxation.

Cost-benefit analysis is influenced also by non-legal costs. For example, if business people do not have their basic human rights respected, the cost of doing business rises. If the level of education makes counting difficult, that is a cost. If the level of healthcare prevents people from using their human capital, that, too is a cost. And outside the classic human rights rubric, if public transporta-

tion is inadequate or the roads are largely impassable, that too is an additional cost. And all these costs are effective barriers to exit from the informal economy, because they make all other costs, including legal costs, that much more onerous. Below is an elaboration of implications for those currently doing business informally.

Legal, Regulatory, and Administrative Barriers

Regulatory barriers comprise inappropriate or rigid requirements and stem from a government policymaking environment that normally wishes to have a total control either for a political or socio-economic agenda. Many developing countries are emerging from a history of heavy-handed regulation, with approvals required for even the smallest activity, and authority overly centralised and inflexible. This means they are hampered by the legacy of a heavily regulated economy and a command and control approach to administration and enforcement. Poor quality law-making over the years has created a tangle of complex and inconsistent laws that present a daunting regulatory hurdle to the would-be formal enterprise. As such, the regulatory systems of these countries are not well developed to support a flourishing market economy that will create growth and formal jobs. A study[56] carried out in 2002 found that the costs and barriers imposed by regulation in developing countries are not only higher than they were in the developed world when it embarked on industrialisation, but are higher in some cases than in the advanced countries today. Taking business entry costs as a proxy for all regulatory costs, the report suggested that these costs in Africa (94%), in relation to GDP *per capita*, are much higher than those in other parts of the world — Central Europe (67%), Industrial South Asia (19.80%), and for many advanced countries (3%).

The World Bank study on doing business using indicators such as those in FIgure 3,[57] established clearly the correlation between the ease of doing business and the size of the informal economy. Two methods were used to produce the ranking — one involved averaging out a country's performance across the indicators, and the other used the raw values of indicators. Both regressions showed that there is a statistically significant correlation between a country's overall performance on the Doing Business indicators and the size of its informal

Figure 3 **Regulatory Burdens Impacting on Informal Enterprises (World Bank, 2005)**

Starting a Business	**Registering Property**
Number of Procedures	Number of Procedures
Time (days)	Time
Cost	Cost
Minimum Capital	
Hiring and Firing of Workers	**Getting Credit**
Difficulty of hiring	Cost to create collateral
Rigidity of hours	Legal rights of borrowers and lenders
Difficulty of firing	Credit information
Rigidity of employment	Public registry coverage
Firing costs	Private bureau coverage

Box 3 Most Difficult Places to Do Business (by specific category)

Starting a Business
- 17 Procedures in Uganda/Paraguay,
- 694 days in Suriname
- 1,194 percent of income per capita required as cost in Sierra Leon
- 4,233 percent of income per capita minimum capital required in Syria

Dealing with Licenses
- 186 Procedures in Egypt
- 668 days in Iran
- 5,869 percent of income per capita required as cost in Montenegro

Registering Property
- 16 Procedures in Nigeria
- 683 days in Haiti
- 28 percent of property value as cost in Syria

Employing Workers
- On difficulty of hiring index (100=worst) in Morocco, Nigeria and Tanzania
- On difficulty of firing index (100=worst) in Bolivia and Egypt
- 329 weeks of salary as firing cost in Sierra Leone

Trading Across Borders
- 16 number of documents required to export in Zambia
- 20 number of documents required to import in Rwanda

Getting Credits
- 0 Strength of legal rights in Cambodia, from an Index 0-10 (0 is the worst)
- 0 Depth of credit information in 48 countries, from an Index 0-10 (0 is the worst)

Paying Taxes
- 130 times payment per year in Uzbekistan
- 291 percent of profit as total tax rate in Gambia

Closing a Business
- Takes up to 10 years in India
- Cost (percent of estate): 76 in Lao PDR

Source: World Bank: Doing Business 2007 (prepared by Mahmood Iqbal)

economy; a worse environment for doing business correlates with a larger informal economy. The analysis also examined the relationship between the individual measures of ease of doing business and the size of the informal economy.

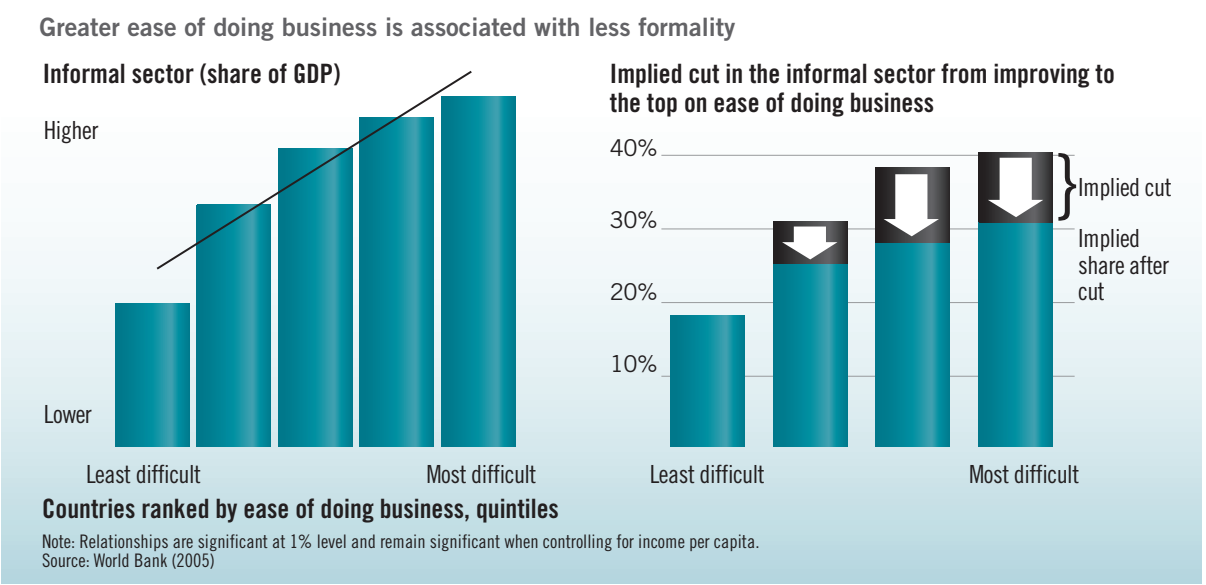
The World Bank has conducted a comprehensive study,[58] in identifying and quantifying the cost of barriers for all regions of the world and individual countries. The extreme cases are summarised in Box 3.

The World Bank study also shows that regulatory environment and informality are highly correlated: the greater the difficulty in business operation, the larger the size of the informal sector. In other words, barriers or extent of difficulties in doing business force many operators to take the informal route.

Administrative barriers are the bureaucratic requirements that flow from regulations, their implementation and enforcement. A regulation may be well-designed, proportionate and efficient, but its true effect on enterprises comes from the way in which it is administered. Administrative barriers are the hassle that dissuades informal enterprises from wanting to interact with government officials;[59] they include excessive paperwork; civil service inefficiency leading to delays in decision-making; low levels of civil service capacity, i.e. poor skills levels so that mistakes are made, and too few people and access points providing services; inaccessibility, as when there is too little delegation to the front-line and decisions have to be referred up to the management chain; general bureaucratic obstruction (perhaps stemming from inherent distrust of the private sector by officials) contributing to delays, and abuse of position (linked to corruption).

The time and money spent complying with government regulations impose significant transac-

Figure 4 Regulatory Environment and Informality



Note: Relationships are significant at 1% level and remain significant when controlling for income per capita.
Source: World Bank (2005)

tion costs on businesses. In addition, the direct cost of payments, such as licensing fees, also represents a significant cost of doing business. Conversely, payments made to avoid detection of non-compliance, or payoffs to government officials are the costs of operating in the informal sector. The regulations imposed on business fall into several categories. Some regulations governing business start-up raise the costs of entering the formal sector, others govern ongoing business activity, and additional regulations are dictated by the central authority or by regional or municipal governments. Furthermore, small businesses face government-imposed costs in the areas of labour practices, payroll charges, health and safety standards, taxation, and foreign trade.

Governance Issues: In many developing countries, corruption and rent-seeking reduce information flows and weaken contract enforcement, reducing economic activity, especially foreign investment. Every major study on barriers to formalisation and indeed on barriers to growth generally, refers to the problem of corruption.

Often it is not the financial cost itself that creates the largest transaction cost obstacle to setting up a small business, but rather the time and energy required to navigate the bureaucratic maze, along with the opportunity costs involved. A well-known example was provided by Hernando de Soto when he measured the cost of establishing a small garment manufacturing enterprise in Lima, Peru. He found that it required many different steps over an extended period of time to set up a small formal manufacturing company.[60] Although Peru has substantially reformed and simplified the process of setting up a small business, de Soto's overall conclusions remain as valid for many other Latin American countries today as they did in Peru in the late 1980s. This is why entrepreneurs frequently resort to bribes or professional 'fixers' in order to expedite the registration and licensing process. Fixers' fees to establish a company range from US$600 to US$800 to establish a company in most Latin American countries; they rise quite sharply as the size of the firm increases.

Case Study:

Ukraine and Private Business Development

The dimension of the problem: A 1999 survey of businesses and households suggested that, there were 3.073 million businesses in Ukraine, of which 2.651 million (86%) had no employees. Comparing the official figures of small firms (with fewer than 50 employees) suggested that over 80 percent of these 2.651 million, or two million businesses were unregistered and informal, which is, strictly speaking,, illegal, in Ukrainian terms.

Key problem: Corruption and other rent-seeking behaviour. It is widely agreed that the biggest issue for the regulatory environment for Ukrainian businesses is its unpredictability. Regulations are often confusing or unclear, many regulatory activities lack a comprehensive legislative basis, information is lacking and procedures are unnecessarily complex. Rules change frequently — for example there were 34 amendments to key tax laws in 2004. The lack of clear and accurate information for businesses on the current state of the law assists rent seeking behaviour by corrupt officials.

Inspections are still the biggest problem faced by Ukrainian business, but the problem appears to be decreasing slowly. In 2001, 94 percent of firms were inspected at some time during the year (a figure which had declined by 20 percent since 2000) with the average firm receiving 11.7 inspections. In 2004, 78 percent of firms surveyed were inspected. The typical small firm spent 22 days dealing with inspections in 2001, compared to 27 days in 2000. There is no comparable figure for 2004.

In 2001, 40 percent of all firms surveyed made unofficial payments to inspecting bodies, and 28 percent in 2002. In 2004, this figure appeared to have dropped to 20 percent.

Key problem remaining: Current legislative frameworks are too complex, confused and scattered. As a result of reform and donor assistance over several years, the 140 steps that businesses had to take for full registration have now been decreased to 70. Needless to say, this number still is very high.

(Source: A Review of the Development of the Private Sector in Ukraine since1998, and an Evaluation of the Contribution of DFID. DFID 2006)

Corruption deters formalisation as businesses stay off registries and tax rolls in order to minimise contact with corrupt public officials. One broad study of 69 countries found a direct link between decreasing corruption and an increasing formal economy.[61] In a study of the informal sector in Ukraine, 82 percent of businesses believed that bribes to officials were necessary in order to continue to operate.[62] The smallest businesses suffer most from paying bribes, because these sums decrease the paltry profits made by thm.

Financial Barriers: Financial institutions depend on the credibility of formal documentation to provide the security and enforceability necessary to extend credit. As informal businesses commonly do not possess land title or a standing relationship with a bank, the most prevalent forms of loan guarantee, real estate and fiduciary collateral, are generally unavailable. Formal lenders typically require borrowers to provide financial statements and credible documentation related to the lender's recent operations (bank

statements, invoices, etc.). Accordingly, informal entrepreneurs unaccustomed to separating their business and personal transactions or recording and maintaining the firm's information, or who use informal suppliers who are unable to provide documentation as solicited by the lender, will be required to make significant adjustments to their daily operations.

The greater the exposure to risk that a banking institution assumes due to lack of credible documentation or an unreliable legal framework, the more it needs to charge higher interest rates and guarantees to loan ratio requirements. Thus, in many developing countries, bank loan portfolios are often over-collateralised (guarantees to loan ratios of greater than one), which further limits credit access. In Honduras, creditors ask for a guarantee of 150 percent of the value of a loan. The low access to credit in the developing world also relates to limited competition in the financial services industries of many countries and the state's imposition of high licensing requirements on financial intermediaries. There are also fundamental problems of scale in lending that do not favour those with meagre assets.

Innovative lending schemes such as the group-lending schemes pioneered by the Grameen Bank, BRAC[63] in Bangladesh, and NGOs in some other countries, have been able to somewhat circumvent the problem of limited access of the poor to collateral. By tying each group member's ability to receive loans to the repayment of other members (i.e., one member's failure to make a loan payment results in the loss of credit for the other members), loans are essentially secured by peer pressure. However, such lending schemes should not be considered a replacement for traditional credit providers, as their small lending portfolios, often prohibitively high interest rates, and reliance on external funding limit the potential reach.

Costs of Informality

The barriers discussed above clearly establish the reasons why the poor opt to remain in informal businesses. Informal enterprises often have limited access to broader economic opportunities and are especially vulnerable to the uncertainties, the corruption and even violence prevalent outside the rule of law and have few means to settle disputes apart from bribery or violence. Without legal rights or protection, they are in a continual state of legal and political vulnerability.

Small informal businesses assume larger risks (than the larger and usually formal firms) and spend more time and resources to monitor their agents and partners (which explains why they usually hire relatives and close friends). They choose low-risk businesses that often yield low returns. They operate with a limited amount of capital and as a result, they are forced to do business at a very small scale. Since they hardly accumulate capital, it is very difficult to leave or sell the business to pass on benefits of both tangible and intangible assets.[64]

The relationship between poverty, informality and political alienation leaves the poor especially vulnerable to organised crime and other unscrupulous parties that rise up to fill the gaps. Making formality more accessible could legally empower the poor to grow their businesses, enjoy the appreciation of their assets in formal property markets, and access credit more easily. This is the vision of the Commission as a means to alleviate poverty.[65]

The benefits that a business person would obtain by going into the formal economy, would be that registration of ownership rights in property would mean having capital to collateralise; there could be state support for collection of obligations; greater ease and record of transactions and hopefully, increased protection for intellectual property

The Chart below captures broadly the costs and benefits to businesses of being formal versus informal.

	Costs	Benefits
INFORMALITY	Fewer mechanisms for dealing with risk and uncertainty Bribe and Corruption Lack of identity Limited access to economies of scale and scope (markets are limited to family circles) Impossibility of diversifying risks and investments Higher transport costs Risk of losing family assets, unlimited liability Less access to market knowledge Difficulty to establish business hierarchies different from the family ones Difficulty to divide and specialize labour Enforcing contracts only by force Limited Access to capital Short-term firms and investment Losing the advantages of advertising because they have to hide their business Unpredictability (inspections, laws, etc) Higher credit costs	Avoiding the costs of formality (taxes, permits, regulations)

	Costs	Benefits
FORMALITY	Administrative Permits Taxes Product Regulations Labour Regulations	Limited Liability Shielding the firms from shareholders & creditors Enforceable rules and agreements among partners Predictable rules to withdraw capital from the firm The possibility of issuing shares that facilitate the perpetual succession of the firm, can be used to raise capital, transmit info about the business and represent rights over the enterprise Access to business identification mechanisms that transmit information about the national identity, address, the assets they own, their financial history, etc. Access to rules that establish enforceable standards of responsibility among partners, administrators and workers, allowing a more efficient division and specialization of labour and achieving economies of scale Enforceable contracts, Access to formal conflict resolution mechanisms Legally advertise and protection of brands and trademarks Predictable and speedy rules for closing of business, Default rules Membership of trade associations Permits to use public land, resources and utilities. Access to incentives packages such as tax rebates, exports licenses and trade fairs Flexibility

rights. Other benefits would include a potentially larger market, or at least easier access to larger markets. Although business persons in the informal economy routinely trade across borders, in Africa, only the people in the formal market are able to import or export through major ports or any other major transit areas, given the presence of customs and other border officials. A benefit of being in the formal market, therefore, is the potential to grow a larger business and to get out of poverty.

As discussed in the next section, this cost-benefit analysis highlights the areas where the law can make the transition from the informal to the formal economies easier. The role for the law, then, is to reduce the costs and enhance the benefits of entering the formal economy. Because the process may be long, and because the existence of the informal economy is an adaptive response rather than moral failure, the law should not seek to force the poor out of the informal economy by increasing costs or reducing benefits. The point is to empower the poor to leave the informal economy and to provide incentives for them to choose to do so.

Rights-based Legal Empowerment

Most people enter the informal economy not by choice but out of a need to survive. The decent work deficits are most pronounced in the informal economy, where the majority of informal businesses have little or no social protection and receive little or no social security. Poor respect for, or lack of freedom of association, make it difficult for workers and employers to organise in the informal economy.[66]

In 2001, an ILO Conference concluded that informality is principally a governance issue and it encouraged employers' and workers' organisations to extend their representation throughout the informal economy. The growth of the informal economy can often be traced to inappropriate, ineffective, misguided or badly implemented macroeconomic and social policies, often developed without tripartite consultations among workers, employers and governments. Workers' representatives on the committee forcefully stressed that informality is not a solution to unemployment and the resulting report called on governments to provide conducive macroeconomic, social, legal and political frameworks for the large-scale creation of sustainable, decent jobs and business opportunities.

However a fundamental concern in the recognition of rights is the need for individual legal identity, as expressed by M. Woolcock:[67]

> To the extent there is now a broad scholarly and policy consensus on the importance of property rights for development — i.e., for encouraging investment by the poor (and others) in small business ventures; or, concomitantly, a recognition that endemic corruption, costly bureaucratic delays and weak contract enforcement all undermine capacities and incentives to make such investments — it is also important to appreciate that responding effectively to these concerns is not simply (or only) a matter of encouraging policymakers to 'grant' property rights, 'stamp out corruption' or make relevant line ministries 'more efficient.' In the most elementary sense, property rights must be given to actual people, who themselves — in order to advance and defend their personal status and identity. A crucial prerequisite, then, to enhancing the quality of property rights is ensuring that residents/citizens have recognised documents (such as birth, death, marriage and divorce certificates) verifying such basic information as their name, age, sex and marital status.

To balance between rights and market-based approaches, emphasis should be laid on programmes providing increased wages, government assistance, education, land reform, labour monitoring, and access to credit, which are good starts

in helping the poor create wealth. However, institutional reform is needed to eradicate poverty, attain development, and successfully transition to free market economies. Reforms that reduce bureaucratic red tape and bring the cost of legal compliance under that of extra-legality are necessary to formalise those who were previously excluded. Such reforms should also create greater regulatory transparency, allow for citizen input, and aim at fighting corruption and inefficiency. When tailored to local circumstances, titling programmes that turn dead assets of the poor into useable capital are great tools for poverty reduction, development, and attaining legal inclusion for informals.[68]

To Sum Up

The constraints and barriers discussed in this chapter clearly establish the reasons why the poor opt to remain in informal businesses. Informal enterprises often have limited access to broader economic opportunities and are especially vulnerable to uncertainties, corruption and even violence which is prevalent outside the rule of law. They have few means to settle disputes apart from bribery or violence. Without legal rights or protection, they are in a continual state of legal and political vulnerability. Thus making formality more accessible could legally empower the poor to grow their businesses, enjoy the appreciation of their assets in formal property markets, and access credit more easily. This is the vision of the Commission as a means to alleviate poverty which has been the focus of this as well as the following section which highlights the importance of access to markets, goods and services and infrastructure.

4. Empowering Informal Enterprises through access to markets, goods and services, and infrastructure

Improving the functioning of markets

The close correlation between being poor and operating in the informal economy in the rural and the urban sectors is conspicuous. Also, high business costs and the informal economy move in parallel in response to ill-designed, unstable and non-participatory rules and regulations, lack of secure property rights, inadequate government capacity and resources to enforce laws and regulations, a lack of transparency, accountability and autonomy of judicial process as well as high degree of macroeconomic instability and corruption. Inadequate access to markets, and poor quality or non-existent basic public services and infrastructure further lead to low productivity, particularly for informal businesses.

Agriculture accounts for a large share of gross domestic product (GDP) and employment in Sub-Saharan Africa. It is primarily a family activity, a component of the informal economy with the majority of farmers being small holders owning between 0.5 and 2.0 hectares. Women provide nearly 50 percent of the labour force and produce most of the food crops for the family. The recent review by the Independent Evaluation Group of the World Bank assistance to agriculture in Sub-Saharan Africa makes a pressing case for the necessity of access to credits and markets, roads, fertilisers, seeds, water, etc. by the impoverished farmers to sustain their lives and livelihoods.

Given that poor households are concentrated in agriculture, any improvement in their livelihoods would necessitate entail in part in making

agricultural activities more productive. Improved access to markets and technology are therefore important as is the need to strengthen property rights and create better methods of risk management.

At the same time, well over half of the 1.1 billion people projected to join the world's population between now and 2030 may live in under-serviced slums[69] thereby raising the urban population, including those living in poverty, well above that of rural areas. Additionally, conflicts and natural disasters are causing migration from those areas to developing countries with relatively greater economic strength in order to seek out entrepreneurial and business opportunities. These migrants glide into the burgeoning informal economy of the countries of destination and in the absence of inclusive development processes, the informal economy would continue to expand.

Of the three billion urban dwellers today, one billion live in 'slums' i.e. in areas where people lack access to key necessities such as potable water, sanitation, basic energy services or durable housing.[70] For the slum inhabitants, disease and violence are threats faced on a daily basis and health care and education for the children are a distant hope. As the pro poor growth reform must increase the utilisation of the marketable assets of the poor, it is vital to ensure that markets for the poor are better integrated in to the economy with efficient backward and forward linkages.

Accordingly, targeted public investments need to be stepped up in education, healthcare, water and sanitation and energy services, and infrastructure[71] for enabling entrepreneurship and generating sustainable livelihoods. Also public investments are crucial for the 'private-based economy' to prosper and to allow the private sector to create employment and sustain long term economic growth. In the absence of adequate infrastructure, health services, education, inclusive financial services, etc., market forces alone can accomplish little.

However, these basic and necessary services represent 'missing markets' or 'incomplete markets.' While the demand clearly exists, it is not communicated through conventional market characteristic elements because of asymmetric information and regulatory and transaction barriers to market access and market creation for new products and services. These, in turn limit the supply of these goods and services. Additional supply-side constraints include the reluctance of the private sector to invest in measuring the demand for new products and services because of new and rela-

Sustainable Livelihoods Framework

A livelihood is sustainable if it can recover from stresses and shocks while maintaining or enhancing the necessary capabilities and assets. The interventions for engaging the private sector would reduce the vulnerability of the poor and increase their resilience through investments in enhancing access to resources, building assets for them, and improving their skills and capabilities to support livelihood opportunities and design a living. Income generation is the foundation of a sustainable livelihood. Access to basic services like energy, water and sanitation, housing and healthcare is fundamental to enable people to seek, maintain and continue to work. For a livelihood to be sustainable, it must lead to a surplus beyond immediate consumption requirements to allow additional resources for overcoming shocks and stresses, when required.

tively unknown markets that require innovative marketing mechanisms including multi-stakeholder partnerships.

Increasing Access to Goods and Services

Markets have to be created to target the groups that are currently excluded from them. For instance, well focused and participatory policies can lead to the evolution of markets for goods and services through improvements in production, distribution and storage components of the value chain and mitigating the risk of starvation.

As discussed earlier, lack of access to potable water, basic sanitation, energy services, and solid waste management services adversely affects the lives and livelihoods of poor people directly and has a devastating impact on efforts to engage in trade and business. The poor pay many times more for water (of questionable quality) and other essential services than the rich.[72] While in the rich countries, public spending on health is nearly US$3000 *per capita*, the poorest countries can afford to devote barely US$10 *per capita* or so to public health per year.[73] At this level of investment, it is not possible to operate and manage a

Case Study:

New markets lead to new opportunities for rural informal businesses — *VegCARE, Kenya*

Less than a year ago, Mutulu was living below the poverty line, along with three-quarters of the population of Makueni district in eastern Kenya. Now, he is one of more than 400 farmers selling vegetables in supermarkets in the UK such as Tesco and Sainsbury's.

'Before, I cycled 10 km each day to sell my produce to middle men and they gave me low prices and sometimes did not even buy my produce.' Now Mutulu educates his children and is saving money thanks to VegCARE — a business partnership that has helped over 400 farmers gain access to markets and, on average, doubled their incomes in six months.

Their baby corn is sold in Tesco and Sainsbury's and their aubergines, chillies and okra are destined for the tables of the Asian community in the UK.'When VegCARE came and said that they would market our produce for us, most people doubted them. I was one of the first in the Kwa Kyai scheme, which now has over 300 farmers who decided to join VegCARE.'

The partnership's roots are in a project, initially piloted by CARE, which showed that if smallholders were given access to markets they could and were willing to invest in farming. The project was a success but not commercially viable, so CARE linked up with Vegpro, the third largest vegetable buyer and producer in the region .As a result, Vegpro's supply to the market from smallholder farmers increased as their incomes and livelihoods improved.

Initially Vegpro bought the produce and did not get involved in production. CARE pre-financed the production and provided technical support to the farmers. Now a rural enterprise, known as VegCARE, has been formed to take over the activities. It is a new type of partnership, born out of an aid project that was aimed at helping farming communities in the long term — and giving them ways of making a sustainable living for themselves, their families and their communities. *Source: CARE Canada, 2007*

primary health system. Similarly, it is estimated that achieving the Millennium Development Goals for water and sanitation would requires additional annual funding of US$10 - US$25billion; an estimated US$700 billion of investment is required to bring electricity to an additional 1.4 billion people.

There is need across much of this world for greater resources to effectively deliver basic services to the poor. While increased financing is a necessary condition, it is not sufficient to ensure that the unmet needs of the poor and the vulnerable are fulfilled. In the case of education and health services, lessons learnt from a number of developing countries have shown that increase of funding in any given sector does not always lead to delivery of enhanced access and improved quality of service. Increasing public expenditures may not lead to anticipated outcomes if the institutions and professionals responsible for delivery of integrated services have inadequate capacity and are not accountable. Accordingly, capacity development, participation, transparency and accountability are mandatory to ensuring that funds allocated to public service for equitable development reach their intended targets.

Investments in health, education and basic services, like energy, water and sanitation, involve increasingly both the public and private sectors. In many countries, such services are in part being delivered through private initiatives that include cooperatives, communities and independent network providers. This in turn has given rise to experimentation with privatisation of core functions of the state (services delivery, for example) and increasing participation of delivery through operators in the informal economy. Privatisation has not yielded many positive results as it reduces the ability of the state to define an active social and economic agenda. Informal operators require regulation as well as capacity development, particularly form the perspective of quality control and also for consumer protection.

But, since the poor interact with the private sector, both as consumers and entrepreneurs, the private sector can play an important role in delivering goods and services for development and poverty alleviation. This would work best in partnerships that also include civil society organisations, because they are vital in assuring the participatory and accountable approaches needed for improving the quality of life of the poor.

At the same time, governments are increasingly recognising the benefits of decentralisation in making the delivery of services more effective. For local communities to take advantage of the benefits of decentralization, it is critical to put institutions in place for enforcing accountability, reducing costs of varying kinds (for transactions, negotiations and enforcement of contracts), and for developing adequate capacity to facilitate coordination among public agencies, private enterprises, NGOs, and civil society organisations. Multi-stakeholder partnerships in public service delivery involving state and non-state actors can contribute to mobilising their competitive advantage in terms of capacity and resources from various partners and supplementing traditional direct public delivery of services.

Well-trained and motivated service providers, whether from public, private, or civil society communities, and adequate institutions with transparent procedures and responsive accountability systems, are important constituents of effective public service delivery. Involvement of the poor themselves in setting service delivery priorities, infrastructure investment planning, level of service and oversight, responsive feedback mechanisms, and accountability, is critical in determining the quality of service provided.

Case Study:

Linking Markets: Promoting sustainable tourism development with indigenous and rural communities in Latin America

Aiming at supporting grass-roots initiatives and small and community based enterprises consolidation in the tourism sector, the ILO has been supporting a programme in Latin America, the main purpose of which is to assist rural and indigenous communities usually engaged in work in the informal economy, to gain greater access to new markets and business development services.

Operating since 2000, REDTURS is now present in seven Latin American countries; it relies on a network of communities, institutions, and resources devoted to encouraging the development of sustainable tourism keeping in mind economic productivity, social equity and cultural identity. REDTURS has encouraged the competitive advantages of these communities in fostering quality job creation and productivity increases mainly through three strategies: a) improving the service supplied by making the most out of existing social capital and training the community's labour force; b) gaining market shares by applying a five-point marketing strategy; and c) establishing strategic cooperative alliances involving other networks and international agencies. By promoting participatory mechanisms for dialogue and capacity building for local partners, REDTURS supported the creation of four national community tourism networks that have benefited several indigenous communities. *Source: ILO*

The provision of efficient, reliable and affordable public infrastructure services should work as a catalytic incentive encouraging enterprises in the informal economy to move upwards along the continuum towards greater formalisation.

Inclusive financial services

Limited access to working capital and financial services including risk management services is responsible for holding back the growth potential of informal enterprises. Micro-entrepreneurs in the informal economy regard the need for finance as a top priority. The ILO's Global Agenda for Employment identifies the constraints on the development and growth of efficient and competitive enterprises as 'a wide swath of policy areas particularly those arising from difficult access to credit and other financial markets.'[74] Finance can be a dominant tool to initiate and reinforce self organisation among those in the informal economy. It is often the monetary transactions that catalyse the formation of joint liability and solidarity groups, some of which develop multipurpose self-help organisations.

Access to finance is essential for creating an enterprise and keeping it going. A considerable expansion of rural bank branches in India promoted non-agricultural output and enhanced economic growth. Additionally, the expansion of bank branches led, indirectly, to an increase in agricultural wages and reduction of rural poverty.[75]

But, it is often the case that access to credit in conjunction with macroeconomic policies relating to trade, may work to further strengthen the larger enterprises while preventing smaller ones from gaining access to global markets. For instance, export promotion policies favouring the coir industry in Sri Lanka directed a shift in the supply of coconut husks to mechanised units

(owned by men with access to credit), and away from manual units owned by women who had little access to credit.[76]

While the availability of credit is a concern, what is equally important are the terms on which it is available and whether they are within the reach of the existing and potential entrepreneurs. Most micro, small and medium enterprises need small loans and small-scale deals that banks, in general, are either unable or sometimes unwilling to provide. At the same time, self-employed workers in the informal sector do not have collateral to offer as a guarantee. Most operators in the informal economy therefore look to informal financial sources.

Micro-finance

'The poor are bankable' is the important lesson we have learnt after nearly three decades of

Case Study:

Alternate Model of Informal Credit: SMEs Helping Informal Enterprises in Peru

Vincent Sanchez lives in the community of San Martin de Porres, with his wife, Ruth, and their two kids. This is a semi-formal settlement, where an association, rather than the city of Lima, provides electricity and water. Vincent has 15-years experience in the metal working business and lives in San Martin de Porres which means he is not able to qualify for a loan from the bank. As part of a credit programme operated by the medium-sized enterprise, Promac, he was recently able to purchase a large metal working machine (valued at approximately US$5000). Vincent and his wife, who is also a micro-entrepreneur, now make enough money to support their family, for their kids to attend school, and to pay off the loan on the machine. Before negotiating the loan for the machine, Vincent commuted an hour and a half each way to work. Now, he only travels once a week to the informal market to sell the metal pieces he makes, and market demand is now outpacing his production capacity. Vincent does not have a tax number, and he pays no taxes to the federal or local government.

Approximately 15 percent of Promac's clients have a private loan arrangement, similar to the one Vincent has. Segundo, Promac's founder, says that a typical growth path for a business like Vincent's would be to outgrow his home-based operation within two to three years, and to move into the industrial zone of the city. By this time, Vincent should be able to engage with a few larger clients who would no doubt insist on formal tax receipts, eventually warranting the expense of registering the business. Once he moves into the industrial area, Vincent says he will register the business with the appropriate local municipal agencies to avoid some of the current hassles and to access larger loans from the banks. Hassles include intermittent electricity loss within San Martin de Porras, which has the potential to affect Vincent's ability to re-pay his loan on time. In urban areas, 95 percent of households have electricity, however this drops to just 86 percent in the lowest economic quintile (Sociometro, 2007).

Promac has a loan repayment rate of 100 percent. Some clients are late with their payments on occasion, but the company also offers a work-repayment option, where clients work in the Promac factory on an hourly basis as a way of paying off the loan. Promac credits its success to a hands-on approach and a keen sense of the potential in its clientele.

micro-finance activities. Micro-finance plays a pivotal role in providing sustainable livelihoods by stimulating small businesses. Although micro-finance[77] is becoming increasingly available to micro-entrepreneurs, frequently their only options for access to capital are through informal financial arrangements with priced transactions, rotating savings and credit associations (ROSCAs), or moneylenders who usually provide emergency loans, often on usurious terms. The latter may not be able to lend as per the needs of the growing enterprises. Furthermore, despite the positive response to the progress of micro-finance, there has so far been little involvement by the world's largest financial institutions in micro-finance successes. To be sure, there are currently examples of large private sector banks entering into risk-sharing partnerships with NGO micro-finance institutions that merge the social mobilisation skills and rural presence of NGOs with the capital resources and financial credibility of the bank. These efforts, however, need to be leveraged to enhance access to financial resources by micro and small enterprises. The commonality between informal finance and micro-finance is in that they consider the households and the enterprise as a unit and are usually not concerned with how the loan is used — whether for consumption, productive investment or saving.

Related to the issue of exploring the integration of micro-finance with the financial sector and the roles of the private and public sectors, it is important to analyse the impact of policies[78] that will encourage greater financial sector involvement with the markets and with demand by the poor and the disadvantaged. The micro-finance institutions have induced more competition in the credit market and therefore lowered the credit interest rate that poor people have to pay. Currently these institutions are unable to meet requests for sums needed to take micro-enterprises to a larger scale.

Savings

It is now widely recognised that the poor have a high propensity to save and that there is a considerable demand for savings instruments and institutions. The creation over time of smoother flows of income can work to form the basis of a non-contractual insurance against natural, social and physical shocks and stresses. In West Africa, in most savings-based micro-finance institutions (credit unions, village banks or savings, and credit cooperatives), nearly six times as many people make deposits as take out loans at any point in time.[79]

Micro-insurance

Even though there are important links between micro-finance and micro-insurance, a related 'mantra' that the poor are uninsurable still persists. Increasingly micro-insurance is a part of the developing micro-finance systems.

Most entrepreneurs in the informal economy, particularly micro and small entrepreneurs, do not have access to risk management and safety-net mechanism tools that large private firms do. These tools include a range of savings and insurance products as well as more sophisticated products that minimise risks from macroeconomic variability, such as inflation, as well as shock and stresses from natural hazards and disasters. However, informal mechanisms such as savings and other traditional risk management structures,[80] have proven very expensive and therefore unsustainable as long-term coping strategies.[81]

Access to insurance by the poor reduces the vulnerability of households and increases their ability to take advantage of opportunities. Even though micro-insurance is a nascent market, it

provides protection to low-income people against specific risks and hazards in exchange for premium payments proportionate to the likelihood and costs of the risks involved.[82] By reducing the impact of household losses that could exacerbate the poverty situation of households, micro-insurance can enhance their stability and profitability. However, these insurance instruments are not widely available for managing risks for populations with low incomes. If this kind of insurance could be delivered cost-effectively through microfinance institutions (MFIs), it could represent a profitable segment for the insurance industry. While previous attempts to launch such products have not been entirely successful they have pointed the way to eventual growth. There definitely is a need to be filled that would allow the poor to alleviate the economic impact of natural disasters. Also, micro-health insurance schemes offer reasonable guarantees of loan repayment since the insurance would provide for adequate medical treatment to the borrower in the event of serious health problems. Additionally, micro-insurance has the potential to be used as collateral for borrowing additional credit for business enterprises.

Herein lies an important tool for the promotion of equitable growth: enhanced access by the poor to inclusive and gender-responsive financial products and services (like micro-insurance), supported by policies, social institutions and new technologies that reduce market barriers and transaction costs. These interventions together with capacity development at human, institutional and system-wide levels, show the promise of reducing vulnerabilities among the poor by assisting them in creating assets, promoting entrepreneurship, improving service delivery, and strengthening livelihoods.

The private and formal sectors are capable of providing micro-insurance products, as they can design and offer sustainable and long-term risk reduction strategies that are also profitable. This role is being explored comprehensively, both as a business model and as an intervention for social protection. In the process, it will be important to learn just how micro-insurance relates to government policies, role of government, and the public sector. For now, it is encouraging that a significant number of insurers are keen to explore the low-income market; in time, the viability of a micro-insurance product will be determined by the demand and its attractiveness, as well as by the number of potential clients. Currently, the ability to pay and incentives to fill the demand for the insurance products are common barriers for consumers and suppliers. There is anticipation that these barriers can be overcome, in part, by providing an operational linkage between micro-insurance and remittances.

Remittances

While the search for a better life and livelihoods drive rural-urban migration, the root causes of international migration derive from the major economic, demographic, and social disparities as well as conflicts, climate change and environmental degradation or disasters. Remittances constitute the most tangible contribution of migrants to poverty alleviation. A better understanding of how remittances are used would inform public policy and development interventions for migration and financial services and for enterprise development, livelihoods strengthening and provisions of other basic services. It is equally important is to ensure that the money reaches rural areas as well as other areas where large populations are still outside the banking system with no access to diverse financial goods and services that can improve their quality of life.

Remittances — the transfer of funds from one place to another, from urban to rural areas or by developing country nationals sending earnings back home — can play an instrumental role in providing greater access to resources and to safety- net mechanisms for entrepreneurs at the bottom of the pyramid. Remittances constitute the second largest capital flow to developing countries. It is less than capital that is invested directly by private companies but more than official aid. In 2006 remittances in the developing world amounted to about US$206 billion. In many developing countries, amounts sent home by migrants supporting family and friends were many times the value of official government-to-government aid flows.

If the transaction costs of remittances can be reduced, formal channels will substitute informal transfers.[83] Fundamental issues involved in making this change range from accessible technology, hours of availability, and efficiency of transaction and regulations, to the profit margins by the institutions engaged in the process.[84] While it is expected that the technology would play an important role in lowering the cost of remittances, new business models and a regulatory environment hold the key to greater access to the services, and efficiency of the transfer process. Better service can provide greater profits by integrating remittances more fully into financial services offerings for migrants and their families. Although the issues are complex, remittance are important for developing countries as the amount can provide access to additional financial resources and ultimately to the creation and sustainability of livelihoods.

There are several ongoing initiatives at this time undertaken by different countries, development agencies and institutions, and the learning is evolving. The governments of origin and destination have to work together with multilateral organisations, private sector, and diaspora and other stakeholders to create options, tools and incentives to maximise the development benefits of remittances. These incentives and tools can be linked to the transfers themselves (e.g. through savings, credit, micro-insurance and micro-pension schemes) or focus on mobilising savings generated by remittances towards productive investments (made by the migrant, the recipients or a local entrepreneur). This would buttress streamlined and gender-responsive remittance policies and regulations, and strengthen capacity development at human, institutional and system-wide levels. These collaborative efforts can also catalyse public

Case Study:

Construmex (Mexico) — Helping Migrants with Remittances

Overview: Construmex helps thousands of Mexican migrants in the U.S. purchase and build homes for themselves and their families back in Mexico.

Constraint: Construmex recognised that its earlier model of serving low-income clients in Mexico would not work for migrants in the U.S., as the latter approached commercial transactions with extreme caution. The company lacked adequate market research to determine how best to proceed.

Solution: Construmex partnered with Mexican consulates in the U.S. to conduct market research on the needs of the migrant population. Following these surveys, it developed a new 'cash-to-asset' transfer service that was offered through migrant associations.

Source: UNDP, 'Growing Inclusive Markets — Business Works for Development- Development Works for Business.' June 2007

private-partnerships (PPPs) that can lead to innovative demand-based products and services for meeting the needs of the poor people.

To summarize: an enabling environment, capacity and institutions that will enhance access to finance and safety net mechanisms are critical for the entrepreneurs at the bottom of the pyramid and require innovative approaches. Remittances can be an attractive business for micro-finance institutions and a valuable additional financial service for current and potential micro-finance clients. Also, micro-insurance can assist in increasing the demand for micro-finance and potentially take micro-finance activities to a larger scale.

Public-Private Partnerships

The informal economy is particularly dynamic and demands a high level of responsiveness from the state. Even though globalisation is significantly changing the traditional role of the State, the role of the government must remain central in the development choices. One compelling reason is that 'in most reforming countries the private sector did not step in to fill the vacuum when the public sector withdrew.'[85]

At the same time, developing countries are recognising the importance of markets and they understand that markets have to be created and governed. And sometimes the private sector has to be motivated to do what needs to be done through the strengthening of the policy environment, and through incentives and removal of barriers for market creation. An efficient private sector depends on a sound domestic macro environment that fosters good trade policies and institutional foundations, and adequate capacity to maximise benefits from the macro global environment and to promote distributional equity. The private sector is keen to harmonise private interest with public interest because, *inter alia*, it has started recognising the potential business opportunities. Accordingly, the private sector is actively promoting new approaches to alleviating poverty, opening opportunities for all concerned, including the poor people and the private sector companies. While private financial institutions are willing to develop innovative partnership models to provide access to inclusive financial services, they need assistance in formulating appropriate policies and strengthening capacities that would remove barriers to market creation and expansion of market access to entrepreneurs at the base of the pyramid. Governments, meanwhile, should be encouraging private financial institutions to garner savings, long-term credit and market-based social protection instruments in rural and underserved areas,[86] hence the emphasis on public-private partnerships. Also, partnership with the private sector is no longer simply about mobilisation of resources; it is also about acting on knowledge gained from the wealth of collective experience about entrepreneurship, management skills and global networking.

The challenge to make the 'missing markets' play an economic role in job creation and service delivery lies less in finding technological solutions to production and distribution and more in structuring institutions, capacities, incentives and regulations. And, if sustainable, high quality and affordable basic services are actually to be delivered to the poor and disadvantaged, capacities must be built to engage the talents and energies of the greater community and to allow for real and meaningful ownership of the activities of the different stakeholders.

Public-private partnerships hold great promise in this endeavour, especially if they were given an enabling environment that removed barriers to the entry by the smaller and community-based

Case Study:

Durban: A Heterogeneous Solution Through Public Private Partnership

The city of Durban in South Africa, took a non-restrictive approach to street vending. It demarcated sites throughout the city; changed the legal framework that governed street trading from criminal to administrative law; decreased the cost of trading spaces; and guaranteed services such as basic shelter, solid waste removal, water, toilets, lighting, and storage facilities. The city also created an appeal committee of five members, of whom at least one was required to be a street vendor, where municipal decisions can be reviewed.

However, as the majority of informal businesses were in the traditional medicine sector, it was necessary to provide access to market. Over 30,000 people, mostly women, worked in this sector. Through direct intervention, Durban built a dedicated market for traditional medicine traders with shelter, storage, water, and toilet facilities. It also trained gatherers on cultivating products and sustainable harvest techniques and is currently planning to establish a company to procure materials from growers, process them in partnership with a pharmaceutical firm, and market the products.

(Source: Lund and Skinner, 2005.)

Case Study:

Buy-back Centres for Waste Collectors: A Public-Private-Community Partnership Model

Waste collectors are amongst the poorest of those working in the informal economy. In South Africa, since legislated racial segregation of urban areas was abolished, there have been increasing numbers of waste collectors operating throughout its cities. They are largely black women whose incomes are extremely low. In the mid-1990s the Self Employed Women's Union (SEWU) organised cardboard collectors in the inner city of Durban/Thekwini. The union found that these collectors were innumerate and often exploited by unscrupulous middle-men, and it lobbied local government to assist them.

Through SEWU's activism, and the understanding by the City Council that waste collection provided a livelihood for many residents, a buy-back centre was established in the inner city. This is a public-private-community partnership. The Council provided a small plot of centrally-located land that was converted into the centre, and a large private-sector recycler provided the scales, storage containers for the cardboard and trolleys for the collectors. SEWU worked alongside city officials to design the intervention and trained the cardboard collectors on how to weight their cardboard. Through this intervention, the collectors sold their cardboard directly to the recycling company. This has substantially increased the (albeit still low) incomes of these waste collectors. The success of the inner city buy-back centre has led to the Council establishing a number of similar centres throughout the city.

(Source: Mgingqizana, 2002.)

enterprises. Developing effective skills for nurturing partnerships, enforcing transparent rule of law (including efficient contracting and procurement processes), and improving managerial capability could go a long way to encourage the creation and then to sustain such PPPs. Their energies could be tapped to meet the needs of the poor for basic services. For instance, it is estimated that the achievement of the MDG goals for water and sanitation will require enormous annual budgetary outlays. A very different and more manageable scenario is foreseen if efforts to achieve these targets were supplemented by service delivery through PPPs, particularly if the local communities were empowered to manage their needs through effective value-chain strategies. If effectively formulated, PPPs would generate benefits beyond the obvious ones of providing jobs and livelihoods. Health in the communities could be improved and children could have greater opportunities to attend schools.

Economic success requires getting the balance right between the government and the market in terms of who should provide the goods and services and how they should be provided. The balance is, of course, country-specific and depends on the level of development. While recognising the critical role of governments in creating foundations for a healthy and dynamic private sector, it is vital to develop innovative models of PPPs both at the local levels as well as national levels, to harness resources, capacity and skills of the private sector to benefit national development.[87]

Successful mobilisation of the communities, whether through the efforts of the government, the private sector or NGOs, represents collective action at the local level. Though the interventions involved in working for new economic growth outcomes reflect local interventions, their implementation recognises a global context that influences all development activities. At the same time, assurance is needed that the supporting state and public policies are functioning, that the necessary regulation for creating greater equity is in place, and above all — that the arrangement works.

To Sum Up

The discussion in this section has focussed on sound economic governance that provides policies, laws, regulations, institutions, practices, and individuals to support a strategic partnership of government, private sector and civil society for delivery of basic goods and services and access to markets. In addition, issues were explored concerning access to finance and safety net mechanisms which are critical for the informal entrepreneurs, particularly micro-finance, micro-insurance and the matter of remittances and savings among various other financial services and portfolios. The next section focuses on solutions that authorities and businesses (i.e., bottom-up and vice versa) have developed based on real life problems and experiences. Experiences and solutions come from all aspects of business life and several different countries. An advantage of evidence-based solutions is that measures successfully adopted by one country may be replicated in others, with necessary modifications.

5. Institutional changes and legal tools making a difference for informal enterprises — an evidence-based approach

In the earlier sections of this chapter, we referred to constraints and barriers businesses have faced in their operations, as well as the need to broaden access to markets, services and infrastructure. We now focus on solutions that authorities and businesses have developed based on real-life situations, problems, and experiences. Experiences come from a number of countries and from all aspects of business life.

The main advantage of evidence-based solutions is that measures successfully adopted by one country can — with necessary modifications — be replicated in others. Instead of academic discussions, realities exist on the ground and can be borrowed and implemented.

The format we adopt for evidence-based solutions are the same — from business start-up to business exit — as described in our discussion of barriers and constraints to keep conformity and maintain the linkage. We also present cases of reforms that have taken place both from the perspectives of the top (due to sustained pressures from the bottom) as well as initiatives undertaken at the local/grass-root level or by the private sector.

Improvement in the quality of institutions in an economy has to proceed simultaneously with transformation of the nature and efficiency of its informal economy. Learning from the institution-building experience of the industrialised countries, and those in transition, as well as from other developing countries, can be valuable. There are several good practice examples from around the world to illustrate how constraints of informal businesses have been successfully addressed through institutional and policy changes. At the same time, national and local-level institutional changes can be initiated implicitly by introducing new economic activities to provide direct and measurable benefits to those who will be influenced by the institutional change. Ability of the population impacted by the institutional change to recognise the tangible benefits provides ownership. And, the economic activity becomes an agent for, and a catalyst of, derived demand for appropriate institutions.[89] For instance, economic empowerment based on economic activity is a step towards gender equality,[90] even though these are not synonymous with it.

Linking creative economic activities with business rights in the informal economy has an added advantage in that it allows for a learning-by-doing approach to implementing institutional reforms. It also allows a synergistic linkage between reforms from above, including those initiated by governments or promoted by international organisations with effective action from below — for example, by civil society organisations and the organisations of the poor themselves.

Legal empowerment entails making laws and regulations appropriate and relevant to the realities of informal businesses. Some successful innovations are discussed below. It also requires a just and fair system of enforcement of laws. Specifically, it implies:

- A competent, independent judiciary, applying the law equally and evenly on all members of the community. Essential are education of the legal profession, full publication and dissemination of legal texts including judicial decisions;
- Transparent, coherent laws, including laws for

Case Study:

'Tell us how to make legal mechanisms and tools work for informal businesses.' *President Benjamin Mkapa, Tanzania*

In 2005 President Benjamin Mkapa of Tanzania proposed that the next government should speed up the process of bringing informal businesses within the legal ambit to shore up achievements recorded and spur further the country's economic growth. The president made the remarks when he launched a report on the Diagnosis Phase of the Property and Business Formalisation Programme for Tanzania. Quoting the 2005 Global Competitive Report released by the World Economic Forum, Mkapa noted that Tanzania had climbed 11 places above last year's rating and overtaken Uganda and Kenya partly because of the contribution by informal businesses. In order to take Tanzania to the next level of development, the President specifically sought answers to the following:

a) How are we going to turn all this recognition into something accessible and beneficial to the 98 per cent of business operating outside the legal system?
b) How can we enable people to leverage their participation in this competitive environment when probably 89 percent of their assets are held in the extra-legal sector?
c) What legal reforms should be instituted to recognise, protect and 'formalise' of the informal operators' assets?
d) What needs to be done to ensure our people benefit from the growing formal and market economy?
e) Due to lack of recognition legally, informal entrepreneurs have created their own mechanisms of documentation, registration, fungibility and collateral, and testament.

These informal entrepreneurs have developed archetypes of business organisations and expanded markets outside the legal sector,' he added. 'How can we bring these organisations into the mainstream and provide recognition? And the real challenge is to use these archetypes as a basis for a new system wherein people can relate to and access, and thus bring down the barriers that stifle entrepreneurship. How to remove those barriers that exclude them from participating in the markets we seek to create, and that retard our poverty-reduction efforts. Mkapa said Tanzania continues to be excluded from the benefits of an expanded market economy, and it was time to bring them in. He called for support from stakeholders and development partners, non-governmental organisations, financial institutions ,and others in the protection and formalisation of the hard-won assets and business of the majority of poor Tanzanians. *Source: Guardian, 2005-10-06*

the protection and facilitation of business;

- Freedom of the press, and adequately paid journalists to shelter them from bribery;
- Enforcement officers who apply the law uniformly to all;
- Ease of entry into formal business so that various business forms are quickly and cheaply formed, some to limit the owners' liability to their investment in the business;
- Significant effort to reduce grand corruption and, ultimately, to reinforce social norms that constrain petty corruption.

Of the emerging business laws in some African countries, 91 are an example of an important

step toward this kind of structure. They do not, however, fully protect transactions from distortions within the national judicial systems, and they have not yet generated the transparency they are designed to provide as neither the decisions nor the filings have yet been systematically computerized. The laws also do not address who controls the military. They do, however, create a vocabulary and a virtual forum for discussion of legal predictability and, generally, of the rule of law; in this way the laws have facilitated discussions among actors in the formal economy, including business people as well as lawyers, academics and judges. The same vocabulary and forum allow social norms underlying formal laws to influence the informal economy, too, for example when business people with one foot in each economy are vectors for transfer of information. The appearance in the informal economy of relationships and documents mimicking those in the formal economy suggests the power of such transfers from the formal economy.

Innovations which Demonstrate Business Rights and Legal Empowerment

While business regulations vary from country to country, and from municipality to municipality, they usually include most of the features bulleted below. Responses to the obligations that follow from such regulations are appropriate to the circumstances of the informal entrepreneurs and may be termed 'empowering'. Most countries would expect the following from a formally recognised business:

- Incorporation of the business as a legal entity.
- Inclusion in a business registry at the national, regional, or municipal level.
- Registration with the national tax authority.
- Registration of employees in pension/health/other national social security schemes.
- Acquisition of building permits, at the municipal level.
- Acquisition of operating and other licenses, at the municipal level.
- Approval of health officials upon inspection (especially for sales of food), at the national and/or municipal levels.
- Safety approval from local fire officials.

Starting a Business

Some of the best practices[92] adopted across the world to simplify business start-up formalities and registration are as follows:

1. Diagnose the problem:

Australia: A taskforce was created to measure the administrative burden, resulting in the establishment of a Business License Information Systems (BLIS) as a one-stop-shop service designed to deliver pertinent governmental information to small businesses regarding licenses, application forms and contact details. The results of BLIS are very impressive. They have reduced the administrative burden for business by reducing the information search cost incurred in trying to establish their regulatory compliance obligations. Furthermore, 15,000 people use this system every year; and in the nine months between September 1999 and May 1999, BLIS generated more than 13,500 fact sheets and reports for new and existing business via the Internet alone.

Mexico: a special deregulation unit was set up under the Ministry of Industry and Commerce to review all existing business formalities, including start-up requirements. The comprehensiveness of the approach led to a more fundamental reform than if the government had sought fast results.

2. Provide adequate training and resources to

Case Study:

Business Registration Reform in Uganda

In Uganda, firms must apply for annual 'trade licenses', which combine basic registration of their status with other approvals. This process is a major deterrent to formalising businesses. It takes an average of two days to obtain the license at an average compliance cost of about 20 percent of per capita GDP. Administration includes cashiers for fee payments, registrars for reviewing paperwork and issuing the license, a site visit by a health and safety inspector, and approval by the Local Chairman.

Little of this is really necessary, except for a few firms which pose significant risks to public health or security. The DFID project introduced a simplified trade licensing process in Entebbe municipality, involving only provision of basic information by the entrepreneur, payment of a fee, and immediate issue of the license document — all in one stop. This reform was found to have brought the following benefits:

A cheaper & shorter process: compliance cost dropped by 75 percent and is now estimated at 2 percent of per capita GDP. Average registration time is now 30 minutes, down from two days.

Better business-government relations: businesses feel that the attitude of the registration staff is much more positive and pro-business.

More businesses registered: registration levels have improved by 43 percent. In the first year, four times more businesses registered than in the previous year.

More government revenue: total revenue collection has increased by 40 percent through more registrations. Individual businesses pay less on average.

Reduced administrative costs for government: Entebbe municipality estimates a 10 percent reduction in administrative costs. Administrative time effort by staff is down by 25 percent. There are reduced waiting lines and hassles for businesses.

Health & safety inspections more targeted & prioritized: inspectors can now target their visits on high risk businesses.

Better knowledge of business profiles/sectors: a new computerized system and improved compliance gives the local authority better information. These reforms were implemented without changes to national level legislation which would have been very difficult and slow to achieve. Instead, other legal means were found to make change. In cases such as this, regulatory barriers to formalisation can be reduced without large-scale legal change, but rather through small incremental change. The Entebbe experience is now being replicated in other local authorities in Uganda.

licensing authorities:

Australia: Training to licensing authorities on the use of new technologies for business registration, having the greatest positive effect on small businesses and micro enterprises, which generally do not have resources to spend on legal assistance.

Ceará, Brazil: Technical assistance given to applicants, many of whom are illiterate or semi-illiterate. Government prepares material for SMEs, which explain their rights and responsibilities on

key topics in simple and clear language.

Eritrea: Legal assistance provided to SMEs to make better use of their rights and instruments.

3. Business Help Centres (BHC) - Create single access point for business for entrepreneurs:
Turkey: a one-stop registration launched in June 2003 by combining seven procedures into a single visit to the company registry. The time to start a business was cut from 38 days to nine. In addition, application forms were unified and shortened, and registry officers were trained in customer relations. The cost fell by a third and the number of registrations shot up by 18 percent, almost halving the time to start a business — from 23 days to 13.

Portugal: at the Centro de Formalidades de Empresa all company registration procedures are performed in only three visits.

4. Introduction of standardised forms resulted in significant reduction in rejection rates:
In the *United Kingdom* rejection rates went down by eight percent, in *Malaysia* by 11 percent and in *Costa Rica* by 14 percent. These can cover all business forms: sole proprietorship, partnership, limited liability, or corporation.

5. Electronic registration, online forms and registry data base in Denmark, Italy, UK, and Norway: electronic registration, an innovative and efficient procedure, has become norm.
Australia and Canada: The Internet can be used to file business registrations, which cuts the administrative cost by more than 50 percent.

Netherlands: the Ministry of Economic Affairs has launched a programme of 'Forms on Line.' Forms are unified under this programme. Registry database should be updated continually and accessible by the Internet. A system should be in place for real time access to the database by inspectorates and others who need the information, such as tax, customs, pension, and social security authorities.

6. Cut the newspaper publication requirement:
Serbia and Montenegro abolished the requirement to publish a notice in the official gazette. Instead, companies announce their formation on the registry's website.

7. Allow businesses to start activities immediately after registration:
Germany and Italy allow companies to begin activities as soon as they file the required information (as long as it does not involve dangerous activities). This eliminates *ex ante* barriers to start-ups.

México: the government created the Sistema de Apertura Rápida de Empresas (SARE), which reduced the number of federal formalities to open a low-risk business for individuals (tax registration) and for business (tax registration and enterprise registration). Under the SARE system, it takes one working day to comply with federal start-up formalities for low-risk activities (specified in annex to the decree). As of November 2002, more than 226 000 individuals and 1,400 legal entities have received their tax and enterprise registration under this scheme.

8. Impose a 'silence is consent' rule:
This means that once the deadline had passed, the business is automatically considered registered. This approach, pioneered in *Italy*, is currently enforced in *Armenia, Georgia, and Morocco.* All four are among the world's fastest 20 percent for registering a business.

9. Reduce or scrap the minimum capital requirement for private limited liability companies:
In *Bosnia and Herzegovina* the capital requirement has been reduced by half.

In *France,* the requirement was abolished.

10. Establish a single business identification number to expedite and track the processing of official requests:
Oregon: the single business identification number is used when reporting, paying, making enquiries about employment-related obligations — such as withholding, unemployment, and transit taxes — and worker's compensation assessments.

Ireland: brought together tax registration details for income, social security, and value-added taxes under a single registration number. This practice has also been introduced also in other European countries.

11. Involve the private sector in registration:
Serbia: the independent agency registers business through a network of service centres strategically located around the country, and through on-line and mail registration.

Italy recently eliminated the role of the courts altogether and enjoys substantial efficiencies as a result. The trend in Europe is toward administrative management of registries and away from legal process involving courts and notaries.

(A recent study[93] for the European Commission found that key drivers of good registration are improvements in internal efficiency in public bodies through better management techniques and performance measures, accountability, and user consultation, which implies a client-orientation focused on business needs. The study found that reduction in the involvement of court notaries and other legal bodies were associated with substantial efficiency improvements.)

12. Licensing Reforms — rationalisation:
Russia: the new law on licenses significantly reduced the number of activities subject to licensing, reduced the license fee, and extended the term of validity of a license to at least five years (from three years). After the adoption of the new law, the percentage of the enterprises that applied for licenses and permits dropped by a third.

13. 'Get out of the Courts.' Eliminate the need for mandatory use of both notaries and judges from registration:
Bosnia-Herzegovina will make registration an administrative process, without resorting to the courts. Also eliminates the need for judges.

Italy: registration was taken out of the courts, saving three months.

Serbia and Montenegro adopted legislation to do the same in May 2004. The benefits are large. Entrepreneurs in countries where registration requires a judicial process spend 14 more days to start a business.

Operating a Business

1. Reduce the number of inspections by government authorities with the exception of those areas where regular inspections are needed due to the nature of transactions. Inspections, in general, are based on ad hoc system in terms of document requirements, interpretation of documents, and intention of inspectors. They usually lead to bribes and corruption:

Russia: According to a new Inspection Law, any one state agency can carry out no more than one inspection of one and the same firm in two years. The number of inspections dropped by a third.

2. Private inspections and certification — alternatives to administrative regulation:
Australia: a model involving private and third-party certification of building compliance by competent building professionals has been incorporated at the national level. It involves the development of a model of rational building legislation devel-

oped as part of a long-term regulatory harmonisation process in this area.

Dubai has implemented this system, while *Japan* and *Malaysia* have expressed considerable interest.

Finland introduced several types of private inspection in 2004, such as for foundation, steelworks and electrical work. All Nordic countries as well as *Australia, Canada, Ghana, Kenya, South Africa, Uganda, the United Kingdom and Zambia* have adopted risk-based inspections.

3. Simplified and transparent taxation system:
Uzbekistan: which used to have a complex and frequently changeable tax system, recently introduced a fixed simplified taxation system for SMEs — a great benefit to individual entrepreneurs, micro-firms, and small enterprises. Instead of various national and local taxes, they pay either a fixed or a unified tax.

Russia: the new Taxation System Law gave firms incentives to use a simplified tax system. Instead of VAT, profit, sales, and property taxes, small enterprises can pay one unified tax. (According to the old 1995 Russia law, SMEs had to pay 10 percent of profit for federal and 20 percent for regional budgets; 3.3 percent of revenue for federal and 6.7 percent for regional budgets, if revenue was below 7.5 million roubles and employment below 20 people. The new Russia law requires 15 percent of profit or six percent of revenue, if revenue is below 11 million roubles and employment below 100 people.)

4. Tax Identification Numbers:
Australia: introduced ID numbers in real estate transactions and banking and financial activities. The aim is to reduce tax evasion and unreported activities by employing computerised tax offices and management information systems, setting up regional information and audit centres and establishing a system to track unpaid taxes.

5. Electronic Tax declarations:
Mexico is using instruments such as electronic funds transfer submission of declarations through the Internet instead of paperwork. The results of this practice have been astonishing: reduced paper; expanded customer service coverage; it iseasier for the Ministry of Finance to identify the origins and the destination of payments; and less time spent in tax compliance.

Egypt established a Model Tax and Customs Centre in 2003. The Centre has brought together the three revenue generating departments in one building with one tax and customs file for every tax payer. Efficiency in collection and avoidance of double taxation were evident in tax with payers' compliance with the new system.

6. Establish a flat tax and cut back special exemptions and privileges:
Estonia: 1994 reform replaced a concession-laden system with a single flat tax offering no exemption. The country's tax base broadened, and revenues have not suffered.

Slovakia: in 2003 streamlined its convoluted incentive schemes into a single flat tax, with similar results.

Colombia, El Salvador, Indonesia, Jamaica ,and Mexico: eliminated distortions by cutting ineffective incentive schemes — and increased revenues in the process.

7. Increase revenue by keeping rate moderate:
Russia: reduced corporate tax rate from 35 percent to 24 percent in 2001, resulting in an annual average revenue growth of 14 percent over the next three years, the lower rate resulted in increased tax compliance.

Egypt: reduced the corporate tax rate from 40 percent to 20 percent in 2005. Indications show that there is an increase in tax compliance.

Expansion

1. Distribute both positive and negative credit information in the registry sharing credit information: There is a need to put more emphasis on positive information like outstanding loans, assets, land payment behaviour on accounts in good standing. The public registries in *Belgium, Brazil, and Turkey* began sharing more positive information. Backed by new laws, the *Greek and Hong Kong* private bureaus did the same. In Greece, the number of bureau consultations grew by more than 50 percent and several new products for lenders were launched. In addition, negative information like defaults and arrears should also be displayed.

2. Improve data quality (reforms on registries): *Bangladesh:* the public registry raised the penalty for banks that withhold data from 2,000 takas to 500,000 takas and the penalty for disclosing credit information to unauthorised parties from 2,000 takas to 100,000 takas. As a result, the share of banks submitting data on time jumped from 25 percent to 95 percent.

Mozambique: quality shot up after new regulations allowed the registry to fine banks for providing incomplete information. More than a dozen countries are improving data protection laws, which include incentives and safeguards for quality.

3. Make credit registry electronic: *Pakistan:* an online system has been implemented to improve credit registries. Providing online access is associated with more credit. In addition, this system might help spur commercial banks to adopt credit-scoring technology, which both speeds up the lending process and reduces opportunities for gender bias. Creditors can now obtain information instantly.

4. Introduce universal security for debtors and creditors: *Slovakia* permitted debtors to use all movable assets as collateral — present and future, tangible and intangible, and abolished the requirements for specific description of assets and debts. Since then, movables and receivables secure more than 70 percent of all new business credit.

5. Permit out of court collateral enforcement: *Spain:* introduced out of court enforcement through notaries execution, allowing debtors and creditors to agree on enforcement methods. Time to enforce was cut from more than one year to three months.

Slovakia: the gains from reforms were even larger. It took 560 days to enforce a mortgage through the old system. Now it is possible to enforce it in 45 days.

India: state-owned banks which account for 90 percent of lending, were permitted to enforce settlement out of court. On default the bank must notify the debtor. After a 60-day grace period the bank can seize the assets directly and sell by public auction. Creditors can expect to enforce within nine months.

Ukraine also expanded the scope of assets that can be used as collateral, and gave secured creditors first priority to their collateral and its proceeds. In addition, it gave creditors the ability to enforce collateral privately, bypassing the lengthy court procedures required before.

Croatia cut several months from enforcement by making it harder for debtors to delay the enforcement process. Movable collateral can now be seized and sold not just by the courts but also by authorised private firms.

Poland changed its bankruptcy laws in 2003. Previously, employees and taxes were paid before the secured creditors upon liquidation. Now, se-

cured creditors have priority to the proceeds from the sale of their collateral.

Armenia: since March 2004, the debtor automatically loses control of his or her property to an administrator on bankruptcy, increasing creditor rights.

6. Introduce a new Leasing law:
The development of leasing as a complementary tool to bank loans provides an alternative solution, which can significantly expand access to capital for business.

Benefits are: (a) an effective tool where capital markets are less developed; (b) security arrangements are simpler as it is provided by the leased asset itself; (c) little cash is required, allowing the lessee to conserve cash or use it as working capital; (d) tax incentives often make it possible for SMEs to reduce income before taxes; and (e) promotes investment in capital equipment, increases competition in the financial sector, and facilitates the transfer of new technology.

Serbia and Montenegro: since passing a new leasing law in May 2003, nine new leasing companies have opened for business. They expect to issue US$170 million in leases this year, roughly half of all SME finance in the country.

Uzbekistan: the level of leasing transactions was extremely small, now there are 23 leasing companies financing SMEs.

Kazakhstan: after amending the tax law in 2003, six new lessors opened: leasing deals grew from US$57 million to US$89 million within three months of the introduction of the new legislation, and the average deal size fell from US$190,000 to under US$90,000, bringing leasing within reach of more SMEs.

Egypt: lease law introduced in 2000. Seven leasing companies cover most sectoral activities and more than $5 billion of financial leasing activities were introduced in the financial market.

7. Repeal the normative acts, which authorise banks to carry out functions that are not appropriate for financial intermediaries:
Uzbekistan: banks act regularly as tax agents to track timely tax payments and other mandatory returns by SMEs and to withdraw the outstanding amount of taxes and other payments owed to the authority. Obviously, SMEs do not view banks as effective financial intermediaries. As a result, there is a need to repeal the normative acts, which authorise banks to carry out functions, that are not appropriate.

Enforcing Contracts

1. Summary proceedings:
Russia: the most popular reform in 2003 was the introduction of summary proceedings for the collection of small debt and other smaller commercial disputes. In late 2002, 60 percent of debt collection cases in *Moscow* used this procedure. A summary procedure typically takes two months from start to finish, nine months less than a general procedure.

2. Introducing case management:
Case management can be described as a procedure in which the judge follows the case from start to end, reduces delays and increases user satisfaction. In addition, this is very important for collection of debt. The average duration of debt collection is five months in rich countries where judges actively manage the case, and nearly 18 months in rich countries where judges don't.

Finland: an electronic system of recording was part of the case management. A judge can follow each case at any moment, reducing the time it takes to reach resolution.

Slovakia: this system has been implemented

successfully without much additional cost. The average time between filing and the first hearing was cut from 73 days to 27 and the average number of procedures from 23 to five, as judges were randomly assigned and could schedule the hearings without the need for consultation with court clerks and other judges.

3. Privatise enforcement process and make it competitive:
Private enforcement or specialised public collection agencies to collect debt are more effective. The best way to speed the recovery of overdue debt is by allowing competition in enforcing judgments.

Colombia scrapped the monopoly of the courts to enforce judge's ruling in 2003. Private companies quickly moved into the business. As a result, time was cut by nearly two months.

Hungary and Slovakia also introduced private enforcement.

Exit

With higher recovery rates, banks are more willing to lend and more money goes to new business ventures. The freedom to take on new ventures, and do so through an efficient process, ensures that a country's people and capital are put to their most productive uses.

1. Specialised expertise:
Provide specialised judges who deal with foreclosure or bankruptcy cases. In developing countries this can be achieved by establishing a specialized commercial section in the general court or in an administrative agency.

Peru: Its clerks and judges deal only with bankruptcy and debt recovery issues and not with divorce or criminal cases.

2. Limit appeals:
Appeals are needed to resolve legitimate disputes. But too often they are abused and invoked for frivolous reasons thus delaying an efficient outcome. Limiting appeals, both at the outset and during the procedure, increases recovery rates.

Australia, New Zealand and the United Kingdom: In foreclosure proceedings, the creditors need only to prove that a payment is overdue. Appeal is not possible.

El Salvador: in contrast, the debtor can appeal foreclosure and delay its start by up to 16 months. Appeals delay liquidation or reorganisation.

Romania reduced each appeal from 30 to 10 days. In addition, appeal can be limited only on legal grounds, not on the case facts, which are already established and accepted by the judge at the start of the case.

Estonia: allows the case to continue during appeal, avoiding disruption while providing for disputes to be resolved. Allowing the foreclosure or bankruptcy case to continue on appeal is associated with 20 percent less time in closing a business. And it almost doubles the chance of keeping it operating.

Successful Initiatives taken by Businesses

This section focuses on the initiatives taken from the private sector including informal businesses perspectives on their business rights and ensure they can take full advantage of opportunities and markets.

1. Appropriate legal frameworks that enshrine the following as economic rights:

- Access to finance, raw material, and product markets at fair prices;
- Access to transport and communication infrastructure;

- Access to improved skills and technology;
- Access to business development services;
- Access to business incentive and trade promotion packages: tax deferrals, subsidies, trade fairs, etc.;
  Examples:
  Fair Trade examples
  Vegcare, Kenya
  Grameen Bank, Bangladesh
  Social Fund, Egypt

2. Legal property rights:

- Private land
- Intellectual property
- *Examples*:
  land rights for rural women in Mozambique, intellectual property rights for indigenous people in southern Africa

3. Use rights to public resources and appropriate zoning regulations:

- Rights to urban public land;
- Rights to common and public resources: pastures, forests, and waterways;
- Appropriate zoning regulations stipulating where and under what conditions informal operators or businesses can operate in central business districts, suburban areas, and/or industrial zones
  Examples:
  Warwick Junction in Durban/eThekwini;
  Dedicated Built Market for Traditional Medicine Vendors in Durban/eThekwini, South Africa;
  Buy-Back Centre for Waste Collectors in Durban/eThekwini, South Africa;
  street vendors zoning in Bangkok and Manila.

4. Appropriate legal frameworks and standards for what informal operators and businesses are allowed to buy and sell:

- Appropriate laws and regulations on what are legal vs. illegal goods and services;
- Appropriate product and process standards: e.g., public health and sanitation concerns about street food;
- Marketing licenses for products and services
  Examples:
  Appropriate standards for handling and processing of milk in Nicaragua, Kenya;
  market license for gum collectors in India.

5. Appropriate legal tools to govern the transaction and contractual relationships of informal operators or businesses:

- Bargaining and negotiating mechanisms/power;
- Legal and enforceable contracts;
- Grievance mechanisms;
- Conflict resolution mechanisms;
- Possibility of issuing shares;
- Right to issue shares;
- Right to advertise and protect brands and trademarks;
  Examples:
  Brand name and advertisement for packaged cashew nuts in Senegal;
  brand name and fair prices for Ghanaian chocolate in UK;
  use of IT to market fish products in Senegal, India.

6. Legal rights and mechanisms to provide informal operators and businesses with:

- Temporary unemployment relief
- Insurance of various kinds, including of land, house, equipment, and other means of production;
- Bankruptcy rules;
- Default rules;
- Limited liability;

- Asset protection;
- Capital protection;
- Capital withdrawal and transfer rules.

  Examples:
  Limited liability devices (ILD);
  Asset shielding devices (ILD;)
  Capital locking-in devices (ILD).

7. Legal right for informal operators and businesses to join or form organisations, legal recognition of such organisations, and legal right of representation of such organisations in relevant policy- making and rule-setting institutions:

- Membership in mainstream business associations;
- Membership in guilds or other associations of similar types of entrepreneurs;
- Representation in relevant planning and rule-setting bodies.

  Examples:
  SEWA in India;
  StreetNet International;
  Ghana Trades Union Congress;
  Catalunya affiliate of national trade union confederation in Spain.

An Integrated Economy Approach

Instead of considering the formal and informal economies as a dichotomy, practice is beginning to recognise them as a continuum. Slowly but surely, the more enlightened policymakers are beginning to understand that legal empowerment in the form of reduced regulatory burden makes sound business sense. New models, some of which have been illustrated above, are emerging which recognise that economic policy has to promote an integrated approach to maximise social and economic opportunity and well-being of all social and economic strata. The integrated and inclusive economy approach recognises that if relationships between different levels of economic activity are to be anticipated, and made strategic and optimal, policy and institutional change for sustained business linkages and skills development has to take place.

To design and support the development of appropriate policy and institutions for an integrated economy, innovations emerging at the interface between the informal and formal have to be analysed. Small producers and micro entrepreneurs are daily developing strategies for dealing with the demands of formal institutions while the latter have also developed ways of managing their inevitable encounter with those who are the majority in the poorer countries of the world. These coping strategies hold the clues to what development interventions can build upon within particular cultures and economies.

Analysis of current practice offers several observations that could guide movement from a bifurcated to an integrated, cohesive approach to entrepreneurship and economic activity.

First, in order to encourage greater engagement between established formal businesses and the smaller enterprises, transaction costs and risks of such engagement have to be reduced.

Second, the public sector has to develop and implement participatory processes so that support is relevant to those on the fringes of formal activity. Third, change has to be negotiated through iterative dialogue and partnerships that span across central and local governments, the private sector, domestic capital markets, producer groups and their social and economic organisations. Fourth, the function in micro and small scale entrepreneurial activity of 'immediate and direct reciprocities'[94] has to be recognised; in many low-income communities social groups and economic

Case Study:

Identity, Voice, and Association in the Informal Economy

— The Long Journey of Self-employed Women's Association (Sewa), India

SEWA, established in 1972, is a trade union of low-income working women who earn their livelihoods by running small businesses, doing subcontracting work or selling their labour. With over 700,000 members in 2003, SEWA is the first trade union of workers in the informal economy not only in India, but also around the world. It is also the largest trade union in India. SEWA's objectives are to increase self—reliance as well as the economic and social security of its members. SEWA members fall into four broad occupational categories:

- *Hawkers and vendors*, who sell a range of products including vegetables, fruit and used clothing from baskets, push carts or small shops;
- *Home-based producers*, who stitch garments, make patchwork quilts, roll hand-made cigarettes (bidis) or incense sticks, prepare snack foods, recycle scrap metal, process agricultural products, produce pottery or make craft items;
- *Manual labourers and service providers*, who sell their labour (as cart-pullers, head-loaders or construction workers), or who sell services (such as waste-paper picking, laundry services or domestic services); and
- *Rural producers,* including small farmers, milk producers, animal rearers, nursery raisers/tenders, salt farmers and gum collectors.

Over the years, SEWA has built a sisterhood of institutions, as follows:

- SEWA Union (the primary membership-based organisation to which all SEWA members belong and which provides overall governance of the organisation);
- SEWA Bank (which provides financial services, including both savings and credit);
- Gujarat Mahila Cooperative Federation (which is responsible for organising and supporting SEWA's membership in several types of co-operatives);
- Gujarat Mahila Housing SEWA Trust (which provides housing services);
- SEWA Social Security (which provides health, childcare and insurance services);
- Rural and Urban Branches of SEWA (which oversee, respectively, its rural and urban activities, including the recruitment and organising of members);
- SEWA Marketing (which provides product development and marketing services);
- SEWA Academy (which is responsible for research, training, and communication).

The first three are democratic membership-based organisations, governed by elected representatives. The others are support institutions that provide services of various kinds to SEWA members.

Source: SEWA, 2003.

groups are synonymous. How social relations and values other than material affect the *modus operandi* of millions of entrepreneurs has to be brought into economic reform considerations.

Finally, the private sector has to be defined as incorporating all entrepreneurial activity in any country and should be seen as inclusive of both 'entrepreneurship inspired by opportunity' and

'entrepreneurship inspired by necessity'.[95] The latter was always known as the social welfare approach; it now needs to be looked at through a business and wealth creation lens. Within an inclusive economy, entrepreneurship, whether formal or informal, would be supported by:

- Removal of regulations that unduly inhibit private sector development;
- An integrated perspective on micro, small, medium and large enterprises;
- Linkages between various sizes of businesses;
- Increased efficiency and productivity of the labour force;
- Enhanced competition;
- Expanded markets.[96]

In making profitable markets more inclusive of the poor, risk mediation is a fundamental concern. Formal institutions and large firms as well as small and micro enterprises are all equally risk averse, given the absence of adequate investor protection or social safety nets in many countries. Acceptable risk is central in developing and sustaining trust.[97] So far, successful mediation between large and small businesses has usually been provided by guarantees through contractual and financial arrangements facilitated by credible intermediaries such as donors, governments and NGOs. These models can be scaled up to become mainstream if there is political will towards pro-poor policy and institutions that can move current practice towards greater parity and fairness in access to opportunity and assets.

Another example of integration is the prospect of large numbers of micro-enterprises, living precarious lives in the informal sector, coming together to form large corporate entities, and competing in national and global markets. This could provide a new perspective on the role of the informal sector, in the national economy. These corporate entities of micro-enterprises can become the natural partners of larger corporate entities that might outsource many of their operations and component inputs to these entities. The problems of dealing with large numbers of such enterprises, scattered as they are across the country, and maintaining quality control have discouraged what might otherwise have been a most cost-effective partnership between the formal and informal sector. Larger corporate entities of micro-enterprises would eliminate both the cost and managerial problems associated with building this linkage and could open new horizons of opportunity that might lead the informal sector to become formally integrated with the macro-economy.[98]

To Sum Up

There are rich, real life examples of 'business rights' successes from all over the world that can be borrowed and implemented, with necessary improvements and modifications to suit local environments and priorities. What is needed on the part of both the authorities and business participants is openness in critically evaluating real-life cases, and in adopting and adapting as necessary those with potential for successful implementation.

6. Pursuing the agenda for change

Over the last two decades, much attention has been paid to legal and regulatory institutions and to their influence on economic outcomes. It is recognition of the importance of good governance in advancing economic development initiatives. As a result, much development assistance is being directed towards reforms of national legal codes, public institutions, and bureaucratic processes. The anticipated result is a legal infrastructure conducive to market-led economic growth. However, the reform movement has not fully (perhaps only marginally) addressed the multifarious issues of informal economic activity. Deregulation was expected to result in significant shifts of entrepreneurial activity from informal to formal. But, as pointed out earlier the scale of informal economic activity is actually growing, not decreasing. The informal sector is here to stay. At the same time, policy reform, that strengthens what works for the working poor and responds to what does not, is long overdue.

Laws, regulations, and institutions governing commercial relations need to reflect the reality that most economic units are very small with few hired workers and that many of the working poor operate on their own account. Also, biases in existing laws, regulations, and institutions that favour large enterprises over small ones, and men over women, need to be addressed. Meanwhile, in the absence of new and more appropriate laws, regulations and institutions, most informal businesses will remain unprotected, insecure, and vulnerable.

Business-related reforms are now really coming under closer scruitiny.[99] In fact, there is an increasing demand for reforms to contain 'value based policies, strategies and institutions' that will bring long-term sustainable benefits to the poor in general and to informal enterprises in particular.

What is needed at this juncture are policies regarding formalisation that not only simplify formalities or improve the quality of regulation, but also increase the value of information provided by public registers to their users, both public and private. This is because business formalisation is an ordinary productive process that incurs costs but also provides valuable public and private services. The private services reduce firms' transaction costs in many of their contracts, and the public services facilitate the work of the administration in its dealings with firms. In other words, 'the main priority should not be to reduce the cost of business formalisation — a cost paid only once — but rather to reduce transaction costs in all business dealings. . . . The restructuring of formalities is in itself insufficient for reducing total transaction costs. It may also be a costly distraction. It is necessary, rather, to enhance the value of formalisation.'[100]

Addressing informality, therefore, is a multi-faceted proposition requiring a thorough understanding of the factors that create and drive informality. Reform initiatives may also require that the formal sector be re-defined to accommodate many of the principles and values which characterise the vibrancy and resilience of the informal sector. Clearly, there is no single approach to reform but there are essential and common principles that must be observed. Three key ones are: context specificity, a participatory and gendered approach, and recognition of legal empowerment of informal businesses as a governance issue.

This section sums up our discussion on what the promise of legal empowerment holds with respect to unlocking the productive capacities of the

millions who operate poor, micro informal businesses.

Changes have to be Context Specific

Although development interventions tend to favour reform through standardised, 'best practice' institutional forms,[101] what is required is an empirically grounded perspective using context-specific research, organisational innovation and political entrepreneurship rather than the importation of institutional templates ('toolkits') forged elsewhere.[102] Because rules are at once constituent elements of cultural norms and values as much as they are embodied in commercial codes and constitutions, attempts at 'legal empowerment' need to engage if not with that full spectrum then at least with a more complete awareness of the spectrum's existence and importance.[103]

Therefore context-specificity is a fundamental requirement in moving towards change. This specificity must also extend to the reality of different categories of informal businesses in specific locales and industries. Any policy or institutional reform has to recognise and support both the self-employed (differentiating between micro-entrepreneurs and own-account operators) and wage workers in the informal economy. The lack of recognition and understanding of these basic components of the informal economy often hinders the development of appropriate policy.

Reform Processes Must be Participatory and Gender Responsive

Policy and institutional reform should be *participatory and inclusive* and allow for policies to be developed through consultation with informal businesses, and through consensus of relevant government departments, the organisations of informal businesses and other appropriate social actors. In order to have a voice, those who are in the informal economy must be organised and their efforts to organise into association and cooperatives at every level should be encouraged. In order to organise, the working poor have to be allowed the space and resources to associate for a common economic purpose and without political manipulation.

Of course, formulating appropriate policies and strategies is not an easy task. However, with the involvement of the organisations that represent informal businesses it is likely to succeed. The way forward has to be one of negotiated solutions, and these negotiations have to be about rights and responsibilities. While the inclusion of the voice of all stakeholders in making policy is essential to its success, the input of informal workers and their organisations, based on recognition of their right to organise, is crucial.

The voice of women has to be clearly heard in this process. In most regions of the world, a larger share of the female than of the male workforce is in the informal economy and, within the informal economy, more women tend to be concentrated in lower-return segments than are men. As a result, even within the informal economy, there is a significant gender gap in earnings and in the benefits and protection afforded by work. Understanding relations between men and women, their different positions in the economy and their access to and control of resources, is crucial to understanding the informal economy, where a gendered approach is a pro-poor approach. Supporting women's work will, in effect, lead to support for poor households and poor children.

Legal empowerment of informal business should be prioritised as a governance issue

The reform process should be based on an informed understanding of the economic contribu-

Case Study:

Technology and the Informal Sector: Fishing with Mobile Phones

A Fisherman on the coast of Kerala, in southern India, faces the dilemma: in the situation of good catch, should he or she sell the fish (sardines) at the local beach or or travel to a market farther away? If he or she stays at the local beach , prices could be low due to over supply, but travelling would be a costly decision in terms of transportation cost and time to another market. Moreover, each market remains open for only a couple of hours before dawn and fish are perishable; any that cannot be sold will have to be dumped into the sea.

According to a research by Robert Jensen, until the introduction of mobiles phones in 1997 fishe people used to stick with their home markets all the time. This was wasteful: on average, 5-8 percent of the total catch was lost. He noted, for example, on January 14th 1997, 'Eleven fishermen at Badagara beach ended up throwing away their catches, yet on that day there were 27 buyers at markets within 15km (about nine miles) who would have bought their fish.'

After the introduction of mobile phones there was remarkable change in fishermen's behaviour, the price of fish, and the amount of waste. Fishermen started to buy phones and use them to call coastal markets while still at sea. Instead of selling their fish at home beach auctions, the fishermen would call around to find the best price. In one area, the proportion of fishermen who ventured beyond their home markets to sell their catches jumped from zero to around 35 percent. At that point, no fish were wasted and the variation in prices fell dramatically. 'The 'law of one price' — the idea that in efficient market identical goods should cost the same — had come into effect, in the form of a single rate for sardines along the coast... This more efficient market benefited everyone. Fishermen's profits rose by 8 percent on average and consumer prices fell by 4 percent on average. Higher profits meant the phones typically paid for themselves within two months. And the benefits are enduring, rather than one-off.'

This shows the importance of the free flow of information to ensure that markets work efficiently, which in turn improve welfare.

tion of informal businesses and serve to *mainstream* the concerns of the informal businesses in those institutions that deal with economic planning and development. In the past, the management or regulation of informal activities has often been relegated to social policy departments or, in urban areas, to those departments (such as the police or traffic) that deal with law and order issues. Locating governance of the informal economy in traffic, health, policy or social departments ignores its economic aspects.

Institutions that govern the informal economy should be those dealing with economic planning and development. That is why this report has emphasised that reform has to be couched within an integrated economy approach where informal and formal are seen as equally important economic players, each demanding equal attention in national governance laws and institutions.

Strategies and Institutions to Support Informal Businesses

In developing and promoting new approaches, some considerations and innovations outlined below could be considered.[104]

Market-based institutions for the poor

The capacity of informal businesses to operate on more equal terms in the market place depends greatly on their capacity for collective action. The weakness of the poor in the market place originates in their isolation. Here, investments in institutions, whether sponsored by NGOs or representing collective action by the poor in the form of marketing cooperatives, or corporate bodies of the poor, remain crucial interventions. The issue therefore remains, posed as a challenge: to invest the poor and informal businesses with capacity to develop the financial and organisational strength to sell products and services, at a time and in a market that offers them the best terms, or to simply watch as they continue to sell their goods out of distress or just the need to subsist. Taking up the challenge positively demands interventions in the macro-credit market to underwrite such marketing ventures, the designing of institutions which aggregate the market power of the poor, and the deployment of professionals with management skills and especially trained to assist the poor in up-scaling their participation in the market economy.

Adding value and supply chain to the labour of the poor and informal businesses

Many NGOs around the world provide marketing services to the poor, for particular commodities, in particular markets. The best service that can be provided is to help the poor and informal businesses add value to their labours by moving up-market through either agro-processing or providing inputs to the corporate sector. The pioneering role of Amul Dairy in India and, more recently, BRAC, are instructive model examples. They enable small dairy farmers, or just poor households that own a cow bought through a micro-credit loan, to become part of a milk processing chain, thus enabling the poor to share in the profits from selling pasteurised milk or cheese in the metropolitan market. Such initiatives may be taken one step further by financially empowering the vast body of small farmers servicing the private agro-processing sector, as well as handloom weavers, to become equity stakeholders in the upstream enterprises that could add value to their produce or abour.

Taking micro-credit out of the ghetto[105]

Nowhere is there a greater need for developing a macro-perspective for poverty eradication than in the area of monetary policy. The instruments of monetary policy appear to be exclusively targeted towards ensuring macroeconomic stability, moderating inflation and meeting the credit needs of the corporate sector. The financial needs of the poor, once left to the informal sector, have now been segregated in the micro-credit market. This apartheid within the monetary system remains a major anomaly.

Indeed, it can however be argued that by its very nature, micro-credit can never aspire to eradicate poverty since it only addresses one component of the various markets that condition the lives of the rural poor. It is arguable that by locking the poor into the micro-credit system, based on the fiduciary responsibility of the household, they have been excluded from participating in the macro economy, isolated from collective action, and condemned to live on the fringes of the poverty line. It is, therefore, not surprising that those countries with the most substantive exposure to micro-credit, remain mired in poverty. However, it

is not the aim to diminish the enormous contribution of micro-credit in alleviating poverty and distress, as well as enhancing the self-worth of the poor. There is, today, no reason why such organisations, of the maturity of Grameen Bank, should not graduate into the macro finance system by accessing the deposits of the public and even marketing its assets at the global level, through such financial instruments as securitisation, that are in widespread use in more advanced financial systems.

A number of commercial banks are already using NGOs and community-based organisations to retail banking services to the poor. Other examples include Scotia Bank in the Caribbean and ANZ Bank in the Pacific Islands, which have ventured into 'Banking for the Poor' and 'Mobile Banking for Villages'. In Egypt, the Social Fund, Credit Guarantee Company and Micro-finance NGOs are not only successful providers of credit to informal businesses but also organisers of permanent exhibitions for MSMEs' products, offering entrepreneurial training and outreach services to poor enterprises.

Mutual funds for the poor

Apart from the issue of redesigning monetary policy to deliver credit to the poor, the monetary system also needs to design special financial instruments to attract these micro-savings into the corporate sector, particularly where it can be structured to serve the poor. The mutual fund is but one institutional mechanism to link the poor to the corporate sector. The underlying premise of the mutual fund is the notion of creating possibilities for the poor to own corporate assets. Opportunities are therefore opening for linking the farmers to the agro-processing corporate sector by giving them an equity stake in such enterprises. At the same time, the agro-corporations should be motivated to invest in improving productivity and capacities of their rural partners. An interesting possibility of enabling the poor to own corporate assets is provided in Bangladesh.

Financial policy need not limit itself to ownership of corporate assets but could also be restructured to ensure that all assets, from urban land, to real estate development, and from banks to corporate trading houses, could be redesigned to accommodate the poor as equity partners. The two

Box 4 Largest multi-national company has 2.3 million rural poor women as shareholders

The largest single foreign corporate investment in Bangladesh is manifested in the GrameenPhone experience. GrameenPhone is a commercial joint venture to provide cellular phone services. The company currently has two million subscribers which covers two-thirds of all phone subscribers in Bangladesh.

Telenor, the largest mobile phone company in Norway holds a 51 percent ownership stake in GrameenPhone and has so far invested over US$600 million in the joint venture making it the largest single foreign investor in the country. Grameen Telecom, a sister organisation of Grameen Bank, owned by 2.3 million poor rural women in Bangladesh, owns 35 percent of Grameen Phone. As and when GrameenPhone goes public it will be possible for these rural women to become direct stakeholders in the largest private enterprise in the country. The goal of Grameen Bank is to make these poor women into the majority owners of the company as Telenor meets their commitment to gradually divest their equity stake in the company to local investors. The prospect of poor rural women in Bangladesh owning one of the largest corporate enterprises in the country could have a transforming effect on how the poor perceive their role in the national economy.

institutional instruments to make this possible remain the mutual fund and the need for private limited companies to transform themselves into public limited companies. Here monetary and fiscal policy can provide incentives to encourage the corporatisation of private wealth along with the reservation of space for equity ownership of this wealth by the poor.

Institutionalising the collective identity of poor and informal businesses[106]

Suggestions about building a collective identity for the poor and informal businesses through specially constructed institutions derives from the need for the poor to claim a place in society that is more commensurate with their numbers. The poor remain disempowered because they are isolated; bring them together and they emerge as a major force in the economy, in society and, eventually, in the political arena. Institutional arrangements that can add value to the reform agenda are:

a) Corporations of the poor and informal businesses: Community-based or self-help organisations (CBOs) of the poor, cooperatives and activity-based organisations, that bring groups of the poor together, should aspire to forge an institutional identity. Corporatising the CBOs will provide the legal foundations for collective action, to enable these bodies of the poor to access credit, enter into contractual relationships and deal with international organisations. The precise legal persona of these corporations may vary from limited liability companies, with the poor as equity owners, to cooperatives with the poor as partner members. But the common feature of all such corporate entities of the poor is that they must operate in the market place and generate income rather than limiting themselves to survive as savings and loan associations.

b) Corporatising micro-enterprises: The prospect of large numbers of micro-enterprises, living precarious lives in the informal sector, coming together to former large corporate entities that would compete in national and global markets, provides a new perspective on the role of the informal sector in the national economy. These corporate entities of micro-enterprises can become the natural partners of larger corporate entities that could outsource many operations and component inputs to them... The larger corporate entities of micro-enterprises would eliminate both the cost and managerial problems associated with building this linkage and open up new horizons of opportunity to the informal sector to formally integrate with the macro economy.

Bangladesh provides technology upgrading, quality control, credits and marketing services to large numbers of handicraft enterprises across the country. However it still deals with these enterprises as clients who are helped by access to credit, markets and skill development. BRAC has to take the next step of aggregating these producers into a larger corporate entity where they acquire an equity stake in the final profits of the enterprise. Such a corporate entity has been developed in India with the *Papad* cooperative where around 100,000 small household enterprises producing the spicy snack condiment, the *Papad*, have been aggregated to become the largest single supply source of quality *papads* to grocery stores across the country.

c) Micro-insurance — Protecting Informal businesses: Micro-credit can help the poor rise above poverty. Micro-insurance can help by providing protection against certain perils; micro-insurance complements other financial and social services. Because they often live and do business

in risky environments — in urban shanty towns with unsanitary conditions, in rural areas prone to droughts or floods — the poor and informal businesses are more vulnerable than the rest of the population to perils such as illness, accidental death and disability, theft or fire, agricultural losses, natural or manmade disasters. They are also the least able to cope with crisis when it occurs. Micro-insurance with the use of technology has been successfully been introduced in a number of countries:

In Uganda and Malawi, some insurance providers issue smart-cards to poor policyholders to confirm that they are who they say they are, and can instantly provide information on their level of coverage and whether the premium has been paid.

In the Philippines, insurers have minimised the transaction costs of collecting many small premiums by allowing people to pay via their mobile phones.

In India, a barcode system is being tested as a way of managing client information. The barcode stickers are especially useful for illiterate clients who can attach them onto pre-addressed envelopes to identify themselves.

Business Rights — provide value-based change process.

The rationale for changes in the informal businesses such that some elements and advantages of formalisation are incorporated is rooted in a wider appreciation of how both individuals and businesses can be disadvantaged by operating outside the formal economy and the recognition that there are benefits to formalisation. Nevertheless micro-entrepreneurs make an economic calculation along the lines of a cost-benefit analysis, which determines a minimum threshold of participation in formal arrangements for which the costs remain lower than the benefits. Some firms will therefore choose to participate in only a subset of institutions at any point in time. In addition, benefits and costs of participating in a formal context vary for firms of different size and expected lifetime. It would for instance seem that young, inefficient and small firms are disproportionately informal.

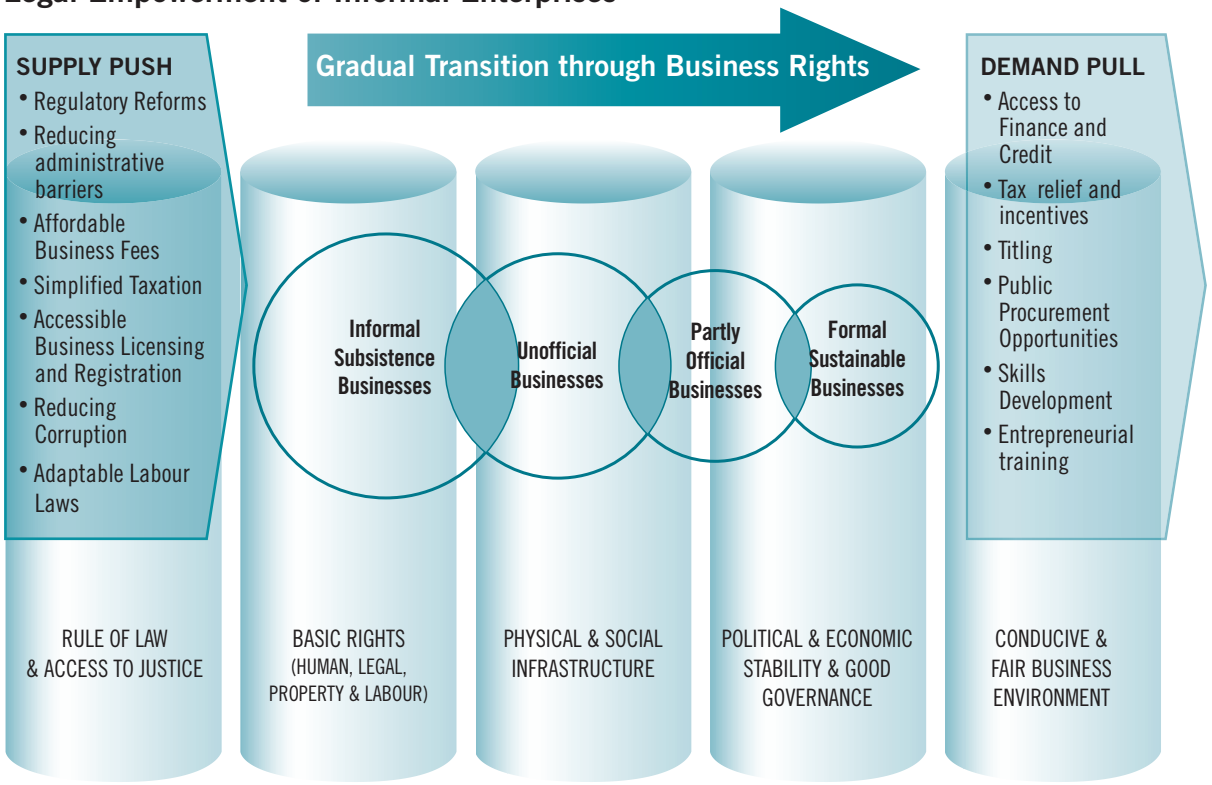
The chart below illustrates the phases an enterprise might hypothetically go through before it becomes an official formal enterprise. The chart also illustrates that the transition from an informal to a formal status is gradual and that it is important to initiate the relevant processes that could assist enterprises to reach a more formal existence. Any interventions in support of moving enterprises towards a more formal existence should be prioritised and concentrated on where the maximum effects can be reached. The way that the informal enterprises themselves rank the problems that they are facing would indicate how to prioritise interventions.

In order to make a smooth transition from informal to formal there needs to be a strong foundation of: a) rule of law and access to justice; b) good governance and protection of basic rights (human, legal, property and labour); c) strong physical and social infrastructure; d) political and economic stability, and e) conducive and fair business environment.

Additionally, the causes of informality are complex and defy simple explanations. Consequently, the transformation can only be tackled successfully by a linking set of policy initiatives that deliver both pull and push pressures. The Demand Pull and Supply Push measures are briefly highlighted in Chart 1. Demand 'Pull' initiatives include: access to finance, capital and credit; tax relief and incentives, titling, public procure-

Figure 5

Legal Empowerment of Informal Enterprises



ment opportunities, skills development, entrepreneurial training, etc. Supply 'Push' initiatives are regulatory reforms, reducing administrative barriers, affordable business and licensing fees, accessible business and licensing and registration procedures; reducing corruption; adaptable labour laws, etc. The chart further highlights that the number of informal enterprises moving towards formal sustainable enterprises is small compared to the huge size of subsistence informal enterprises.

Formalisation may therefore be seen as an incremental process that begins by introducing appropriate incentives and benefits of formality, then progressively enforces compliance with the costs and regulations associated with operating formally which would depend on the size, output, or location of the enterprises. Once conditions are met, the working poor in the informal economy would be entitled to the benefits of formality and, at the same time, they would be enabled to comply with the duties of formalisation

Pillars of Change

The sustainability of any proposed reform to a country's governing institutions depends on public recognition of the changes to be made. Recognition will thus depend on the capacity of the reform to be legitimised within the public's cultural and social milieu. Failure may prevent the successes of legal reforms that are otherwise cognizant of larger policy aims to promote market-driven economic growth. For Sub-Saharan Africa, for example, failure to incorporate widely

accepted customary forms could mean outright rejection by the private sector. Therefore, in determining what can be done to legally empower informal businesses to better access the opportunities, finances, services and facilities of the formal sector, one would have to take into account that which already works.

The recommendations of the working group for Chapter 4 of this report may be summarised in descriptions of five proposed pillars of reform:

Pillar 1: Adopt an inclusive and integrated approach to economic development so that there is legal recognition and empowerment of informal businesses.

Legally empowering small informal businesses run by poor individuals or households should be seen as a central pillar of a just society and a central strategy for reducing poverty and inequality. This means that policies and global economic privilege, which is geared at present to the elites and large enterprises, have to change to become inclusive of the billions at the bottom of the economic pyramid. These billions are the producers and consumers who make markets profitable for the privileged. Their share has to be duly recognised through much greater public and private sector cognisance and support to small firms and enterprises. Informality, with its flexibility and space for millions to engage productively in economies, is here to stay. Official and legal response needs to recognise what works in this sector and strengthen and integrate these innovations into an inclusive integrated approach to wealth creation.

Pillar 2: Support legal empowerment through a package of commercial rights underlined in policies and instituted and enforced through regulatory bodies.

Commercial rights for informal entrepreneurs/operators include, but are not limited to, property rights, labour rights, right to social protection, right to be organised and represented in policy-making and rule-setting institutions and processes, and the right of access to justice in a transparent and equitable manner. The rights of the more vulnerable groups — the own-account operators, including single-person operators and those who work in family businesses or on family farms — must also be addressed. These commercial rights should address all categories of informal enterprise, and include the following provisions:

a) *Basic commercial rights:* right to work, including the right to vend; right to a work space (public land, private residences), including related basic infrastructure (shelter, electricity, water, sanitation);

b) *Intermediary commercial rights:* right to government incentives and support (including procurement, tax holidays, export licensing, export promotion); right to public infrastructure (transport and communication);

c) *Advanced commercial rights:* relevant for larger, more advanced informal enterprises.

Pillar 3: Reduce Decent Work 'deficits' of those who work informally.

This means support to informal businesses in the form of:

- Participation in policy processes of a representative voice of the working poor in the informal economy. Recognition and correction of the bias in existing commercial policies, regulations, laws and procedures favouring larger firms and enterprises. Extension of government incentives and procurements to the smallest informal enterprises;
- Facilitation as appropriate of backward and

forward linkages on fair terms between larger and smaller firms;

- Promotion of market access and fair trade for smaller firms and enterprises;
- Social protection of informal operators through property, health, life, disability insurance;
- Adequate and relevant retraining, life-long learning, and other support to labour mobility.

Pillar 4: Broaden access of informal business to financial services and support innovation in financial products and processes. This requires that there be:

- Awareness in both formal and informal credit systems of the way the working poor use credit and the barriers and often inappropriate rules in formal lending procedures;
- Legal and administrative processes in place which make the processing of collateral including social collateral cheaper, transparent and faster;
- Legally recognised and mutually negotiated risk mediation processes in place for both the lenders and borrowers from informal business;
- Support to innovation in financial products and services with a view to deepening their outreach.

Pillar 5: Engage in evidence-based reform.

There are now hundreds of good practice examples that illustrate how the constraints of informal businesses have been successfully addressed around the world. These examples should be studied and the lessons learnt should be grouped according to what constraint or need was being addressed and the policy lesson drawn from the experience. The policy reform that ensures should be participatory and targeted to the realities of the different sub-sectors in the informal economy.

Conclusions

This report has outlined how the process of achieving greater legal empowerment (through business rights and access to the advantages of formalisation) can and should take different forms. Incentives to encourage informal entrepreneurs to actively engage in the change process must show actual benefits to their livelihoods and their well-being. These incentives are essentially what would result if the barriers to entry into and/or interaction with formal and legal economic activity were addressed. Incentives could be in the form of

- Simplified registration procedures and progressive registration fees;
- A supportive investment climate and a business enabling environment;
- Fair commercial transactions between informal enterprises and formal firms;
- Appropriate legal and regulatory frameworks, including: enforceable commercial contracts; private property rights; more equitable use of public land; and tax-funded incentives, such as government procurement, tax rebates, tax-funded subsidies, and incentive packages.

These incentives would have to be supported at the same time by appropriate and customised financial, business development, and marketing services. Mechanisms and financing arrangements to provide social protection to informal producers have to be put into place and policy and institutional reform undertaken in a participatory manner. The participation of informal entrepreneurs, both women and men, would be best ensured through proactive and iterative dialogue — on an ongoing basis — with representatives of associations of informal entrepreneurs.

Recommendations and Key Messages

Objectives of Empowerment Process

Legal empowerment of informal businesses should seek to promote an appropriate mix to different types of business rights, and the pursuit of the following sets of objectives:

Broad Objectives

- Reducing regulatory burden;
- Reducing barriers to formal markets and institutions;
- Increasing assets, including property rights;
- Expanding market access;
- Improving terms of doing business;
- Extending legal and social protection;
- Increasing organisation and representation.

Specific Objectives — Depending on their size and potential for growth, informal businesses need some combination of the following business rights:

- *Basic business rights:* right to work, including right to vend; right to a work space (including public land and private residences), and related basic infrastructure (shelter, electricity, water, sanitation).
- *Intermediary business rights:* right to government incentives and support (including procurement, tax holidays, export licensing, export promotion); right to public infrastructure (transport and communication).
- *Advanced business rights:* ILD set of legal tools, such as bankruptcy rules, relevant for larger, more developed, informal enterprises.

Means to Meet Objectives

Different Instruments — Policies and laws, regulations and procedures, business development infrastructure, and organisation and representation of informal business.

Policy and Regulatory Environment - Legal empowerment of informal business requires a policy and regulatory environment that:

- Provides legal identity to the working poor as producers or traders;
- includes representative voice of the working poor in the informal economy;
- Recognises and addresses the bias in existing commercial policies, regulations, laws, and procedures that favour larger firms/enterprises;
- Seeks to extend government incentives and procurements to the smallest informal enterprises;
- Seeks to build backward and forward linkages on fair terms between larger and smaller firms;
- Seeks to promote market access and fair trade for smaller firms and enterprises;
- Promotes social protection for informal operators (property, health, life, disability insurance) plus retraining, life-long learning, and other support to mobility.

The Formalisation Debate:

In response to the question of whether and how to formalise informal businesses, the Commission should highlight the point that formalisation has different dimensions:

- Expanding formal employment opportunities.
- Creating incentives for informal enterprises to formalise, including
  1) Simplified registration procedures and progressive registration fees;
  2) Supportive investment climate;
  3) Fair commercial transactions between informal enterprises and formal firms;
  4) Appropriate legal and regulatory frameworks, including enforceable commercial contracts, private property rights, use

of public space, tax-funded incentives (including government procurement, tax rebates, tax-funded subsidies, and incentive packages).

- Providing financial, business development, and marketing services to informal enterprises;
- Creating mechanisms and financing arrangements to provide social protection to informal entrepreneurs;
- Promoting participatory policy processes and inclusive rule-setting institutions that include representatives of associations of informal entrepreneurs.

Chapter 4 Endnotes

1 A business has been defined as an organisational entity designed to sell goods and/or services in an effort to generate profit or a financial return. They can be also be a source of employment for others — in addition to the owner and operator - and provide wealth and livelihoods to the owners as well as the employees. Informal Businesses and Informal Enterprises are used interchangeably in this report.

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Chapter
FIVE

Road Maps for Implementation of Reforms

Implementation Strategies, Including Toolkits and Indices

EXECUTIVE SUMMARY

Existing power structures prevent poor people from taking charge of their lives and occupations and achieving upward mobility. To end poverty, those structures must be reorganised — a challenging task due to the many dimensions of poverty and disempowerment. Interchangeable solutions do not work across countries in exactly the same ways; practitioners must be inventive and experimental to produce more just relationships among the state, the marketplace and the poor.

Listening to the poor and learning by doing are critically important. Civil societies, non-governmental organisations, membership-based groups of employers and of workers, coalitions and networks have major roles to play in generating and articulating bottom-up demand for legal empowerment. Support of central authorities is also vital for sustaining progress in most countries. Policy champions are needed to bring other government actors on board to preclude policy spoilers from blocking implementation of legal empowerment.

Implementation of Legal Empowerment of the Poor (Legal Empowerment of the Poor) in a country begins with contextual analysis, focusing on the social and cultural features that could affect implementation. Consideration must also be given to the economic context (which can be both a help and a hindrance), and to the openness and capacity of the state. Supplementing the inventory of these concerns should be a careful analysis of the reach and hold that informal institutions have on the poor. A full contextual analysis forms the basis for a feasibility review of various empowerment scenarios.

The most important constraints set by the national socio-political context are:

- The domestic social structure, especially its gender, class and ethnic makeup, as well as cultural attitudes toward participation and equality;
- The economic context — including the distribution of wealth and income, and the level and rate of economic growth;
- The characteristics of the state — both the political and the administrative system;
- The extent of economic and political informality and tensions with the formal and officially recognised systems.

Practitioners and policymakers can use the tool of contextual analysis within a country to determine: 1) if conditions appear ripe for legal empowerment reforms; 2) which implementation options seem most probable; 3) what sequencing and timelines for reform look doable; 4) how the reforms should be designed; 5) what tradeoffs need to be considered; 6) which risk-mitigating mechanisms are worth trying, and 7) what contextual variables need careful monitoring during implementation.

Following the contextual analysis — or perhaps simultaneously with it since implementation steps are never discrete — local activists and external change agents should undertake a stakeholder analysis of the constituencies concerned with Legal Empowerment of the Poor. The objective is to differentiate among the superficially homogeneous beneficiaries, to better understand the divisions, alliances and particular needs that exist among the poor. Other stakeholders who might oppose or assist the target group or groups also need to be scrutinised to see what motivates their behaviour and to reflect on how they could be brought into the process. The purpose of the stakeholder analysis is to get a firmer grasp of the probability of moving forward with various legal empowerment alternatives, and to begin serious thinking about what it might take to build a minimum winning coalition for legal empowerment in the country.

Stakeholders act out of regard for their own advantage, as they define it. Poor people are the target beneficiaries of legal empowerment and need to have as big a hand as possible in initiating and designing the relevant policies. Even though they lack physical, financial or organisational resources, and even social capital in many locales, the poor always have a passive capacity to derail legal reforms aimed at them. Because poor stakeholders are diverse, legal empowerment policies may have surprisingly uneven impact if officials are inattentive to the needs and preferences of the intended beneficiaries.

Legal empowerment also creates policy 'losers', no matter what the broader merits are. It often redistributes a right or benefit from one group of stakeholders to another, for example when there are mutually exclusive claims to a fixed resource such as fertile land or minerals. Policymakers may endeavour to minimise redistributive conflicts by expanding economic opportunities so that different interests can be negotiated to meet every side's needs, but plenty of potential for confrontation remains because important stakeholders believe others' gains come at their expense. The mutual payoff to legal empowerment is in the future, but the individual sacrifices must be borne now.

Finally (though again the chronology would probably be overlapping), the internal technical features of the alternative courses of action must be reviewed. Policy characteristics analysis would focus on the complexities of the different policies, their ambiguity, and their potential to sow discord — all of which may hinder implementation. Efforts would be made to find a simple, incremental, and sustainable way forward, and to avoid as much as possible taking steps that provoke needless confrontation.

Obviously, what legally empowers the poor in one nation may be unsuitable in another country, where there would likely be a different social structure, economic environment and universe of stakeholder groups. The procedures in determining a suitable reform strategy might look alike in both countries, but the substance of the outcome would be sharply different. And in all cases, the process is messy and imprecise, yielding only what appear to be the best fitting policies, given the imperfect information available to policymakers at the time and under the political realities.

Development professionals must creatively seek to capitalise on the specific situation at hand, placing front and centre poor people's perceptions. While legal or organisational reforms may appear self-evidently empowering to outside experts, they should be cautioned that a poor community might see them as dangerous from their own perspective. It may be best to move forward selectively and not dissipate energy on too many legal or regulatory initiatives at once. Empowerment policies seldom

take effect quickly. Individual uncertainty about implementation encourages poor people to withhold support for reforms, which can create self-fulfilling prophecies of slippage. One should therefore look for interventions promising short-term rewards for beneficiaries. Design simplicity should be a key consideration to minimise conflict, uncertainty, and other implementation problems arising from the procedural and technical traits of legal empowerment activities.

Roadmaps to Implementation

Effective implementation of policy reform takes a mix of experience, professional judgment, and willingness to take chances. Creative policymakers look to open up policy windows that create the space needed to move forward in solving particular problems even under difficult circumstances.

Six common sets of tasks are associated with developing specific national roadmaps for Legal Empowerment of the Poor. They follow a generalized (but not lockstep) pattern, conceived as an interactive cycle launched by a stream of issues, agendas and decisions that, over time, provide additional input and momentum to the process.

- *Issues, Agendas, and Decisions:* Advocate for change, develop policy issues, and make decisions to launch policy reforms. Although politicians and interest groups tend to take the lead, they will seldom succeed without pressure from below, and mobilisation from among the poor themselves, including their demands.
- *Policy Formulation and Legitimisation:* Address the technical content of reform measures. However, besides technical content, reform measures need to be accepted and be seen as necessary and important. Through their representatives, the poor should be part of the reform design process.
- *Constituency Building:* Convince beneficiaries of the advantages of reforms, and demonstrate that long-term benefits are worth short-term costs.
- *Resource Mobilisation:* Ensure the flow of adequate resources by addressing incentives, and exercising leadership in galvanizing constituencies. Financial, technical, and human resource commitments are needed.
- *Implementation Design and Organisational Development:* Reformers need to create and nurture networks and partnerships for cooperation and coordination, and provide for the development of new organisational skills and capacities in the public, private and non-governmental sectors. Old procedures, operating routines, and communication patterns are difficult to root out; change is likely to be resisted within some quarters.
- *Action Planning and Progress Monitoring:* Set up systems and procedures for obtaining feedback so that implementation is related to learning and adaptation, so as to produce results and impact.

Legal Empowerment of the Poor may be perceived as a spectrum that provides opportunities, protection and security to beneficiaries. It establishes a minimum 'floor' of entitlements and safeguards to which everyone is entitled, by the simple fact of our common humanity. The task is to establish this floor using human rights law. For every facet of empowerment, therefore, one test is to identify a range of potential policy options from which nations and citizens can choose, depending on their national context and the different starting points of various groups of the poor within them. Finally, a spectrum approach explicitly recognises the incremental manner in which poor people improve their lives in practice.

Implementation of empowering policies at the national level should seek to integrate legal empowerment into existing processes, such as the preparation of national development plans or poverty reduction strategies, rather than seek to

establish a 'legal empowerment programme' as a stand-alone entity. Another important dimension of national level work will involve working closely with professional associations to create a new cadre of legal, engineering or other para-professionals to assist poor men and women.

The base organisation of the poor must be engaged in the design of interventions of any kind. Information dissemination will be a central strategy for legal empowerment at the local level. In some countries with particularly weak or oppressive national governments, community empowerment activities may be the only feasible ones. Where social mobilisation is strong, however, the legal empowerment agenda can be built, bottom-up, by supporting existing initiatives of the urban or rural poor.

Mapping Legal Empowerment beyond the Nation State

Implementation undertaken at the global level should support country-level activities. The important differences among countries and regions call for a flexible, demand-driven approach that is appropriate to local realities. The likely focus would be on two types of measures to encourage legal empowerment at the country level: advocacy and knowledge management. Advocacy activities would focus on getting key messages out to important target audiences through a variety of vehicles. A website, or a 'brand/logo' that can be added to existing websites, providing updates and progress reports on how the Legal Empowerment of the Poor agenda is being implemented. An inventory of evidence on capacity development in domains similar to Legal Empowerment of the Poor would be compiled, and dialogue would be supported to disseminate global good practices.

Knowledge management activities should build on the initial inventories of good practice, on-going initiatives and actors engaged in promoting empowerment. A key element is to identify existing indicators and monitoring efforts that would further the Legal Empowerment of the Poor agenda. Similarly, and particularly in the case of the rights to justice and asset holding, evaluations for learning will prove to be valuable.

In addition, a range of measures should be undertaken to prepare for country-level dealings. Countries and international support organisations can be identified to support the process of change at the country level. Pro-poor toolkits and methods to support capacity building can be inventoried and gaps identified. These would be made available through a variety of avenues, including websites and workshops, among others.

At the regional and sub-regional levels, activities should also likely focus on advocacy and knowledge management. The region and sub-region are critical for success of the legal empowerment agenda; at these levels global norms can be adapted to different socio-economic contexts. Building political will for change will occur through regional and sub-regional organisations, UN Regional Commissions, sub-regional bodies, and in partnership with regional development banks. A series of new 'Regional Social Contracts' could be an important mechanism to forge political consensus on the legal empowerment agenda.

Toolkits and Indices

Carrying out Legal Empowerment of the Poor takes a variety of different tools or specific techniques, many of which have been developed by anti-poverty workers, community organisers and reform advocates around the world. These techniques were designed to promote activities analogous to the poor person's empowerment agenda of the poor, and they include: advocacy/lobbying; collection and dissemination of best practices; community map-

ping; competencies assessment; conflict prevention and resolution; domestic resource mobilisation; exchanges; focus groups; force field analysis; gender auditing; impact evaluation; influence mapping; institutional analysis; institutional twinning; internship programmes; the logical framework approach; national symposia; opportunity ranking; media outreach, public hearings and study circles; participatory budgeting; participatory poverty assessments; translating laws into plain language; political mapping; political will and risk analysis; problem solving studies; problem tree analysis; social impact and opportunities assessment; stakeholder monitoring with household surveys and key informant interviews; strategic planning framework; technical assistance and training on leadership, group work, and related management issues; travel grants/internships for officials; web-based support; and workshops.

These tools are general, flexible and easy to modify; development practitioners should reject the ones that don't apply to their particular country context. Critical tasks often include the following:

- Mobilising stakeholders: Identify key stakeholders and agree on a process as well as a set of principles that will guide the legal empowerment agenda. This should help to build confidence among stakeholders. Key issues include coordination mechanisms, adoption of a protocol or agreement, clarification of roles and responsibilities, and agreement on a broad process for reform.
- Situation analysis or legal empowerment diagnostic: A detailed assessment should be made of the relevant issues to be addressed. The analysis will identify policy, legal and institutional concerns, as well as gaps in resources, capacity and tools.
- Action planning: Development of the goal, objectives, strategies, and specific interventions that contribute to the legal empowerment objective. Critical issues include sequencing and timing, resource constraints, establishing a monitoring and evaluation framework, and ensuring a balance between process and products required to maintain momentum.
- Pilot activities: These should be built around the idea of 'quick wins' in areas where these are feasible. In this way one can build the credibility of the legal empowerment agenda and demonstrate initial success.
- Scaling-up: Expanding the range of activities and taking on more complicated challenges. Raising awareness of past successes, additional sensitisation, and strengthening the consultation process.
- Institutionalising change and the change process: Tackling some of the fundamental reforms by building on experiences in the pilot phase and scaling-up phase to reform the organisations and rules that shape the institutional context.

Both the formulation and monitoring phases of implementation look to indicators of democratisation, good governance, human rights protection, and many other variables related to legal empowerment. There are numerous measures of different aspects of governance in the public domain, but unfortunately, none is sufficiently developed to be of great value in measuring changes in the political or legal status of a country's poor men and women over time. Accordingly, legal empowerment programmes and projects must develop and use their own metrics for evaluating the socio-economic environment and gauging accomplishments, based on surveys and interviews.

Action planning and progress monitoring are especially important for outside agencies. Among its tools are:

- A management information system based on

targeted indicators endorsed by national stakeholders;

- Stakeholder monitoring to identify the responses of those that benefited or those that lost from the policy reform measures;
- Problem-solving studies to devise tailored and practical solutions to implementation issues;
- Process and impact evaluations to support learning over time.

The design of each component should respect some important principles: adaptation to user needs and availability of resources; user participation; parsimony (the least amount of information and cost required to accomplish the task), and simplicity. Monitoring of the implementation policy reform process will loom large over time, and a number of practical suggestions that have been gleaned from lessons learned from country experiences are offered here:

- Define a list of steps, processes, targets and milestone events in the reform process. This will enable the breakdown of the policy processes into a series of components to enable an easier grasp of what needs to be monitored.
- Make use of qualitative rather than quantitative approaches in monitoring the system, as they offer a more complete and nuanced set of data that are numeric and narrative.
- Engage implementing parties and beneficiaries in drawing up the monitoring systems and methodologies and acquire feedback. This will simplify the process of tracking previously identified indicators. Focus group discussions, workshops and other similar methods can be used to ensure participation.
- Customise the choice of monitoring methods to the needs and constraints of the implementing agencies.
- Delegate the monitoring process to an external body, such as civil society organisations, think tanks and advocacy groups, to ensure greater independence, transparency and accountability.

Strategy and Tactics

Change agents must put aside preconceived or uniform approaches to empowering the poor and think creatively about how to make policies available, affordable and acceptable. The following core values belong front and centre:

- Poverty reduction is the ultimate objective, so every reform must be judged by the extent to which it imparts the freedom that allows poor people to gain more control over their futures and to improve their well-being.
- The peaceful struggle against impoverishment must be participatory and based on respect for human rights, with the poor playing active roles along the way.
- Gains of legal empowerment should be broad-based and take into account the diversity of disadvantaged groups, especially indigenous people who are often inadvertently overlooked by policymakers.
- Gains also must include women, hence another standard against which to measure Legal Empowerment of the Poor policy is whether it takes full account of gender-specific effects.
- Empowerment of the poor in the end means social transformation — not only a more just distribution of wealth and income, but a more expansive sharing of power that enables disadvantaged people to begin bringing about significant change through their own actions.

A number of strategic options and considerations stand out. Although they are rich with paradox, it will be up to government officials, civil-society members, and development practitioners to

sort out the conflicting elements and determine the most promising strategic direction to take for their community, their country or their region. We list them as follows:

- Legal Empowerment of the Poor is easiest to implement where it is needed least.
- A rich base of comparative international experience exist, but there are no ready-made formulas for legal empowerment.
- Think systemically, act incrementally.
- Think long, go short.
- Start from afar, but change from within.
- Support associations of the poor, but do not compromise their independence.
- Work from the bottom up and the top down.
- Decentralise — except when it is better to centralise.
- Balance demand for change with the capacity to accommodate change.
- Put together informal and formal institutions.
- Look for cooperation, but anticipate confrontation.

While walking the tightrope of these strategic suggestions, change agents can call upon a variety of implementation tactics they can use, including:

- Be opportunistic.
- Use plain and local language.
- Work with para-professionals.
- Bring existing technical solutions up to date.
- Bring together technical expertise and grassroots experience.
- Dedicate resources to support participatory processes and coordination.
- Provide effective outreach.
- Provide access to information.
- Bundle service delivery.
- Support Alternative Dispute Resolution.
- Collaborate with professional organisations.

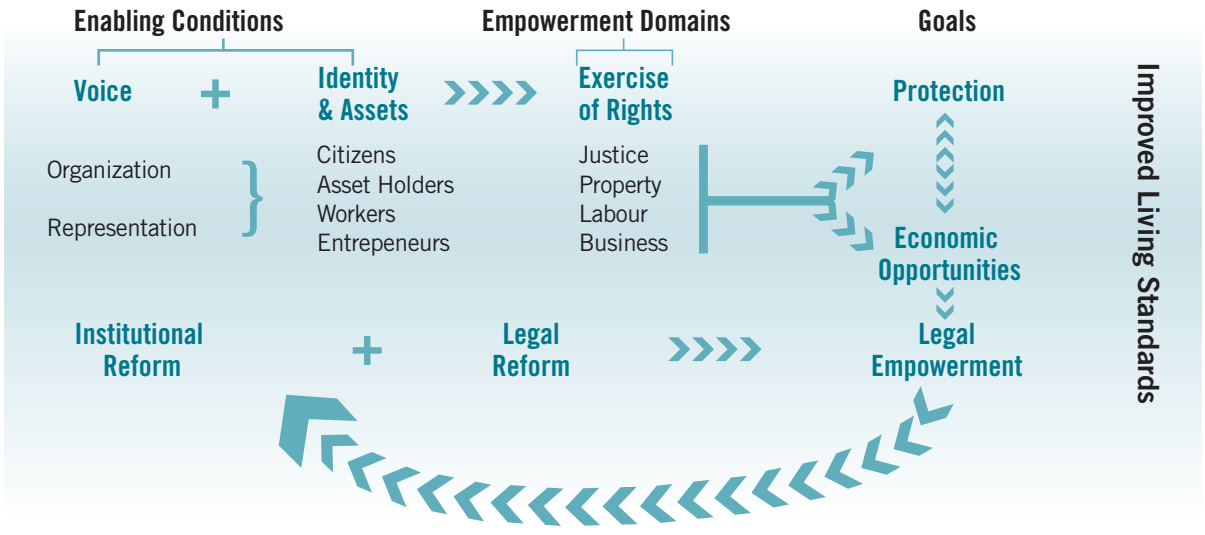
Change agents may consider employing these suggestions. While remaining true to the core values of the legal empowerment agenda, they may make it possible for many more poor people to improve their lives in the foreseeable future. Of course, these agents must be prepared to come up against countervailing factors, and there can be no guarantee of successful implementation; but steady and modest progress in fighting poverty with legal tools and rights is well within the realm of possibility in most countries.

1. Introduction: Attributes of Legal Empowerment

A singularly promising means for empowering poor people, the Commission contends, is to establish lawful claims they can use to lift themselves out of poverty. The four interdependent domains of empowerment highlighted by the Commission are a coherent, accessible legal order; more secure rights to assets and possessions; stronger and clearer labour rights; and fairer, more constructive rules for small business and micro-enterprise. Each domain is meant to provide defences against exploitation and loss of assets; they fit together in a way that would work to emancipate the poor to become both more productive and better able to keep the surpluses they produce.

The conceptual framework is depicted graphically in Figure 5.1. Due to insecure land tenure systems, and to the unequal distribution of other factors of production, as well as of economic and political power, the poor are shut out from economic opportunities. Voice, identity and assets are the key enabling conditions that offer space and leverage to the poor to bring their legal rights to bear in changing their socio-economic status. Using voice and taking on stronger identity require both bottom-up and top-down institutional reforms. Membership-based organisations must be built and strengthened, and state policymaking institutions must be made more inclusive and accountable to the poor. Strengthened by voice and identity in their roles as citizens, asset holders, workers, and entrepreneurs, the poor can begin to use their rights in the corresponding empowerment domains to keep hold of and grow the resources at their disposal. If things go by design, institutional restructuring and legal reform will furnish society's least advantaged members with the capability to raise their stature, meet their basic needs, and eventually move into the economic mainstream. Figure 5.1 also shows that the link between the enabling conditions and empowerment goes in two directions, and that the legal setting both shapes and reflects power relations. Existing political, administrative and juridical institutions have not been fashioned with the rights of the poor in mind as a major consideration,

Figure 5.1 **Legal Empowerment of the Poor**



so the Commission is advocating radical changes in the existing distribution of public (and private) power. As the poor gain income, assets and power, they will be in a stronger position to call for additional institutional reform, and so on in a virtuous cycle of empowerment. Changing policies in just one or two legal domains represents a start to empowering the poor, but the possibilities of legal empowerment will eventually require establishing more open, inclusive and accountable institutions system-wide.

This is a bold vision. Making it a reality means implementing a host of specific public policies around the world to tackle the everyday humiliations of powerlessness and destitution. Many legal covenants have been proposed and ratified by the world community that are reasonable starting points for building inclusive domains of power[1] — the challenge is to adapt the broad principles of institutional and legal reform to real life circumstances so they mean something to the multitude living on the edges of society. Implementation seldom goes as planned, or as the English proverb has it: 'There's many a slip 'twixt cup and lip.' This report discusses why those slips systematically occur and how development practitioners can work with poor people to sustain momentum during implementation despite the tendency for pro-poor policy to be diluted and delayed while being carried out.

Reports from the working groups for Chapters 1 through 4 have analysed the way rights-expanding policies in the four domains of empowerment can blunt impoverishing forces. Legal recognition is a fundamental step so that even the poorest citizens can invoke the law to assert their rights and demand protections to which they are lawfully entitled. For that to occur, judicial institutions must be made responsive, transparent, and answerable to all, not just to the privileged few. Property rights are central to the fight against poverty: they are a means for poor people to transform limited assets into secure, productive resources, which they can then use to enter the marketplace and claim a fairer share of gains from exchange. Eventually, they could build their asset base to support a better quality of life. Labour rights are another mechanism by which disadvantaged groups can obtain decent and productive work. Such rights enable the poor to claim their rightful share of the wealth they have helped to generate and to achieve their human potential. Many poor people are caught in ambiguous employment relationships where their rights as workers are illdefined and their ability to make occupations safe and non-abusive is limited. Business rights round out the anti-poverty approach taken by the Commission, in view of the fact that a significant share of the poor are either self-employed or already in charge of micro-enterprises. These entrepreneurs are burdened by unnecessarily complicated procedures and regulations, and they lack legal instruments providing access to the credit markets that would allow them to expand their small business activities and to take more risks with new investments.

It may be evident that the interdependent domains of empowerment are vital to ending poverty, but we must ask if, and to what extent, the underlying rights are realisable. The question has prompted our working group to address ways of putting rights-expanding policies in place so they actually reach the poor. In Section 2, we discuss the numerous obstacles that policymakers must face and overcome in efforts to implement rights-conferring programmemes. Understanding these obstacles is the first step to overcoming them.

2. Implementation: Challenges and Opportunities

Implementation refers to the carrying out of public policy. A public policy can be thought of as a course of action (or purposeful inaction) chosen by public authorities to confront a given problem or set of problems. Implementation thus involves government or quasi-government organisations setting aside resources and organising specific activities to improve society in line with announced plans. For Legal Empowerment of the Poor (Legal Empowerment of the Poor) the relevant policies may include citizen registration drives, land titling schemes, labour rights for workers, whether in enterprises or home-based, juridical recognition of informal businesses, and many other concrete activities.

Table 5.1 lists representative specific reforms identified by the different working groups that have been involved in preparing this volume. They are only illustrations, and may not necessarily be the most pressing required for a particular country in achieving legal and institutional change. (For the complete record of recommended possible reforms, we refer the reader to the groups' separate papers exploring the four domains of empowerment.) It should be self-evident that the policies suggested in Table 5.1 are not all equally needed or feasible for every country. Reformers need to look at the

Table 5.1 **Sample Legal Empowerment of the Poor Reforms**

Justice
• Effective, affordable and accessible systems of alternate dispute resolution. • Improved identity registration systems, without user fees. • Legal simplification and standardisation and legal literacy campaigns targeting the poor. • Stronger legal aid systems and expanded legal service cadres with paralegals and law students. • Structural reform enabling community-based groups to pool legal risks.
Property
• Legal recognition of joint registration of land rights and reform of discriminatory inheritance and divorce laws and practices. • Legal guidelines for forced relocation, including fair compensation. • Recognition of a variety of land tenure, including customary rights, indigenous people's rights, group rights, certificates, etc. • State land audits with findings published to discourage illegal taking possession of public land. • Simplified procedures to register and transfer land and property
Labour
• Fundamental rights at work, especially freedom of association, collective bargaining and non-discrimination. • Improved quality of labour regulation and its enforcement. • Inclusive approaches to social protection, delinked from the employment relationship. Labour rights (health and safety, hours of work, minimum income) extended to workers in the informal economy. • More opportunities for education, training and retraining.

menu of possible Legal Empowerment of the Poor reforms to find the policies that are applicable to given situations and to particular problems of poverty and disempowerment.

Implementation sometimes conjures up erroneous impressions of a chain of command for public policy, but this regimented image hides the disorderly element of the true process. It is best to avoid getting locked into a vision of public policy as a hierarchy of separate stages (one of which is implementation), and to think instead of interacting spheres of policy activity all of which contribute to implementation. We will navigate this loosely ordered process more carefully with the policy roadmap in Section 3 of this chapter.

Because it is an overarching set of aspirations, covering four mutually supporting domains of empowerment, Legal Empowerment of the Poor itself is not something that is usually 'implemented' in the narrow sense of the term being used here. Implementation entails identifiable projects and programmemes in different sectors, and many of these specific courses of government action might be empowering in different ways without ever bearing the official label Legal Empowerment of the Poor. Seldom is constructive pro-poor policy possible if the poor are the passive targets of state-centred reform; a balanced legal empowerment strategy is community-driven and grounded in local needs, which, however, can be translated into national-level reforms for wider impact on upward mobility (Golub 2003).

In some cases, the positive outcomes for the poor depend upon government establishing new procedures or institutions. (An example from the Andes countries is given in Box 5.1.) In other cases, the task is to revive an existing policy that was never fully or fairly enforced — for instance, a bill of rights that calls for treating everyone in society equally. A third possibility for aiding the poor is to change or eliminate existing policies that have outlived their usefulness or that have come to serve new purposes now at variance with their original intent. Examples of the latter are colonial era statutes regarding vagrancy, trespassing and forced labour, many of which survive on the books of many countries. Whatever their original function, these relics of colonialism have the effect of criminalizing poor people. Archaic laws of this

Box 5.1 Removing Barriers to Public Works Contracts

The development of public investment policies that promote the use of labour-based technologies has improved access of small local contractors to public procurement processes for services and works in Andean countries. Activities range from contracting of micro-enterprises for routine road maintenance in rural areas, to involving them in waste collection and street cleaning in urban areas. An ILO study shows, however, that access of small local contractors to public procurement is still very limited due to the existence of a series of legal and institutional barriers. For example, countries may restrict contracts to enterprises recorded in the national contractor register or to recognised civil engineers or architects.

A transparent information system about tenders needs to be implemented to facilitate the participation of small contractors in public works. Two alternatives have proven workable: A 'small contractor card' and a register for local contractors, enabling small contractors to carry out small and medium-sized works in the local area after passing certain prerequisites and minimum qualification criteria. Other possibilities include: subcontracting consortiums and associative contracts for contractor collaboration; special contracting arrangements in projects receiving donor funding; preferential treatment of micro and small enterprises in public procurement in Peru; and direct contracting (i.e., one bidder) for small contracts.

See: José Yeng and Serge Cartier van Dissel, Improving access of small local contractors to public procurement — The experience of Andean Countries, ASIST Bulletin #18, ILO (September 2004).

nature need to be rewritten or abolished to encourage broad-based legal empowerment.

Policy Initiation

Where a public policy originates is therefore a leading factor to consider with implementation. There is also the question as to who proposes such a policy and who formulates the approach. The degree of domestic enthusiasm and support is what matters most for implementation, though external donors and international agencies are a useful source of ideas for policy reform. Often, a crisis such as a natural disaster, or warfare, may act as a powerful stimulus for introducing new policies; but it is neither a necessary nor a sufficient condition for implementation. In the wake of the Asian financial meltdown in the second half of the 1990s, for instance, Indonesia enacted a series of important labour law reforms that began with guaranteeing the fundamental right of freedom of association. The first legislative change repealed provisions that limited representation to a single government-controlled national federation of trade unions, and put into place a framework offering workers the chance to form federations as they wished. These reforms might well have been shelved under normal conditions.

Building on earlier work analysing political will for anti-corruption activities and on policy reform (Brinkerhoff 2000; Brinkerhoff and Crosby 2002), the following initiating scenarios for legal empowerment can be identified:

1. Grassroots groups, social movements, membership-based groups of workers or of small business owners mobilise and demand change. Some decision makers in the government respond favourably. This option provides motivation for insiders who can potentially champion change.
2. Choice of Legal Empowerment of the Poor reform is based on country actors' consideration and analysis of options, anticipated outcomes for various groups, and cost/benefits. When country actors choose policies and actions based on their own assessments of the likely benefits to be obtained, the alternatives and options, and the costs to be incurred, then one can credibly speak of independently derived preferences and willingness to act.
3. Government initiates Legal Empowerment of the Poor reform. Commitment is questionable when the initiative for reform comes largely from external actors. Some degree of initiative from country decision-makers must exist in order to talk meaningfully of political will.
4. Government mobilises key stakeholders in support of Legal Empowerment of the Poor. This set up concerns the extent to which government actors consult with, engage, and mobilise Legal Empowerment of the Poor stakeholders. Do decision-makes reach out to members of civil society and pro-poor groups to advocate for the changes envisioned? Are legislators involved? Are there ongoing efforts to build constituencies in favour of new Legal Empowerment of the Poor reforms?
5. Government publicly commits and allocates resources to Legal Empowerment of the Poor reform. To the extent that country decision-makers reveal their Legal Empowerment of the Poor policy preferences publicly and assign resources to achieve announced policy and programmeme goals, such actions indicate commitment to change. When countries commit to changes funded by outside donor resources, the presence of political will becomes unclear.
6. Government supports continuity of effort. Another situation is the assignment of resources and effort over the long-term to achieve Legal Empowerment of the Poor goals. One-shot or episodic efforts would signal weak or wavering own-

ership. Legal Empowerment of the Poor reforms, by their very nature, are long-term undertakings.

7. Key actors monitor Legal Empowerment of the Poor progress for learning and adaptation. It shows a level of commitment when country actors establish a system for tracking Legal Empowerment of the Poor reform progress, and actively manage implementation by adapting to emerging circumstances over time. However, learning can also apply to country decision-makers who have been able to observe Legal Empowerment of the Poor policies, practices, and programmemes from other countries and who can selectively adopt them for their own use.
8. Donors club together into a joint programmeming strategy, or multi-donor group (e.g., through the Harmonisation Alignment and Coordination approach). This option provides another possibility for outsiders to assess the possibility for change. While external support can be a strong catalyst for change, external micro-management can also easily render the process too burdensome for reformers and policy champions within government. It is important that the donor role in Legal Empowerment of the Poor be supportive and not self-defeating.

Before adopting any of these options, thought should be given as to whether to engage in several Legal Empowerment of the Poor domains, or sectors, at once, or to proceed with one and then transition to others. Also, one must be on guard to ensure that a policy chosen does not simply increase state power and patronage in ways inconsistent with pro-poor objectives. Agrarian reform has often gone wrong, with the supposed beneficiaries becoming victims. The best guarantee against such perverse developments is to bring the poor themselves into the policy initiation process. Civil societies, NGOs, membership-based organisations of employers and of workers, coalitions and networks all have a major role to play in generating and articulating bottom-up demand. The participatory objective often goes hand- in-hand with decentralisation.

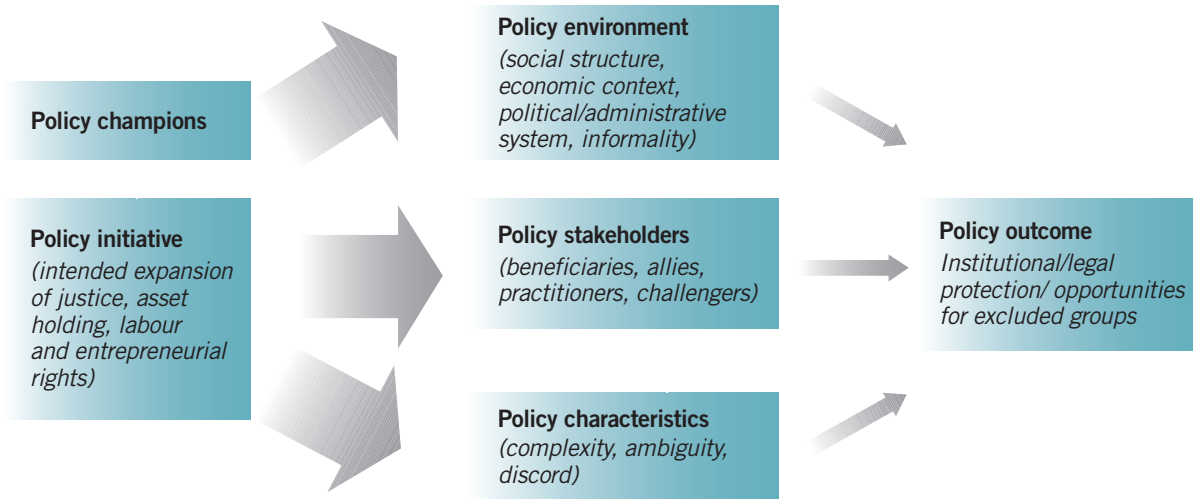
But the advantage of community engagement and decentralised structures is not a universal law. In some cases, central authorities may be the best allies for the poor, because they can potentially sidestep local spheres of interest in support of marginalized and disadvantaged communities. They could serve as counterweight for the poor and minorities against what may be entrenched control of local government by anti-poor factions. A concrete example is the key role played by the federal government of Brazil in combating forced labour in remote rural areas of the country (ILO 2001: 25).

Policy Champions

The degree of initial government support for any policy derives from domestic leaders who share a perception of a problem and who have agreed on how to solve it. One or a few of these people may emerge as policy champions, or entrepreneurs, who make a policy their signature issue and drive it forward over time. Securing political will for any new course of action needs champions to bring other government actors on board and preclude policy spoilers from blocking introduction of the policy. Having strong advocates at high levels of government is vital to getting the legislative and executive arms to cooperate and follow through on policy reform.

Policy champions within government may be emboldened by backing and pressure from civil society within the country. To start a controversial policy such as Legal Empowerment of the Poor, which threatens many vested interests (see below), domestic policy advocacy is especially important. That is another reason why organising by the poor and their representation of their rights are basic to

Figure 5.2 **Influences on Policy Implementation: Empowering the Poor**



the Commission's empowerment agenda.

A policy champion can come forward at any level of government. Many Legal Empowerment of the Poor policies do not start out not at the national centre, but emerge from the periphery via local or regional governments. A mayor or town council, for example, may want to take care of problems at an irregular housing settlement, an open air market or a waste disposal site. Acting pro-actively, the local government may try to include the people who live or work in these areas in finding the solutions. Perhaps more commonly, the local government may simply go ahead with reforms devoid of popular participation, sometimes triggering an empowering reaction as poor men and women move to legally to protect themselves from the harm caused by the policy. In either scenario, the national government may be on the sidelines of implementation.

Protagonists dedicated to the task of implementation may emerge out of other stakeholder groups (see below), as well, not just from the public sector. Any individual with leadership skills, initiative, and commitment can play the role of policy champion, though they may be most effective if they also have technical knowledge about the subject at hand. Having several policy champions is generally better for implementation.

Forces Affecting Implementation

Once a policymaking process has been started, several common factors have been found to facilitate or impede reaching the desired policy conclusion, notwithstanding the content. Some of the general influences on implementation concern the people affected by the policy, or the policy stakeholders. Another set of influential factors reflects attributes of the context in which the policy exists, or the policy environment. A third set is distinctive features or policy characteristics of the proposed course of action. We can think of these three categories of significant forces as the 'who', the 'where', and the 'what' of policy implementation. (The 'how' will be dealt with in Sections 3 and 4, on implementation roadmaps and pro-poor toolkits.) Figure 5.2 presents a schematic summary of these influences on implementation in the specific context of empowering the poor. The arrows in Figure 5.2 are shown as diminishing in size during the implementation venture, to convey the idea that these tend

to be frictional forces that reduce the probability of fully attaining projected policy outcomes. The large initiating arrows also assume there is strong political will for the policy, which may or may not be true. The frictional influences on implementing Legal Empowerment of the Poor will test the resourcefulness of policymakers seeking to carry out the Commission's agenda. Legal Empowerment of the Poor requires continued vigilance to push back against inertia and the status quo.

Policy Stakeholders

A logical place to start when trying to understand influences on pro-poor policy implementation is to enumerate the stakeholder groups and apprehend their stand on the issue being considered. Stakeholders are people with an interest in a policy, and who have the capacity to move the policy forward or stop it in its tracks. Some of these groups may be set up as formal entities, while others may be unorganised collectives with shared interests but no official representation or recognition. Stakeholders act out of regard for their own advantage, as they define it.[2] To implement policy requires a critical mass of supportive constituencies and minimisation or neutralisation of the unsupportive groups.

The important thing to bear in mind in looking at stakeholders is that they act in response to economic and political incentives. At its core, legal empowerment is about changing incentives to induce poor people to be more creative and productive by allowing them greater autonomy and freedom. Change agents are nevertheless cautioned to be on guard against perverse incentives that could lead some constituencies to act in ways detrimental to poverty reduction.

Accordingly, it is advisable to conduct a stakeholder analysis and to plot stakeholder interests and intentions regarding the problem that a particular policy seeks to address.[3] There are many possible formats to use with stakeholder analysis, but the usual practice is to start by enumerating the possible constituencies. Examples from the land sector might include the following:

- Individuals: landowners, landlords, tenants, shareholders, squatters, refugees, as well as beneficiaries of specific programmemes.
- Public sector: politicians, line ministries, provincial/municipal/district departments.
- Private sector: land developers, estate agents, notaries, lawyers, surveyors, planners, bankers, media.
- Civil society: business associations, NGOs, CBOs, CSOs, faith-based groups, public policy research institutes, universities.
- Traditional authorities: chiefs, elders.
- International development partners: multilateral institutions, bilateral agencies, private foundations, international NGOs.

The next step, typically, is to estimate each constituency's position on an issue, the intensity of its interest in the outcome (or policy salience), and the group's relative power to affect the outcome. This may be tricky because any given set of stakeholders need not have monolithic interests. Policy cleavages are important because they affect the possibility of building alliances across groups. Also any one member of these groups may belong to several stakeholder categories, and this may also present opportunities for communication, bargaining and coalition-building among the groups. In general, it is must be remembered that the configuration of stakeholder interests and policy positions is not static.

Sometimes the importance of the issue to the group and its potential influence on implementation might be rated on a rough zero-to-ten scale (from no importance to vital). The priority to be accorded the group could also be quantified. Table

Table 5.2 **Illustrative Stakeholder Matrix**

Stakeholder	Interest in the Policy (Pro/Neutral/Con)	Salience of the Policy (0-10)	Influence on the Policy (0-10)	Priority for Policymakers (Hi/Medium/Low)
Group 1				
Group 2				
Group 3, etc.				

5.2 shows a generic stakeholder matrix, similar to the kind of tool policymakers might develop to identify potential alliances and implementation strategies for an Legal Empowerment of the Poor policy initiative.

Archon Fung and Erik Wright (2003) suggest two generic strategies to contend with stakeholders: top-down adversarial strategies and participatory collaboration. Building alliances across stakeholder groups is vital, which will turn on the networks and coalitions to which they belong. Support for Legal Empowerment of the Poor will arise from stakeholders who view it as good politics and a means to build political support and legitimacy. Donors can assist, but the driving forces for change must come from within the country. National leadership in debating the difficult issues is crucial.

With regard to participatory collaboration, agreement may be absent about who should be involved in decisions. Some stakeholders will not have a prearranged structure. Also, there may be no approved inter-stakeholder process for developing common policy positions. Such an institutional arrangement will therefore need to be expressly brought together for purposes of implementing Legal Empowerment of the Poor. The challenges of establishing commonly agreed upon definitions of problem situations and identifying the relevant stakeholders must be overcome as a first step.

Adversarial situations are even riskier for the poor. Most of the time, disfavoured, disenfranchised stakeholders stand to lose in confrontations with better endowed groups. Resolution of the conflicting interests ranges along a continuum from negotiation to mediation, to third-party adjudication or arbitration, to refusal to compromise at all. Adversarial stakeholders ordinarily enter into negotiation when they see that is the best alternative compared to what they could obtain 'away from the bargaining table' (Ramirez 1999). Where conflict already exists, a strategic starting point for development professionals is to understand stakeholder preferences for how to deal with the clash of interests.

In thinking about stakeholder preferences, there are four stylised stakeholders (shown in the middle box of Figure 5.2, above) to consider: the policy's beneficiaries, obviously, but also its allies (who support the policy even though they may not benefit directly), practitioners responsible for the policy, and challengers of the policy. Some of the possibilities are sketched out below; these are illustrative categories and, needless to say, the descriptions may not accurately depict any actual group in any given country. As noted, real groups may straddle the generic categories or switch back and forth among them, for example from being Legal Empowerment of the Poor challengers at one point in time to being Legal Empowerment of the Poor allies at another period.

Beneficiaries

Poor people are the target beneficiaries of Legal Empowerment of the Poor policies. They are the ma-

jority of the population in many countries. The term 'the poor' is a convenience, of course, for this multitude is far from a monolithic constituency despite sharing hunger, ill health, inadequate housing and other pathologies of poverty. They live in remote rural villages and in urban shantytowns. They work as subsistence farmers, agricultural labourers, domestic workers, street vendors, and trash recyclers. They are members of underrepresented ethnic minorities — often internal or external migrants seeking improved opportunities in a new area where they lack clear legal status. They have been displaced by war and civil unrest, and they are indigenous people who have been left out and left behind by the dominant society. A lopsided number of the poor are women, who usually have home and family responsibilities on top of any work they have found outside the home. It is useful to have a segmented census of the poor as a starting point for Legal Empowerment of the Poor work in any country, to know who they are, where they are located, and to what extent their interests are aligned.

Beneficiaries of legal empowerment need to have as big a hand as possible in initiating and designing the relevant policies. Even though they lack physical or financial resources, and organisational resources and social capital in many locales, the poor always have a passive capacity to derail legal reforms aimed at them. If the poor are afraid of or averse to playing their designated role in implementation, the best intended policy would come to nothing. It is critical that their views be aired and taken into account by policymakers to make sure the proposed course of action fits what poor stakeholders are prepared to do.

Because poor stakeholders are diverse, legal empowerment platforms may have surprisingly uneven impact if officials are inattentive. An illustration comes from South Africa. Residents of extra-legal settlements in South Africa can be given individual deeds to their homes. Yet, for some inhabitants the result is a decrease in security of tenure. Ownership is registered in the name of only one member of each household, to the disadvantage of women and members of the extended family. The new property owners also become liable for paying local taxes and service charges, forcing some to sell because they cannot afford to pay. A few people who, by statute, come to own dwellings, cannot not live in them because informal street committees decide other people should take possession of the properties (Cousins et al. 2005). Thus an apparently equitable policy to expand asset-holding rights ends up having an unequal impact on poverty, because even within these very poor residential areas, material goods and power are not distributed equally. Policymakers might have minimised this outcome by differentiating among beneficiaries and paying greater attention to existing social practices that have widespread legitimacy (see the later discussion of informal institutions).

Poor women present a particular challenge for Legal Empowerment of the Poor because in some cases their advantage can be to the disadvantage of the male half of the poor population. In East Africa, for instance, women tend to enjoy 'use rights' to land (see further discussion of the spectrum of land rights, below) as wives and mothers, but lack transfer rights due to customs that reserve these for men. Women therefore are without secure claim to a natural resource they use for daily supplies of fuel, water and food. Legal insecurity inhibits economic progress because women cannot make decisions on expanding or developing land (UNEP 2004:99). Their fathers, husbands and sons are likely to balk at efforts to implement expanded women's rights in this important economic realm, because they would compromise men's rights to the same assets. Women's community based organisations may be the answer. These have proven somewhat effective in preserving women's land access in Mexico, though

effective land control does not necessarily follow (Radel 2005).

Poor indigenous people, who represent 15 percent of the world's poor but only 5 percent of its population (ILO 2007: 27), are another special test for Legal Empowerment of the Poor due to physical or social isolation from the influence of the governance claimed by a nation-state. Some indigenous people are nomadic; some have been dispossessed de jure or *de facto* of their ancestral lands. They may speak a separate language. Indigenous people often live in remote sites with high economic potential for water, timber, or medicinal plants, but lack legal instruments to prevent over-extraction of natural resources by outsiders. All these characteristics make it all the more important for government to reach these would-be beneficiaries. (See Box 5.2 for an example of a participatory approach that helped indigenous people in Philippines assert claims to their ancestral realm.)

Box 5.2 Ancestral Domain, Sustainable Development, and Protection Plan of the Bago and Bugkalot Tribes.

The Philippines Indigenous Peoples Rights Act (IPRA) of 1997 consolidated bills related to ancestral domains and lands, and international agreements on the recognition of land/domain rights of the indigenous peoples. Metagora (a project funded by OECD) in the Philippines developed evidence-based assessment methods and tools combining quantitative and qualitative approaches. The study measures four aspects of the rights of indigenous peoples to their ancestral domains and lands: the indigenous peoples' perceptions and awareness of their rights, the enjoyment or violations of these rights, the government measures and customary laws for the realisation of these rights, and the availability of mechanisms for redressing violations or fulfilling rights.

Metagora's method of work is based on a bottom-up approach consisting of:

- Working with the shareholders in pilot countries, to identitfy issues in human rights, democracy; and governance for which evidence-based assessment is highly relevant;
- Applying statistical methods and tools to that particular context;
- Assessing these methods for their capacity to provide policy relevant results;
- Providing stakeholders with a shared knowledge on the policy issues at stake; drawing universal lessons from the local experiences;
- Formulating recommendations for further application of the tested methods elsewhere.

Three tribes covering public ancestral domains in three regions of the Philippines were covered by the survey. Major respondents were representative samples of the tribal population stratified according to selected criteria that are in consonance with the customs and traditions of the target population. Non-indigenous people respondents, especially the governance stakeholders, also comprised the secondary respondents of the survey.

This is a case of objective survey data having policy force on account of the involvement of an international project in partnership with the Commission on Human Rights of the Philippines, its Regional Offices, the National Commission on Indigenous People, and National Statistical Coordination Board (NSCB).

The data and evidence gathered had the positive consequence of making the national and regional government authorities take the implementation of the provisions of the Philippines Indigenous Peoples Rights Act seriously, so that the rights of indigenous peoples are settled, a proactive public policy approach is taken, and funds provided under the law are allocated properly to benefit the indigenous people.

Source: Metagora Training Materials. Ref: http://www.metagora.org.

At the national level, a society's failure to provide opportunities to all in an ethnically diverse population (poor and not-poor alike) is found in some studies to be a drag on economic performance, making it harder for a country to grow its way out of poverty (ILO 2007: 9-10). Policymakers need to consider how ethnic and religious cleavages within a country, along with traditional caste or gender-based exclusions and oligarchic traditions of domination, affect the distribution of wealth and income, and the projected likelihood of empowering reforms. These power relations may have a significant impact on the chances of implementing Legal Empowerment of the Poor. We return to the questions of the economic and social context later in Section 2.

Allies

The main allied stakeholders of Legal Empowerment of the Poor policies are pro-poor community associations and activists of civil society. Some of these stakeholders will be local social action or advocacy groups, such as the Indonesian Legal Aid Foundation whose mission is to defend poor people in court and expand their rights. Allies may also include professional associations sympathetic to the plight of the excluded and have-nots. For example, Ecuador's Association of Law School Deans supports legal assistance for the indigent in that country. National bar associations are engaged in similar activities in many nations.

Certain politicians may come out as allies. It is not uncommon, for example, to find even somewhat disreputable politicians offering to use public land to woo voters' support in slum areas. Such persons may not be reliable allies, however. More dependable will be the genuine policy champions, who have emerged from among the national or local political leadership to make a progressive name for themselves as friends of legal empowerment.

Some commercial enterprises, and particularly larger companies and multinational corporations, may fall into the camp of policy allies on certain occasions. Over 3,000 corporations in more than 100 countries have joined the UN's Global Compact, which commits them to support high standards in the areas of the environment, human rights and labour rights (UN 2007). These firms often say they would like to forge partnerships with poor communities in the developing world to create business models that are sustainable, equitable and embedded in the local culture (Hart 2005). Some signatories are turning to the poor as business partners, suppliers, or distributors.

Nairobi, for example, has a productive alliance between informal entrepreneurs and larger businesses. Two business associations joined with the street vendors' organisation in a dialogue with local authorities to improve the status of street vending. Street vendors in Kenya's capital city are subject to harassment and demand for bribes from city inspectors. The uncertainty forces the vendors to limit their stock and hinders their productivity and income. The two conventional associations had wanted to drive out street vending because of litter and crowding, but came around because, among other things, of a growing realisation that the outdoor presence of vendors limits crime and thus is good for everyone's business. Interestingly, the vendors' group wants its members to pay licensing fees, on the argument that paying gives the members legal cover and provides leverage for government services (Kamunyori 2007).

It should go without saying that these observations do not mean every self-described ally of the poor is a true friend of the legal empowerment agenda. The real world is far more subtle and complex than that. Some grassroots groups may feel threatened by Legal Empowerment of the Poor if they do not have the lead in directing the movement. Stakeholder analysis cannot be done by mechanistically applying generic labels to pre-determined groups of

actors and assuming they will behave according to their category.

Practitioners

A third important set of generic stakeholders are practitioners — mainly the government officials, court officers, and others who draft, interpret and administer the land laws, labour statutes and commercial regulations in a country. Despite sometimes having low positions in the bureaucratic hierarchy of government, these officials can and do wield considerable effective discretionary authority over implementation.

One common problem is that permits, business licenses, tax assessments and the like are sources of power and potential illegal income through bribes, kickbacks and other 'rent-seeking' behaviour.[4] Even the abstruse text describing many of these regulations provides low-level government employees with power, for citizens cannot decode legal jargon easily on their own. The interests and attitudes of government officials at all levels must therefore be factored into the implementation process. In Beijing, for example, law enforcement officers and local authorities look the other way when rural-urban migrant entrepreneurs do not comply fully with license requirements and instead lease licenses illegally from local residents. This illicit license-leasing practice is sustained because bureaucrats profit from it (He 2005). Streamlining the business registration process in line with Legal Empowerment of the Poor goals would threaten illegal but routine bureaucratic income in China's capital city.

These comments do not imply that bureaucrats are always spoilers of reform. A new programmeme may also mean that staff members gain promotions, have interesting new responsibilities, or have training opportunities or other perquisites. Within every government executive agency or judicial institution there may be potential policy champions, who come to identify with a particular solution to a social problem and make strenuous effort to get it implemented. As noted, entrepreneurial effort by policy champions in elected and administrative office is a consistent theme in successful policy implementation around the world.

Challengers

A final constituency to consider is rival stakeholders that challenge disenfranchised people exercising new rights or reviving latent ones. These competing or oppositional stakeholders may include foreign businesses and large domestic companies, but also cover many small landlords, mine owners, shopkeepers, and moneylenders, plus some lawyers, engineers, and similar specialised experts who tend to prefer the status quo. We should be careful about brushing any class of people with too broad a stroke, but numerous local elites and professionals are likely to feel threatened by confident and forceful poor people and may try to pre-empt improvements in poor people's status and income. Lawyers, for example, may lose the upper hand with clients if laws are translated into everyday language or if inexpensive conflict resolution forums are made widely available.

A common and tricky problem of implementation is when contending stakeholders do not try to block reforms outright, but subtly manipulate emerging policies (and especially donor-driven programmemes) to their advantage — a phenomenon known as 'elite capture' (Decker 2005). This distortion is chronic with Legal Empowerment of the Poor activities. In many Asian countries, for example prospective titling programmemes often have the perverse effect of inducing speculators to buy up land ahead of time from squatters at slightly better than informal prices. The squatters come out ahead in the short term, but pay the opportunity cost of not waiting long enough to get the main benefit of the titling

programme — which accrues to the people with deeper pockets. Low income and vulnerability lead to a safety-first calculation, so squatters reasonably prefer to have their cash immediately. Contrary to the stated intention of the titling programmeme, however, elites capture most of the gains from it. The sequential and conditional release of funds is one strategy for countering the persistent problem of elite capture (Platteau 2004).

Policy Environment and Contextual Analysis

Crucial as stakeholders are to implementation, even more basic is the country context. In most countries, a minority of the better-off holds disproportionate influence over the local and national policy apparatus due to its more sophisticated knowledge about markets, to its greater business and political contacts, and to its better access to finance. These power structures influence the decisions on who prevails in the bargaining, competition and cooperation among stakeholders, and also constrain many other facets of Legal Empowerment of the Poor. It is impossible to decide what sorts of reforms to attempt and to determine what it will to take to carry them without first coming to an honest assessment of the country policy environment.

A clear-eyed contextual analysis should therefore guide all decisions on if, when and how to go forward with Legal Empowerment of the Poor policies and provide guidance during implementation. As Figure 5.2 suggests, the most important constraints set by the national socio-political context are:

- The domestic social structure, especially its gender, class and ethnic makeup, plus cultural attitudes toward participation and equality.
- The economic context — including the distribution of wealth and income, and the level and rate of economic growth.
- The characteristics of the state — both the political and the administrative system.
- The extent of economic and political informality and tensions with the formal and officially recognised systems.

These are the critical factors for contextual analysis and the parameters within which practitioners must operate as they try to steer implementation of legal empowerment reforms.

Social Structure

Several important points regarding social structure were already implied in the discussion of stakeholders, which emphasised the task of building winning coalitions for change among clashing constituencies. Thus, a country with fewer poor people relative to its population will likely find it easier to integrate them into the legal and economic system compared to a country with more poor people (though the poor also may be easier to ignore when their numbers are lower). Similarly, a homogeneous country will also find empowering people at the bottom takes less effort compared to a country where the population is deeply divided by language, religion or national origin. The absolute gap between rich and poor also matters, with a smaller gap facilitating implementation of Legal Empowerment of the Poor policies. A society where women have considerable legal recognition will have less ground to make up with empowering poor women than another society. Whether the social and economic cleavages are cumulative or cross-cutting (that is, to what extent does membership in a particular religious community or ethnic group correlate with discrimination, low income, exclusion from power, and other negative attributes). These are given social facts at any point in time, though they can change in a country due to economic growth, human migration, mass education, and exposure to media, among other factors. Poli-

cymakers must tailor their empowerment strategies to the structure of particular societies.

Cultural factors are crucial to the social structure, as well. Assorted traditions and customary practices colour the systems of property rights, contract enforcement and dispute resolution that the poor typically use. Indigenous people are particularly likely to have elaborate but officially non-existent systems in place for organising economic life. There may be a large gap here between the shared norms and values of the beneficiaries of legal empowerment versus their stakeholder allies (not to mention their rivals or opponents). That cultural distance makes it harder to come up with workable and effective empowerment instruments and activities (see additional discussion on informal institutions, below).

Another important social structure consideration is that many societies and subcultures reflect hierarchical and patriarchal power structures that may impinge on implementation of legal empowerment, which is predicated on broad participation of the beneficiaries in decisions and the levelling effects of economic rights. Great tact may be needed to find socially acceptable yet effective means of involving, say, women or members of historically excluded minorities in choosing and implementing policies that expand the ambit of empowerment. Development practitioners need to pay close attention to these cultural factors when they consider how to carry out Legal Empowerment of the Poor.

Economic context

A country's social structure cannot be isolated in practice from who holds the country's wealth and exercises economic power. The distribution pattern may reflect historical injustice whereby a privileged few used their political influence and access to the justice system to legitimise unfair claims to property. The more unequal the initial pattern of ownership of land, capital, and other productive assets, the more cautious will reformers have to be about regularising the system of economic rights. There is no advantage to the poor from locking in place deep pre-existing inequities in proprietorship — though to correct those inequities compensation must usually be paid to the pre-existing asset holders, which may be both financially costly and politically risky due to the resistance it is likely to spark. It is important to the Commission's agenda that Legal Empowerment of the Poor reforms are designed in a manner that braces the claims of the poor to assets without amplifying the existing skewed allocation of property.

Land is probably the most difficult economic resource to manage, both because its supply is limited and because so many poor people depend directly on land for their survival. Indigenous peoples, and pastoralist and subsistence farmers must assure their use of forests, pastures and arable fields, but, as mentioned earlier, that brings them into head-on conflict with richer claimants to the same limited resources. Land reforms have proven a conundrum in many countries due to the expense and complexity of managing overlapping claims to the identical resource.

In addition to how a nation's 'economic pie' is divided up, the overall size of the 'pie' also influences the extent of absolute poverty and hence the urgency of poor people's empowerment and the scale of the effort needed to confront that social problem. Economic growth makes it easier to redistribute assets to the poor, yet, ironically, growth is also an unsettling force for the poor.

A case in point is redevelopment of the vast squatter settlement of Dharavi, in Mumbai, India. As the land has soared in value, the city and state have advanced plans to replace the informal township with upscale development. Because

Dharavi's residents lack ownership rights their ability to defend their homes and shops is limited. Fortunately, direct action and advocacy from civil society has gotten the government to agree to provide small apartments to the residents who will be displaced. That is not the end of the story, however. These redevelopment plans can be drawn up without any consultation, and it is unclear who within Dharavi's population will get the new living units and work sites. Mumbai has sky-high real estate prices and the state and the private developers still stand to earn huge amounts over and above the cost of this mitigation effort (Patel 2007). On the other hand, mitigation may not have been forthcoming at all were it not for the dynamic economic conditions in Mumbai.

With the clear exception of many programmemes involving the transfer of land and property, the financial cost of empowerment programmemes may be modest. Since some elements of Legal Empowerment of the Poor are revenue neutral, it is possible to pick the resource neutral elements first, or else the ones that require limited expenditure of resources. Special attention should be paid to low-cost ways to enforce property rights, guarantee contracts, and provide fair resolution of business and commercial disputes. Still, even these activities will slow to a crawl if the country does not find enough funds to pay for them.

Empowering the poor is a long-time endeavor so ongoing budget support is problematic. Take many of the emerging market economies in Asia. They still frequently underpay their judges and allow their courts to languish with inadequate facilities. Many of these legal systems are swamped with a backlog of cases and are widely accused of corruption. Hence, fast economic growth does not necessarily put an end to resource scarcities for implementation if change is not a high priority.

Political System

Political system variables (i.e., factors affecting the demand side of government) are crucial for implementation and need to be taken apart and looked at carefully. To combat legal disempowerment, there is no substitute for collective action by poor men and women to push for rights and protections, as in the Mumbai case cited above. When doing contextual analysis, therefore, practitioners must consider whether farmers, residents, workers, consumers and other constituencies have legal protection to organise and petition the government or bargain with private entities to redress their grievances. In countries where these basic rights are neglected or suppressed, Legal Empowerment of the Poor will be harder to carry out. The right to organise does not exist in a vacuum separated from actual organisations, and thus the level of development of civil society is another important influence on the diagnosis for policy implementation. It is easier to carry out Legal Empowerment of the Poor in countries with strong community organisations, occupational membership groups or pro-poor political parties, than where such social capital is absent.

As we have stressed, implementation of Legal Empowerment of the Poor usually involves community participation, sometimes through formal venues set up for the purpose or else through the established mechanisms of local government. Simply making participatory procedures available, however, is not sufficient because the better-off and more connected members of communities tend to take advantage of them. Barbara Pozzoni and Nalini Kumar (2005) describe two related forms of social exclusion: formal, which refers to the poor and disadvantaged not showing up at meetings, and substantive, which refers to their not speaking up in these venues. In India, for example, local self-government appears to be working reasonably well,

but some community members report being too intimidated to contradict local leaders and government administrators (Viswanathan and Srivastava 2007: 72). Social mobilisation of the poor can help make participatory procedures in government work closer to the way they are meant to.

Legal empowerment is sometimes also facilitated by democratic competition and free discussion of policy issues at the national level, which induces leaders seeking majority support to vie with policy proposals favourable to disadvantaged citizens. But these are not panaceas. Procedural democratic rule is now quite common in the world, yet empirical studies show countries experiencing democratic reform do not have systematically better poverty outcomes (Ross 2006). For example, democratic countries are just as capable as dictatorships at carrying out government austerity programmemes that fall most heavily on the poor (Lindenberg and Devarajan 1993).

The procedural democracies are not at all consistent in the extent to which they protect minorities, root out political corruption and prevent state-sponsored violence against citizens. Often the leadership positions in these countries are dominated by the same social stratum that was in charge before the advent of procedural democracy and competitive politics. In some societies this dominant group's role is legitimated by religion or tradition, and deferential attitudes on the part of the poor may add another stumbling block to empowerment. One explanation for the economic disparities that persist under democracy is the holdover of identity politics that divide the poor (Varshnay 2005). There may also be deep rooted patron-client networks that push down the poor (more on this topic later).

Take the example of Philippines. Its government is chosen in contested elections. Thousands of community based organisations exist in Manila and elsewhere, so there is a strong civil society. Philippines has a national housing finance programmeme to regularise the city's vast informal settlements, implementation of which is left to partnerships between community groups, local governments, and the private sector. Local governments are also required to set aside land for relocation of informal settlers and to compile lists of informal settlers who are eligible for relocation. Yet even in this relatively benign political environment, the community groups tend to have limited influence and evictions and conversion of land to commercial uses continues apace (Shatkin 2000).

Honduras and Nicaragua have analogous problems in rural areas. Land and forestry laws favour the poor on paper, but practice is different. In Nicaragua, constitutional and legislative provisions exist for the demarcation and titling of indigenous territories. Yet the government continues to grant industrial logging concessions on community lands without fulfilling these requirements. In Honduras, small-scale forest producers have use rights but seldom can meet transaction costs of securing permits and other approvals, owing to regulatory complexity and bureaucratic corruption. This forces them to rely on timber traders to secure permits and other approvals, which, in turn, fuels collusion between traders and public officials, and elite capture of community forest management rights (Wells et al. 2004). Again, the quality of democratic institutions in this pair of countries appears to vary according to the class and income of the citizens using them.

These anecdotes obviously do not mean dictatorships are consistently better at confronting poverty than are countries classified as democratic. There are examples throughout history of authoritarian regimes that carried out successful land reforms and other pro-poor policies; yet there have undoubtedly

been a far greater number of authoritarian regimes that did little or nothing to improve the health and well-being of ordinary citizens. We need to look beyond political labels when designing implementation strategies for Legal Empowerment of the Poor.

It is important to think of political systems as shades of grey when it comes to empowering the poor. At the far end of the pallet are systems of arbitrary personal rule, which are typically quite closed regarding grassroots participation in policy-making, but which may be open to pro-poor policies if the regime is a populist one that depends on mass support. Dictatorships blend into more open and competitive systems where the poor may have progressively greater scope to sway public policy, but where the rich may still exercise hegemony on key political economy issues. Happily, there are fewer political systems today where poor people cannot organise at all to have some countervailing influence on government decisions; but in a number of countries, freedom of association is still being denied (ILO 2004: 1-2). And even in the most receptive political systems the influence of the poor is difficult to transform into extensive power. Development practitioners should be careful not let preconceptions about regimes blind them to these possibilities.

Administrative state

The supply side of political systems also needs to be considered to understand implementation probabilities. How capable is the public administration? Does the state have the capacity to provide physical safety, to secure personal belongings, to settle disputes fairly, and to provide other public goods to society? Does it possess the personnel, skills, systems, and infrastructure to carry out these core functions? Even political will cannot drive reform in the face of binding constraints on the capacity of institutions charged with delivering the mandate of empowerment. High-capacity states are ones that implement policies efficiently, predictably, and in the manner intended. High-capacity states may or may not be democratic, but they can carry out the Legal Empowerment of the Poor agenda if that is what the leadership wants. In very low-capacity states, on the other hand, supportive leadership is still beneficial except the follow-through capability is missing. Residents must therefore improvise and figure out how to protect assets and resolve disputes through pragmatic means, such as aligning with a political patron (see discussion of informal governance below).

Administrative weakness is usually rooted in lack of human and financial resources, but a vicious cycle reinforces the problem. A World Bank report argues: Burdensome or extraneous business and labour market official regulations drive people into the shadow economy, while a collective perception of ineffectiveness of the state's actions gives rise to a social norm of non-compliance with taxes and regulations, which further undermines the state's capacity to enforce the law and to provide public services (Perry et al. 2007). However, the methodology underlying such studies has come under serious technical criticism (Berg and Cazes, 2007).

Bureaucratic corruption can also be a major weakening factor, especially for the poor who lack the wherewithal to pay bribes to make things happen within the bureaucracy. For people with means, on the other hand, the civil service may seem capable enough because, unlike the poor, they can pay for individualised special treatment. Thus bureaucratic corruption will tend to reinforce the existing configuration of wealth and power. In cases where public sector wages are low and virtually everything the civil service does is for sale, it may be almost impossible for the poor to get public administration to work in their favour. Legal Empowerment of the Poor reformers would have to address corruption

before taking on implementation, or choose to work in sectors where government employees are more professional and trustworthy.[5]

Attitudes of public servants are also significant. Receptivity of state institutions to the agenda of legal empowerment is as much about changing the bureaucratic mindset as it is about new processes or additional resources. Too often public functionaries for a variety of reasons lack a service orientation and see their job as an entitlement. This must begin to change to implement Legal Empowerment of the Poor.

Again we are talking about shades of capacity, not stark monochromatic differences. Among developing and transitional countries, those with higher national incomes tend to be recognised as having the stronger administrative capability, though there are certainly exceptions to this pattern. The least developed countries, especially small island nations and land-locked countries tend to have lower capacity as a rule. Legal Empowerment of the Poor is obviously easiest to carry out on a national scale in countries with better capacity.

State capacity is at its nadir in countries where central authority is so ineffective that it has lost or is losing practical control over much of its territory. Implementing Legal Empowerment of the Poor in these political systems must be done entirely from the bottom up or the outside in, because the national government is too dysfunctional to work from the top down. Consider the extreme case of Somalia, with four overlapping judicial structures: a formal one in regional administrations and central governments created at international peace processes, a traditional, clan-based system, a growing number of Muslim *shari'a* courts in urban areas, and ad hoc mechanisms established by militias (Le Sage 2005: 7). A nationwide implementation strategy for legal empowerment is currently problematic in Somalia, though there may be local or regional space for

Box 5.3 Empowering Workers through Community Contracting

'As in many other places in Somalia, the civil war that has been raging on for years has had its toll on Garowe, a city in the Puntland region of that country. … A project to improve the livelihoods of the people of Garowe through sustainable waste collection management … applied the Community Contracting Model, a participatory process whereby the community group negotiates with local government or a development programmeme and enters into contractual agreements to undertake garbage collection and disposal. This had multiple advantages: members of the community were directly involved in negotiating contracts which in turn provided them with jobs that helped them improve their livelihoods.'

'This contracting system uses a participatory and bottom-up approach…. Local actors were responsible for … organising community contributions, transport hire, procurement of tools and materials, authorization of payments, decisions on workers' wages, selection and supervision of workers and ensuring workers' safety. They were also responsible for solving all disputes related to project implementation.'

'There is a great potential for replication of sustainable waste management activities in towns and municipalities within the country as well as in urban centres of other African countries.' UN-Habitat, ILO and UNA (an Italian consortium of NGOs) have supported the Somali initiative.

Indeed, 11 municipalities in Kenya, Tanzania and Uganda are pursuing similar approaches to municipal service delivery. Community-based organisations, small enterprises, NGOs, informal economy operators and local training institutions work with the administration to create pro-poor urban services using public-private partnerships. This was made possible by changing local government by-laws. The change opened up new opportunities for poor men and women; the ILO is working with local partners towards ensuring that the jobs are safe and productive.

Source: ILO, Success Africa: Partnership for Decent Work — Improving People's Lives, 2nd vol. (Addis Ababa, Apr. 2007), pp. 2- 4 and 31-33.

reform, as Box 5.3 indicates.

Post-conflict states present a special situation for legal empowerment even if the central state has nominally reasserted its claim to authority. It is particularly vexing to figure out how to return property after its rightful owners have fled or been killed by one side or the other in a civil war. Often the disputes over homes and other assets are so intense they must be addressed at once to sustain peace.[6] The international community has recognised institutional reform of the legal infrastructure is essential for reconstruction and reconciliation. Yet, a realistic timeframe for recreating a justice system following serious armed conflict with formal courts, trained judges and a retrained police force is close to 20 years (Samuels 2006: 19). That is a long period for implementation with many chances for administrative operation to deviate from initial policy intent.

Merilee Grindle (2007) proposes an elementary typology of political systems, adapted here in Table 5.3, right, which is a useful place to begin to consider what sort of Legal Empowerment of the Poor policies are feasible within different countries. The three left-hand side column headings reflect the political and administrative dimensions of regimes, with the far right-hand column very roughly indicating the sorts of Legal Empowerment of the Poor initiatives that might be appropriate; the rows are five common regime patterns or syndromes. These are heuristic, but they suggest the possibilities for legal empowerment are greatest in states that are more competitive and better institutionalised. As Grindle points out, there is simply more to build upon in these countries than in weaker states. A starting point for Legal Empowerment of the Poor practitioners, then, is to debate honestly where a particular country can be located among the common patterns of political administrative systems, and use the information to think creatively but realistically about what empowering reforms will work in that context.

The typology in Table 5.3, right, is educative, not exhaustive; the capsule policy prescriptions in the last column on the right are not meant to cover all the possibilities, which are too numerous to capture in a simple table. The reality on the ground is that policy champions may need to pursue a variety of tactics in every country, custom fit to the different stakeholders, to support their overall strategy. That means mobilising the grassroots, the community organisations, the professional groups, and other interests to counterbalance opponents of Legal Empowerment of the Poor trying to derail the agenda. The prospect of working with state actors varies according to the administrative capacity of the government.

Informality

Across-cutting dimension of the policy environment is the extent of informality — in the economy, in the polity, and in the juridical system. People, organisations, and firms can operate under conditions of informality for some purposes and under conditions of formality for others. Legal Empowerment of the Poor reformers must be sensitive to the vulnerability of informal empowerment mechanisms to cooptation and domination by elites and formal organisations. Let us look at the phenomenon and consider the impact on implementation of Legal Empowerment of the Poor.

In the economic sense, informality refers to small-scale, self-financed and unskilled labour-intensive productive activities, which the poor use to survive. These pursuits are under-the-table and off-the-books, and thus are legally defenceless against more powerful market interests and are subject to unfair exploitation. This parallel or shadow economy is a vast domain, representing the equivalent of about 40 percent of official economic activity in developing and transition countries, according

Table 5.3. **Political Administrative Syndromes**

Political Competition	Institutional stability of the state	Organisational capacity of the state	Potential Legal Empowerment of the Poor policy initiatives*
Rule through stable and legitimate organisations and procedures; open competition for power through programmematic parties	Rules of the game widely recognized as legitimate and not subject to significant change; conflicts resolved through appeal to the rules	High. Organisations challenged to improve performance on a sustained basis.	National level reforms in human and economic rights; assert claims to existing legal and basic welfare services; work through established civil society
Rule through stable and legitimate organisations and procedures; no open competition for power. Political parties serve the regime or are hindered and controlled by it	Clear rules of the game and generally orderly processes of decision-making and public management are in place; generally centralized and authoritarian practices.	Modest. Many organisations carry out routine activities on a sustained basis.	Mobilisation of poor citizens for greater influence over the range of legal protections and opportunities from the centre
An unstable mixture of personal and impersonal rule, with varying degrees of legitimacy. Parties are based partly on personalities	Basic rules of the game are established in law and practice, although they function poorly and intermittently.	Low. There may be some organisations that are able to carry out responsibilities on a sustained basis.	Similar to above, but with possibly more decentralised focus and more emphasis on institution building; corrupt bureaucracy may be a bigger obstacle
Rule through personalities and personal connections. If political parties exist, they are based on personalities.	Stability highly dependent on personal control of power. Rules of the game emphasise power of elites and personal connections to elites; there is conflict over who controls the state	Low. Organisations respond to the personal and shifting priorities of powerful elites.	Bypass strategies to get around corrupt officials; incremental steps only; watch out for elite capture
There is no effective central government	Extremely low. There are no effective rules of the game that are agreed upon	Extremely low. It is difficult to identify organisations that have any capacity to produce results.	Community-based empowerment programmemes

* Illustrative examples only; the activities in these cells are not mutually exclusive.

to a study financed by the World Bank (Schneider 2002). Half or more of the employment (including subsistence farming) in developing countries is outside the formal sector. Earnings are low and uncertain, but these parallel market activities have proven remarkably vital and have grown worldwide in new guises and unexpected places. Capturing the positive attributes of the informal economy while minimising the low productivity and hazardous working conditions that go along with it, is one of the challenges of the legal empowerment agenda.

Economic informality does have some advantages for the poor; for example, women may find home-

based work easier to fit in around their household responsibilities. Formal sector businesses may choose to outsource work to informal workers to gain flexibility. That said, these jobs are mostly very badly paid, often dangerous, and they rely heavily on children (ILO 2003). Most people who toil in the parallel economy do so out of necessity, not freely exercised choice. Judith Tendler (2002) writes of an implicit 'devil's deal' in Brazil and other countries, whereby informal economy workers and entrepreneurs consent to support certain politicians. In return, the politicians agree not to enforce tax, environmental, or labour regulations; and to keep the police and inspectors from harassing the poor. This arrangement is difficult for either side to get out of and it limits the options for legal empowerment. Tendler suggests the way to break the 'devil's deal' is by demonstrating the paths by which small firms grow into form ones, including treating workers better and helping to upgrade their skills.

The boundary between the informal and the formal economies is fluid and poor people can push it in a direction that favours them. Cairo, to take an example, has an informal refuse collection system which actually has a well-defined set of internal rights, responsibilities, and sanctions that evolved over several decades in response to a changing external environment. The city tried to bring refuse collection under municipal control by issuing licenses to large corporate contractors. Refuse collection is a major enterprise for poor people so the city was threatening their livelihood. After negotiation and mutual adjustment, a new arrangement emerged in which small-scale service providers selectively adopted institutional forms recognised by the municipal authorities, while hanging on to the personalised and adaptable practices that marked their informal system (Assaad 1996). The second element of informality that concerns Legal Empowerment of the Poor policy implementation is found in the political system. Similar to what goes on in the economy, informality here is based on implicit and unwritten understandings. In effect, it is a coping method for the poor. The terms used to describe this grey government zone are 'patrimonialism' and 'clientelism.' Its dimensions are hard to measure, but the informal patron-client political system is widespread in many countries and may crowd out the official state system of rule, along with that system's broad policies that guarantee rights and distribute privileges according to objective criteria.

Patron-client politics emerge from webs of personal bonds that develop between patrons and their individual clients or followers. These bonds are founded on mutual material advantage: the patron furnishes excludable resources (money, jobs) in return for support and cooperation (votes, attendance at rallies). Typically, marginalized members of society are drawn into patron-client arrangements as a more reliable means than the state to take care of their everyday concerns (Brinkerhoff and Goldsmith 2004). Clientelism is widely seen as a barrier to more transparent governance and professional public administration. It lives on, however, because it provides something of value to people. No society is so 'advanced' that it relies exclusively on de jure institutions to run its common affairs. For all their drawbacks, informal patron-client exchanges are expedient means to get things done.

Clientelism evolves and adapts to the formal governance system, similar to what happens in the economic sphere. In fact, individuals who hold the formal levers of power are often also head up patronage networks. Political openness, widespread political participation and the emergence of broad programmeme that help people regardless of their personal affiliations are ways 'clientelism' can be pushed back to benefit the poor (Brinkerhoff and Goldsmith 2005). But this is a struggle. Patrons do

not give up their position willingly, and they often have multiple additional claims to power, not just their control over material resources but also legitimacy derived from a high position in the local system of social stratification and privilege. There may be a religiously or historically derived convention of deference to authority that makes poor people less likely to stand up for their prescribed rights against the wishes of traditional patrons.

The participatory budget process in Porto Alegre, Brazil illustrates how hardy "clientelism" can be. The city has garnered a great deal of attention for making public spending more programmematic and universal, and less dependent on individual connections and friends in high places. When the Workers Party came to power in Porto Alegre in 1989, it was determined to end the 'clientelism' of the old administration and it set up an inclusive process that involved citizens from all social groups in establishing budget priorities, allocating investments and monitoring results. Many city council representatives held office based on clientelistic networks tied to neighbourhood associations. Though often disagreeing with participatory budgeting, they voted for it with the hope of using the programmeme's popularity to gain votes in the next election. It was difficult for these legislators to oppose projects that directly benefited their own constituents (Wampler 2007). Despite this progress, after the Workers Party lost control of the city government in 2004, due in part to a drop in support from its low-income political base, there were signs of resurgent 'clientelism', with the city councillors and municipal staff once again doing deals to arrange individualised delivery of public works and services.

Informality turns up a third time in the legal system itself, where we again see overlapping statutory and non-state systems of law (including mafia-like self-regulating systems) in every country. As with economic informality and political 'clientelism', the informal legal structures exist partly because they are more accessible and 'user friendly' to people of limited means. Sometimes, private or mixed arrangements for rule enforcement and settlement are efficient because they enjoy the confidence of the participants and encourage flexibility and compromise within community norms. Other times, however, the non-state system is neither efficient nor fair.

The minibus-taxi industry in South Africa shows how the informal economic and governance domains can coincide in the real world, in this instance with major social cost. Minibuses are the major means of transportation for South Africa's poor, plus a major source of employment for poor people. A loophole in the transit law allowed this largely unregulated sector to emerge toward the end of the apartheid era, and commuter transportation became dominated by independent small, business operators, driving owned or rented vehicles. The minibus-taxi business provided low-cost movement around the country at a time when the majority was trying to get out from under the oppressive minority regime ruling South Africa, and it has continued to grow to currently account for about two-thirds of commuter travel. In the absence of government regulation, however, the individual minibus owners and drivers turned to emerging private industry associations to allocate taxi routes and cab stands, and to settle disputes that arose among competitors. Over time, these associations grew very powerful in their own right and began to use strong-arm tactics to defend or expand turf claimed by rival taxi groups. By the mid-1990s a virtual taxi war was costing hundred of drivers and passengers their lives each year. Lack of vehicle maintenance, overloading and poor safety standards led to thousands of additional fatalities per year in road accidents. According to reports, the police have been corrupted to look the other way on traffic violations and in some cases have become leaders in the

Box 5.4 Organising out of Poverty: Taxis in Rwanda

The International Cooperatives Alliance, the International Trade Union Confederation (formerly the ICFTU) and the International Labour Organisation have teamed up to develop an approach known as SYNDICOOP. 'SYNDICOOP promotes trade unions and cooperatives — membership-based organisations for workers in the informal economy. And because they are membership organisations, they can be accountable.'

An example is Assetamorwa (Association de l'Esperance des Taxis Moto au Rwanda) in Rwanda. 'Each driver is an individual trader, negotiating fares with passengers. But by combining together, they support each other and can negotiate with the authorities of Kigali, the Rwandan capital.' Assetamorwa has organised a system of pooling money that its members can tap in turn (known as tontine) and a health insurance fund for members. The group also trains young drivers, runs a garage and spare-parts depot, and works to combat the spread of HIV/AIDS. All of this activity depends on the necessary framework legislation on freedom of association and cooperatives being in place at the national level.

Source: Stirling Smith and Cilla Ross, Organising out of poverty: Stories from the grassroots: How the SYNDICOOP approach has worked in East Africa *(Co-operative College, Oldham, 2006).*

violence and intimidation among taxi associations (Barrett 2003).

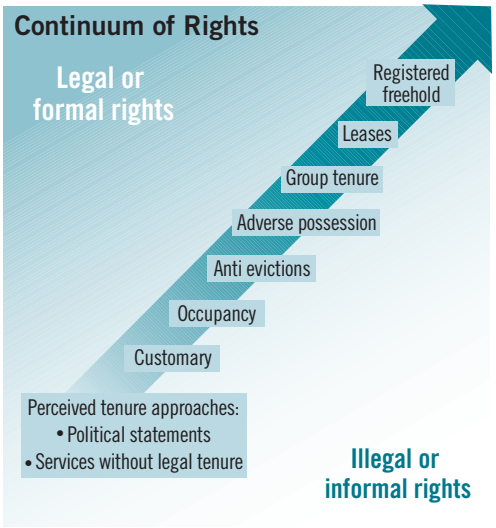
Fortunately, freedom of association is guaranteed by law in South Africa, and the government has a non-judicial mechanism to resolve disputes through mediation and conciliation. Thus, institutional and legal conditions exist for overcoming the industry's problems. The government has tried to reassert its regulatory authority and formalize the industry. After consultation with stakeholders, a financial incentive programmeme has been developed to encourage operators to upgrade the minibus fleet, join designated membership associations, keep better records and begin paying taxes on their enterprises (van der Merwe 2007). The effectiveness of these efforts to supplant the informal institutions and practices remains to be proven, however.

This example is extreme, and Box 5.4 reports a much more encouraging case of a taxi drivers' organisation from Africa; nevertheless, it makes the point that development practitioners face dilemmas in dealing with informality (and, by extension, with decentralised and local institutions generally). There are obvious advantages to exercising rights through personalized and traditional authority because it is less expensive, more familiar and locally available. Yet, just because *de facto* or relationship-based authority is embedded in poor communities does not mean they must be constructive in fighting poverty and injustice, as the violent feuding of the South African taxi case vividly illustrates. A patron-client network, or clique, may provide a safe haven for society's most vulnerable, but it limits their options also, long-established rules for allocating resources may work when the population is small, but they might buckle under population pressure. Additionally, a private legal mechanism may be accessible, but it could easily play favourites depending on a plaintiff's personal connections.

A bottom-line concern is that development professionals must creatively seek to capitalise on the available mix of *de facto* or 'traditional' modes of authority. There is no reason to assume that the informal institutions, rules and arrangements are either superior or inferior to their *de jure* or 'modern' counterparts. Context is critical. India is a possible model for how to integrate representative and legal institutions, having extended official recognition to a system of village councils and people's

Box 5.5 Authority Systems: Land Rights

Regarding the critical asset of land, there exists an internationally well recognized spectrum of rights, as shown in the figure below. Starting with the floor of freedom from eviction, security of tenure progressively improves as one follows the arrow. Land rights begin with the perception that one will not be evicted, based often on political statements to that effect. The right becomes stronger through customary law, temporary occupancy certificates, through anti-eviction legislation and adverse possession (otherwise known as squatters' rights) and group tenure. Long-term leases and individual freehold tenure represent the most secure forms of tenure. The noteworthy feature of the continuum of land rights is that it accommodates and reflects the diverse reality of land rights and social land tenures that exist in the world today (for example, family and group rights). It also demonstrates the potential for an incremental path to greater security consistent with the way the poor accumulate their resources over time. This approach may be a solid foundation for achieving consensus on the issue of land and property rights. It is also a good starting point for developing an innovative spectrum of protection and opportunities in this area, where parallel opportunities-protection/security spectrums can also be linked (e.g. labour, justice, entrepreneurship).



courts. Drawing on traditional norms, the councils are reported to be seeking out new roles and to be adapting to the democratic factor in India's formal political institutions (Pur and Moore 2007). Several West African countries use decentralised local councils to administer land laws. These tend to be based on customary power structures, though as yet they appear upwardly accountable to the central state, rather than downwardly to local populations (Ribot 1999). Box 5.5 discusses how the integration of formality and informality may help the poor with land rights generally.

In all instances poor people's perceptions should be kept front and centre. Legal or organisational reforms that look self-evidently empowering to experts from outside the poor community may look dangerous from the perspective of someone on the inside. This could detract from the local support needed for implementation.'

As we finish this aspect of Section 2, it should be more than evident how important contextual analysis is to implementation of Legal Empowerment of the Poor reforms. Policy makers have to come to grips with the national environment of public policy — that is, with the domestic social structure, economic context, nature of the political and administrative systems, and the scale of economic and legal informality. While a country's environment for reform has to be unpacked and probed on its own terms, we have offered useful questions that could be asked. Practitioners and policymakers can make good use of the tool of contextual analysis to determine if conditions appear ripe for Legal Empowerment of the Poor reforms, which implementation scenarios seem most probable, what sequencing and timelines for reform look doable and how they

should be designed, what tradeoffs need to be considered, which risk mitigating mechanisms are worth trying, and what contextual variables need careful monitoring during implementation. Adhering to this general set of guidelines will increase the chances of successfully carrying out empowerment policies.

Policy characteristics

Three internal policy characteristics (the lower middle box in Figure 5.2, above) stand out in influencing implementation: complexity, ambiguity and the potential for discord and conflict. These characteristics are important in all policy arenas but are especially relevant for the four domains of legal empowerment.

Complexity

Other things being equal, the more complex a policy is, the harder it is to implement due to the intensity of the administrative effort required. On the scale of complexity, Legal Empowerment of the Poor tends to fall at the far end. As seen by the Commission, the paradigm for empowerment is holistic and thus highly ambitious. Ideally, the poor should obtain legal protection for their physical and financial assets (property rights) and human capital (labour rights), and also have the ability to engage in market transactions (business rights). Cutting across all three areas is a need to obtain access to justice and political decision making (legal identity and citizenship rights). Those are a lot of balls to juggle during implementation. It may be best to go forward selectively and not dissipate energy on too many initiatives at once. On the other hand, progress in only one area without the others may create imbalances that perpetuate poverty.

A second source of complexity is the fact that legal and regulatory systems are very robust; meaning that reconfiguration of one or a few aspects of the law or institutions may not alter the overall risk and lack of opportunity poor people face. Social conventions and structures develop over long periods with many redundancies and mutually reinforcing elements. Progress in one domain of empowerment may be neutralised by lack of progress in another. Unanticipated effects may also be triggered during implementation that undermine or bypass the intended beneficiaries. In Peru, for instance, the introduction of greater flexibility in the labour market was heralded as progress in the early to mid 1990s; one of its effects, however, was to drastically reduce the percentage of the population who enjoyed a legal status as employees, which had given them access to social protection. Poverty rates increased in the short-term. Had the reform package been less sweeping, or accompanied by a social floor or mitigating measures, this negative impact might have been avoided.

Third is the time dimension to complexity. Empowerment policies seldom take effect quickly. Regarding law reform to promote the right to freedom of association and collective bargaining, for instance, the ILO (2004: 110-111) has observed that four to five years is the minimum time that should be allowed before substantive results can be seen. In general, delays make political back-tracking likely as ministerial appointments change and bring in new ministers who have little interest or commitment to their predecessor's programmemes. Hesitation in implementation reinforces any inclination of the poor not to go along as expected with a policy in the first place. Individual uncertainty about implementation encourages the majority to hold back supporting the reform, which creates a self-fulfilling prophecy of implementation slippage. Thus it is important to look for interventions that promise short-term rewards for beneficiaries. Micro-finance, for example, can have an immediate (though perhaps not sustainable) effect on poor people's consumption.

A final source of complexity is that legal empowerment is both a top-down activity (initiative and coordination often come from the national capital, regional centre, or city hall) and a bottom-up activity (the poor and their allies play a central role as advocates and watchdogs). There are many chances for misunderstanding and miscommunication with a policy where leadership comes from several directions. Even if NGOs and local communities are the prime movers of Legal Empowerment of the Poor, they may not be able to accomplish much on their own without government assistance.

An example of how complexity can distort implementation of Legal Empowerment of the Poor is the ongoing struggle over labour rights in Latin America. During the 1990s, several governments in the region tried to promote greater flexibility in the labour market through changes in national labour legislation. This undermined labour union members' freedom of association and rights to collective bargaining; it also impinged on workers as individuals because they lost job security. Trade unions fought back against these changes and, in some cases, succeeded in curbing erosion of their group rights, a positive accomplishment from the perspective of Legal Empowerment of the Poor. But they often ceded on deregulation of employment law relating to individual rights, which is perhaps an even greater loss for an Legal Empowerment of the Poor agenda. An unintended by product of these policy disputes was also to strengthen the larger and more established unions but to further weaken the organising and bargaining rights of emerging rival unions (Cook 2005). These last are often strong allies of poor people.

Ambiguity

Ambiguous policies are also more challenging to carry out than clear policies are. There are several reasons for this, but a principal one is that ambiguity gives bureaucratic stakeholders greater discretion in interpreting or even ignoring the policy. Ambiguity also clouds the efforts of beneficiaries and sponsor groups to hold the bureaucrats to account. As a result, the policy in practice tends to drift further and further away from its design. Many policies related to Legal Empowerment of the Poor rank relatively high for ambiguity. In several African countries, for example, local people's access to land is protected through use rights, which are legally recognised as long as the land is put to productive use. What uses are 'productive' is not clear in the formal law, however, which tends to favour large-scale commercial or industrial users not pastoralist or subsistence farmers seeking access to land (Cotula 2007: 36). The less clear-cut a policy is, generally the greater is the probability of elite capture during implementation.

The informal legal arrangements discussed earlier are a source of ambiguity simply because they exist side by side with the formal system of civil and criminal justice. Which one takes precedence? The inadvertent result could be a labyrinth of law, in which the poor and disadvantaged may lose their way. Setting aside any possible net advantages of informality for the poor in a given legal context, the absence of documentation tends to render informal justice a less effective platform for implementing empowerment strategies. Consider the phenomenon known as 'forum shopping' whereby economic actors navigate among multiple legal orders to seek the most favourable forum to pursue their claims. Thus a policy to give legal recognition to poor people's customary system of justice or dispute resolution may in some cases work against the poor, as long as the statutory or rule-based legal code continues to exist. A business corporation or rich person will simply avoid the less expensive traditional forum and force poor people to litigate in forums where they are at a disadvantage. The

flip side of forum shopping is that NGOs and human rights stakeholder groups working on behalf of the poor also have multiple venues to seek redress of their grievances, so, again, the implication is not that institutional pluralism is inherently bad for Legal Empowerment of the Poor. Still, it is a complicating factor that makes empowerment policies trickier to plan and execute.

There may be temptation to clarify an ambiguous informal legal structure simply by replacing it with a more orderly statutory code, but as it might conceivably backfire on the poor, any approach must be carefully reasoned. Sudan is an acute case of what can happen when change is suddenly rushed though. Urban elites in Sudan aggressively moved to take land at less than its true value by shifting land out of community-based tenure systems and into a standardised Islamic tenure system. The civil war that raged for years in the south of the country was set in motion for many reasons, but one was the resistance by rural people to the imposition of an unfamiliar tenure system that destroyed their traditional land rights (Bruce *et al*. 1998: 195). The conflict in Sudan's Darfur region also grows in part out of conflicts around competing systems of land tenure, represented by group-based camel nomadism, on the one hand, and more individually oriented sedentary cultivation, on the other (Abdul-Jalil 2005).

Ambiguity additionally clouds lines of accountability and responsibility among implementing agencies and allows them to 'pass the buck' during implementation. In post-tsunami Sri Lanka, the housing authority allocated land to the displaced which was later found to have been under claim by the municipality as a waste dump, and had been classified by the water board as uninhabitable. Straightening out mix-ups like this takes time and energy that could have been used more productively.

Discord

The distributional strife unearthed by policy ambiguity in countries such as Sudan merges into the third stylised internal influence on implementation, which is a policy's inbuilt potential to generate dissension. An 'iron law of public policy' says that most acts of government, no matter what the broader merits, create winners and losers. If the gains and losses are seen as significant, they will become the object of intense political attention. This is particularly likely where the policy redistributes a right or benefit from one group to another, as happens when there are mutually exclusive claims to a fixed resource such as fertile land or minerals. Legal Empowerment of the Poor attempts to minimise redistributive conflicts by expanding economic opportunities so that different interests can be negotiated to meet every side's needs, but there is still plenty of potential for confrontation because important stakeholders believe others' gains come at their expense. The mutual payoff to legal empowerment is in the future, but the individual sacrifices must be borne now.

A concrete example of this 'iron law' is the titling and registration programmeme implemented in Peru starting in the 1980s. According to a World Bank report, the main winners were: settlers, who accrued the economic and social benefits of formal ownership; the President of Peru, who earned the political credit for the programmeme; local mayors, who shared the political credit, and congressmen, who backed the legal framework for formalization. The principal losers were reportedly the public officials in charge of regularisation processes who previously benefited from bribes; lawyers and notaries, who lost the monopoly they enjoyed in the traditional registration system, and former community leaders, who were replaced by new leaders elected by the communities during the reforms (Palacio 2006: 41).

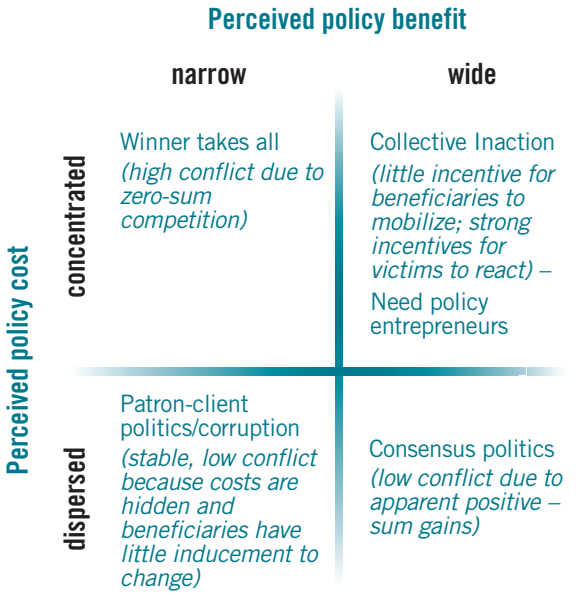
In conflict equations, defenders of the status quo

almost always have the upper hand because they have won earlier power struggles over the same public policies. With Legal Empowerment of the Poor a special difficulty is that the self-perceived 'losers' are apt to include members of the local elite and bureaucrats mentioned earlier, who feel their monopoly on neighbourhood or community power is jeopardised should anyone else gain economic and financial independence. While these stakeholders have many means to delay or dilute implementation of policies they reject — especially by co-opting the poor through the dependency relationships of patronage and 'clientelism' and by corrupting the local bureaucracy — the example of Peru proves it is possible to overcome the odds with the right leadership and a winning coalition of support.

Legal Empowerment of the Poor conflicts can be mapped and considered before they come to a head, providing time to think about political strategies to manage the tension. A policy's cost and benefit can both be widely distributed (spread over most citizens) or narrowly focused (limited to an identifiable group). Decisions by a central bank to greatly expand the money supply, for instance, have widely distributed costs because everyone has to pay the consequent inflated prices for goods and services. Regulations targeting a specific industry, such as licensing or safety inspections for minicab taxis (mentioned earlier), are more focused and narrowly concentrated and may be perceived as a loss or gain for those most affected. In other words, whether people see themselves as policy winners or losers is more important than the reality of who wins or loses. By and large, we can group the varieties of political situations into four categories; they are shown in Figure 5.3.[7] Each has different implications for generating conflict.

Legal Empowerment of the Poor policies such as land titling or legal assistance fall in the top two cells in this matrix. Where both cost and benefit are narrowly concentrated (the top left cell), each side has an incentive to dig in to defend its interests by preventing or establishing the transfer of resources. Because the policy affects relatively few people, gaining allies may be difficult for both sides unless they can make 'side payments' or engage in 'logrolling'.[8] Where the benefit is widely dispersed, as might be true of many policies designed to help the poor by expanding their rights, getting those beneficiaries motivated to push for the policy is difficult because the individual gains are small or may seem abstract. In short, each category of policies tends to have a distinct shape that Legal Empowerment of the Poor practitioners ought to be alert to, as they try to predict and influence stakeholder actions. The categories, however, are not air-tight and can metamorphose into one another over time, as perceptions of issues change. Thus education and marketing are important aspects of Legal Empowerment of the Poor implementation to try to get stakeholders to take a wider perspective on their self-interest.

Figure 5.3 Conflict Implications of Public Policy



Lessons may be drawn from knowledge about the inbuilt characteristics of public policy. For example, as Legal Empowerment of the Poor tends to be complex and ambiguous, and as implementation efforts might therefore be hindered, the policies to promote empowerment must be made as clear-cut and straightforward as possible. Design simplicity is one way to avoid or minimise conflict, uncertainty and other implementation problems arising from procedural and technical traits of legal empowerment activities.

Diagnosing the Influence on Policy Implementation

We have emphasised the stresses and strains on Legal Empowerment of the Poor implementation to awaken policymakers to the need to think pragmatically and opportunistically about policy reform. Policymaking is not an assembly line, and a formulaic approach to the 'who', 'what' and 'where' factors could lead to overly pessimistic generalisations and missed opportunities. Effective implementation requires a mix of experience, professional judgment, and a willingness to take chances. Creative actors look for policy windows that open up and create space for moving forward to solve a particular problem, even when the circumstances appear to be difficult.

With these caveats in mind, Table 5.4 outlines how to catalogue the influential factors in different nations and assess tendencies to impel or impede implementation (as indicated by the three right-hand columns). The questions are illustrative and need to be altered to suit different needs and situations.

An approach to implementation for Country 'X'

Broadly, Legal Empowerment of the Poor implementation in country 'X' might start with an environmental scan and contextual analysis. The focus would be on 1) social and cultural features that affect implementation; 2) the economic context, which also can be both a help and a hindrance, and 3) on the openness and capacity of the state. Supplementing the inventory of these concerns would be a careful analysis of the reach and hold that informal institutions have on the poor. The full contextual analysis would then form the basis for a feasibility review of various empowerment scenarios.

Next (or perhaps simultaneously because these are never discrete implementation steps), local activists and external change agents in country 'X' would undertake a stakeholder analysis of the constituencies concerned with Legal Empowerment of the Poor. The objective: to differentiate among the superficially homogeneous beneficiaries, to better understand the divisions, alliances and particular needs that exist among the poor. Other stakeholders, who might oppose or assist the target group or groups, would also be scrutinised to see what motivates their behaviour and reflect on how they could be brought into the process. The purpose of the stakeholder analysis would be to get a firmer grasp of the probability of moving forward with various Legal Empowerment of the Poor scenarios, and to begin serious thinking about what it might take to build a minimum winning coalition for legal empowerment in country 'X'.

Finally, with possible overlapping chronology, the internal technical features of the alternative policy scenarios would be reviewed. The policy characteristics analysis would focus on the complexities of the various policies, potential ambiguities that might possibly sow discord — all of which would serve to hinder implementation. Efforts would be made to find a simple, incremental and sustainable course of action, and to avoid as much as possible taking steps that provoke confrontation needlessly

Table 5.4 **Skeleton Diagnostic Tool: Analysing Influences on Policy Implementation**

Questions (list is not comprehensive)	Effect on Implementation		
	Negative	Positive	Neutral
Policy Environment How extensive are poverty and lack of ownership of or access to productive assets? What is the position of women in society? What is the degree of social and ethnic heterogeneity? Are there marginalized minorities? What is the relative balance of power among social/ethnic groups? What dependency relations exist between elites and the poor? How open and competitive is the political system? Nationally? Locally? Is freedom of association guaranteed? To what extent do public agencies operate as effective bureaucracies? Is bureaucratic corruption common? What is the capacity of institutions of the state to deal with the agenda of legal empowerment? Are accountabilities clearly spelled out? How scarce or abundant are government resources? Anything special about the country context? (Transition economy, least developed country, post-conflict, etc.)			
Policy Stakeholders Who are the target beneficiaries? How many are there? Are they members of an ethnic group or groups? Mostly women? Are the beneficiaries organised? What civil society organisations exist? Where do they stand on the pro-poor policy issue? Who is in opposition to the policy? What are their resources? What allies and potential allies are there for empowering the poor?			
Policy Characteristics How complex are the changes that are supposed to happen? Are these small departures from current practices or major changes? Is the policy geographically concentrated? Does it require a high degree of technical or professional knowledge? What is the level of conflict about the value and nature of the changes? What does the pro-poor policy do? Is this clear or vague? What is the desired impact of policy reform, what is it expected to accomplish or facilitate?			

Table 5.4 **Skeleton Diagnostic Tool: Analysing Influences on Policy Implementation cont.**

Questions (list is not comprehensive)	Effect on Implementation		
	Negative	Positive	Neutral
Policy Characteristics cont. Where did the impetus for the policy come from? Who decided to pursue the policy, how, and why? What is the nature of the policy benefits, and to whom do they accrue (disaggregated by sex, age and ethnicity)? What is the nature of the costs of the policy reform, and who bears them (disaggregated by sex, age and ethnicity)? What is the degree and complexity of the changes brought about by the new policy? How administratively intense or technically complex is the new policy?			

— recognising that some confrontation is unavoidable and that it might even prove productive in moving the empowerment agenda forward. Obviously, what for works for Legal Empowerment of the Poor in country 'X' may be irrelevant in country 'Y' with a very different social structure, economic environment and universe of stakeholder groups. The procedures in determining a suitable Legal Empowerment of the Poor strategy might look alike in these two locations, but the substance of the outcome would be sharply different. And in all cases, the process is messy and imprecise, yielding only what would appear to be the best fitting policies given the imperfect information available to policymakers at the time and the current political realities.

Without looking beyond the generic influence on implementation to any specific cases, we can see that the legal empowerment movement has taken on a stiff but not infeasible implementation challenge. We have placed much stress on the need for imaginative and adaptable policymaking, but to help imagination along it is imperative to have a number of rough roadmaps that will help to take policymakers around some of the pitfalls and impediments to Legal Empowerment of the Poor implementation. That is the subject of Section 3.

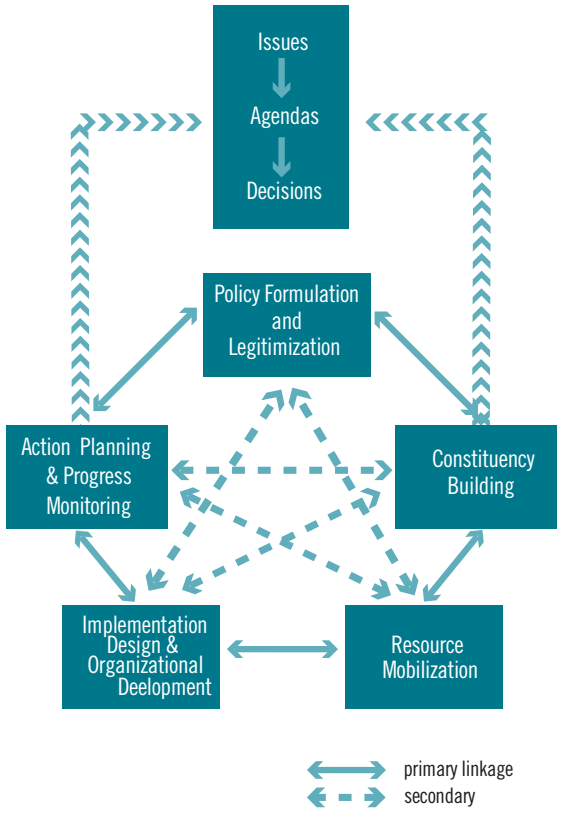
3.Roadmaps to Implementation

Reforms to legally empower the poor are multi-faceted. Besides technical analysis and prescription, successful implementation of reforms calls for consensus building, participation of key stakeholders, compromise, contingency planning, adaptation, and flexibility. These are the 'how' or method issues of implementation. Reforms never proceed in a straight line; change is multi-directional and calls for actions — by donors, government, NGOs, the private sector, and communities — sometimes iteratively, sometimes simultaneously, and sometimes sequentially. To guide and track the necessary actions to achieve reform ends, a roadmap is useful to identify and to incorporate the technical, institutional, and political and dimensions of the reform process.

In developing an implementation roadmap for reforms for Legal Empowerment of the Poor, our working group adapted a practical template developed by Brinkerhoff and Crosby (2002), which draws on policy reform research from multiple sectors. This template builds on empirical analysis that identifies a common set of tasks associated with successful reform design and implementation. These tasks follow a generalised (but not lockstep) pattern, which can be conceived of as an interactive cycle comprising the following phases: policy formulation and legitimisation, constituency building, resource mobilisation, implementation design and organisational development, and action planning and progress monitoring. A stream of issues, agendas and decisions launch the cycle and, over time, provide additional input and momentum to the process.

Figure 5.4, adapted from Brinkerhoff and Crosby (2002), illustrates this iterative process of policy implementation, showing junctures or 'crossroads'

Figure 5.4
Roadmap to the Implementation Cycle



where choices must be made while moving the policy onward. Below is a brief description of tasks associated with each decision point on the roadmap.

Issues, Agendas, and Decisions: Advocating for change, developing policy issues, lists of items to be considered, and making decisions that launch Legal Empowerment of the Poor reforms are the precursors to crafting the operational content of a specific policy. For these activities, it is politicians and interest groups that tend to take the lead but they will seldom succeed without pressure from below and mobilisation and demands from the poor themselves. Out of this process, in the ideal, a policy champion will emerge (this could be an influential individual, a change team, or a coalition

of interests). Without the commitment to reform and the political will to empower the poor, it is difficult, if not impossible, to move to implementation. Commitment and political will depend upon incentives; thus Legal Empowerment of the Poor reforms must identify and create reasons for government and other entrenched interests to back (or at least not vigorously oppose) the pro-poor policy.

Policy Formulation and Legitimisation: Address the technical content of reform measures. However, besides technical content, reform measures need to be accepted and seen as necessary and important. The poor should, through their representatives, be part and parcel of the reform design process.

Constituency Building: Convince beneficiaries of the advantages of reforms, and demonstrate that long-term benefits are worth short-term costs.

Resource Mobilisation: Ensure flow of adequate resources by addressing incentives, and exercising leadership in galvanizing constituencies. The recommendations of the Commission call upon countries to undertake reforms that will require financial, technical, and human resource commitments.

Implementation Design and Organisational Development: Reformers need to create and nurture networks and partnerships for cooperation and coordination, and provide for the development of new organisational skills and capacities in the public, private and non-governmental sectors. Old procedures, operating routines, and communication patterns die hard; change is likely to be resisted within some quarters.

Action Planning and Progress Monitoring: Set up systems and procedures for obtaining feedback so that implementation is related to learning and adaptation, so as to produce results and impact.

Table 5.5 suggests the questions to consider in drawing up a roadmap for implementing Legal Empowerment of the Poor in a specific country — recognising that it is never possible to a have a complete understanding of the social structure, political framework and legal system beforehand, and that even if such foreknowledge were possible, it would soon be outdated because the factors themselves are constantly changing.

Mapping the Empowerment Domains

Legal Empowerment of the Poor may be perceived as a spectrum that provides opportunities, protection and security. It establishes a minimum 'floor' of entitlements and safeguards to which everyone is entitled, by the simple fact of our common humanity. Under each of the Commission's four core themes (access to justice, security of assets, labour protection, and entrepreneurial rights), the task is to establish this floor using human rights law. For every empowerment domain, therefore, one challenge is to identify a range of potential policy options from which nations and citizens can choose, depending on their national context and the different starting points of various groups of the poor within them. Finally, and perhaps most significantly, a spectrum approach explicitly recognises the incremental manner in which poor people improve their lives in practice. At each stage of this improvement, fundamental rights and an appropriate combination of protection measures/security and opportunities must be available to them.

It would be futile to propose implementation recommendations for universal application; but it is possible to put forward stylised recommendations in the four domains of empowerment. Table 5.6 shows how access to justice issues can be mapped with protection/opportunity available in various legal instruments and with the goals of empowerment.

Table 5.5 **Country Specific Implementation Roadmap: Representative Summary Checklist**

Reform implementation 'crossroad'	Questions to bear in mind
Issues, agendas and decisions	Contextual analysis and checklist: Are the conditions right for a legal empowerment reform to succeed? Consultative process: Are the poor organised and represented by community groups, NGOs or member-based organisations of workers?
Policy formulation — legitimisation	Have specific pro-poor policies been formulated? What Legal Empowerment of the Poor policies are proposed/underway? What are the characteristics of the Legal Empowerment of the Poor policies? What does the policy do? What is the desired impact of policy reform, what is it expected to accomplish or facilitate? Where did the impetus for the policy come from? Who decided to pursue the policy, how, and why? What are the policy benefits and costs, and who is affected? What is the degree and complexity of the changes brought about by the new policy? What is the duration of the policy change process? What institutions are involved in implementing the policy? How administratively intense or technically complex is the new policy? Have Legal Empowerment of the Poor reform champions been identified, and who are they? Have Legal Empowerment of the Poor reform policies been discussed in public forums and the press? Do key stakeholders see the Legal Empowerment of the Poor reforms as desirable?
Constituency building	Do Legal Empowerment of the Poor reform champions have sufficient support and resources? Has a stakeholder analysis been conducted? Are constituencies at various societal levels organised and supportive of the Legal Empowerment of the Poor agenda? Has the Legal Empowerment of the Poor agenda been marketed to demonstrate its desirability and benefits? Are politicians and technocrats on board? Are representatives of the poor identified and engaged? Has opposition been addressed and overcome?
Resource mobilisation	Have resources been identified/obtained to pursue reform policies? Have partnerships been formed among government, civil society organisations, community associations, and pro-poor advocates? Are donors on board with resources and technical support? Have capacity/resource gaps been identified? Steps taken to fill them?
Implementation design and organisational development	Has implementation responsibility been assigned, and to which organisations or groups? Have implementation measures been elaborated and sequenced? Have pilot sites been identified? Do implementing organisations/groups have the appropriate capacities, missions, mandates, and resources to carry out implementation activities? If no, what modifications are required? Are new organisations/partnerships/networks required? Has the design of appropriate incentives been considered and addressed?
Action planning and progress monitoring	Have specific plans, performance expectations, timetables and outcomes been developed? Do these plans include provision for early success and dissemination of success stories? Have resistance, opposition, and conflict been planned for? Are milestones in place to track progress and flag the need for adaptation? Are mechanisms established to capture lessons learned?

Table 5.6 **Empowerment Domain 1: Access to Justice**

Framework of Opportunities and Protections		
Legal Instruments	**Problem for Poor People**	**Opportunities/Protections**
• Universal Declaration on Human Rights (UDHR), ICCPR, CESCR • Rights related to access to information; legal services; protection • Professional rules of conduct • Extracts from other inter-national human rights treaties (including fundamental ILO Conventions and the Convention on indigenous and tribal peoples) conventions, UNGA resolutions, etc.	• Lack of legal identity: indigenous, stateless, displaced • Ignorance of legal rights • Lack of access to legal services • Unjust & unaccountable legal institutions • Denial of fundamental rights	• Registration drives; right to legal identity • Increase knowledge of rights • Improve access to legal services • Institutional reform/legal reform • Capacity-building of representative organisations

In the second empowerment domain of asset-holding rights, the major issues for the poor include insecurity of tenure, forced evictions, the appropriation of the rural commons by the state, confusing institutional, legal and regulatory frameworks, lack of access to infrastructure, basic services and credit, and difficulty of establishing rights. Table 5.7 shows how these might be mapped.

The first task would be to identify the minimum standard to which all human beings are entitled by their very humanity — in other words, the minimum floor of protection. In the case of property rights, it would be the 'freedom from eviction'. No one should feel threatened with being removed from their place of residence without due process and compensation, including the possibility of resettlement. The main sources of this protection include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Relations (ICCPR) and the International Economic and Social Covenant (ICESR); for indigenous peoples, the Indigenous and Tribal Peoples Convention, 1989 (ILO Convention No. 169). In addition, there is an internationally recognised 'Right to Adequate Housing', which includes security of tenure as one of its six components.

New opportunities and protections for the poor could include systemic reforms to legal, regulatory and institutional frameworks to simplify procedures and systems, the recognition and training of para-professionals (valuators, surveyors, etc.), extending housing micro-finance 'down-market' to reach the poor, community-based savings linked to urban poor funds, low cost and decentralised surveying and registries of land, recognition and registration of customary and common property rights in the name of rural poor and indigenous people, and freehold titles where appropriate and affordable.

The spectrum of land rights (see Box 5.5) has some important policy implications that could inform a practical approach to the follow-up work of the Commission, namely implementing a legal empowerment agenda in the area of land rights. A government could initially make a public statement or decree that residents of unauthorised settlements will not be evicted without due process. This

Table 5.7 **Empowerment Domain 2: Property Rights**

Framework of Opportunities and Protections		
Legal Instruments	**Problem for Poor People**	**Opportunities/Protections**
• Universal Declaration on Human Rights (UDHR), ICCPR, CESCR • Habitat Agenda • Right to adequate housing, including security of tenure, General Comment 4 & 7 • Pinheiro Principles on Restitution of Housing, Land and Property Rights • Extract from other international human rights treaties, conventions, declarations, etc (in particular Indigenous and Tribal Peoples Convention, 1969 (ILO Convention No. 169)	• Insecurity of tenure • Forced evictions • Common-property appropriated by the state • Non-respect for rights of indigenous and tribal peoples • Legal and institutional barriers (path to property, overlapping mandates, professional reluctance) • Lack of access to infrastructure and basic services • Lack of access to credit	• Spectrum approach to security of tenure • Guidelines to promote due process in the event of forced evictions • Pro-poor land and agrarian reforms • Joint titling and reform of discriminatory inheritance laws and practices regarding land • Skills development of para-professionals (e.g., 'barefoot surveyors') • Extending housing micro-finance 'down-market' • Community-based savings linked to urban poor funds

would enable residents to invest in improvements to their home and community that would have beneficial side effects on other aspects of their life, particularly health. As resources permit, security could be increased, facilitating further investments. This incremental process would help ensure that the tenure increases take place at the pace of the urban poor and do not unintentionally result in 'downward raiding' by the middle-class — possibly resulting in market-based evictions of the poor.

On the labour rights front, the major concern is how to ensure decent work for all. The poor face non-respect for fundamental principles and rights at work, a lack of legal recognition of workers and their organisations in the informal economy (and to some extent in the formal economy), institutional and regulatory issues, unsafe working conditions, the specific problems of vulnerable groups such as children, and the lack of social security and protection. As in the case of land, workers find themselves in a range of situations, from those in which they are denied all opportunities (being subjected to forced labour) to those in which they enjoy opportunities for full and productive employment, accompanied by basic security. Unlike land the spectrum for legal empowerment in relation to rights at work should focus on the extent of opportunity/protection enjoyed by a particular worker or group of workers. This is to avoid formal legal classifications ('casual work', 'independent contractor', etc.) which vary across legal systems. Fundamental principles and rights at work are particularly vital in the market for unskilled labour that is the main source of income for the poor.

In relation to labour issues, protection/security and opportunities could be mapped along an 'upwards arrow' spectrum towards decent work for all (full and freely chosen productive employment, carried out in conditions of dignity, equity and security). Fundamental principles governing work (e.g., freedom of association, freedom from forced labour, child labour and discrimination) involve both

Box 5.6 Gold Rush in Mongolia: from Herders to 'Ninjas'

Harsh winters in Mongolia have been forcing traditional herder families to eke out a living as informal miners. Workers laid off from formal mining sites were the first to mine informally. From the green plastic containers they wear on their backs in turtle style, they are known as 'ninjas'. An estimated 100,000 men, women and children engage in informal mining (the entire population is only 2.7 million), producing the same level as formal mining companies. Exposure to mercury used to extract gold from the ore puts the miners, especially the children, at serious risk.

The Mongolian Employers Federation (MONEF) has been seeking a new law to govern informal mining. At the same time, it has been raising awareness among the mining companies and providing chances for children of mining families to receive education and training. Tripartite negotiations (involving government, and employers' and workers' representatives) agreed on changes to labour legislation that would extend its reach to those in the informal economy and improve protection against the worst forms of child labour. So far, however, these initiatives have not been enacted into law.

Such measures would help to fill a legislative gap that emerged at the time of privatisation of mining in the 1990s. Legislation on mining minerals and the people who mine them provides an opportunity for coherence between policies on natural resource use, investment, property ownership, job creation for adults and labour protection.

Source: Damdinjav Narmandakh, 'Extending labour protection to the informal economy in Mongolia,' in David Tajgman, ed., Extending Labour Law to All Workers: Promoting Decent Work in the Informal Economy in Cambodia, Thailand and Mongolia *(ILO, Bangkok, 2006), pp 105-153; 'Gold rush in Mongolia: When shepherds become 'ninjas'.' ILO: About the ILO, 2 Sept. 2005.*

opportunities and protections. For example, the legal protection prohibiting children from engaging in the worst forms of child labour (that can stunt their growth and condemn them to a life of poverty as unskilled workers) needs to be accompanied by opportunities to attend school and acquire marketable skills.

Similarly, the exercise of freedom of association goes hand in hand with legal protections that permit easy registration of trade unions, small employers, cooperatives and small traders' associations, whether they are in the formal or informal economies. The security/protection dimension has obvious relevance in relation to protecting workers' health and ensuring a social floor that keeps them from falling back into poverty when a family health emergency strikes. For example, the Zambian Congress of Trade Unions and the Alliance for Zambia Informal Economy Associations launched a partnership in 2002. (Another illustration from Mongolia is presented in Box 5.6.) Moreover, the ability to achieve decent work for all will be conditioned by the job-creating or job-destroying effects of international and national macroeconomic policies, so this dimension would need to be captured as well

Table 5.8 shows how labour rights can be mapped with the protection and security available in various legal and other instruments and with the opportunities and protections implicit in the Legal Empowerment of the Poor agenda.

Establishing entrepreneurial rights also implies a broad policy reform agenda (Table 5.9). Within the mandate of the Commission, the major issues for poor business people include lack of recognition and vulnerability, lack of credit and capital, absence of social security, lack of protection of labour and of assets, and institutional barriers to the formal economy such as complicated procedures (entry/exit, expansion of business contracts, conflict resolution). There would be a possible spectrum from the street hawker or fisher without

Table 5.8 Empowerment Domain 3: Labour Rights

Framework of Opportunities and Protections		
Legal and Other Instruments	**Problem for Poor People**	**Opportunities/Protections**
• Universal Declaration on Human Rights (UDHR), CESPR, CCPR • ILO Conventions • Extracts from other international human rights treaties, declarations, etc. • Rights to decent work/ livelihoods • National labour laws • Collective bargaining agreements • Some corporate codes of conduct	• Earnings inadequate to support family • Lack of recognition • Denial of freedom of association • Institutional barriers/issues • Unsafe working conditions • Child labour • Forced/bonded labour • Discrimination • Barriers to combining work and family • Lack of social security/ protection • Low productivity and long hours	• Productive employment with higher incomes • Skill acquisition/upgrading • Balanced regulation of sub-contracting • Improved enforcement mechanisms and other institutions • Legal framework for stronger collective representation • Minimum package of labour rights for informal economy workers • Innovations in social protection • Measures for gender and indigenous equity • Rapid, efficient and low-cost dispute resolution mechanisms

assets, to the petty trader, the mobile hairdresser, the shopkeeper or tea-shop owner to the small business person with less than five employees, and the larger formal sector business. All these different entrepreneurs require different levels of protection and access to different kinds of opportunities. Examples of these rules and institutions are guarantees of fundamental rights, member-based organisations, cooperatives, access to financial services, social security innovations, insurance, credit, equity and capital.

These questions become even more important because the Commission's intent is not to push legal

Table 5.9 Empowerment Domain 4: Business Rights

Framework of Opportunities and Protections		
Legal Instruments	**Problem for Poor People**	**Opportunities/Protections**
• Universal Declaration on Human Rights (UDHR) • Rights to livelihoods • Right to development • Extract from other international human rights treaties, conventions, declarations, etc.	• Lack of recognition-vulnerability • Institutional barriers to formal economy: Complicated procedures (entry/exit, expansion of business contracts, conflict resolution) • Health and environmental risks • Lack of credit and capital • Lack of social security/protection	• Registration • Member-based organisations (associations, cooperatives) • Access to credit, equity and capitalisation • Rapid, efficient and low-cost dispute resolution mechanisms • Social security deficits (insurance)

reforms, *per se*, but legal empowerment of the poor. Policy changes must provide poor people with an institutional environment that offers protection, and in addition, provides incentives so that they can develop their full capabilities as individuals. This becomes a difficult agenda to implement because in too many developing countries, rights that are well articulated in legislation are simply not respected; in other developing countries, there is well-functioning statutory legal regime, but it often mainly serves the interests of the middle and upper income brackets. In some cases, the same law can be used against the poor.

We should also make mention of the legal regimes based on customary and sometimes religious rules and social compacts. These are well described and increasingly rely on some form of documentation nested in local institutions, but not recognised by statutory law. It is the poor, as previously discussed, who typically use these regimes. Formal institutions and regulations are too complex, with technical standards set too high. The lack of legal identity cuts off access to basic opportunities, such as education. At the same time, lack of identity exposes the poor to harassment and violence. Ignorance and illiteracy prevent accessing opportunities and ensuring enforcement of legal obligations. Special opportunity-measures are often required for women and the more vulnerable groups, including children and indigenous peoples.

Mapping the Legal Empowerment of the Poor Agenda at Different Political/ Administrative Levels

There is also a need for 'global public goods' or activities undertaken at the global level that will have an important role to play in supporting country-level activities. Moreover, as the Commission itself has stated, important differences exist between countries and even between regions that also call for a flexible, demand-driven approach appropriate to local realities. This section presents a framework for discussing the potential activities that could be undertaken at the global, regional national and local levels to support the implementation of the Legal Empowerment of the Poor agenda.

Table 5.10 presents an indicative summary of potential strategies and activities to be considered in the implementation of the Legal Empowerment of the Poor agenda at the global, regional national and local levels.

Activities at global level

Activities at global level would likely focus on two types of activities to support Legal Empowerment of the Poor at the country level: advocacy and knowledge management. The former would focus on getting key messages out to important target audiences through a variety of vehicles. For the World Bank's *World Development Report*, a period of six months is usually allocated to promoting the key messages after the launch date. A website, or a 'brand/logo' that can be added to existing websites, would become the future repository of the follow-up to the Commission, providing updates and progress reports on how the Legal Empowerment of the Poor agenda is being implemented. An inventory of evidence on capacity development in domains similar to Legal Empowerment of the Poor would be compiled, and dialogue would be supported to disseminate global good practices.

Knowledge management activities would build on initial inventories of good practice, on-going initiatives and actors engaged in promoting empowerment collected through the process of preparing the Commission's report. A key element would be to identify existing indicators and monitoring efforts to further the Legal Empowerment of the Poor agenda. Similarly, and particularly in the case of the rights to justice and asset holding, evaluations for learning will be vital.

Table 5.10 **LEP Implementation Strategies and Indicative Activities**

Political/ Admin.Level	Advocacy	Knowledge Management	Pilot Initiatives	Capacity Development
World	• High Level Meeting within the framework of the UN • Identify global principles of Legal Empowerment of the Poor and promote as vehicle for poverty reduction • Media strategy and campaign promoting Legal Empowerment of the Poor agenda • Mobilise donors • Target setting in relation to 2015 • Periodic reports on state of Legal Empowerment of the Poor • Website	• Inventory of existing initiatives and actors • Inventory existing evaluations and analyse lessons • Develop analytical frameworks for evaluation (including from gender/indigenous perspectives) • Developing indicators and Legal Empowerment of the Poor monitoring • Strengthen statistical bases for contextual analysis • Establish support networks of professionals, academics, etc.	• Develop country selection criteria • Conduct global survey • Engage in dialogue with potential countries and support organisations • Develop Legal Empowerment of the Poor intervention logic and strategy (logical framework approach) • Develop assessment tools • Gender audit • Use Poverty Reduction Strategies and Decent Work Country Programmemes	• Advocacy to change organisational and management practices to favour Legal Empowerment of the Poor • Inventory of existing capacity-building programmemes • Inventory of toolkits, tools and methods to support implementation • Undertake capacity needs/gap assessment
Region and sub-region	• Regional and sub-regional advocacy strategies with relevant political and financial bodies • Regional Social Contracts • Ministerial meetings • Awareness raising	• Sharing of Regional Best Practice • Regional progress monitoring • Regional reports	• Cooperation between implementing countries, development banks, and political and economic regional institutions	• Peer-exchanges within and between regions • Knowledge platform on capacity development and evaluative evidence

In addition, a range of activities would be undertaken to prepare for country-level work. Countries and international support organisations would be identified to support the process of change at country level. Resources would be mobilised. Pro-poor toolkits and methods to support capacity-building would also be inventoried and gaps identified. These would be made available through a variety of avenues — websites, workshops, etc.

Activities at the Regional and Sub-regional Levels

At the regional and sub-regional levels, activities would also likely focus on advocacy and knowledge management. The region and sub-region are critical for the success of the legal empowerment agenda; it is at these levels that global norms can be adapted to different socio-economic contexts. Building political will for change will occur through

Table 5.10 **LEP Implementation Strategies and Indicative Activities** cont.

Political/ Admin.Level	Advocacy	Knowledge Management	Pilot Initiatives	Capacity Development
Nation	• National Legal Empowerment of the Poor Campaigns • Integrate Legal Empowerment of the Poor into poverty reduction strategies/ national development plans/ decent work country programmemes	• Establishing baselines and monitoring progress regarding Legal Empowerment of the Poor • Situation Analyses • Thematic studies • Who's doing what where in Legal Empowerment of the Poor	• Pilot countries step forward/ are identified • Pilot initiatives	• Inventory of existing support structures and needs • Collaboration with professional orgs and academia to train grassroots professionals • Set up and activate forums for state interface with the poor
Locality	• Rights awareness • Information campaigns • Opportunities awareness	• Identifying grassroots experience • Identifying partners	• Pilot initiatives in up to four thematic areas	• Support to grassroots/ community-based organisations • Support to grassroots professionals and para-professionals • Facilitate community engagement techniques and forums

regional and sub-regional organisations (e.g. African Union, ASEAN, etc.), U.N. Regional Commissions (e.g. ECA, ESCAP, ECLAC), sub-regional bodies such as SADAC, Mercosur and in partnership with regional development banks (African Development Bank, Asian Development Bank, Inter-American Development Bank). A series of new 'Regional Social Contracts' could be an important mechanism to forge political consensus on the legal empowerment agenda.

Existing ministerial forums could be good opportunities to promote Legal Empowerment of the Poor and existing peer-exchange mechanisms will be possible platforms for aggregating regional demand for national reforms. Forums already engaged in law reform among countries would have a natural interest in the issues being raised by Legal Empowerment of the Poor. For example, francophone countries in West Africa are already taking steps to streamline their commercial codes under the framework of the Organisation for the Harmonisation of African Business Law. In terms of implementation, peer-exchange mechanisms can facilitate the sharing of country level experience in policy reform.

Activities at National Level

Implementation of empowering policies ideally takes place at the national level, where the chance is greatest to have wide impact on poverty; however, the aim should probably not be to establish a 'legal empowerment programmeme' as a stand-alone entity; rather, it should be to integrate Legal Empowerment of the Poor into existing processes, such as the preparation of national development

plans, poverty reduction strategies (PRSs), UN Development Assistance Frameworks (UNDAFs), etc. Another important dimension of national level work will involve working closely with professional associations (lawyers, surveyors, planners, local authorities, micro-finance institutions, Chambers of Commerce, labour unions, farmers' organisations, etc.) to create a new generation of professionals in the spirit of the 'barefoot engineers' that have been pioneered in South Asia.[9]

Activities at the Local Level

Without support from the base organisations of the poor, there is little chance of realising the Legal Empowerment of the Poor agenda. Involving these groups in the design of interventions of any kind (advocacy, knowledge management, pilot initiatives, and capacity development) is crucial. Information dissemination will be a central strategy at the local level. In some countries with particularly weak or oppressive national governments, community empowerment activities may be the only feasible ones. Where social mobilisation is strong, however, the legal empowerment agenda can be built, bottom-up, by supporting existing initiatives of the urban poor, such as the pioneering urban poor funds in Cambodia, India and elsewhere.

4. Country Level Approaches, Toolkits and Indices

The pathways to Legal Empowerment of the Poor are multi-tiered with many possible intersections, roundabouts, dead-ends, detours, and shortcuts. Given the options, carrying out Legal Empowerment of the Poor takes a variety of different country-level approaches, tools or specific techniques for manipulating the 'how' of policy. For countries promoting the legal empowerment agenda, identifying the appropriate process, picking the right tools and establishing the appropriate benchmarks for success are critical.

Countries Piloting Legal Empowerment Reform

There has been a tremendous positive response around the world to the idea of pro-poor legal empowerment. As the Commission moves from the global to the country level, a process must be developed to enable, where appropriate, the matching of the demand for reform with the appropriate supply of information, expertise and experience. Different countries will wish to take different paths to legal empowerment. Some of the critical issues that countries and their development partners will have to address are:

Historical and social context: The objectives of legal empowerment aim at achieving systemic change in the relations between the poor, the state and the market. The historic context will greatly affect the possibility to achieve change of this magnitude and the timing should be carefully considered. Is the country ready to undertake the legal empowerment challenge? Comparing data regarding economic growth, inequality and social exclusion, and poverty will be important in assessing the

need and the potential for success.

Political will: As the reform agenda affects the institutions and structures of government, high level political support must be ensured. Evidence of government commitment will include addition of legal empowerment to national development plans, poverty reduction strategies and, perhaps most importantly, national budget allocations.

Grass-roots and civil society capacity: To sustain the momentum for reform will require the active and sustained support of civil society, perhaps more than any other entity with the exception of government. Assessing its capacity to drive and sustain change is critical.

Governance: The quality of governance — the processes, rules and organisations supporting development — will have an important bearing on the likelihood of success in implementing Legal Empowerment of the Poor. The relations between government, civil society and the professional and private sectors will make or break the chances for success. Political risk mapping and stakeholder analysis will be useful tools for managing political risk.

External support: Legal empowerment processes must be nationally owned, but outsiders can play an important role in supporting the quality of the reform process and in helping to deliver specific outputs that will build the momentum for change. Assessing donor interest and the capacity of external support organisations will be important.

Choosing the appropriate country level process

A variety of options exist for countries, and the organisations that support them, to drive the legal empowerment agenda. The option chosen will depend on the specific country context and will be affected by such factors as the strength of civil society, private sector and donor interest, date of the next elections, preparation of national development strategy, and other time sensitive issues affecting the policy window. Options include:

- National civil society or academia collect information and get specific issues, such as Legal Empowerment of the Poor, into the policy debate and on the table.
- Governments develop projects in a department/ministry as part of their on going development plans and programmemes, independent of donor support.
- Governments and donors agree on specific legal empowerment projects. These can include the establishment of project implementation units whose intent is to facilitate on-the-job training of government officials or, more direct methods, such as establishing an implementation cell in a senior office, possibly even the Office of the President. In so doing, care should be taken not to sideline other institutions that may need strengthening, such as law reform commissions.
- Building on national reform processes in any of the four legal empowerment domains, ranging across broad national processes such as national development plans or poverty reduction strategies.
- Establishing multi-stakeholder processes that include government, civil society and external partners. One such example is the country-level adaptation of the Harmonisation, Alignment and Coordination (HAC) process emerging from the 2005 Paris Declaration on Aid Effectiveness (see Box 5.7 describing the Kenya HAC process in the land sector). Donors can choose from a wide variety of funding mechanisms to support this process, ranging from direct budget support to the establishment of basket funds.
- Using the coordination and funding mechanisms

Box 5.7 Land Sector Harmonisation, Alignment and Coordination for Poverty Reduction in Kenya

In line with the new agenda on aid effectiveness, the Development Partners Group on Land (DPGL) aims to deliver and manage aid to the land sector in Kenya as to meet the principles of harmonisation, alignment and coordination (HAC). In its activities and cooperation with other stakeholders, the DPGL strives to achieve consensus and support around the policy direction of the government instead of pursuing diverging agendas.

The emphasis of the group is on three areas: 1) strengthening government capacity to develop and implement land-related policies and programmemes; 2) aligning donor support with government priorities as set out in its poverty reduction strategy (PRS), and 3) avoiding duplication and overlapping in aid initiatives. The land sector donor group was officially formed in July 2003 and it has up until 2006 channelled support to the National Land Policy Formulation Process through a Basket Fund arrangement. Since its establishment, the donor group has supported the government with investments worth of US$10 million in the land sector.

The support of the DPGL is now expanding beyond policy development to cover the main activities run by the Ministry of Land through the Land Reform Support Programmeme (LRSP). The LRSP incorporates elements relating to the finalisation of the land policy process, policy implementation, institutional transformation, the development of a pro-poor Land Information Management Systems (LIMS), the implementation of the recommendations of the Ndungu Commission on illegal allocation of public land and the development of Forced Eviction Guidelines in Kenya.

These and other activities have collectively supported the Government's economic recovery strategy (i.e., PRSP) as well as the government's efforts to realise the Millennium Development Goals, particularly relating to the Eradication of Extreme Poverty and Hunger (MDG 1), Promotion of Gender Equality and Empowerment of Women (MDG 3), and Ensuring Environmental Sustainability (MDG 7). Development Partners financially supporting the Basket Fund initiative have been DFID (UK), SIDA (Sweden), DCI (Irish Aid) and USAID. Other development partners involved in the land sector in Kenya include JICA, the Embassies of Finland and Italyy, the World Bank, as well as UN related agencies such as the FAO, UNDP, and UNEP.

Source: Adapted from UN-HABITAT (2007) Global Report on Human Settlements 2007: Enhancing Urban Safety and Security, London, Earthscan, p. 154

established in post-disaster or post-conflict contexts to support the reform process.

After deciding on the general tack to take with regard to Legal Empowerment of the Poor, countries will likely need to agree on a more detailed process for managing the reform process. This process will often include a series of steps as outlined below. These are not necessarily sequential and several steps may have to be repeated over time as the situation changes.

- *Mobilising stakeholders:* Identifying key stakeholders and agreeing on a process and a set of principles to guide the legal empowerment agenda will be a critical step to build confidence among stakeholders. Key issues will include coordination mechanisms, adoption of a protocol or agreement, and clarification of roles and responsibilities, and agreement on a broad process for reform;
- *Situation analysis or legal empowerment diagnostic:* A detailed assessment should be made of the relevant issues to be addressed, including the relevant aspects of each of the four legal empowerment domains. The analysis will identify policy, legal and institutional issues, as well as gaps in resources, capacity and tools.

- *Action planning:* Development of the goal, objectives, strategies, and specific interventions that will contribute to the legal empowerment objective. Critical issues will include sequencing and timing, resource constraints, establishing a monitoring and evaluation framework and ensuring a balance between process and products to maintain momentum.
- *Pilot activities:* These should be built around the idea of 'quick wins' — outputs — in areas where these are feasible. In this way one can build the credibility of the legal empowerment agenda and demonstrate some initial success. Pilot activities could include a mix of practical reforms in each of the domains, policy analysis (e.g., 'path to property' analysis), advocacy and awareness, information collection and strengthening coordination mechanisms.
- *Scaling-up:* Expanding the range of activities and taking on more complicated challenges. Raising awareness of past successes, additional sensitisation, strengthening the consultation process will all support this stage. Evaluations may be useful tools here.
- *Institutionalising change and the change process:* Tackling some of the fundamental reforms by building on the experiences in the pilot phase and scaling-up phase to reform the organisations and rules that shape the institutional context.

Tools to support legal empowerment reforms

After deciding on the general approach to be taken with Legal Empowerment of the Poor, reformers need to consider numerous applied techniques, developed by anti-poverty workers, community organisers and reform advocates around the world for carrying out activities analogous to the Commission's empowerment agenda. Table 5.11 summarises some of the pertinent pro-poor policy tools, sorting them out according to the implementation phases where they are most, but not exclusively, applicable. These implementation techniques are general, flexible and easy to modify; development practitioners will need to screen out those tools that do not apply to their situation, and select those that are workable in the particular country context and suitable for the particular task at hand.

Explanation of the tools

Three tools (stakeholder analysis, contextual analysis, and policy characteristics analysis) have already been covered at some length in Section 2. All the tools are annotated in alphabetical order in Annex 1 (and the tools for action planning and monitoring are explained further in Section 5). Readers are also referred to the numerous toolkits developed by international organisations and NGOs for organising communities and implementing numerous aspects of social and economic development policy (see the footnote below and Annex 2 for a comprehensive inventory of toolkits).[10] Many of these tools can be used individually or in combination in the implementation of Legal Empowerment of the Poor reforms. On this basis, a set of Legal Empowerment of the Poor indicators can be developed, tailored to country circumstances.

Ready-made Indicators of Legal Empowerment

Both the formulation and monitoring phases of Legal Empowerment of the Poor implementation depend on indicators of democratisation, good governance, human rights protection, and many other variables related to legal empowerment. There has been a quantitative revolution in recent years of internationally comparable data on political and regulatory institutions. There are now at least 150 measures of different aspects of governance in the public domain. These data series are of variable

quality and utility in establishing rough baselines for governance among the nations of the world; they are not sufficiently developed to be of great value in measuring changes in the political or legal status of a country's poor men and women over time. They are also highly aggregate and thus of limited utility in ascertaining empowerment in a particular sub-national community or region.

While not perfect, perhaps the best example of international indexes relevant to Legal Empowerment of the Poor is the World Bank's Governance Research Indicator series. These are based on several hundred individual variables measuring perceptions of governance. They are organised into six categories: rule of law, lack of political violence, quality of the regulatory framework, efficiency of the bureaucracy, control of corruption and accountability of the political leaders.[11] The World Bank's data have their uses but must be applied very cautiously in development work (Arndt and Oman 2006). The Eurostat/UNDP (2004) users' guide to governance indicators describes at length the applications and limitations of several of the leading off-the-rack governance data series.

Pending reliable pre-existing empirical information on national or local-level legal empowerment, Legal Empowerment of the Poor programmemes and projects will have to develop and use their own metrics for evaluating the socio-economic environment and gauging accomplishments, based on surveys and interviews, as discussed above. Ruth Alsop and Nina Heinsohn (2006) report to the World Bank on one such analytic framework that can be used to measure and monitor empowerment processes and outcomes. Kucera et al. (2007) put forward indicators that have been tested for measuring various aspects of decent work. (See Annex 3 for a list of readymade indicators.)

5. Monitoring and Evaluation

Because action planning and progress monitoring (the final row in Table 5.11) has not been discussed much in these pages, and because this function is especially important for outside agencies, some of its tools are worth looking at a bit more closely. Brinkerhoff and Crosby (2002) identify four components to establish an efficient participatory and country-driven policy monitoring system:

1. A management information system based on targeted indicators endorsed by national stakeholders.
2. Stakeholder monitoring to identify the responses of those that benefited or those that lost from the policy reform measures.
3. Problem-solving studies to devise tailored and practical solutions to implementation issues.
4. Process and impact evaluations to support learning over time.

Best practices recommend that the design of each component should be based on the principles of adaptation to user needs and availability of resources, user participation, parsimony (the least amount of information and cost required to accomplish the task), and simplicity. To address both the content and process sides in monitoring policy implementation, it is important to understand fully what needs to be monitored.

Lessons learned from country experiences have led to the following practical suggestions for monitoring policy reform implementation, according to Brinkerhoff and Crosby (2002):

1. Define a list of steps, processes, targets and milestone events in the reform process. This will enable the breakdown of the policy processes into a series of components to enable

Table 5.11 **Pro-poor policy implementation tools***

Implementation phase	Possible tools
Developing policy issues, agendas, and decisions	Competencies Assessment Contextual analysis Legal and institutional framework Opportunity Ranking Policy characteristics analysis Political will and risk analysis Problem Census Problem tree Social Baseline Study Social Impact and Opportunities Assessment
Policy formulation and legitimisation	Community Mapping Focus groups Force field analysis Influence mapping Institutional Analysis Participatory Poverty Assessments Policy briefings Political mapping Stakeholder analysis Strategic Planning Framework/SWOT/PEST
Constituency building	Conflict prevention and resolution National symposium Outreach (Media Campaigns, School Programmemes, Public Speaking Engagements, Publications, Public Hearings, Study Circles) Workshops
Resource mobilisation	Advocacy/lobbying Domestic resource mobilisation Fundraising Participatory budgeting
Implementation design and organisational development	Best practices (collection, dissemination) Exchanges Institutional twinning Internship programmemes Para-professionals Plain language (translation and dissemination of laws) Technical assistance Training (on leadership, group work and related management issues) Travel grants/internships for officials Web-based support
Action planning and progress monitoring	Gender audit Impact evaluation Logical framework approach MIS Problem solving studies Stakeholder monitoring (household surveys, key informant interviews)

**Guide to the techniques that might be appropriate during the implementation cycle; a technique may be useful in more than one phase of implementation. Highlighted tools are described in Section 2 of this chapter.*

Table 5.12 **A Framework for a Demand-Led Assessment of Implementation**

	Access to Justice	Asset holding Rights	Labour Rights	Entrepreneurial Rights	Capacity Development
Law	E.g., To what extent does the law recognize the right of a poor person to be registered at birth?	E.g., To what extent does the law protect poor tenants from eviction?	E.g., To what extent does the law extend labour standards to the informal economy?	E.g., To what extent does the law mandate the reduction of cost of registering a business belonging to a poor person?	E.g., To what extent does the law mandate government institution to simplify procedures for the poor?
Government implementation efforts	E.g., In the instant case, how affordable was the registration process to the poor persons?	E.g., In the instant case to what extent has the government documented tenure rights of the poor?	E.g., to what extent does the relevant government agency monitor compliance with labour laws in the formal and informal economy	E.g., in the instant case to what extent has the relevant government agency decentralised its business registration process to give access to the poor?	E.g., To what extent does the government provide training to its staff on legal empowerment of the poor? E.g., To what extent does the government provide accessible guidance to the poor on services available to them from government agencies?
Effectiveness	E.g., In the instant case, to what extent was the poor person able to affect the registration?	E.g., In the instant case, to what extent was the poor person able to retain possession of the property?	E.g., to what extent was the poor person working in the formal or the informal economy able to enjoy the benefits of labour protection laws?	E.g., To what extent was the poor person in the instant case able to affect the registration of his/her business?	E.g., To what extent was the poor person in the instant case aware of their legal rights?

an easier grasp of what needs to be monitored.

2. Make the use of qualitative rather than quantitative approaches in monitoring the system, as they offer a more complete and nuanced set of data that are numeric and narrative.
3. Engage implementing parties and beneficiaries in the draw up of the monitoring systems and methodologies and acquire feedback. This will simplify the process of tracking previously identified indicators. Focus group discussions, workshops and other similar methods can be used to ensure participation.

4. Customize the choice of monitoring methods to the needs and constraints of the implementing agencies.
5. Delegate the monitoring process to an external body selected from civil society organisations, think tanks and advocacy groups, to ensure greater independence, transparency and accountability.

A possible framework for a demand-led assessment of government implementation of the Legal Empowerment of the Poor recommendations is shown in Table 5.12, which is based on the framework of the World Resources Institute's Access Initiative Assessment method. Each cell of the matrix has been populated with an indicator to serve as an example. Those undertaking the assessment can rank each metric based on research guidelines and data collected. These assessments, when repeated over time, will show whether and how well Legal Empowerment of the Poor recommendations are being implemented.[12]

Monitoring of reforms will involve seeking answers to critical questions. Among the questions that may need to be posed are the following: Are the policy reforms really being implemented? And if so, do they really matter? If they do make a difference, how important is it? What are the gender impacts?

Taking into consideration the multiple dimensions of policy reforms, the pace of implementation will likely be gradual. There may not even be conspicuous impact in the short-term. Therefore, in the monitoring of progress, it will be important to establish process indicators, and to pursue monitoring activities either on a continuous or repetitive basis. Furthermore, the entire set of measuring activities — data collection, analysis, and interpretation — will need to be based on the country's national priorities.

6. Strategy and Tactics

We have reviewed the social, political and technical factors that stand in the way of poor people's legal empowerment, and set forth broad ideas about how to counter those forces. Change agents must put aside preconceived or uniform approaches to Legal Empowerment of the Poor to think creatively about how to make Legal Empowerment of the Poor available, affordable and acceptable in their own specific context. They must be on the look out for unintended consequences, perverse incentives, and hidden agendas. Their initiatives must be informed by pilot projects that can be amended if they fail, and scaled-up and replicated if they work.

In designing empowerment policies and deciding upon how to implement them, change agents must always keep the following core values front and centre:

- Poverty reduction is the ultimate objective of Legal Empowerment of the Poor, so every reform must be judged by the extent to which it imparts freedom and allows poor people to gain more control over their futures and to improve their well-being.
- The peaceful struggle against impoverishment must be participatory, based on respect for human rights, and with poor people playing active roles along the way.
- The gains of Legal Empowerment of the Poor should be broad-based and take into account the diversity of disadvantaged groups, in particular, the indigenous people who are often inadvertently overlooked by policymakers.
- The gains also must include women; therefore, another standard against which to measure Legal Empowerment of the Poor policy is whether it takes full account of gender-specific effects.

Empowerment of the poor in the end means social transformation — not only a more just distribution of wealth and income, but a more expansive sharing of power so disadvantaged people can begin bringing about significant change through their own actions.

Strategic Findings

Among the strategic options and considerations implied in Chapters 1 through 4 of this volume, a number of them stand out, and they are mentioned below. Several are rich with paradox, and government officials, civil society members, and development practitioners need to sort out the conflicting elements to determine the most promising strategic direction to take for their community, country or region.

1. **Legal Empowerment of the Poor is easiest to implement where it is needed least.** An effective administrative state, a set of transparent and accountable political institutions, and a growing economy are predictors of success for legal empowerment policies. Yet, countries that meet these criteria probably have their poverty and social exclusion under relative control; the bulk of the global poverty problem is in precisely those nations that lack these positive attributes, so implementation of Legal Empowerment of the Poor must usually be completed under inauspicious conditions.
2. **There is a rich base of comparative international experience, but no ready-made formulas for legal empowerment.** Solutions that suit one context may be dead wrong in another. Great care should be taken to develop interventions that are appropriate for the specific historical, socio-economic and political context of a given country.
3. **Think systemically, act incrementally.** A nation's legal and administrative setup functions like an ecosystem with a heavy measure of interdependence. That implies empowerment takes systemic changes. Yet, big bang approaches are rare and they often run out of steam when they are tried. In particular, any attempt to supplant and replace existing informal mechanisms seems doomed to failure. Instead, informal mechanisms must be gradually integrated with the formal.
4. **Think long, go short.** Justice, labour and land issues are complicated and do not lend themselves readily to a traditional two-year project approach. Yet, reformers can never lose sight of the fact that politicians are in office for finite terms. The implementation process, therefore, needs to involve actors who are less affected by elections, and deliver successes on a regular basis. Even if these successes are small, they must provide tangible improvements to maintain the momentum for reform.
5. **Start from afar, but change from within.** Legal empowerment is on the international community's agenda, as the very existence of this Commission proves. Yet, pro-poor policy change has to be endogenous. Any perception that foreign donors drive reform may prove counter-productive. Reforms that do not find champions and build constituencies within are likely to fail (as they should).
6. **Support associations of the poor, but do not compromise their independence.** Capacity-developing support is important to associations of the poor, be they small farmers' cooperatives, community-based organisations, domestic worker trade unions or urban user-groups. The incongruity is that assisting these groups may cause them to become more accountable to the external funding agency than to their membership.
7. **Work from the bottom up and the top down.** Donor expectations regarding the interest of the poor in legal empowerment are often out

of touch with the desires of the poor to get the state to provide services and benefits through recourse to client connections if necessary. At the same time, external change agents cannot ignore the preconceptions and policy positions of the international agencies that are funding their work with Legal Empowerment of the Poor. They need to think about how to balance these two perspectives.

8. **Decentralise…except when it is better to centralise.** A common theme in several Working Group reports is the need to decentralise responsibility, resources and accountability for legal service delivery to the lowest level at which they can be effectively managed. But decentralisation also gives power to local elites opposed to the Legal Empowerment of the Poor agenda, so this option bears watching.
9. **Balance demand for change with the capacity to accommodate change.** The energy of the poor to pinpoint solutions to their problems, to organise, and to engage in advocacy must be met with an equally receptive state. It is important to give attention to official capacity to respond to the thrust for change coming upwards from the grassroots.
10. **Put together informal and formal institutions.** Informal institutions and authority can be of great utility in pursuing Legal Empowerment of the Poor, but so can official institutions. Policymakers need to combine the best features of both to facilitate implementation.
11. **Look for cooperation, but anticipate confrontation.** There are Legal Empowerment of the Poor policies where all sides can benefit, for instance land readjustment which takes irregularly sub-divided land and reallocates it for public and private use according to planning requirements. However, practitioners also need to face up to the fact that compromise and mutual adjustment are not always going to happen with Legal Empowerment of the Poor. The narrow technical and legal aspects may be the least controversial, but even those ultimately affect the distribution of power within society. Governments trying to implement an empowerment agenda have to figure out ways either to reimburse or to defuse those possibly disadvantaged by the reforms. Managing political risk throughout the implementation process, therefore, is critical.

Tactical Ideas

While walking the tightrope of these strategic issues, change agents will also need to consider implementation tactics. A list of common modes of action is presented below. These actions have been selected from materials put forward by all the working groups involved in the preparation of this volume, and are presented in no particular order.

1. **Be opportunistic.** Take tactical advantage of opportunities as they arise and do not be constrained by a programmemed calendar of deliverables.
2. **Use plain and local language.** One of the key elements for national ownership is language: dialogue, debate and information sharing must be conducted in local languages; legal documents should be demystified by rendering them in layperson's terms.
3. **Work with para-professionals.** A proposal raised in several working group reports is to create a new generation of para-professionals, who are trained and possibly certified to respond to the day-to-day service requirements of the poor, but who do not require the advanced studies of current professionals, which are often inappropriately scheduled, expensive and include subjects of limited relevance for the prospective client base.

4. **Bring existing technical solutions up to date.** Particularly in the land sector, many of the existing legal instruments are inadequate. Land information systems are often expensive, complicated, and bureaucratic and, as a result, quickly become outdated. Unfortunately, the systems required, for example, to integrate innovative forms of tenure (certificates, group rights, etc.) into the national spatial data infrastructure do not currently exist. As emphasised in Chapter 2 of this report, the choice of long-term technical solutions must be driven by the willingness and ability of the users to pay. Thus an important element in successful Legal Empowerment of the Poor implementation will be the appropriateness of the underlying analysis and the existence or creation of technical systems to support reform.

5. **Bring together technical expertise and grassroots experience.** Technocrats dominate policymaking in Legal Empowerment of the Poor. While valid reasons exist for some technical requirements, grassroots realities and community solutions also need to be understood and incorporated in the reform process. If a law does not meet its users' needs, it is useless to the poor.

6. **Dedicate resources to support participatory processes and coordination.** While technical solutions often attract significant donor and government interest, capacity development for participation and coordination mechanisms is often undervalued and therefore under-funded. Other kinds of support, for example, are translation of laws and regulations into local languages, or grants to local civil society groups to lay bare Legal Empowerment of the Poor issues and to fund dissemination campaigns. Specific support is required for coordination, preparation of research and options papers, and information dissemination. Peer exchanges (both inter-regional and intra-regional) are another valuable pro-poor tool for building commitment to reform and for maintaining momentum over time.

7. **Provide effective outreach.** Under intense pressures to deliver, information and communication programmemes are often neglected during implementation. Yet without a dedicated outreach campaign, clients will rarely adopt the proposed reforms. Feedback received from those involved needs to be cycled back into the reform process, to keep it homegrown and responsive to demand.

8. **Provide access to information.** Two-way communication between governments and the poor will need to be improved. For example, access to information has helped people to secure tenure and to tackle job discrimination through a better understanding of their rights. There are also examples in post-disaster and post-conflict nations of the importance of providing access to information. Mobilising resources to take advantage of information in support of Legal Empowerment of the Poor presents a challenge because in many countries information that is nominally 'public' is in practice difficult to obtain. In India, for example, civil society organisations waged a fierce campaign to gain access to public budget and expenditure data using freedom of information laws in six states, which later culminated in the passage of a national law. However, in countries where civil society is weak, and where certain social groups have been marginalized over extended periods of time, the ability of the poor to engage in effective collective action is likely to be limited and fragile.

9. **Bundle service delivery.** The strategy of bundling services is highlighted in several chapters of this report; it is seen as a cost-effective strategy for delivering a variety of services to the poor. An example is to deliver identity cards with vaccination programmemes. Such bundling may also have the great potential of contributing to com-

munity empowerment, especially if the delivery is structured so as to reinforce transparency and accountability in community institutions. Experience with delivering bundled municipal services (e.g., licensing, registration, tax and fee payments) through one-stop shops offers relevant lessons of utility for Legal Empowerment of the Poor reforms as well. Membership-based organisations such as cooperatives, business associations, trade unions and grass-roots women's organisations can offer free or low-cost legal services to the members.

10. **Support alternative dispute resolution.** All four working groups emphasise the need to support alternative dispute resolution mechanisms, including arbitration, mediation and conciliation. The fundamental challenge is to avoid the cost and expense of formal litigation in return for decisions that are made transparently and can be enforced. Lessons learned from labour courts may be instructive in other fields as well.
11. **Collaborate with professional organisations.** Professional organisations are promising potential allies. While lawyers, national bar associations, law reform commissions, and law schools are oriented towards meeting the needs of the middle and upper classes, they are also often willing to lend their professional expertise to the needs of the poor. Land surveyors, valuators, and notaries often act as gatekeepers of rules that are often divorced from the realities of the urban poor or even holdovers from the colonial era, but they may also be amenable to reorienting their thinking. The role of urban planners and local authorities also merits attention. It may be possible to convert these stakeholders from possible opponents into allies for change.

Change agents are invited to consider and then try these suggestions for strategy and tactics, remaining true to the core values of the legal empowerment agenda. Where their efforts prove successful, they will make it possible for many more people now mired in poverty to improve their lot in life within the foreseeable future. While implementation success cannot be guaranteed because of the many countervailing factors mentioned earlier, steady, modest progress in fighting poverty with legal tools and rights is well within the realm of possibility in most countries.

Annex 1: Policy Implementation Tools

Listed below are a variety of tools deemed useful for implementing policies that may help to advance legal empowerment reforms:

Advocacy/lobbying: These are attempts to influence the outcomes of any policymaking system through endorsements, publicity, discussions, etc.

Best practices (collection and dissemination): A best practice is a management idea that assumes there is a technique, method, process, activity, incentive or reward that is more effective at delivering a particular outcome than any other technique, method or process. The idea is that with proper processes, checks, and testing, a desired outcome can be delivered with lessproblems and fewer unforeseen complications.

Contextual analysis: This involves a system-wide review of economic, social, cultural, political, administrative, and institutional factors that affect the ease of implementing a particular public policy in a country, such as legal empowerment reforms.

Community Mapping: A Community Map is a visual representation of what the community perceives as its community space. This includes showing the boundary of the community as understood by community members and all the elements recognised by them as part of their area. Most of the spatial information is obtained through direct observation. The community members themselves decide what does and does not go on the map. Some items of importance to the community may not be noticeable to outsiders, such as sacred sites or clan boundaries (ICMM, the World Bank and ESMAP 2005).

Competencies Assessment: Measuring and recording the skills of an individual or group is an essential starting point for any Legal Empowerment of the Poor implementation strategy. Competencies may include knowledge, skills, and abilities as well as other characteristics such as initiative, motivation, legitimacy and values. Competencies can be assessed in the framework of a facilitated workshop process or on an individual basis, for example.

Conflict resolution: Conflict is a normal part of relationships and occurs whenever people or groups have different expectations of joint or intersecting activities. Instead of seeking to avoid conflict at all costs, which would be unrealistic, it is better to learn to recognise and manage conflict as part of good relationship building and maintenance. Not all conflicts can be resolved, but methods exist for managing differences between stakeholders so that development activities can continue (ICMM, the World Bank and ESMAP 2005).

Domestic resource mobilisation: As defined in the Monterrey Consensus, domestic resource mobilisation includes policies that foster good governance that is responsive to the people's needs; an appropriate policy and regulatory framework; the fighting of corruption at all levels; sound macroeconomic policies aimed at sustaining high growth rates, full employment, stability and poverty eradication; fiscal sustainability; investment in basic economic and social infrastructure; improvement in working conditions; strengthening and development of the domestic financial sector, enhanced by microfinance and credit for micro- and small and medium-sized enterprises, and the establishment of development banks to further facilitate access to credit.

Exchanges: Practitioners may visit or temporarily work in a similar organisation or job assignment in a foreign country to gain practical and comparative experience about a policy such as legal empowerment.

Focus groups: These are groups selected for their

relevance to a particular area of investigation, which are engaged by a trained facilitator in discussions designed to share insights, ideas, and observations on the area of concern. Focus groups are typically open-ended, discursive, and used to gain a deeper understanding of respondents' attitudes and opinions. A key feature is that participants are able interact with each other. The group dynamic often provides richer insights and data than would have been achieved by interviewing the participants individually (ICMM, the World Bank and ESMAP 2005)

Force field analysis: Force field analysis helps clarify a group's position on a particular policy. It is a graphical representation in which groups are placed on a continuum from 'oppose' to 'favour', where the middle of the continuum is 'neutral'. It is useful in providing a quick overview of sources of major opposition and support (Brinkerhoff and Crosby 2002).

Fundraising: There are individuals, corporations, foundations, and national and international government bodies that may be approached for help in funding Legal Empowerment of the Poor.

Gender audit: A participatory and self-assessment approach to promote organisational learning about gender mainstreaming (Moser 2005).

Impact evaluation: An impact evaluation assesses changes in the well-being of individuals, households, communities or firms that can be attributed to a particular project, programmeme or policy. It is aimed at providing feedback to help improve the design of programmemes and policies. In addition to providing for improved accountability, impact evaluations are useful for dynamic learning, allowing policymakers to improve ongoing programmemes and ultimately better allocate funds across programmemes.

Influence mapping: This technique identifies the individuals and groups with the power to effect a key decision. It further investigates the position and motives of each player and the best channels through which to communicate with them (Start and Hovland 2004).

Institutional Analysis: Institutional analysis studies the institutional set-up in and around a given community, including how important each institution is, how they interact with each other and who participates in them. This information can be gathered through an interview process, for example, by asking community members to describe the institutions present in their community, their function, importance in relation to other institutions, and if and how they participate in them. Institutional analysis is particularly useful in identifying institutions at the community level that can play an important role in the legal empowerment process (ICMM, the World Bank and ESMAP 2005).

Institutional twinning: Institutional twinning is a form of staff exchange. For instance, staff of a particular agency would visit a similar institution in a foreign country, with the aim of exchanging expertise. Often the exchange is two-way (Ouchi 2004).

Internship programmemes: These are programmemes that integrate study with planned and supervised career-related work experience on practical issues of implementation.

Logical framework approach: LFA is an analytical, presentational and management tool that can help planners and managers to analyse the existing situation during project preparation, establish a logical hierarchy of means by which objectives will be reached, identify some of the potential risks, establish how outputs and outcomes might best be monitored and evaluated, and present a summary of the project in a standard format (Örtengren 2004). LFA is an overarching tool that may use other techniques listed here, for instance situational analysis and stakeholder analysis.

MIS: A Management Information System is one of four components that establish an efficient policy monitoring system (see Section 5). MIS is used to collect, analyse, store, and disseminate information useful for decision-making in a project. It tracks targeted indicators that help inform choices in a project. Design of the MIS should be based on the principles of adaptation to user needs, and availability of resources, user participation, parsimony, and simplicity. It is important to understand fully what needs to be monitored.

National symposium: This is a high-profile way to publicise Legal Empowerment of the Poor or other policies.

Opportunity Ranking: This is used to help community members and development partners decide upon which projects to start implementing. Taking account of locally available resources, skills, and capacities, it is built around a scoring system that ranks various options against agreed criteria.

Outreach: Methods for publicizing Legal Empowerment of the Poor or other policies include media campaigns, school programmemes, public speaking engagements, publications, public hearings, study circles. (Study circles, for example, are a method of adult education and social change popular in Scandinavia._

Para-professionals: These are people in various occupational fields, such as education, healthcare, and law, who have obtained a certificate by passing an exam that enables them to perform a task requiring significant knowledge, but without having the occupational license to perform at the professional level in the field.

Participatory budgeting: Participatory budgeting is a process of democratic deliberation and decision-making, in which ordinary residents decide how to allocate part of a municipal or public budget. Participatory budgeting is usually characterised by several basic design features: identification of spending priorities by community members, election of budget delegates to represent different communities, facilitation and technical assistance by public employees, local and higher level assemblies to deliberate and vote on spending priorities, and the implementation of local direct-impact community projects. Various studies have suggested that participatory budgeting results in more equitable public spending, higher quality of life, increased satisfaction of basic needs, greater government transparency and accountability, increased levels of public participation (especially by marginalised residents), and democratic and citizenship learning.

Participatory Poverty Assessments: A PPA is a tool that allows consultation of the poor directly. Findings are transmitted to policymakers, thereby enabling the poor to influence policy. APPA uses a variety of flexible participatory methods that combine visual techniques (mapping, matrices, diagrams) and verbal techniques (open-ended interviews, discussion groups). It also emphasises exercises that facilitate information sharing, analysis, and action. The goal is to give the intended beneficiaries more control over the research process. To ensure follow-up at the community level (a principle of participatory research), many PPAs have involved the development of community action plans subsequently supported by local governments or NGOs (Robb, 2000).

Plain language: In many countries, the law is only drafted and administrated in the national language, which many of the poor may not speak or read. Translation of laws into local language is hence an obvious way of improving access of the poor to information. This may also involve rendering legal jargon into everyday terms in the dominant country language.

Policy briefings: These are summary reports that re-

view the current state of practice and methodologies and summarize critical issues and implications.

Policy characteristics analysis: This analysis informs the understanding of the reformers, on the dimensions and dynamics of the policy, its origins and where greatest support and opposition are most likely to lie. Its purpose is to provide a systematic understanding of the policy that can carry over into more detailed appraisal such as the political mapping or the stakeholder analysis. It is designed to answer questions such as the exact aim of the policy, its implementation context, how the public may react to change, how consequential the change will be (Brinkerhoff and Crosby 2002).

Political mapping: Political Mapping is a means for organising information about the political landscape in an illustrative way. Macro-political mapping provides analysis of political alliances at the macro (national or sector) level, while micro-political mapping provides more disaggregated insights into the political landscape. Political mapping can be used to illustrate concentrations of support for the government.

Problem Census: The Problem Census is usually conducted in a small group setting, at the local community level, for example. Designed as a non-threatening, focused discussion that uses small group dynamics, its objective is to elicit a comprehensive and ranked census of the problems, real or perceived, of households and the community as a whole as well as the community's proposed solutions. This approach gives community members the opportunity to articulate and prioritise the problems they consider need addressing in their community, to discuss them as a group, and then collectively decide on which problems to solve (ICMM, the World Bank and ESMAP 2005).

Problem solving studies: Problem solving studies are aimed at devising tailored and practical solutions to implementation issues. As for MIS above, the design of problem-solving studies should be based on the principles of adaptation to user needs, and availability of resources, user participation, parsimony, and simplicity. (Also see Section 5.)

Problem tree: Problem-tree analysis serves to identify immediate and direct causes and effects of a focal problem assisted by graphic representation. The technique helps illustrate context and interrelationship of problems as well as possible impacts when targeting projects and programmemes towards specific issues.

Social Baseline Study: A base line study consists of collecting and analysing baseline data that describes the social and economic environment of an area of interest as well as the characteristics of a target group. A social baseline study, for example, would observer demographic factors (population, population density, age, ethnicity, health, income, etc.), socio-economic determinants (e.g. factors affecting income and productivity, land tenure, access to productive inputs and markets, family composition, access to wage opportunities), social organisation (e.g. participation in local-level institutions and decision-making processes, access to services and information), economic organisation (e.g. local and regional businesses and commercial structures, infrastructure supporting economic activity, government, and other economic/industrial development plans for the area), socio-political context (stakeholder organisations, development goals, priorities, commitment to development objectives, control over resources, experience, and relationship with other stakeholder groups), historical context (e.g. historical issues and events, migration, relocation), needs and values (stakeholder attitudes and values determining whether development interventions are needed and wanted, appropriate incentives for change, and capacity of stakeholders to manage the process of change), human rights context (prevail-

ing human rights issues and country risks), institutions (role, governance, resources, capacities of local institutions as well as regulatory framework), cultural background (cultural norms and practices and places of high cultural value) (ICMM, the World Bank and ESMAP 2005).

Social Impact and Opportunities Assessment: This is a process that identifies negative and positive impacts resulting from a given project. It then looks at ways of maximising opportunities that can arise from the positive impacts and offsetting or minimising the negative effects. Being able to demonstrate positive effects at the early stages of a project facilitates local engagement and participation (ICMM, the World Bank and ESMAP 2005).

Stakeholder analysis: Stakeholder analysis is designed to identify those interests that should be taken into account when making a decision. It assesses the nature of a policy's constituents, their expectations, interests, intensity of their interest in the issue at hand, and the resources they can bring to bear on the outcome of the policy. It helps ensure that the policies are designed in ways that improve their chances of adoption and implementation. In implementation, it helps build an understanding of the relative importance of various groups and the role they might play. To be useful, it is important that the stakeholder analysis indicates why interests should be taken into account (Brinkerhoff and Crosby 2002).

Stakeholder monitoring (household surveys, key informant interviews): Household surveys provide data on spending for different kinds of goods as well as household characteristics, such as age, gender, education and occupation of family members. Data obtained from household surveys is particularly useful for measuring income poverty and relating it to household characteristics. They are the most valuable resource available for assessing economic outcomes, as well as some aspects of opportunity, and for understanding how those outcomes are associated with household characteristics (Stern, Dethier and Rogers 2005). A key informant interview is a form of in-depth interview often used in the initial phase of a project and again in evaluation. Key informants are selected for their first-hand knowledge about the topic of interest. Some of the people who might be approached in a key-informant interview include a community leader, the head of an NGO that could become a partner, or the leader of a small business organisation. (See Section 5 of this chapter for further discussion.)

Strategic Planning Framework/SWOT/PEST: Strategic planning is a general management technique of defining development objectives, planning to achieve those objectives, and deciding how to know when you have succeeded. Strategic planning begins internally, and as it progresses toward detailed activity planning, it needs to be shared and reviewed by stakeholders. SWOT Analysis stands for 'Strengths, Weaknesses, Opportunities, and Threats' and is a specific strategic planning tool used to evaluate those involved in a project or in a business venture. It involves specifying the objective of the project and identifying the internal and external factors that are favourable and unfavourable to achieving that objective. PEST analysis stands for 'Political, Economic, Social, and Technological analysis,' and describes a framework of macro environmental factors used in environmental scanning. It is a part of the external analysis when doing strategic planning and gives a certain overview of the different macro environmental factors that the company has to take into consideration.

Technical assistance: Technical assistance means transfer of new knowledge along with new technology to others who do not know about it. The field of technical assistance may include management, operations systems, engineering and other technologies.

Training (on leadership, group work and related management issues): This tool covers a variety of planned, prepared, and coordinated programmemes to give group leaders and practitioners information they can use to perform their jobs better.

Travel grants/internships for officials: These allow mid-career professionals and para-professionals to acquire practical knowledge by visiting or serving in organisations in foreign countries.

Web-based support: The Internet is an invaluable tool for disseminating information to change agents and development practitioners about legal empowerment of the poor.

Workshops: These are structured group meetings at which a variety of key stakeholder groups, whose activities or influence affect a development issue or project, share knowledge and work toward a common vision. With the help of a workshop facilitator, participants undertake a series of activities designed to help them progress toward the development objective (consensus building, information sharing, prioritisation of objectives, team building, and so on). Stakeholder workshops are used to initiate, establish, and sustain collaboration in policies such as Legal Empowerment of the Poor (World Bank 1996).

Annex 2: Existing Toolkits: An Inventory

Access to justice

There are several access-to-justice toolkits, focusing on different aspects of the justice question. Among the major ones are the following:

- *The Access Initiative Assessment (TAI) Toolkit.*[13] Although this has been designed with the environment in mind, the concepts are capable of being extended to more general access to justice issues. There are four categories in the TAI toolkit — access to information, public participation, access to justice, and capacity development. More importantly, the indicators are divided into law, effort and effectiveness. Law indicators measure the presence and scope of the law, its breadth and support for access and whether it provides sufficient guidance for implementation and enforcement. Effort indicators assess government action taken to provide access, including action to implement laws. Effectiveness indicators assess whether laws and government efforts have resulted in effective access and whether the world has changed because of the level of access achieved. Given the focus of legal empowerment, adapted use of the access to justice indicators (on all three counts of law, effort and effectiveness) seems to be the most appropriate.
- *The Office on Drugs and Crime of the United Nations (UNODC) has a Criminal Justice Assessment Toolkit*[14] This has separate segments on policing, access to justice, custodial and non-custodial measures and cross-cutting issues. Given the focus of legal empowerment, adapted use of the access to justice indicators (covering four heads of the courts; the independence, impartiality and integrity of the judiciary; the prosecution service; and legal defence and legal aid) seems to be the

most appropriate.

- *Although not quite presented as a toolkit, UNDP's Practitioner's Guide on Access to Justice can be interpreted as a toolkit*[15] This has the additional advantage of bringing in a pro-poor angle. 'The meaning of access to justice is interpretative and contextual. When people think of 'access to justice', they are not necessarily thinking of the justice system. For example, a UNDP participatory survey on people's perceptions of justice in India found that slum dwellers prioritised access to justice with regard to economic issues, whereas members of marginalised castes highlighted the social dimensions of access, and indigenous minorities highlighted the political dimension. Therefore, the potential of formal and informal mechanisms to provide people with a sense of 'justice' in a particular situation depends on the context, and is just one part of a bigger picture.'
- *The Asian Development Bank has a few toolkits* in the general law area, but the most relevant one is the one on gender, law and policy[16].

Property rights

Toolkits on property rights belong to different categories or segments — such as housing, land rights, minerals, forests and intellectual property. Among the major ones are the following:

- *The Housing and Land Rights Network (HLRN) of the Habitat International Coalition (HIC)* has a toolkit for the 'housing rights defender'[17] — 'At the end of the last century, close to 1.2 billion people of the world survived in housing conditions that were unhealthy and precarious, including 100 million who were homeless. At least 600 million urban residents in developing countries, with these numbers swelling everyday, already live in housing of such poor quality and with such inadequate provision of water, sanitation and drainage that their lives and health are under continuous threat.'
- *USAID has a toolkit* for situations where there is a link between land rights (or their lack) and conflict[18] Today a 'menu' of approaches helps facilitate broader access to land and engenders greater equality in economic opportunity. In the past, land was typically taken from large landholders and redistributed to the 'land-needy' by way of expropriation, usually with compensation or channelled through land funds. Increasingly, market-mediated and community-managed efforts are being explored, including land rental market facilitation. There is a parallel USAID toolkit on the relationship between minerals and conflict[19] and yet another one on forests and conflict.[20]

Labour rights

- *Core Labour Standards Handbook,* co-published by ADB (Asian Development Bank) and ILO.[21]
- *The Public-Private Infrastructure Advisory Facility of the World Bank group* has a toolkit specifically on the issue of how private participation in infrastructure can affect the labour market, because of fears of job losses and changes in employment status.[22] This is designed for policy-makers and practitioners, especially in countries where there is an absence of social safety nets.
- *The ADB has a toolkit,* although it is described as a technical note, on labour issues in public sector restructuring.[23]
- *ILO: Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement.*[24]
- D. Tajgman has edited, *Extending Labour Law to All Workers: Promoting Decent Work in the Informal Economy in Cambodia, Thailand and Mongolia* (ILO, Bangkok, 2006).
- Ojeda Avilés, *Métodos y prácticas en la solución de conflictos laborales: Un estudio internacional* (ILO, Geneva, Dialogue Document No. 13, May 2007). [Methods and practices in the resolution

of labour disputes: An international study]

- *Informal Economy Resources Database,* which includes case studies.[25]
- *Labour legislation guidelines* (which provide substantive guidance on drafting legislation that is compatible with core labour standards) features a chapter covering elements to take into account in any legislative drafting process.[26]
- Child Workers in Asia/ILO (2006). *Raising one voice: Training manual for advocates of the rights of child domestic workers.*[27]
- ILO's *Gender Mainstreaming Strategy (GEMS) and Toolkit for Asia and the Pacific* includes elements that can be applied to law reform processes to ensure their gender inclusivity.[28]
- ILO: Gender Equality and Decent Work — *Selected ILO Conventions and Recommendations promoting Gender Equality.*[29]
- The ILO Gender, Poverty and Employment (GPE) Programmeme has included law reform as one means of tackling exclusion that keeps women in poverty. Its capacity-building and policy development tools, used in countries in all regions, are captured in the GPE Package, which is available in English and Spanish (Arabic forthcoming).[30]
- ILO: *Sustainable Enterprises.* (Report of the Director-General, International Labour Conference, 96th Session, 2007), and the Conclusions on sustainable enterprises adopted at the Conference (Provisional Record No. 20), set out features of legislation promoting both sustainable entrepreneurship and protection for labour rights.

Business

- Business licensing is often a major barrier to doing business and over-regulation and red tape are associated with low income, low productivity and large levels of informality and corruption. First, the *World Bank group has a business licensing reform toolkit, with eight case studies* from Belgium, Netherlands, India, Mexico, Hungary, Georgia, Kenya and Belarus.[31] Second, there is a *parallel and complementary toolkit on good practices for business inspections*[32] that lists out benchmarks that can be used as guidelines by reformers. Third, there is a guide on the design and implementation of business registration reforms at the national level, with good-practice cases and examples of reform from several countries.[33] Fourth, there is a toolkit for the simplification of business regulations at the sub-regional level, with a focus on the municipal level.[34]
- *The Commonwealth Secretariat has a Commonwealth Youth Credit Initiative Toolkit* to help governments, development agencies and NGOs to implement micro-credit programmemes.[35]
- A *micro-credit rating toolkit* was prepared by the UNDP's regional centre in Colombo, based on micro-credit experience in Bangladesh, India, Myanmar, Sri Lanka and Sudan.[36]
- The Office on Drugs and Crime of the United Nations (UNODC) has an *anti-corruption toolkit*, under the framework of the Global Programmeme Against Corruption (GPAC).[37]
- Transparency International has a range of *corruption-fighters' toolkits* for monitoring public institutions and demanding and promoting accountable and responsive public administration.[38]

Annex 3: Existing Indicators and Indices — An Inventory

Access to justice

- Bertelsmann Transformation Index (BTI), with data since 2004 for 119 developing countries. The status index (SI) of BTI has a question on rule of law.[39]
- Business Environment Risk Intelligence's Operation Risk Index (ORI) has data on 50 countries since 1996, with a question on enforceability of contracts.[40]
- Columbia University's State Capacity Survey has data since 1999 on 108 countries and has a question on the degree to which ethno-cultural and/or religious conflict posed a threat to political stability in the country.[41]
- Columbia University's State Capacity Survey has data since 1999 on 108 countries and has a question on the state's adherence to rule of law.[42]
- Since 1997, the Economist Intelligence Unit (EIU) maintains a database on the economic and business environment in approximately 120 developed and developing countries. There are six questions on violent crime, organised crime, fairness of the judicial process, enforceability of contracts, speediness of the judicial process, and confiscation/appropriation.[43]
- Freedom House has three separate rankings; but two — Nations in Transit and Countries at the Crossroads — are only applied to a limited number of countries. The one that can be used readily is Freedom in the World, in existence since 1978 and currently with a database of 192 countries. There is a question in determining the ranking as to whether cultural, ethnic, religious and other minority groups have reasonable self-determination, self-government, autonomy and participation. There is a separate question on whether citizens are equal under the law, with access to an independent, non-discriminatory judiciary. Yet another question can be included in this access to justice head and this is about whether there are personal social freedoms, including gender equality, property rights, freedom of movement, choice of residence and choice of marriage and size of family.[44]
- Since 2004, Transparency International and Gallup have the Global Barometer Survey for 69 developed and developing countries. There are two separate questions on trust in the legal system and concern with the level of crime.[45]
- Since 1996, Global Insight's Global Risk Service covers 117 developed and developing countries and has a question on losses and costs of crime. It also has two separate questions on enforceability of government contracts and private contracts.[46]
- Since 1996, Global Insight's Business Conditions and Risks Indicators cover 202 developed and developing countries. This has two separate questions on judicial independence and crime.[47]
- Since 1995, Heritage Foundation and the Wall Street Journal produce an index of economic freedom that covers 161 countries. This has a question on the size of the black market.[48]
- Since 1996, Institute for Management Development brings out a World Competitiveness Yearbook that has data on 49 developed and developing countries. This has a question on whether the legal environment is detrimental to the country's competitiveness. There is also an additional question on whether justice is fairly administered in society.[49]
- Since 1982, Merchant International Group Limited has data for 155 developed and developing countries. This has a question on legal safeguards.[50]
- Since 1982, Political Risk Services produces data on country risks. The financial and economic risk

categories don't interest us. But within the political risk category (140 developing and developed countries), there is a law and order question, divided into two-subcomponents of law and order.[51]

- The US State Department has a Trafficking in People Report, started in 2001 and covering 149 developed and developing countries.[52]
- The Cingranelli-Richards Human Rights Dataset covers 192 developed and developing countries. It has a question on independence of the judiciary and another one on imprisonments because of ethnicity, race, and political or religious beliefs.[53]
- The World Bank's World Business Environment Survey has existed since 1998 and covers 80 developed and developing countries. This has several questions on access to justice and rule of law — predictability of changes in rules and laws, quality of the police, organised crime, street crime, fair and impartial courts, affordable courts, consistent/predictability of courts, enforcement of court decisions, dishonesty in courts and functioning of the judiciary.[54]
- Since 1996, the World Economic Forum has brought out the Global Competitiveness Report and this covers 104 developed and developing countries. This has questions on common crime, organised crime, money laundering (through banks and non-banks), quality of police, independence of the judiciary, legal framework to challenge the legality of government action, settlements outside the court system, compliance with court rulings and/or arbitration awards, enforcement of commercial contracts and use of illegal means to adjudicate disputes.[55]
- The World Bank's World Development Indicators database can be used for female work participation rates, unemployment among women and female representation in national parliament. This gives data on 184 countries.[56]
- Although developed for the environment area, The Access Initiative's (TAI) 148 indicators for 40 countries can also be selectively used.[57] These indicators are divided under law, effort and effectiveness. One should probably concentrate on law indicators, rather than effort and effectiveness. The last two essentially belong to a tool-kit category. The law indicators are again divided into access to information, public participation and access to justice. We would propose applying the last heading, on access to justice, in which case, there are 23 questions to consider. Questions linked to free legal aid, government immunity, confidentiality of information on government action and independence of appellate bodies should certainly be picked up.

Property rights

- Bertelsmann Transformation Index (BTI) has data since 2004 for 119 developing countries. The status index (SI) of BTI has a question on private property.[58]
- The World Bank's Country Policy and Institutional Assessment (CPIA) database has data on 136 developing countries. The creation of the database goes back to the late 1970s. There is a question on property rights.[59]
- Since 1997, Economist Intelligence Unit (EIU) has a database on the economic and business environment in 120 developed and developing countries. There are two separate questions on intellectual property rights protection and private property protection.[60]
- Since 1996, Institute for Management Development brings out a World Competitiveness Yearbook that has data on 49 developed and developing countries. This has a question on whether personal security and private property are adequately protected and a separate question

on whether patent and copyright protection is adequately enforced.[61]

- The World Bank's World Business Environment Survey has existed since 1998 and covers 80 developed and developing countries. This has two questions on confidence in the judicial system in ensuring property rights and violation of patents.[62]
- Since 1996, World Economic Forum has brought out the Global Competitiveness Report and this covers 104 developed and developing countries. This has questions on protection of financial assets and protection of intellectual property.[63]
- UNDP's Human Development Report (HDR) has been in existence since 1990 and now covers 177 countries. This has data on patents granted to residents.[64]
- The International Property Rights Index (IPRI) is extremely new, 2007 being the first year when the index was constructed for 70 countries. It covers both physical property rights (PPR) and intellectual property rights (IPR) and also includes a third category titled Legal and Political Environment (LP), IPRI being obtained by aggregating across all three categories.[65]
- Centre on Housing Rights and Evictions (COHRE) has been collecting national data regarding evictions for several years.[66] As 'freedom from evictions' should be the minimum set of 'protections/security' to which anyone is entitled, this indicator is vital to assessing the state of legal empowerment regarding land and property rights. COHRE has also developed a tool for monitoring the 'Right to Adequate Housing' which includes a sub-index on 'security of tenure'.
- International Land Coalition/CAPRi (Collective Action on Property Rights) are developing an index for common property resources, a crucial issue for many rural communities, including indigenous groups.[67]
- African Union, the Economic Commission for Africa, Millennium Challenge Corporation, the UN-HABITAT, and World Bank map land indicators for Africa. A joint initiative to develop a comprehensive set of land indicators for Africa is to be linked to, *inter alia*, the African Peer Review Mechanism and the Expert Group meeting will be held on 3-4 May 2007.
- UN-HABITAT Global Urban Observatory has been developing a Secure Tenure Index to monitor Target 11 of the MDGs related to the slum challenge. Secure land tenure is the proxy for the achievement of progress in this target.[68]
- UN-HABITAT Housing Rights Indicators (HRI) is under development, with the United Nations High Commissioner for Human Rights and includes an indicator related to security of tenure.[69]

Labour rights

- Since 1997, Economist Intelligence Unit (EIU) has a database on the economic and business environment in 120 developed and developing countries. There is a question on freedom of association.[70]
- Freedom House has three separate rankings, but two — nations in transit and countries at the crossroads — are only used for a limited number of countries. The one most frequently used is Freedom in the World, in existence since 1978, and now with a database of 192 countries. There is a question on whether there are free trade unions or peasant organisations or their equivalents and whether there is effective collective bargaining. There is yet another question on whether there is equality of opportunity, which includes freedom from exploitation by, or dependency on, landlords, employers, union leaders, bureaucrats or any other obstacle that prevents access to legitimate economic gains.[71]

- Since 1996, Institute for Management Development brings out a World Competitiveness Yearbook that has data on 49 developed and developing countries. This has a question on whether labour regulations hinder business activities.[72]
- UNDP's *Human Development Report (HDR)* has been in existence since 1990 and now covers 177 countries. Data on ratification of some conventions (child labour, elimination of discrimination against women, elimination of forced and compulsory labour, freedom of association and collective bargaining, elimination of all forms of racial discrimination can be used).[73]
- The ILO database can be extensively used. Indicators are broadly of two categories: those that contain information on ratification of selected international labour conventions, and those that measure specific aspects of work, often linked to poverty/empowerment and the lack thereof. International labour conventions set minimum standards, and information on ratification is available for 180 member countries.[74] Ratification doesn't solve the problem of implementation per se, but ratification in itself signifies political will. The ratified convention database can be divided into three broad segments, beyond which there is a rich database on statistics:[75]

  1. Eight fundamental conventions that concern fundamental principles and rights at work, such as Conventions 29 and 105 on elimination of forced labour, Conventions 138 and 182 on child labour, Conventions 100 and 105 on discrimination in employment and protection, and Conventions 87 and 98 on freedom of association and right to engage in collective bargaining.

  2. Conventions that provide a basic institutional framework aimed at protecting against exploitation, such as Convention 95 on protection of wages, Convention 155 on occupational safety and health, Convention 81 on labour inspection, Convention 129 on labour inspection for agriculture, Convention 144 on tripartite consultation, and Convention 122 on employment policy.

  3. Conventions that address situations that overlap with poverty, as, for example, Convention 149 on indigenous and tribal people,[76] Conventions 97 and 143 on migration for employment and migrant workers, Convention 183 on maternity protection, and Convention 137 on rural workers' organisations.

Business

- Business Environment Risk Intelligence's Operation Risk Index (ORI) has data on 50 countries since 1996 and has a question on bureaucratic delays.[77]
- Columbia University's State Capacity Survey has data since 1999, on 108 countries and has a question on the severity of corruption within the state and several separate questions on nepotism, cronyism and patronage.[78]
- The World Bank's Country Policy and Institutional Assessment (CPIA) database has data on 136 developing countries; the creation of the database goes back to the late 1970s. There is a question on transparency, accountability and corruption in the public sector.[79]
- Since 1997, Economist Intelligence Unit (EIU) has a database on the economic and business environment in 120 developed and developing countries. There are three separate questions on orderly transfers, vested interests and accountability of public officials. There is a separate question on excessive bureaucracy/red tape. There is a separate question on corruption among public officials.[80]
- Freedom House has three separate rankings, but two nations in transit and countries at the cross-

roads — cover only a limited number of countries. The one that can be used freely is Freedom in the World, in existence since 1978 and now with a database of 192 countries. There are two separate questions on whether there are free professional and other private organisations and whether there are free businesses or cooperatives. There is also a question on whether there is freedom from extreme government indifference, and corruption.[81]

- Since 2004, Transparency International and Gallup have the Global Barometer Survey for 69 developed and developing countries. There are five separate questions on percentage who believe the government is corrupt, frequency of corruption, frequency of household bribery, extent of grand corruption and extent of petty corruption.[82]
- Since 1996, Global Insight's Global Risk Service covers 117 developed and developing countries and has a question on costs of corruption.[83]
- Since 1996, Global Insight's Business Conditions and Risks Indicators, covers 202 developed and developing countries. This has two separate questions on whether the necessary business laws are in place and whether there are outstanding gaps and on corruption.[84]
- Since 1995, Heritage Foundation and the Wall Street Journal produce an index of economic freedom that covers 161 countries. This has a question on corruption.[85]
- Since 1996, Institute for Management Development brings out a World Competitiveness Yearbook that has data on 49 developed and developing countries. This has three separate questions on ease of starting a business, the size of the parallel economy and bribery and corruption.[86]
- Since 1982, Merchant International Group Limited has data for 155 developed and developing countries. This has a question on corruption.[87]
- Since 1982, Political Risk Services produces data on country risks. The financial and economic risk categories don't interest the Commission. But within the political risk category (140 developing and developed countries), there is a question on corruption.[88]
- The World Bank's World Business Environment Survey has existed since 1998 and covers 80 developed and developing countries. This has questions on regulations on starting new businesses, dishonesty in courts, frequency of additional payments, corruption as obstacle to business and bribery.[89]
- Since 1996, World Economic Forum has brought out the Global Competitiveness Report and this covers 104 developed and developing countries. This has questions on ease of starting a company, burden of administrative regulations, percentage of firms that are unofficial/unregistered, frequency of bribery, frequency of firms making extra payments and the extent to which firms' illegal payments or influence impose costs on other firms.[90]

Chapter 5 Endnotes

1 These international agreements include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESR), ILO fundamental Conventions on freedom of association/collective bargaining, and elimination of forced labour, child labour and discrimination; and for indigenous peoples, the Indigenous and Tribal Peoples Convention, 1989 (ILO Convention No. 169). In addition, there is an internationally recognised 'Right to Adequate Housing,' which includes security of tenure as one of its six components.

2 Two useful approaches to analysing stakeholder interests in development are DFID's drivers of change *(http://www.gsdrc.org/go/topic-guides/drivers-of-change)* and SIDA's power analysis *(http://www.sida.se/sida/jsp/sida.jsp?d=118&a=24300&language=en_US).*

3 Stakeholder analysis is a standard strategic management tool. It is often applied to development programmes and policies. See, for example, the Overseas Development Institute's *Tools for Policy Impact.* Start and Hovland. 2004 and Chapter 5 of the International Development Research Centre's text on *Cultivating Peace, by* (Ramirez. 1999. Also see Bianchi and Kossoudji, 2001.

4 'Rent seeking' refers to efforts to get government to create economic rents, which can then be captured for private gain. Economic rent is simply extra income that would not exist in a competitive marketplace. Rent-seeking behavior benefits the individual doing it, but is a loss for society due to the inefficiencies it creates.

5 Where a country has ratified the United Nations Convention on Corruption (140 have done so to date), formal political commitment (if not true political will) already exists to fight corruption.

6 There are tools that have been used for refugee return and restitution in the Balkans and in Afghanistan that are useful in this regard (e.g., Aursnes and Foley 2005).

7 This typology is based on one that first appeared in Wilson.1973., ch. 16. Similar matrixes are widely used in public administration and development texts (e.g., Brinkerhoff and Crosby 2002).

8 A side payment is a term from game theory referring to a compensation paid to the game's loser. Logrolling is the exchanging of political favours to support projects that are of interest only to one side or the other.

9 See for example the work of the 'Barefoot College' (Social Work and Research Centre) in Vilonia, Rajasthan, India.

10 Development practitioners wanting to mix and match tools may refer to the following easily found toolkits and handbooks: The Access Initiative Assessment Toolkit *(www.accessinitiative.org/how_to_guide.html)*; the World Bank/International Council on Mining and Metals Community Development Toolkit *(http://www.icmm.com/library_pub_detail.php?rcd=183)*; the UNDP's Practitioner's Guide on Access to Justice *(www.undp.org/governance/guidelines-toolkits.htm);* the Housing and Land Rights Network of the Habitat International Coalition toolkit for the 'housing rights defender' *(www.toolkit.hlrn.org/English/start.htm);* the Overseas Development Institute's Research and Policy in Development (RAPID) Toolkits *(http://www.odi.org.uk/publications/toolkit2.html)*; USAID's toolkit for situations where there is a link between land rights (or their lack) and conflict *(www.usaid.gov/our_work/cross-cutting_programmes/conflict/publications/docs/CMM_Land_and_Conflict_Toolkit_April_2005.pdf);* the Core Labour Standards Handbook, co-published by the Asian Development Bank and ILO *(www.adb.org/Documents/Handbooks/Core-Labor-Standards/default.asp)*; the ILO's toolkit for mainstreaming employment and decent work: *http://www.ilo.org/public/english/bureau/dgo/selecdoc/2007/toolkit.pdf*; Transparency International's corruption fighters' toolkits for monitoring public institutions and demanding and promoting accountable and responsive public administration *(www.transparency.org/tools/e_toolkit)*; the CIVICUS and Aga Khan Foundation resource mobilisation toolkit *(http://www.akdn.org/agency/akf_trainer.html).* See Annex 2 for a comprehensive inventory of toolkits.

11 Available at *http://go.worldbank.org/KUDGZ5E6P0.*

12 The World Resources Institute is one organisation that has developed participatory monitoring and evaluation techniques. These may be adapted for use in Legal Empowerment of the Poor activities to help countries track progress (and lost ground), and allow them ensure that reforms actually do lead to empowerment of the poor. Also see the Participatory Methods Toolkit prepared by the King Baudouin Foundation and the Flemish Institute for Science and Technology Assessment: *http://www.viwta.be/files/ToolkitPartAssessment.pdf.*

13 *www.accessinitiative.org/how_to_guide.html* .

14 *www.unodc.org/unodc/criminal_justice_assessment_toolkit.html*

15 Programmeming for Justice: Access for All, UNDP, 2005, *www.undp.org/governance/guidelines-toolkits.htm,* especially Chapter 2.

16 *Gender, Law, and Policy in ADB Operations: A Tool Kit,* 2006, *www.adb.org/Documents/Manuals/Gender-Toolkit/Gender-Law-Policy-Toolkit.asp*

17 *The Housing and Land Rights monitoring 'Toolkit',* 2005, *www.toolkit.hlrn.org/English/start.htm*

18 *Land & Conflict, A Toolkit for Intervention,* USAID, 2005, *www.usaid.gov/our_work/cross-cutting_programmes/conflict/publications/docs/CMM_Land_and_Conflict_Toolkit_April_2005.pdf*

19 *Minerals & Conflict, A Toolkit for Intervention,* USAID, 2004, *www.iisd.org/pdf/2004/envsec_minerals_conflict.pdf*

20 *Forests & Conflict, A Toolkit for Intervention*, USAID, 2005, *www.usaid.gov/our_work/cross-cutting_programmes/conflict/publications/docs/CMM_Forests_and_Conflict_2005.pdf*

21 *Core Labour Standards Handbook,* ADB and ILO, 2006, *www.adb.org/Documents/Handbooks/Core-Lab*our-*Standards/default.asp.*

22 *Labour Issues in Infrastructure Reform: A Toolkit,* PPIAF, 2004, *www.ebookmall.com/ebook/168641-ebook.htm*

23 *Labour Issues in Public Enterprise Restructuring, Technical Note,* Asian Development Bank, 2006, available at *www.adb.org/Documents/Reports/Labor-Issues-PublicEnterpriseRestructuring/Labor-Issues-PER.pdf*

24 Geneva 2005.

25 *http://www.ilo.org/dyn/infoecon/iebrowse.search?p_lang=en*

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> This is a wholly different approach to the poverty debate …our Commission will focus on a unique and overlooked aspect of the problem: the inextricable link between pervasive poverty and the absence of legal protections for the poor.
>
> – Madeleine K. Albright

> The law is not something that you invent in a university – the law is something that you discover. Poor people already have agreements among themselves, social contracts, and what you have to do is professionally standardize these contracts to create one legal system that everybody recognizes and obeys.
>
> – Hernando de Soto

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