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Legal Empowerment of the Poor: The Re-emergence of a Lost Strand of Human Rights?

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ABSTRACT¹

This paper considers the contribution of the UNDP's Legal Empowerment of the Poor (LEP) framework to the rights and poverty reduction discourse. It argues that the value of LEP, as envisaged by its architect, Stephen Golub, is less of a new development paradigm, but rescues one of the strands of the rights-based approaches from a contested discourse, which is being lost to an overly legalistic interpretation. I respond to the critique that the LEP framework lacks conceptual rigour, by initiating a discussion on power and empowerment, the objective of which is to contribute to LEP's conceptual development. LEP's focus on power, as opposed to law, critically distinguishes it from the dominant rights-based discourse, yet little attention is paid in LEP literature to constructing a coherent concept of power or empowerment. This paper aims to contribute to the concept of empowerment within the LEP framework. I draw on the work of Lukes and the substantial body of work on empowerment by development scholars.

KEYWORDS: legal empowerment; human rights; poverty reduction

RESUMEN

Este ensayo considera la contribución del marco de Empoderamiento Legal de los Pobres (ELP) del PNUD a los discursos sobre los derechos y la reducción de pobreza. Sostiene que el valor del ELP, según Stephen Golub, no es un desarrollo de un marco nuevo pero rescata uno de los corrientes de un enfoque basado en los derechos que está perdido por una interpretación demasiado legalista. Yo respondo a la crítica de que el marco ELP carece de rigor conceptual, iniciando una discusión sobre el poder y el empoderamiento, cuyo objeto es contribuir al desarrollo conceptual de ELP. El enfoque del ELP en el poder, en oposición a la ley, se distingue críticamente del discurso dominante basado en los derechos; sin embargo, se presta poca atención en la literatura sobre ELP a la construcción de un concepto coherente de poder o empoderamiento. Este ensayo tiene como objetivo contribuir al concepto de empoderamiento dentro del marco ELP. Me baso en el trabajo de Lukes y el volumen considerable de trabajo sobre empoderamiento por los estudiosos de desarrollo.

PALABRAS CLAVES: empoderamiento legal; derechos humanos; reducción de pobreza

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Introduction

The interrelationship between rights and poverty reduction has received increasing attention from governments and international aid agencies. This paper considers the relatively new Legal Empowerment of the Poor (LEP) development paradigm, in contradistinction to the more entrenched rights-based development frameworks and assesses what LEP has to offer the poverty and rights discourse.

In 2007, the UNDP established the Commission for the Legal Empowerment of the Poor (CLEP), under the leadership of Hernando de Soto and Madeleine Albright. The Commission comprised powerful global leaders and several Nobel prize winners. Of the twenty-one Commissioners, thirteen were or had been heads of states.¹ Four technical working groups were established, which commissioned input papers from twenty-two countries. CLEP's premise is that 'people around the world are robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law.'²

CLEP's definition of legal empowerment is the following:

'A process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors.... It involves states delivering on their duty to respect, protect, and fulfill human rights, and the poor realising more and more of their rights, and reaping the opportunities that flow from them, through their own efforts as networks, and governments.'³

CLEP's report has been widely criticized as being overly informed by market-based perspectives, as conceptually weak, making unsubstantiated claims and as reiterating 'top-down' approaches.⁴ Nevertheless, CLEP placed LEP 'on the global map'⁵.

Some have questioned whether the LEP framework is any different to existing rights-based approaches. CLEP argued that there is a strong connection between LEP and rights-based approaches, but failed to articulate the nature of the connection. Others, such as Banik,⁶ have argued that LEP should form a sub-set of rights-based approaches. Many have critiqued LEP for 'lack[ing] conceptual rigour.'⁷

¹ Stephens, M. 'The Commission on Legal Empowerment of the Poor: An Opportunity Missed' (2009) *Hague Journal on the Rule of Law*, 1, pp. 132–157.

² CLEP, *Making the Law Work for Everyone*, p. 1 at <http://www.undp.org/publication/Making> the Law work for everyone.

³ Ibid, at 3-4.

⁴ CLEP, with Hernando de Soto as one of its chairs, has been critiqued for its co-option of LEP by unfusing market values, and thereby domesticating what could amount to a counter-hegemonic use of law. See *The Hague Journal on the Rule of Law* 2009 (1) for a series of articles critiquing CLEP's approach.

⁵ Dan Banik 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication' (2009) *The Hague Journal on the Rule of Law* 1 at 127.

⁶ Ibid.

⁷ Ibid, at 122.

This paper considers the contribution of LEP to the rights and poverty reduction discourse. It argues that the value of LEP as a development paradigm is not that it introduces a new framework, but rather that it rescues one of the strands of the rights-based approaches from a contested discourse, which is being lost to an overly legalistic interpretation.

The paper responds to the critique that the LEP framework lacks conceptual rigour, by initiating a discussion on power and empowerment, the objective of which is to contribute to LEP's conceptual development. LEP's focus on power, as opposed to law, critically distinguishes it from the dominant rights-based discourse, yet little attention is paid in LEP literature to constructing a coherent concept of power or empowerment. This paper aims to contribute to developing LEP's concept of empowerment, by drawing on the work of Lukes and the substantial body of work on empowerment by development scholars.

The paper is divided into three parts. The first part explores the origins of the different approaches that have become known as rights-based approaches and focuses in some detail on two of the approaches. The second part discusses LEP and its relationship with rights-based approaches. The third part discusses the concepts of power and empowerment.

2. Rights-based approaches

Prior to the 1990s, human rights and development paradigms operated independently of each other. During the 1990s, development scholars began to incorporate human rights into development frameworks and this merger of human rights and development became known as 'rights-based approaches' to poverty alleviation. The majority of the global development or aid agencies, including the World Bank,⁸ are now engaging or incorporating rights-based approaches into their work. From a development perspective, the incorporation of rights into development frameworks has been important, for at least three reasons. First, poor, marginalised people are no longer regarded as beneficiaries of development, but as rights holders; 'rights-holder,' unlike 'beneficiary,' suggests potential agency. Second, a right-holder implies a corresponding duty-holder, which re-focuses development on the responsibility of national states to its citizens.⁹ Last, depending on the way rights are conceptualised, this potentially challenges prevalent liberal constructs of poverty, particularly prevalent in the USA, that poverty is attributable to individual failure, and creates an intellectual space to explore the structural dimensions of poverty.¹⁰

⁸ See a series of papers commissioned by the World bank, *Power, Rights and Poverty: Concepts and Connections*, Alsop (ed) at 16, accessed at on 18 December 2009 at <http://siteresources.worldbank.org/INTEMPowerMENT/Resources/PPFinalText.pdf>.

⁹ Given the influence of the global financial institutions (GFIs), including the IMF, the World Bank and the WTO, the role of states in developing countries is circumscribed by the conditionalities attached to loans from the GFIs and by global economic arrangements and agreements. Thus the idea of the state as the duty-holder is contestable. Debates around the implications of the UN's Right to Development incorporate more expansive ideas of who other potential duty-bearers, such as developed nations and translational capital.

¹⁰ Miller, VeneKlasen and Clarke, 'Rights-based development: Linking Rights and participation – challenges in thinking and action, in Pettit and Wheeler (eds) *Developing rights?* (2005) Institute for Development Studies Bulletin 36(1) at 20-41.

From a human rights perspective, rights-based approaches introduce other spheres of concern besides the legal, namely the social, political, cultural and economic.¹¹ Thus rights-based approaches challenge lawyers to interrogate their narrow focus on changing laws and regulations, to the importance of locating advocacy and public interest litigation within strong social movements, to the fact that formal law is often of less relevance to poor people's lives than informal and cultural norms,¹² and to the important role that public opinion and the media play in the realisation of rights.

But there is no overarching meta-narrative for rights-based approaches. Instead, 'it is Babel of competing voices and agendas.'¹³ 'Rights-based approaches' incorporate at least three distinct strands: the first, and most dominant, is one that is based on the international human rights framework, which is derived from a succession of United Nations conventions and covenants. The second is borne out of the socio-political struggles of marginalised peoples, such as women's and workers' movements, and the third has its roots in the evolution of the understanding of citizenship.¹⁴

This paper explores the first two and goes on to argue that the value of LEP as a development paradigm is not that it introduces a new framework, but rather that it rescues the social movement strand of rights-based approaches from a contested discourse that is being lost to a liberal interpretation of rights as individualistic, which holds little potential to challenge the structural dimensions of poverty.

Separating out different strands of rights-based approaches, with their different assumptions and even agendas, is a complex task and is one vulnerable to charges of over-simplification. Nevertheless, this paper endeavours to do this, acknowledging that reality is seldom as easily categorisable as theory suggests.

2.1. Rights-based approaches grounded in the international human rights framework

Human Rights discourse gained legitimacy after World War II, in the wake of a worldwide consensus on the need to limit state power. The most significant expressions of this consensus are found in the UN Charter and the Universal Declaration of Human Rights.

The UN Charter bound its signatories to recognise and promote respect for fundamental human rights and freedoms of all people, irrespective of their race, sex, language or religion. In 1948, the General Assembly of the United Nations adopted The Universal Declaration of Human Rights. Its 26 articles gave substance to the UN Charter's principles of equality and non-discrimination, civil and political rights, and social, economic and cultural rights.

While the Universal Declaration established a normative human rights framework, these rights were not legally binding on the member states. It took nearly thirty years for these human rights to be codified into the first legally binding treaties. Parallel to the legal obligations created by

¹¹ Paul Gready 'Rights-based approaches to development: What is the value added?' (2008) *Development in Practice* 18(6) at 739.

¹² See Gerald Lopez 'The Work We Know So Little About' (1989) *Stanford Law Review*, Vol. 42, No. 1, pp. 1-13.

¹³ *Ibid*, at 736.

¹⁴ Institute for Development Studies, 'The rise of rights: rights-based approaches to international development' (2003) *IDS policy briefing* 17 at 1.

these treaties or conventions, are provisions adopted by states at international conferences. While the latter are not legally binding, they represent political and moral commitments by participating states to recognise and develop these rights in their countries.¹⁵

Nevertheless, rights were not dominant in the global discourse. But, 1989 signalled a turning point. The end of the Cold War heralded debates on a new global order, and rights became a keystone idea. Importantly, these rights included socio-economic rights. This 'global order' was constructed in the context of the triumph of capitalism, and of liberal democracy. A central tenet of liberalism is a commitment to individual freedom, which is construed as individual autonomy from state interference. Rights and entitlements are thus primarily understood as accruing to individuals.¹⁶ Grugel and Piper reflect that

The authority of rights discourses now lies in the legacy of the liberal turn in politics. Individualised rights and entitlements fit almost unreflectively within most western notions of how the world should be.¹⁷ ...Where rights claims can be made to resonate with the predominantly liberal ideas that shape the contemporary global political economy they have a greater chance of being heard.¹⁸

Synonymous with this liberal hegemony is a particular economic, moral and political perspective, in which the 'free' market and values associated with the market predominate, with the result that the market 'shape(s) social life according to its own logic,'¹⁹ a logic that privileges efficiency over equity and which is unconcerned with distributional consequences. The dominant international human rights discourse tends to ignore the tensions between efficiency and equity, and seldom questions the distributional consequences of an emphasis on efficiency, with the result that it 'imports many market values incompatible with the practical fight for poverty reduction.'²⁰

While the rights-based approach rooted in the international law regime provides an important international normative framework that individual states are accountable to deliver on their citizens' rights, including socio-economic rights,²¹ poor people lack the financial resources necessary to secure state compliance and seldom have access to organisations that can enforce their rights.²² Thus access to formal justice often amounts to little more than a paper right.

¹⁵ Moser, 'Rights, Power and Poverty Reduction' (2004) *Power, Rights and Poverty: Concepts and Connections*, Alsop (ed) at 16, accessed at <http://siteresources.worldbank.org/INTEMPowerment/Resources/PPFinalText.pdf> on 18 December 2009.

¹⁶ See Ensor, 'Linking rights and culture-implications for rights-based approaches' (2005) in Gready (ed) *Reinventing development? Translating rights-based approaches from theory into practice* at 254.

¹⁷ Jean Grugel and Nicola Piper 'Do Rights Promote Development?' 2009 *Global Social Policy* 9(1) at 82.

¹⁸ *Ibid*, at 80.

¹⁹ Robert Sidelsky 'Where do we go from here' 2009 *Prospect Magazine* Issue 154, London, UK.

²⁰ B. Chimni, 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels' (2008) *The Law and Development Review* 1 at 8.

²¹ See Vienna International Covenant on Economic, Social and Cultural Rights of 1966.

²² Andrea Cornwall and Celestine Nyamu-Musembi 'Putting the rights-based approach to development into perspective' (2003) *Third World Quarterly* 25(8) at 1418.

Even where socio-economic rights are justiciable, as is the case in South Africa, the state's responsibility to realise the right to housing, food, water or social security is conditional upon the state's 'available resources.' How the national budget is spent and which budget items are prioritised are part of a largely political process.

The process of making rights real is a political one, rather than a technical or procedural one, because it entails confronting structural inequalities that underlie the negation of rights. Understanding how rights can shift power relations is essential to realising the potential of rights to contribute to change.²³

The realisation of socio-economic rights necessitates the participation of social movements that are able to engage the state – when necessary – as an ally, and at other times, as an adversary. For example, South Africa's famous social movement, the Treatment Action Campaign (TAC)'s campaign for the realisation of the right to health (in the form of anti-retrovirals for pregnant women) involved complex strategies of mobilisation, legitimising demands by building public consensus through, for example, the media, strategic litigation and negotiation and co-operation with the Health Minister. Realising rights involves contestation, both inside and outside the courts, which challenges who has access to which resources and thus the embedded power relations.

But, if the agency of poor people is largely framed in individualistic terms, as it is by the dominant human rights approach, their influence on the prioritisation of their rights, including in the budgeting process is limited. The ability of this dominant, individualistic rights-based discourse to secure enforcement of rights for those who have little economic, political or social power is therefore limited.

Practical programmes undergirded by this dominant rights-based approach, particularly where staffed by lawyers and paralegals, tend to take the form of (i) legal training of communities, a 'know-your-rights' approach; (ii) assisting people with administrative procedures to claim their rights, for example identity documents or grants, (iii) legal aid to embark on litigation to claim rights, and (iv) advocacy that focuses on legislative reform.

These activities bring about real changes to people's lives. In the language of Caroline Moser, these constitute 'practical interests.'²⁴ However, these approaches are unlikely to challenge the embedded power relations that thwart the recognition of new rights or hold the state accountable to realise existing rights. The recognition of new rights or the realization of justiciable socio-economic rights incurs costs, and will therefore always be contested or resisted, as they imply a redistribution of resources.

An additional limitation of these 'legalistic' approaches is that they do little to shape marginalised people's identities as citizens, who have rights and who can exercise power as

²³ Jethro Pettit and Joanna Wheeler 'Developing Rights? Relating discourse to Context and Practice' *Developing Rights?* 2005 IDS Bulletins 36 (1) at 1.

²⁴ Moser 'Gender Planning in the Third World: Meeting Practical and Strategic Gender Needs' (1989) *World Development* 17 (11) at 1799-182.

citizens.²⁵ Instead, professionals – lawyers or development practitioners – frequently initiate legal reform with little grassroots engagement, with the result that progressive legal reform may have little bearing on poor people’s lives.

Another strand of rights-based approaches, which has its genesis in the women’s and indigenous peoples’ movements, is premised on an understanding of rights-based development as a political, rather than a legalistic process. Whose rights are recognised and whether and how rights are realised and enforced, are, as these protagonists assert, the outcome of politics and power, where advocacy is not limited to legal reform and undertaken on behalf of people, but power is exercised in multiple spheres and by marginalised people themselves.

2.2. Rights-based approaches epitomised by social movements

The notion of rights as universal standards of human dignity belies their inherently political and conflictual nature. Rights do not come in neat packages, but rather are part of dynamic, sometimes messy processes of resistance and change that work to engage and transform relations of power.²⁶

Social movements, such as women’s movements, indigenous people’s and landless people’s movements (especially that of Brazil), have through their demands for access to resources, for recognition, voice, participation and for social justice not only shaped the meaning of particular rights, but also forged new rights. They have done so through social mobilisation and action, harnessing the support of the media, breaking the law and strategic litigation²⁷ – strategies that challenge prevailing power relations. This section will focus briefly on the contribution of the women’s movement to rights-based approaches.

2.2.1. The women’s movement

In the 1980s, women’s movements began to challenge the ‘traditional human rights approaches’ that are embedded in the international law rights regime, described above. Instead, they re-conceptualised rights-based development as political processes.²⁸

The movements mobilised women across all classes and races. Basing their approach on the work of Brazilian adult educator and activist, Paul Freire, they began by meeting with groups of women. The process commenced with discussions of problems experienced by group participants in their daily lives. Thus, their initial focus was problem-centred, not law-centred. The women used adult education methods such as posters, pictures and drama, to portray common problems and to assist in the analysis of their causes. The focus was on identifying the multifarious causes of problems identified by women themselves and on facilitating community responses to address these problems. Thus, the emphasis was on building awareness of the structural causes of problems, but also on building awareness of the potential of community

²⁵ Miller, VeneKlasen and Clarke (n7) at 33.

²⁶ Miller et al (2005), (n 20) at 36.

²⁷ See Peter Houtzager ‘The Movement of the Landless (MST) and the juridical field in Brazil’ 2005 *IDS Working Paper* 248 at 1-22; and Gilbert Marcus and Steven Budlender ‘A strategic evaluation of public interest litigation in South Africa’ 2008, Atlantic Philanthropies at 1-156.

²⁸ Miller et al (n 20) at 33.

members to be change agents. Only once problem solving phases had produced a critical analysis, would facilitators introduce the law and legal process, with the purpose of affirming women's identity as citizens and their right to engage with law and rights processes.²⁹ As women struggled with these problems, they crafted new rights that birthed strategies for social action, which included building public consensus around the legitimacy of these emerging rights.³⁰

The grassroots activities were integrated with other developmental activities, in particular health, literacy, self-esteem and micro-credit programmes. Above all, these programmes emphasised power and empowerment.³¹

The grassroots activities defined the global advocacy strategies of women's movements, which participated in UN conferences, where considerable progress in women's rights was made. For example, the liberal public/private dichotomy was challenged, as women's movements sought to frame domestic violence and war-related rape not as private, individual experiences, but as human rights issues.³²

Strategies were differentiated, depending on the status of the rights in question. Where rights existed on paper but were not enforced, appropriating these rights involved building awareness of people's entitlement to these rights and mobilising for change in the institutions responsible for upholding the rights. By contrast, where rights were not yet recognised, strategies included building consensus on the need for new rights. The approach of the Movement of the Landless (MST) in Brazil illustrates how different strategies are employed to craft new rights.

2.2.2. The Movement of the Landless (MST)

The Movement of the Landless was formally established as a national movement in 1985 and is today the most influential social movement in Brazil. Houtzager³³ argues that the MST employs a 'counter-hegemonic use of law and rights,' in that litigation is but one component of the movement's strategy for the redistribution of land. The use of law is integrated with mobilisation and politicisation.

The MST has mobilised landless peasants, but has also mobilised support from the influential Catholic Church, skilled members of the legal fraternity, the press, international NGOs and the labour movement. This cross-class solidarity expresses a form of power that will be discussed more fully below.

The MST recognises that:

²⁹ Ibid.

³⁰ Cornwall et al (n 16) at 1421.

³¹ Miller et al (n 20).

³² Ibid at 38.

³³ See Houtzager (n 25).

Changes in law that reduce deep rooted social exclusion can result from legislative or executive action, shifts in public opinion, civil society monitoring of public or private action, to name only a few sources.³⁴

Thus the MST's social transformation strategy is premised on the recognition that rights are not forged by individuals claiming their rights through litigation, but rather that new rights are recognized and existing rights are given content or enforced, as a result of changes in power relations outside the 'juridical field.' Shifts in public opinion – induced by media coverage, civil society activity and protests – can bring pressure to bear on the executive. Typically the MST politicizes an issue before litigating.³⁵

A particular case in Rio Grande do Sul is an apt illustration of the MST's sophisticated 'counter-hegemonic use of law and rights.' In 1998, 600 families left an encampment on a highway and occupied farmland. The owner (a company) brought an application for an eviction order on the basis that the company had a lease agreement for the land, the families were in unlawful possession, which is a criminal offence, and were therefore subject to eviction. The Judge ruled in the company's favour. The MST families appealed, challenging the individualist construct of rights. Lawyers for the MST families argued that (i) this conflict was not between private individuals, but rather a collective conflict, which did not fall within the ambit of the criminal code; ii) since the outcome of the case had broader implications in which the public had an interest, that 'it therefore required a social and consequentialist interpretation – the tribunal should consider the social consequences that might accompany the execution of the judge's sentence,' namely that the court should take into account the 'conflictual agrarian history' in Brazil and the wider social impact of rendering 600 families homeless, and iii) the case represented a conflict between two constitutional principles – the right to a dignified life and the right to private property.³⁶

The court ruled that it was appropriate to apply Constitutional principles, rather than the criminal code, and held that the state has an obligation to 'guarantee fundamental goods as a social minimum' – that is, clothing, shelter and refuge. It found that 'the fundamental rights of the 600 families encamped prevail in detriment to a company's purely property rights.'³⁷

Thus the case illustrates that the individualisation of rights renders very different outcomes for marginalised people than when there is a recognition that the rights of different stakeholders may be and often are in conflict and that reliance on rights, in a technical sense, seldom leads to the realization of social justice. Rather, these are political contests that need to be played out not just in the courtroom, but in the public domain too. As Epp explains:

Rights are not gifts: they are won through concerted collective action arising from both a vibrant civil society and public subsidy. Rights revolutions

³⁴ Ibid at 1.

³⁵ The Treatment Action Campaign (TAC) in South Africa employs similar strategies.

³⁶ See Houtzager (n 7).

³⁷ Ibid at 8.

originate in pressure from below in civil society, not leadership from above.³⁸

Rights-based approaches that conceptualise rights as a political process recognise the centrality of power and that the process of making rights real is about power, not about law. This is the essence of the Legal Empowerment of the Poor framework.

3. Legal Empowerment of the Poor

Stephen Golub is credited as the architect of Legal Empowerment of the Poor (LEP), which he defines as ‘the use of legal services and related development activities to increase disadvantaged populations control over their lives’ which, Golub argues, ‘is ultimately about poverty alleviation.’³⁹ In his seminal paper,⁴⁰ Golub critiques the dominant ‘Rule of Law orthodoxy’ approach favoured by the World Bank and other global financial institutions. He critiques their emphasis on institutional reform, which typically takes the form of legislative reform and establishing and building the capacity of state institutions, formal courts and judicial personnel in developing countries:

Rule of law, Golub argues, is pursued not to secure the recognition of everyone’s dignity or to facilitate access to justice by all, but primarily to ensure sufficient predictability and security for local and domestic investors that contracts will be enforced and property rights respected. The global financial institutions argue that this is necessary to secure investment in developing countries, which contributes to economic growth.⁴¹ This ‘top-down,’ formalistic approach privileges those who already have access to markets, land and assets. Existing power relations and distribution of resources thus remain unchallenged by the rule of law orthodoxy. Legislation intended to benefit the poor is often promulgated with little reference to, or understanding of, the daily reality of poor people’s lives and therefore fails to have a meaningful effect on poor people’s lives.

Golub argues for a different, ‘bottom-up’ approach, which starts not with institutional reform, but with poor people and their lived experience. Poor people are not clients, but partners with lawyers, advocacy specialists and other development practitioners, and the objective for the partnership is ‘to increase poor people’s control of poor over their lives.’ This is achieved by integrating legal activities, such as legal training, paralegal assistance, mediation and litigation, with development activities, such as literacy programmes, building social capital and micro-enterprise programmes. He seems to suggest that these latter kinds of programmes build the capacity or, in Sen’s terminology, ‘the capabilities’ of people, which increase their ability to claim rights and to participate in decisions that affect their lives. He envisages the relationship between poor communities, civil society and government as follows:

³⁸ Epp in Marcus and Budlender (n 23) at 197 .

³⁹ Stephen Golub ‘Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative’ 2003 *Carnegie Working Paper Rule of Law Series: Democracy and Rule of Law Project* 41 at 3.

⁴⁰ *Ibid*, at 5.

⁴¹ *Ibid*, p 5; Also see Mander ‘Rights as struggle: towards a most just and humane world’ (2005) in Gready (ed) *Reinventing Development? Translating Rights-based approaches from theory into practice* at 24.

In contrast with the dominant paradigm, legal empowerment is more balanced in nature. It is grounded in grassroots needs and activities, but can translate that community-level work into impact on national laws and institutions. It generally strengthens civil society and the legal capacities and the power of the poor to address their priorities, but wherever possible involves cooperation with government.⁴²

This co-operative stance towards government reflects a growing discourse that understands agency in terms of citizen participation. While social movements pre- the 1990s adopted an adversarial attitude to the state, contemporary social movements, such as Brazil's MST and South Africa's TAC, root their claims and strategies in the identity of the marginalized as citizens and their right as citizens to participate.

The process whereby marginalised people's 'power is strengthened' to 'address their priorities' presumably refers to the kind of processes adopted by women's movements, whereby marginalised people exercise their 'power' for rights to be given content or enforced, or for new rights to be recognized. These are political processes. Inherent in political contestations is the exercise of power. Thus Golub states that LEP is less about law and more about power.

This recognition that claiming rights is a political process resonates with the strand of human rights that has its origins in the women's, landless and indigenous people's movements. Thus LEP may be less of a new framework and more of a restatement or the rescuing of a strand of rights-based approaches that many argue has lost the battle to a legalistic, top-down approach to human rights; an approach that presents rights as neutral and which fails to recognize that the business of contesting and claiming rights is a political process.⁴³

Golub argues that legal empowerment is a rights-based approach, in that:

It uses legal services to help the poor learn, act on, and enforce their rights in pursuit of development's poverty-alleviating goal. And ...the realization of empowerment, freedom, and poverty alleviation typically equals enforcement of various human rights.'

But, he argues that LEP encompasses more, specifically 'related development activities such as community organizing, group formation, livelihood development, and literacy training.' But as I have shown, the strand of human rights that has its origins in the women's movements does that too. Golub's argument for including development activities is that empirical evidence suggests that the impact of legal services is greater when 'integrated with related activities.'⁴⁴

One reason for this is that these other development activities meet the 'practical interests' of people, which make tangible differences to people's livelihoods. Simply to focus on 'strategic needs'⁴⁵ (i.e., those that challenge power relations) requires people's time and results in opportunity cost. Without concrete benefits in the short-term, participation of the most

⁴² Ibid at 5.

⁴³ See Miller et al (n20).

⁴⁴ Golub (n 35) at 27.

⁴⁵ See Moser (n 19) for the distinction between practical and strategic needs.

marginalised is unlikely. Twenty years ago, women's movements, such as Development Alternatives with Women for a New Era (DAWN) and the Self-Employed Womens' Association in India (SEWA), recognised this and thus mobilised women around their everyday struggles. They delivered practical programmes that made a difference to women's everyday lives – in SEWA's case, its micro-credit programme now operates as a bank for its over one million members. Yet the *raison d'être* of SEWA is to mobilise poor self-employed women to secure their rights.⁴⁶

The value of LEP's restatement of an existing strand of rights-based approaches is that scholars and practitioners who are investing considerable energy arguing for the re-emergence of the strand of rights-based approaches that has its genesis in social movements, can instead focus their energy on more creative processes. By rescuing the approach from the dominant legalistic, technocratic understanding of rights-based approaches and naming it something else, namely LEP, attention can be focused on its development, both conceptually and methodologically.

The gain for the LEP framework is that it can draw on the substantial scholarship of feminists and on the practical experiences of various movements in contesting and creating new rights. Moreover, LEP could draw on the women's movement's experience of translating grassroots work into policy and could learn how to facilitate personal transformation, channel such personal transformation into social transformation, and manage the tension between facilitating the leadership of marginalised women and the leadership role of educated middle class women.

The remainder of this paper considers one area of scholarship, namely that of power and empowerment. LEP's focus on power as opposed to law critically distinguishes it from rights-based discourse, yet little attention is paid in LEP literature to constructing a coherent concept of power or empowerment. This paper aims to initiate a discussion of power and empowerment within the LEP framework – what the terms mean and how they could be operationalised within a participatory democracy.

4. Empowerment and Power

Golub's definition of LEP as 'the use of legal services and related development activities to increase disadvantaged populations control over their lives' resonates with Amartya Sen's definition of development as the freedom of people to choose to live lives that are meaningful to them.⁴⁷ Central to these conceptions of control and choice are the notions of agency and power and, thus, empowerment.

Whereas historically, empowerment entailed transformation, either personally or socio-politically, contemporary development and rights-based frameworks construe empowerment in largely technocratic terms. Within the liberal hegemony, it is usually understood as individualistic and involving the development of capabilities – for example, to participate economically or to secure implementation of rights – but not as a process that is personally or socially transformative and that challenges prevailing power relations.

⁴⁶ See www.sewa.org.

⁴⁷ Sen *Development is freedom* (1999).

The dominant rights-based approach thus facilitates the expression of a particular form of power, a ‘power to’ (do something). By contrast, communal agency, expressed in rights discourse as ‘participation’ and depending on how its conceptualised, embodies forms of power that have been described as ‘power over,’ ‘power with’ and ‘power within,’ which potentially challenge prevailing power relations and structural inequalities.

4.1. Towards a framework of power for LEP

Any discussion of power must start with the 1974 seminal work of Steven Lukes, ‘Power: A radical view.’ Lukes introduces a typology of power that focuses attention on different manifestations of power: visible power, invisible power and hidden power. His typology is widely referred to in development literature. I would argue that LEP should be developing strategies to understand what empowerment means in all three dimensions.

Visible power is the form of power synonymous with influence or control. In a socio-political or socio-economic context, those with visible power are those whose decisions or interests visibly prevail when there is a conflict of interest.⁴⁸

Lukes recognises a second form of power, namely ‘invisible power.’ Lukes argues that ‘to the extent that a person or a group-consciously or unconsciously creates or reinforces barriers to the public airing of policy conflicts, that person has power.’⁴⁹ He recognises that certain people or groups control the agenda of politics – they control, often subconsciously, the policy options that are on the table to debate. Subconscious power is exercised by hegemonic ‘values, beliefs, rituals’⁵⁰ that serve a particular group and that are reinforced by political, economic, social and cultural institutions that determine, to a large extent, which policy options are up for debate. Institutions include organisations and formal and informal norms that constitute the ‘rules of the game,’ which Eyben articulates as follows:

When power relations repeat themselves and form a pattern, they become institutionalised; they become the rules of the game⁵¹

Thus if the dominant values are liberal, individualist perspectives are privileged over communitarian perspectives and these individualist perspectives, including of rights, are infused with market values.

If agency is construed as individual agency, the individual is unable to contest the rules of the game. But if agency is construed as participation by groups of citizens, with the concomitant recognition that participation embodies citizens’ right to contest but also their duty to co-operate,⁵² then these rules of the game can be re-negotiated. There is a substantial body of literature on participation, which, in the context of participatory democratic discourse, analyses

⁴⁸ Lukes ‘Power: A Radical View’ (1974) *Studies in Sociology* at 12.

⁴⁹ Bachrach and Baratz in Lukes, *ibid*, at 16.

⁵⁰ *Ibid* at 22.

⁵¹ Eyben ‘Power, Rights, and Poverty: Concepts and Connections’ (2004) in *Power, Rights and Poverty: Concepts and Connections*, Ruth Alsop (ed), 2004, p.16, accessed at <http://siteresources.worldbank.org/INTEMPowerment/Resources/PPFinalText.pdf> on 18 December 2009, p. 23

⁵² See Catherine O’Regan ‘The three R’s of the Constitution: Responsibility, respect and rights’ in Francois du Boit (ed)

participatory spaces in terms of whether they are ‘closed’ not open to participation by marginalised voices at all; ‘invited,’ in which communities are invited to participate but on the terms of the actors that do the inviting and thus set the agenda while invitees have to adhere to ‘the rules of the game’;⁵³ or as ‘claimed,’ where those who are marginalised lay claim to participate and the participation therefore holds the possibility of ‘constructive engagement.’⁵⁴

The challenge for groups of marginalised people is to be able to contest and shape the nature of spaces into ones that enable them to negotiate and re-create the rules of engagement. Williams advocates the need for developing the ‘political capabilities of the poor’ which he defines as ‘the set of navigational skills needed to move through political space and the tools to re-shape these spaces.’⁵⁵ This brings us to the third dimension of power, ‘hidden power’ which Lukes identified and which is his contribution to power discourses.

Hidden power refers to the norms that are internalised by people. It describes the way people are socialised to accept the status quo and their place in it, which affects the extent to which people can even envisage another reality. Empowerment (referred in this context as ‘power within’) would seek to raise people’s consciousness, to make them aware that poverty and inequality (of any kind) are structural phenomena, rather than individual experiences and to challenge their understanding of what is ‘normal’ or ‘necessary.’ Providing different constructions of reality enables different kind of actions.

Gaventa,⁵⁶ Eyben⁵⁷ and others have developed further distinctions to Lukes’ typology that are helpful in operationalising it. They argue for distinctions between ‘power to’; ‘power over’; ‘power within’ and lastly, ‘power with.’

‘Power over’ suggests that it’s a ‘zero sum game,’ that if one party has more power, it means that the other has less. It suggests a redistribution of power, which may be reflected in altered power relations politically, economically and socially within global, national, societal, communal or household contexts.

‘Power to’ is the ability to act, to do something. It suggests agency in the sense employed by Amartya Sen. People are able to make choices that have consequences and enable them to have more control over their well-being.

Two other concepts of power, namely ‘power within’ and ‘power with’ are particularly important for LEP. The concept ‘power within’ is rooted in the Marxist idea of false consciousnesses and describes the development of critical consciousness. It describes an increased individual consciousness of power relations and of one’s capacities, potential and rights. Typically empowerment in this sense leads to an increase in dignity and self-worth. An analysis of invisible power and the development of ‘power within’ is a precursor to the social mobilisation which is necessary for social transformation. From an LEP perspective, a critical part of the

⁵³ Andrea Cornwall, ‘Making spaces, changing places: situating participation in development’ *IDS Working Paper* 170.

⁵⁴ See Jaroszynski (n 21).

⁵⁵ Glyn Williams Evaluating participatory development: tyranny, power and (re) politicization (2004) *Third World Quarterly*, 25 (3) at 566.

⁵⁶ John Gaventa, ‘Finding the Spaces for Change: A Power Analysis’ (2006) *IDS Bulletin* 37(6).

⁵⁷ *Ibid* (n49).

social transformation is the contestation of whose rights and which rights should be recognised, and how they should be given content and enforced. And it is a shift in the ‘power within,’ the hidden power, that enables people to recognise and challenge invisible power that influences which and whose rights are on the agenda.⁵⁸

‘Power with’ recognizes the solidarity present between those who are marginalised and those who are not given their common goal of social transformation. As Eyben notes:

Many people in a sub-ordinate position may question the way the world is ordered but do not organise for strategic resistance because they fear the consequences should they fail. They would need to gain support from others to develop new ways of understanding – or frameworks of meaning – about how the world could work.⁵⁹

In addition to support a re-envisaging of their world, marginalised people need the resources of those who are not marginalized – their financial and material resources; their political and social influence, their skills (such as legal skills) and expertise. Golub stresses that poor people are partners – this encapsulates the solidarity relationship expressed in ‘power with.’

Foucault introduces a further site of power, namely ‘power everywhere.’⁶⁰ Power is exercised in every aspect of our lives and is particularly imbricated with the construction of knowledge.

Programmes that reflect the dominant rights-based approach, particularly if led by lawyers and para-legals, tend to focus on ‘empowering’ people to understand the law and to access their rights. They focus on rights education, para-legal assistance to access rights that have been translated into legislated entitlements and to litigate for enforcement of rights. Most programmes concentrate on particular areas of law, be they land rights, women’s rights or social rights. The reference point tends to be the law, rather than peoples struggles. This understanding of empowerment reflects a ‘power to’ orientation and whilst it has validity (as I will argue below), it reflects a narrow, legalistic understanding of empowerment.

LEP is a bottom-up approach and thus the starting point is not the law, but the everyday struggle of people’s lives. Programmes that reflect an LEP approach may well include teaching marginalised people about their rights and facilitating their appropriating their rights, but that would not be the starting point. LEP’s emphasis or entry point should be ‘power within’ and ‘power with.’ In order to effect real change and challenge structural inequality, these two notions of power are inseparable.

If LEP is concerned not just with facilitating ‘power to,’ but also with ‘power within’ and ‘power with,’ this has profound implications for how participation and empowerment are understood and ultimately for marginalised peoples’ role in how rights develop – which rights are recognised, how they are framed, understood and realised.

5. Conclusion

⁵⁸ Eyben (n 46) at 22.

⁵⁹ Ibid, at. 22.

⁶⁰ Ibid.

It is important to underscore the fact that empowerment is not something done to people. Rather, as expressed by Action Aid, a progressive Aid Agency:

... it is a participatory process that engages people in reflection, inquiry and action. By sharing stories and doing a basic political analysis of common problems such as unemployment violence to inadequate health services, people develop a clearer understanding of power. They begin to question their world and their place in it, affirming their own sources of power and discovering how power affects their lives positively and negatively. As they question, they develop and deepen a sense of personal worth, a critical compassionate worldview and the skills and willingness to act both individually and collectively to improve their world. This change process not only involves developing political consciousness and an appreciation of rights, but also building new forms of inclusive power that forge bridges of solidarity and co-operation across differences such as ethnicity, class, gender and religion.⁶¹

This description of empowerment illustrates the synergy between the different forms of power. It illustrates ‘power with’ as those who are not marginalised facilitate, initially, the process of story-telling and a basic political analysis of struggles, and of ‘power within’ as people appropriate their own sense of dignity and agency and develop skills, including political capabilities referred to earlier. Personal and social transformation results in exercising agency (‘power to’) as individuals and collectives act ‘to improve their world’ – both at the level of their daily well-being and at a structural level. The reflection on how power ‘affects their lives positively and negatively’ and on their own power, reflects a Foucaultian awareness of the transcendence of power, ‘power everywhere.’ Lastly, the ‘new forms of power that forge bridges of solidarity’ attest to the potential to challenge the hegemonic liberal constructs of individualism and a commitment to market values.

There is a significant body of literature on how to build critical consciousness. One aspect needs to be underlined. Every group inherently has its own power dynamics, which often reproduce power relations in the community in question. Thus groups are vulnerable to elite capture, as those with the most power in a community easily arrogate the position of being the ‘voice’ of the community, the most marginalised voices are silenced, and the gender dynamics of the community are reproduced in the groups. Thus part of developing a ‘critical compassionate worldview’ would include a self-reflexive exploration of each member’s (including the facilitators’) own power⁶² and how this power manifests in visible, invisible and hidden ways in the context of the group, but also in their households and in the broader community.

In practice, when faced with a multiplicity of needs and potential actions and limited resources to realise these needs in rights terms, Pettit and Wheeler’s injunction is helpful:

For rights to become meaningful, they must be claimed and realised by real people engaged in specific struggles related to urgently felt needs. And to be sustainable, the process for securing those rights needs to be one which squarely addresses the

⁶¹ Miller (n 20) at 34.

⁶² Jaroszynski (n 21) at 76.

structural inequalities and power relations which deny them in the first place. Rights are both about physical needs and personal experiences about power.⁶³

Thus the Legal Empowerment of the Poor paradigm envisages that we start ‘bottom-up,’ with the ‘urgently felt needs’ of ‘real people.’ As marginalised, poor people are partnered by lawyers, development practitioners, and paralegals, their acutely felt physical needs are met by the developmental activities to which Golub refers – income, houses that don’t leak, healthcare, education. At the same time, people’s critical consciousness and their identity as citizens are developed, bridges of solidarity are built with other stakeholders (including lawyer and the media). The objective is to build social movements able to claim existing rights, to craft and fight for new rights, and to give content to justiciable rights where the jurisprudence is still developing. At a national level, this will call for the ability to engage with the local and national government and with other social actors, such as organised capital. Perhaps the LEP paradigm could provide a conceptual framework that could address the calls for united action of global social movements to challenge globally embedded power, particularly in the context of global supply chains.

⁶³ Pettit and Wheeler (n 17) at 7.