

LEGAL EMPOWERMENT OF THE POOR (LEP) IN FRAGILE AND CONFLICT-AFFECTED AREAS (FCAS)

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Abstract

The United Nations Commission on Legal Empowerment of the Poor estimated in 2008 that there were 4 billion people who lived outside the protection of the law². More recently, in 2019 it was estimated that 4.5 billion people are excluded from opportunities that the law provides³. By 2030, 85% of those remaining in extreme poverty – some 342 million people – will be in Fragile and Conflict Affected Areas (FCAS), situations in which the rule of law is almost non-existent. For many of the excluded, the law is an abstraction or a form of punitive threat, not something that they can use to exercise their basic rights. The idea behind the inclusion of access to justice under Sustainable Development Goal 16 (SDG 16) on peace justice and strong institutions, was in part for legal empowerment of the poor (LEP), in conflict and post-conflict zones. The legal empowerment of the poor is rooted in a human rights-based approach in which markets and human rights interact. The four pillars of LEP are access to justice and the rule of law, and property, labour and business rights. It also admits the fact that every individual should have access to justice, which includes a due process of law and remedies to eradicate discrimination. This paper considers the special requirements for pursuing LEP in Fragile and Conflict Affected States (FCAS) such as legitimate politics, security, and rebuilding social and economic foundations.

Keywords: Legal empowerment, Justice, equality, Poor, SDGs, Fragile and Conflict Affected Areas.

INTRODUCTION

“Over 1 billion people in the world lack legal identity. More than 2 billion are employed in the informal sector and the same number lack proof of

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² <https://link.springer.com/article/10.1007/s40803-016-0047-5>

³ Justice for All Report. 2019. <https://www.justice.sdg16.plus/report>

housing or land tenure. This makes them vulnerable to abuse and exploitation and less able to access economic opportunities and public services. In total, 5.1 billion people – two-thirds of the world’s population – lack meaningful access to justice. While people in all countries are affected, the burden of this injustice is not randomly distributed among people⁴. Among the most affected are those living in FCAS. While LEP is a challenging agenda in stable, less developed countries with mass poverty, such an agenda, while necessary, is sometimes considered impossible in FCAS. The reason is quickly grasped by looking at the nature of the situation at hand.

FRAGILE AND CONFLICT-AFFECTED AREAS (FCAS)

The key features of FCAS include a devastated infrastructure, destroyed institutions, a lack of professional and bureaucratic capacity, an inflammatory and violent political culture, and a traumatized and highly divided society. In many cases the degree of capacity, physical infrastructure, and public trust in the government and its institutions will be dramatically lower than in developing countries. Other common problems include a lack of political will, judicial independence, technical capacity, materials and finances, and government respect for human rights. In addition, in the post conflict context, a shadow or criminalized economy is likely to be entrenched and there is likely to be widespread access to small arms which is reflected in a high level of violence in the society. Given the lack of law and order, accountability, and trust, it is difficult to entrench major reform, and ultimately the reforms that are sustainable may be somewhat limited⁵.

The OECD characterises fragility as the combination of exposure to risk and insufficient coping capacity of the state, systems and/or communities to manage, absorb or mitigate those risks. Fragility can lead to negative outcomes including violence, poverty, inequality, displacement, and environmental and political degradation⁶. In the 2020 framework, the OECD identifies 57 countries and territories as in the FCAS category of which 13 are extremely fragile and 44 are other fragile contexts. The OECD concludes that fragile contexts test people and systems and that supporting societal transitions from fragility to resilience is complex, volatile and politically charged. However, that systems-informed strategy and adaptive operations across the nexus can and do deliver results in addressing fragility. The LEP agenda is a systems-informed approach

⁴ Justice for All. (2019) Report of the Task Force on Justice. <https://www.justice.sdg16.plus/report>.

⁵ World Bank (2006). Rule of Law Reform in Post Conflict Countries.

⁶ OECD. 2020. States of Fragility. <https://www.oecd-ilibrary.org/sites/ba7c22e7-en/index.html?itemId=/content/publication/ba7c22e7-en>.

which seeks to help people help themselves out of poverty with the support of human rights and markets. Clearly a two-pronged approach will be required to support LEP in FCAS humanitarian relief and peace building on the one hand and resilient development including LEP on the other.

The UNDP and the German Development Institute (2009) provide a comprehensive review of the definitions of fragility and the indices used to measure it⁷. They link state and societal fragility as follows: “When fragility refers to the state, it is in fact a property of the political system. A ‘fragile state’ is incapable of fulfilling its responsibility as a provider of basic services and public goods, which in turn undermines its legitimacy. This has consequences for society as a whole, threatening livelihoods, increasing economic downturn and other crises which affect human security and the likelihood of armed conflict. In this sense, such phenomena constitute consequences of fragility. When fragility refers to society as a whole, violent conflict and other human-made crises constitute fragility itself. In this sense, fragility is a property of society and thus, being defined much more broadly, includes any kind of political, social or economic instability. This understanding of fragility is termed a ‘fragile social situation’”. It is generally agreed that all states are, to some extent, fragile and a sharp line cannot be drawn between weak and strong or resilient and vulnerable (Carment and Sammy, 2012)⁸, (UNDP and GDI, 2009). However, only some are mired in deep rooted conflict and violent transitions. Some states might be middle income yet fragile while some might suffer from widespread chronic poverty and be stable. Others might have difficulty in governing spaces in which terrorists or drug lords operate with impunity, yet have other areas in which relative peace and stability prevail.

The resilient development (including LEP) agenda in FCAS is critical of whether the SDGs will be achieved and if the core principle of leaving no one behind will be observed, as these chilling statistics from a recent report shows⁹. Just 18% of fragile states are ‘on track’. This means 82% are either off track or lack the data for an assessment of progress. FCAS will be home to nearly one-third of the population of (Low Income Countries) LICs and nine Middle Income Countries (MICs) in 2030, but will house disproportionate shares of people lacking electricity (96%) and people who

⁷ UNDP/GDI/ 2009. User’s guide to Measuring Fragility. www.undp.org/content/dam.

⁸ Carment, D and Samy Y. 2012. Assessing State Fragility. A Country Indicators for Foreign Policy Report. Carleton University.

⁹ Overseas Development Institute (ODI) and International Rescue Committee (2018). SDG progress: Fragility, crisis and leaving no one behind. <https://cdn.odi.org/media/documents/12424.pdf>

are extremely poor (85%), among other deprivations. This finding indicates that people caught in crises risk being even more excluded from progress in 2030 than they are now. The absolute number of people in FCAS facing certain key deprivations will rise significantly – the number of undernourished people will rise by 84.5 million, the number lacking improved sanitation by 45 million, and the number living in slums by at least 106 million. This means that as of 2030, a larger number of people in crises, most of whom live in fragile states, are likely to face these unmet basic needs.

LEGAL EMPOWERMENT OF THE POOR (LEP)

The ADB¹⁰ indicates that at the heart of their process of poverty reduction is the critical concept of empowering the poor to “to participate in decisions that shape their lives.” They indicate that this requires citizens to have the knowledge and resources to interact in an informed manner with employers, the state, other citizens, and with private and public institutions in relation to their legal rights and obligations. They conclude that legal empowerment is critically linked to the participation of the poor on issues that affect their livelihood, basic rights and security.

The Commission on Legal Empowerment of the Poor (CLEP)¹¹ examined the extent to which people across the world are able to use the law to protect their assets and create new opportunities to improve their livelihoods. It found that around 4 billion people, the majority of the world’s population, are excluded from the rule of law. This figure included the 2.6 billion people living on less than 2 USD a day, and another 1.4 billion slightly better off, but not able to use the law to obtain their rights or improve their livelihoods. At best, they live with very modest, unprotected assets that cannot be leveraged in the market due to cumulative mechanisms of exclusion.

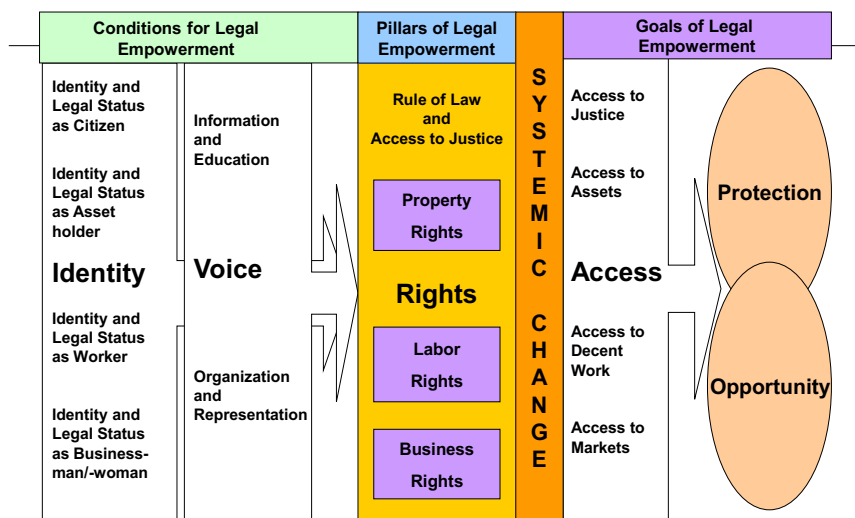
The Commission declared that by design or by default, markets, laws, institutions, and politics often fail to serve the common good, excluding or discriminating against poor women and men. Democracy is often more of a mantra than a reality; the rule of law in practice is often rule *by* law, arbitrarily and unequally applied. While people in poor countries may have rights on paper, that is often where they remain. Frequently, the only laws that people know are informal rules, some traditional, others more recent. Even the most developed countries are far from eradicating exclusion and legal disempowerment.

¹⁰ ADB. (2000) Legal Empowerment: Good Governance and Poverty Reduction. www.adb.org.

¹¹ CLEP. (2008) Making the Law Work for Everyone. Vol 1. Pg 19.

The report of the commission¹² is perhaps the most comprehensive global treatment of Legal Empowerment thus far.

The Process of Legal Empowerment



The schema above illustrates the analytical framework for the legal empowerment of the poor as developed by the commission¹³. It comprises four crucial pillars: *access to justice and the rule of law; property rights; business rights; and labour rights*. These pillars reinforce and rely on each other and a lot depends on their convergence and their synergy. Legal empowerment can only be realized through systemic change aimed at achieving the civic and economic potential of the poor. However, legal empowerment is not merely about legal reform. For legal empowerment to take place the poor must have *identity* and *voice*.

Legal identity is a cornerstone for access to justice. Despite the unequivocal provision for it in the Universal Declaration of Human Rights, tens of millions of people lack a formally documented legal identity. It is estimated that more than seven in ten children in the world's least-developed countries do not have birth certificates or other registration documents.¹⁴ This prevents many of them from accessing education and healthcare. It leaves them more vulnerable to exploitation,

¹² CLEP (2008). Making the Law Work for Everyone. Vols 1 and 2.

¹³ Ibid. Vol. 1, pg. 27.

¹⁴ UNICEF. 2008. The Rights Start to Life: A statistical analysis of birth registration. www.childinfo.org/birth_registration

such as child labour and human trafficking. Without documentary proof of their existence, their parents may find it hard to interact politically, economically, and even socially outside their local communities. Absence of legal documents may be used to block them from taking advantage of anti-poverty programs specifically intended for them.

Identity corresponds to proof of their civic and economic agency as citizens, asset holders, workers and business people. Without a voice, they will be unable to demand their rights and hold their governments accountable to their obligations. Crucially, this voice needs to be based on education, information and awareness on one hand and on organization and representation on the other.

As a reform process, legal empowerment requires parallel and coordinated interventions using a complex systems approach as recognized by the OECD. The whole process is to be understood as iterative and the relationship between the legal empowerment process and systemic change is mutually reinforcing. Poor people who are legally empowered will have increased voice and identity; they will have more influence on institutional and legal reforms and social policies, which in turn, will improve the realization of their rights as citizens, asset holders, workers, and business people. It is an advantage in practice and in principle that legal empowerment is less prescriptive to development than other approaches. By having as its aim the increased capacity of the poor, including in the public sphere, legal empowerment takes responsibility for development away from other outside forces and transfers it to the poor themselves. Development depends on more than markets and economic policy; it also depends on how laws and institutions function and relate to citizens. This in turn reflects how power and influence are distributed in society. We will now consider some substantive examples of policy change and legal reform which will be required to provide legal rights to the poor.

LEP IN FCAS

The human rights indivisibility principle establishes that countries should not apply human rights selectively because the protection and equal recognition of all human rights is required for the full enjoyment of human dignity¹⁵. While there is general agreement at the conceptual level that human rights are mutually reinforcing, equal in standing, and therefore should all be treated as core to an indivisible system, there is significant debate on how the indivisibility principle should be implemented in

¹⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2013).

practice¹⁶. Similarly, indivisibility is at the heart of the SDG agenda and as indicated earlier, a systems approach is needed for the effective implementation of the LEP agenda. In FCAS, the reality of dysfunctional basic governance institutions or their non-existence and scarcity or total lack of resources make the observance of indivisibility almost impossible. A way out of this conundrum is provided in *Priorities and Human Rights*, (Quintavalla and Heine 2019)¹⁷ in which the authors suggest the establishment of a key distinction that aims to prioritize human rights in implementation without disturbing the principle of indivisibility at the conceptual level: the distinction between ‘a hierarchy of human rights’ and ‘a hierarchy of human rights at the implementation level’ akin to the Maslow hierarchy of human needs. The ‘hierarchy of human rights at the implementation level’ is concerned with establishing the necessary sequence for realizing the full implementation of the human rights system based on policy priorities and objectives, or constraints that arise in the context of FCAS.

In FCAS, the lack of functional institutions, many of which in more stable countries work against the poor or at minimum do not include the poor, might be turned into an opportunity for LEP. A lot will depend on people and their leaders being able to mobilise and contextualise the political space for pro-poor policies, laws, and institutions. This political space is typically an informal one and it might be some time before formal elections are held. In the interim, informal power brokering might take place and there is an opportunity to build on informal norms, practices, and institutions which are people-oriented and based on local cultures. This is not normally easy as war lords and other power brokers might be seeking to maximise personal gains. However, interlocutors who recognise that power can be a positive sum game and choose to negotiate towards win-win solutions might serve both the interests of the poor and the process of rebuilding a fractured society. In the next two sections, informality and power as a positive sum game are briefly introduced before the considerations of implementing concrete LEP action in FCAS are discussed.

INFORMALITY

The systems in which more than 4 billion poor people outside the legal framework make their living are variously described as informal, underground, black market, cash economy, slum, and extra-legal. These descriptors are not exactly synonymous although they share many

¹⁶ James W Nickel, “Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights,” (2008) 30:4 Hum Rts Q

¹⁷Quintavalla, A and Heine R, 2019. International journal of human rights 2019, vol. 23, NO. 4, 679–697 <https://doi.org/10.1080/13642987.2018.1562917>

common characteristics. Informality is a “way of doing things characterized by (a) ease of entry; (b) reliance on indigenous resources; (c) family ownership; (d) small scale operations; (e) labour intensive and adaptive technology; (e) skills acquired outside of the formal sector; (g) unregulated and competitive markets”¹⁸. From an economic perspective, the informal sector is broadly characterised as consisting of units engaged in the production of goods or services with the primary objective of generating employment and incomes to the persons concerned. These small-scale units typically operate at a low level of organisation, with little or no division between labour and capital as factors of production. Labour relations—where they exist—are based mostly on casual employment, kinship or personal and social relations rather than contractual arrangements with formal guarantees¹⁹.

As an example, in India the National Commission on the Unorganised Sector Report²⁰ provided an analysis of the conditions of work and lives of the unorganised (informal) workers consisting of about 92% of the total workforce of about 457 million (as of 2004-05). For most of them, conditions of work were “utterly deplorable and livelihood options extremely few. Such a sordid picture coexists uneasily with a shining India that has successfully answered the challenge of globalisation powered by increasing economic competition both within the country and across the world”²¹. Most of India is, of course, relatively stable but some parts are in conflict and the combination of informality and conflict makes for a very difficult challenge of SDG achievement. Beyond the informal economic consideration are the broader social dimensions of informality which are also quite troubling and include characteristics such as:²²

- *Fear and insecurity*: Squatter populations in big cities are highly vulnerable to dispossession. The consequences of these evictions are severe: besides destroyed property and lost assets, social networks are broken and access to essential services is absent.
- *Environmental and socio-political repercussions*: Urban migration is expanding the number and size of informal settlements, creating serious environmental and socio-political implications that affect not only the residents of informal areas, but also the growing urban population as a whole. Informal settlements increasingly encroach

¹⁸ Hart, K. 1972. Employment, Income and Inequality. A strategy for increasing productive employment in Kenya. ILO.

¹⁹ OECD. 2003 stats.oecd.org/glossary/

²⁰ National Commission for Enterprises in the Unorganised Sector. 2007. Report on the conditions of work and promotion of livelihoods in the Unorganized sector. www.prsindia.org/uploads/media.

²¹ Ibid.

²² Adapted from Singh, N. 2014. Legal Rights of the Poor. Authorhouse.

on environmentally sensitive areas, near protected water reservoirs, on public land, and into terrain that cannot be made habitable at reasonable cost.

- *Labour exploitation*: Many of the world's poor are forced into the informal labour sector, including illegal spheres such as child labour, where they receive fewer benefits and lower wages than formal workers, as well as endure longer hours and more hazardous working conditions. They also have less bargaining power and representation than the formal work force achieves through unions and other labour organizations.
- *Lack of healthcare*: More and more of the world's poor — especially those in the informal sector — lack adequate access to healthcare. The poor, who already bear the brunt of the world's worst maladies from malnutrition to HIV/AIDS and COVID-19, are made more vulnerable by their inability to access and pay for medical care.
- *Social-political alienation*: Informality cannot be viewed only in terms of individual needs and rights. Security of individual property rights, for example, must be combined with a broader, collective approach as regards the need to promote socio-spatial integration. Informality also breeds gender inequality, corruption, and political disenfranchisement—all of which compound the position of the under-classes.

MAKING POWER A POSITIVE SUM GAME

No one empowers another in the sense of one with power willingly giving up power to another without power. Least of all in FCAS, where there is either an ongoing struggle for power or a just-concluded violent power struggle. The negotiation of win-win options or strategies for making power a positive sum game become crucial.

The terms zero sum, positive sum and variable sum are drawn from game theory based on rational choice which is increasingly used in various disciplines to help analyze power relationships. In rational choice theory, human individuals or groups can be modeled as 'actors' who choose from a 'choice set' of possible actions in order to try to achieve desired outcomes. An actor's 'incentive structure' comprises (its beliefs about) the costs associated with different actions in the choice set, and the likelihoods that different actions will lead to desired outcomes.

In this setting, we can differentiate between:

1. *outcome power* – the ability of an actor to bring about or help bring about outcomes;
2. *social power* – the ability of an actor to change the incentive structures of other actors in order to bring about outcomes.

This framework can be used to model a wide range of social interactions where actors have the ability to exert power over others. For example, a 'powerful' actor can take options away from another's choice set; can change the relative costs of actions; can change the likelihood that a given action will lead to a given outcome; or might simply change the other's beliefs about its incentive structure. In a recent paper, James Read provides a summary of the conditions that he believes need to be met for a theory which will persuasively show that power can be variable sum; as well as the challenges such a theory will face because of nearly 3000 years of human civilization thinking of power as zero sum²³. Such a theory is important, however, because "We use the idea of power both to describe the social and political world, and to orient our action within it. To change our understanding of power is thus, to a certain degree, to change the political and social world itself"²⁴. According to Read: "The most extensive and richly-detailed descriptions of power have assumed, explicitly or implicitly, that increased power for one necessarily entails an equivalent loss of power for another. There is no question that some important and enduring phenomena of the social and political world lend support to this assumption. But the zero-sum assumption cannot easily account for the peculiar blend of conflicting and shared interest, of competition and cooperation, which characterizes most important social and political relationships. Of course, the same is true in reverse for attempts to ground power on pure cooperation."

In another work which challenged zero-sum relationships, *The Strategy of Conflict*, Schelling²⁵ concluded that a lot of the preoccupation with power as a zero-sum game came from game theory applications which focused almost entirely on such zero sum or pure conflict situations. However, he argued that in reality, a pure conflict situation is only likely to arise in a war that seeks extermination of the opponent, in which opponents are completely opposed. Generally, this is not the case in war. In most cases of conflict, winning does not have a strictly competitive meaning. It is not winning relative to one's adversary. It means gaining relative to one's own value system, and this may be done by bargaining, by mutual accommodation, or by avoidance of mutually damaging behavior.

To study the strategy of conflict is to consider conflict situations as essentially bargaining situations. This allows us to avoid pre-occupations with pure conflicts or zero conflicts which might mean complete collaborations. Both of these are extremes and should be thought of as

²³ Read, J.H. 2011. Is power zero sum or variable sum? Old Arguments and New Beginnings. Paper prepared for the American Political Association Meeting, Seattle. 2011.

²⁴ Ibid.

²⁵ Schelling, T. 1980. *The Strategy of Conflict*. Harvard University Press.

limiting cases. In practice, there is a powerful common interest in avoiding situations seriously damaging to the values of either side. For example, a successful employee strike might be one that does destroy the employer financially; but more commonly it may even be one that never happens. In this work, Schelling traces the definition of his use of the term strategy to game theory in which there are games of skill, chance, and strategy. The strategy game is one in which the best course of action for each player depends on what the others do. The focus is on the interdependence of the adversary's decisions and on their expectations of each other's behaviour.

Therefore, the LEP agenda must be based on the notion of self-empowerment in which the poor and deprived seek to take greater control over their own lives. People have to want to take power but doing so sensibly requires pursuing win-win strategies. A more detailed discussion of the nature of power and the conditions under which power can be a positive sum game can be found in Singh 2014²⁶.

LEP Action in FCAS

LEP action in FCAS will have to start with existing systems while having a vision of what might be. In FCAS, the existing justice systems are likely to be informal ones and it will be important to understand their strengths and weaknesses in order to build on them. The poor living in the informal sector have usually developed informal justice systems in which they seem to have greater trust. Some of the strengths of informal justice systems include:

- They are understandable and culturally 'comfortable';
- They focus on consensus, reconciliation, and social harmony;
- They can be good partners with the formal justice system by reducing court congestion for non-serious offences;
- They offer swift solutions to disputes;
- They tend to enjoy social legitimacy, be trusted, and understand local problems;
- Informal justice systems often survive violent conflict; and
- They provide geographical and financial accessibility.

Despite informal justice systems being widely viewed by many communities as the most likely way of achieving an outcome that satisfies their sense of justice, there are situations in which they fall well short of realizing that ideal. The main weaknesses of informal justice systems include:

²⁶ Singh, N. 2014, Chapter 7. Legal Rights of the Poor. Authorhouse.

- Unequal power relations and susceptibility to elite capture – where power imbalances exist between disputing parties, the weaker party is vulnerable to exploitation;
- Unfair and unequal treatment of women and disadvantaged groups;
- Lack of accountability;
- Arbitrary decisions;
- Non-adherence to international human rights standards;
- They are unsuitable for certain disputes that are important for security and sustainable development e.g., the poor are highly vulnerable to conflicts over scarce assets such as land.
- Informal justice systems do not work in cases such as dealings with government service delivery, companies, complex cases such as serious crimes, and inter-village, inter-community and third-party disputes as the authority of the informal justice actors rarely extends beyond their own sphere of influence.

This understanding of what little of a justice system already exists, along with an analysis of its strengths and weaknesses provides a useful entry point and avoids the common error of imposing an alien system. The next step is to incentivise change through a range of incentives needed to ensure that those in the security sector, from high-level officials or officers to the rank and file, accept the rule of law reform including:

- avoidance of revenge, or arbitrary “justice”
- maintenance of employment, some institutional prerogatives, salary, pensions or other material benefits such as housing
- addressing competing priorities between *stability and security* vs *rights and redress* by a sensible choice of parallel initiatives that mutually reinforce each other to reach a change from violent to nonviolent behavior through coercion by the rule of law

Transitional justice actions are usually helpful soon after a degree of post conflict stabilization occurs. Transitional justice processes address past abuses, including trials of perpetrators, vetting or lustration, commissions of inquiry, amnesties, memorials and reparations, and traditional or non-state justice. This is followed by processes to resolve internal conflicts, with a rapid growth in multidimensional peacekeeping and peacebuilding operations accompanied by related development programming. These latter operations have included significant rule of law components addressing everything from constitutional and judicial reform to legal assistance and alternative legal dispute mechanisms. These conflict-mitigating activities have also promoted security sector reform (SSR), as

well as ensure the disarmament, demobilization and reintegration of ex-combatants (DDR), with activities including vetting of members, particularly on the basis of past abuses, and retraining of those retained.

The **New Deal** is a key agreement between fragile and conflict-affected states, development partners, and civil society to improve the current development policy and practice in fragile and conflict-affected states ²⁷. The goals of this deal are:

- *Legitimate politics*: Foster inclusive political settlements and conflict resolution.
- *Security*: Establish and strengthen people's security.
- *Justice*: Address injustices and increase people's access to justice.
- *Economic Foundations*: Generate employment and improve livelihoods.
- *Revenues and Services*: Manage revenue and build capacity for accountable and fair service delivery.

The New Deal recognised that transitioning from fragility is a long, political work that requires country leadership and ownership. Processes of political dialogue have often failed due to lack of trust, inclusiveness and leadership. International partners often bypass national interests and actors, providing aid in overly technocratic ways that underestimate the importance of harmonizing with the national and local context, and support short-term results at the expense of medium-to-long-term sustainable results that could be brought about by building capacity and systems.

Some of the lessons learned in carrying out legal empowerment-like processes in the context of the complexity of fragile environments and the political sensitivity of change are summarised by de Goor and van Veen as three game changers as follows ²⁸ :

- Game changer #1: Focus more on the political incentives and limitations of change. (Political interventions with a technical component)
- Game changer #2: Build justice and security programmes in a more evolutionary manner. (Establish results progressively, work iteratively, learn; use complex adaptive systems principles)

²⁷ The New Deal was developed through the forum of the International Dialogue and signed by more than 40 countries and organizations at the 4th High Level Forum on Aid Effectiveness on November 30th 2011 at Busan, South Korea.

²⁸ Luc van de Goor and Erwin van Veen. n.d. The Heart of Developmental Change: Rule of Law Engagements in Situations of Fragility. https://worldjusticeproject.org/sites/default/files/the_heart_of_developmental_change_goor_v_veen.pdf

- Game changer #3: Engage more with local/non-state justice and security providers. (Politically challenging but needed)

ILLUSTRATIVE CASE STUDIES

Some country contexts in which the ideas discussed in this paper have been tried with varying degrees of success include Yemen and East Timor.

In Yemen, the ERRY (Enhancing Rural Resilience in Yemen) Program illustrates a way forward. In this case, four UN agencies, UNDP, ILO, FAO and WFP developed joint integrated programs based on cash for rebuilding community assets, agriculture value chains, revitalization of micro-enterprises, apprenticeships and BDS, solar energy, local governance, social cohesion and insider mediation. Insider mediators were drawn from local councils, INGOs, public service, trained in alternative dispute resolution (ADR), and supported through local projects and grants. Local Governance was revitalized through Local Community Councils, Village Coordination Councils (VCC) and District Management Teams. The nomination and election process of VCC members was preceded by various community awareness sessions on the importance of VCCs, their role and the democratic nomination process. Overall, just under half of the VCC members (just over 2000 in 8 districts) were women (44% in the South, and 46% in the North). The main role of the VCCs was to develop community resilience plans focused on service delivery, social cohesion, basic services and livelihoods recovery as a means to address the negative impacts of the conflict. Rule of Law and property, labour, and business rights were introduced through capacity-building and apprenticeship schemes rather than through an explicit rights-based approach, which would be impossible in the face of the lack of a functional government.

The case of East Timor deals with property rights in a post conflict context after the establishment of the nation of East Timor²⁹. Timorese notions of ancestral origin and legal principles of first possession, and the observation that “origin principles are resilient because of their potential to maintain social order and authority in a context of heightened fears of social disorder³⁰” have to be taken into account when formulating programs. Equally important was the Timorese adaptive capacity in the face of war and population movement, coupled with collective action and social ordering to ensure efficient resource use and to respond to fears of

²⁹ This case is drawn from the book: Property and Social Resilience in Times of Conflict: Land Custom and Law in East Timor by Daniel Fitzpatrick, Andrew McWilliam and Susana Barnes. Ashgate 2013.

³⁰ Fitzpatrick D, McWilliam A, and Barnes B. 2013. Property and Social Resilience in Times of Conflict: Land Custom and Law in East Timor. Ashgate Publishers.

costly races for rights. Case studies provide examples of mediated land disputes varying from disputes between two related individuals to accommodation between the customary authority and the Land and Property Directorate to a complex conflict involving large numbers of claimants. Two broad alternatives for the legal regulation of land systems after armed conflicts were: 1) interpretively simple bright-line rules that reduce the costs of identifying, measuring, and enforcing rights to property and 2) interpretively complex ‘fuzzy’ rules that provide greater flexibility for social and political ordering. It is recommended to use a multidisciplinary approach including law, anthropology, and economics in data collection and analysis. It was a difficult balancing act between bright line rules and balancing expectations.

CONCLUDING REMARKS

Today, about 1.4 billion people live in fragile states³¹. Fragile and transitional situations comprise a broad spectrum of contexts – from middle income countries with strong institutions, such as in the Middle East and North Africa – to low-income aid-dependent countries like Haiti. Many countries like Yemen, Syria, and Afghanistan are in active turmoil with an uncertain future where poor people are unlikely to realize rights of any kind. Rule *by* (arbitrary) law rather than rule *of* law is likely to continue in Afghanistan and Syria. Complete lack of any credible government is likely to persist in some countries. The agenda of legal empowerment of the poor depends on the poor organizing to take control of their own lives with support from partners. This agenda includes, but is very different from, legal or rule of law reform alone and requires voice, mobilisation, contestation, legal identity, and leadership from below. It is a difficult proposition but a necessary one. Without it, many will be left behind and SDG achievement will remain a distant dream.

³¹ <https://www.pbsbdialogue.org/en/new-deal/about-new-deal/>