



## Progress Report Working Group 2: Property Rights

### 1. Introduction

Seventeen members of the Working Group on Property Rights (WG 2), led by Chair Ashraf Ghani, met during November 14 - 15 at the offices of the Commission Secretariat in New York City to develop a plan for contributing to the Commission's work. WG 2 identified several ways in which it might advance the work of the Commission. Over the coming months, through the work of its members and drawing upon the energy of national consultations organized by the secretariat, WG 2 will explore ways in which secure rights and secure access to property can empower the poor to gain greater control over their lives and free themselves of the stifling economic and social effects of poverty.

**D**ecision makers committed to eradicating poverty are the ultimate audience for the Commission's work. The work of WG 2 is intended to help the Commission present a realistic and informed appraisal of the ways in which property rights can meaningfully contribute to the improvement of the livelihoods of the poor, as well as a realistic appraisal of the political, financial and institutional commitments that are necessary to realize these benefits. It is necessary to define what successful outcomes will look like, and to realize that useful improvements to property rights regimes will require sustained political and financial commitments.

Property is a contested term. Historically, it conjures the enclosure, a process of literally fencing, staking and drawing boundaries leading to the exclusion of the poor in Europe and the Native Americans in North America. During the colonial period, there was an elective affinity between law and exclusion, for the colonial state operated through the instrument of law to seize the assets of the native peoples in all continents and used gender, race, class, caste and tribe as key categories through which to channel and mediate access to assets. In the 1990s, the implosion of the Soviet Union resulted in massive seizure of public assets for narrow private gain. And, conditions of prolonged conflict in 40-60 countries of the world have been making the poor more vulnerable both to loss of their lives and their assets. Gendering of war has been especially marked, as unprecedented numbers of women are being subjected to violations of their bodies. Historical memory and contemporary evidence, therefore, make for caution, if not outright scepticism, regarding a program premised on the legal empowerment of the poor.

**C**reation of wealth, so goes the other side of the argument, has overcome its process of genesis in primitive accumulation, for rule of law is critical to the globalizing circuits of circulation and expanded accumulation of wealth. Property as a bundle of legally defined rights becomes the lynchpin of a process of transformation of tangible assets into abstract relations of credit and exchange. If an effective market is the key to the creation of prosperity, then the greatest injustices against the poor are the constraints that prevent them from transforming their assets into property regimes and denying them access to the market. The emphasis in this narrative is on releasing the potential that resides within poor countries and among the poor people. The key to unlocking dead capital - de Soto's term for assets held by the poor but



prevented from being given a life through circulation and abstraction - is a process of transformation of assets into fungible capital. Reduction of poverty, therefore, can be changed from a mere slogan into a real program of action and commitment.

As people who have devoted their lives to the understanding and reduction of poverty, members of the group drew on their experience and on the ongoing work and findings of their organizations to speak to the issue of legal empowerment of the poor. Scepticism and hope were both in the air, as the discussion focused on the contested conceptual and policy terrain, and on finding ways of moving forwards. Five key issues emerged as the constitutive themes around which the future program of the working group could be framed. After feedback from the Commission and exchange of information with other working groups, our group will decide on a concrete work program to move forward. The dialogue that began on November 14-15, however, is continuing virtually, with members sharing their ongoing work and directing the group to fresh insights and new sources.

## **2. Value-Added/Rationale**

The group sees its value-added contribution at the level of strategy: discerning knowledge in the pattern of information, and extracting policy wisdom from the knowledge. Conceptually such a contribution would require dealing with power, law, property, and capitalization as a network of conceptual relations that can be translated into policies and programs of action.

Recommendations to policy-makers and other stakeholders will be in the form of a menu of options that can be adapted and tailored to context. Learning from failures will be as significant as learning from successes. Gender will constitute a cross-cutting theme and vulnerability will be operationalized to provide a realistic assessment of risks and risk-management strategies.

Drawing lessons from the experience of global, regional and bilateral developmental institutions that have banked on champions for success of their operations will be particularly important to foreground issues of implementation through participation and commitment of stakeholders. Nationally or locally driven programs that have resulted from discussions and pragmatic alliances among different stakeholders will have particular relevance to understanding sustainability.

## **3. Mobilizing Power**

Any program of legal empowerment of the poor will by definition require a change in the mechanisms of redistributive and collective power<sup>1</sup>. Distributive power is the power of Actor A over Actor B. For B to acquire more distributive power, A must lose some. But collective power is the joint power of actors A and B cooperating to exploit nature or another actor, C, or to create new mechanisms of wealth creation through agreement on new rules. Structural change in Europe, North America, and East Asia has entailed creative uses of power to give the people at the bottom of the economic, social, and political order a stake in the system. Redistributive

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<sup>1</sup> The distinction was made by Talcott Parsons, 1960:199-225.

power has not disappeared, as these societies remain deeply stratified, but the exercise of public power has changed from a zero-sum game to a more inclusive process.

The concerns voiced by members of the working group regarding power as an obstacle flowed from their first hand observation of the practices of the elites of developing countries. Many a project begun by a minister or president has been abandoned by a successor. And a strong case can be made that developmental projects prepared without proper attention to their adverse social impacts have increased the vulnerability, and lowered the standards of living, of the poor. Equally, structural adjustment programs driven from outside may have contributed to increasing destitution rather than creating the enabling environment for inclusive growth.

There have, however, been breakthroughs. From Germany, Japan, and the United States in the late 19<sup>th</sup> century, to southern Europe and Ireland in the late 20<sup>th</sup> century, some political elites have shown that they can muster the imagination, energy, and will to use power to create mechanisms for the participation of the poor in the system. Singapore, Hong Kong, and Dubai are examples of city states that have pursued differing yet successful strategies that have transformed them from third to first world standards of living.

Whether power will be a constraint or the mechanism for the empowerment of the poor depends critically on the effectiveness of the state. The group agreed to a classification of countries into three models – effective states, weak states, and dysfunctional states – that could be a useful organizing principle for the group’s recommendations. State effectiveness can be judged by the performance of an agreed set of functions that a modern state performs for its citizens. The judgement of the citizens as individuals and groups on the degree of responsiveness and accountability of the public institutions to the public, then, provides an important basis for the degree of trust to be placed in a government to undertake a program of empowerment of the poor. The historical record of a country, therefore, should be a key factor in the analysis of the risks to the poor and the type of risk management strategies to be put in place before program implementation.

#### **4. Law**

In developing countries, law has a closer elective affinity with making the poor more vulnerable than with their empowerment. The mercantilist state in Latin America used law to redistribute wealth rather than to create it. Organized into “redistributive combines,” economic and political groups under these conditions focused on influencing “government in order to obtain a redistribution which favors them or their members.... Politicization, centralization, and bureaucratization can all be traced to the same source: redistributive laws.”<sup>2</sup> The post-colonial state in most developing countries continued the legacy of the colonial state by using the law as an instrument of expropriation of the lands and forests hitherto controlled by communities. The wide use of eminent domain through land acquisition laws to acquire the assets of the poor, particularly evident in the case of extractive industries, has been another source of distrust of law by the poor. Identity devices as a means of proof of citizenship and the obstacles erected against

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<sup>2</sup> De Soto, 1989:190-91.



the poor to have ready access to such devices is another arena where the poor experience the law as a source of denial rather than affirmation of rights. In counties with large indigenous populations, the framing of the law in the language of the dominant group has been a major constraint to access to the rule of law.

The state's assertion of monopoly over the creation of rules, however, remains challenged, for the poor continually contest that claim and create their own rules and regulations. Customary law in rural areas and the informal economy in urban areas of developing countries are two facets of this counter-claim. Given this degree of complexity, is "the right to have rights," in Hannah Arendt's apt phrase, the critical parameter for grounding the law as the source of the empowerment of the poor? The Universal Declaration of Human Rights, then, provides the general framework of reference: with dignity, liberty, equality and brotherhood as the four foundations of the preamble. The main text delineates four sets of rights: rights pertaining to the individual as such, the rights of the individual in relation to others and to various groups, the spiritual, public and political liberties, and the economic, social and cultural rights. The individual and society are linked in the conclusion by "placing the enumerated rights in the context of limits, duties, and the social and political order in which they are to be realized."<sup>3</sup>

At the national level, the general framework can be rendered operational through the examination of regimes of citizenship, namely the extent to which people residing in the country are bearers of legally specified and enforced rights and obligations. These rights fall into the categories of civil, political, and social rights. More recently, there have been a series of social mobilizations around the notion of cultural rights, thereby again posing the issue of group rights. The emergence of these rights, however, does not follow an evolutionary trajectory but is determined by the nature of social contestations.

The program of legal empowerment of the poor, therefore, requires a considerable amount of fresh legal thinking on the following issues. First, a framework is needed to assess the degree to which a state's past practices provide a basis for the adoption and implementation of a rights-based approach. Second, a framework is needed to determine the minimum institutional capability required in a country in order to embark on a major program of legal empowerment of the poor. Third, finding the points of entry for pro-poor measures in weak or dysfunctional states requires delineation of a repertoire of legal strategies and tactics that can provide the point of entry.

## 5. Property

The poor control major assets in the urban and peri-urban areas. Given the absence of successful national-level examples of the empowerment of the poor, the group identified some key issues that need to be addressed for the articulation of a strategy. These are: (1) measures for enhancing the security of the assets controlled by the poor in their current locations, (2) unbundling the rights of property to give the poor short-term as well as medium to long-term benefits from their assets, (3) exploring legal mechanisms for balancing individual and community interests, (4) determining mechanisms of public/private partnership that would provide the poor with sustained advantages for their assets. The argument reflects the rising value of land in rapidly expanding

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<sup>3</sup> Glendon, Mary Ann, 2001: 174.

urban areas of developing countries and the desire of developers to secure the assets of the poor through a one-time payment. Aware of the failure of policies to prevent poor people from selling their reserved plots in sites and services, the group emphasized the need for creative legal and social thinking to ensure that the poor do not forgo long-term benefits for immediate gains. Understanding and building upon the practices of the poor themselves would be essential to the formulation of the strategy.

The case for unbundling property has gained strength from the recent successes in reversing the tragedy of the commons in Africa and some Asian countries. In sectors ranging from forestry to generation of power through micro-hydro power communities, there have been significant successes in creating new common resources. The patterns in these successful experiences need to be documented, and menus of options from them formulated for other places. There is equal need, however, to avoid idealizing the old forms of communal control. Far from being pristine or egalitarian, some of these traditions were invented during the colonial period through subordination of women and the young. The issue of the access of the poor to natural resources needs urgent attention, as the combination of interests of rent-seeking governments and the corrupt practices of extractive industry can lead to the dispossession of the poor.

If the scepticism regarding formalization of property rights is to be overcome, a convincing case had to be made for it. The group agreed that making the case would require demonstration that the formalization of property rights:

1. leads to empowerment of the poor by increasing their ability to exercise agency
2. enhances security of the poor
3. results in poverty reduction
4. provides higher value returns to owners of those assets
5. enables its owners to leverage capital and create wealth
6. creates responsibilities (obligations) leading to greater accountability<sup>4</sup>

The group agreed that exploring an initial focus on forms of property – land, housing, common property resources (sometimes called common pool resources), and moveable assets – was useful for gathering and digesting information. At a second phase, this information had to be placed within national, regional, and global patterns to reveal the changing patterns of economic and social dynamics.

The two poles of the tension on property can be discerned easily. In places where assets are fully capitalized, the operation of property as a bundle of rights through a legal system closely tuned in to the economy can be discerned. At the opposite pole, where informal or customary arrangements prevail, the operation of property as a bundle of powers, where the claims have to be (re)negotiated and (re)asserted can also be grasped. The key challenge is to design and implement mechanisms for the transformation of property from a bundle of powers to a bundle of rights. Providing solutions to this challenge will loom large in the program of the working group.

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<sup>4</sup> Anis Dani provided this formulation.

## 6. The Capitalization Process

De Soto has called the process of movement from dead capital - “where assets can not be readily turned into capital, can not be traded outside narrow local circles where people know and trust each other, can not be used as collateral for a loan, and can not be used as a share against an investment”<sup>5</sup> – to live capital, the capitalization process. The building blocks of this process are the discovery strategy, the political and legal strategy, the operational strategy and the commercial strategy.<sup>6</sup>

Formalization is thus clearly a component of the capitalization process. As there are no recent national level examples of processes of capitalization to serve as reference points, discussion often remains at a high level of abstraction. To make the discussion concrete, the working group focused on the linkage between real estate collateral and lending.<sup>7</sup> The issue is formulated as follows:

Access to credit accelerates a family’s or community’s ability to make an expensive investment, such as purchasing materials for a home or for farm equipment. Without credit, such a purchase might be unattainable or, at best, would require decades of savings. The proceeds of a loan can be used to build or improve a structure, start a business in a home or elsewhere, or be invested in education. Property rights that convey secure tenure may enhance access to credit by the poor. Property rights can also be pledged to secure a loan. In such cases, families can benefit from the value of their property without selling it and can capture its economic benefit at an earlier stage in life.

The reason for the cautious tone is that collateralized lending requires institutional conditions to protect the lender against borrower default. The desirability and feasibility of credit have to be thus assessed both from the lender’s and borrower’s perspectives as well as from the wider societal perspective. When the goal is the legal empowerment of the poor, each of the links in the value chain of the process of capitalization has to be fully explored to establish whether the relevant institutional arrangements are in place. The working group will explore this issue in greater detail in the future.

## 7. Next Steps

In their capacities as individuals and as representatives of organizations, members of the Working Group are making substantial contributions to the articulation of the agenda of the Commission. The productive tensions in the discussion underline the nature of the challenges to be confronted if consensus on moving forward is to be achieved. We look forward to the meeting of the Commission in January for delineation of an initial division of labor as a series of steps towards a

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<sup>5</sup> 2000:6.

<sup>6</sup> 2000:160.

<sup>7</sup> Sylvia Martinez provided the formulation.



synthesized report. On that basis, the Working Group will first have an electronic exchange on organizing the work, which may entail cooperation with some academic institutions on preparation of background papers.

## **8. Participants at the first meeting of WG #2**

*WG CHAIR: Ashraf Ghani (Afghanistan)*

*Banashree Banerjee (India)*

Associate Staff Member

Institute for Housing and Urban Development Studies

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*Gabriel Daly (Peru)*

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Institute for Liberty and Democracy (ILD)

*Anis Dani (Washington, D.C.)*

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*Susana Lastarria-Cornhiel (Madison)*

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*Jon Lindsay (Washington, D.C.)*

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Visiting Fellow, Joint Center for Housing Studies

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*Robert Mitchell (Seattle)*

Rural Development Institute (RDI)

*Edgardo Mosqueira Medina (Bolivia)*

Senior Public Sector Specialist

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*Paul Munro-Faure (Rome)*

Chief of the Land Tenure Service (SDAA)

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*Enrique Pasquel (Peru)*

Researcher

Institute for Liberty and Democracy (ILD)

*Ernesto Schargrodsky (Argentina) (not in attendance)*

Professor, Business School

Universidad Torcuato Di Tella

*Rehman Sobhan (Bangladesh)*

Chairman

Centre for Policy Dialogue (CPD)

*Caroline Vandenabeele (Manila)*

Asian Development Bank

Social Protection Network

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*Liz Alden Wily (Kenya)*

Independent Political Economist and Rural Development Strategist

## **9. Timing and venue of second WG 2 meeting**

The second meeting of WG 2 is scheduled for March 28 and 29 in New York City at the offices of the Secretariat of the UN Commission on Legal Empowerment of the Poor. These will be two full-day sessions.