



MEASUREMENT METHODOLOGIES FOR LEGAL EMPOWERMENT OF THE POOR

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Abstract:

In the summer of 2008, following the launch of the Commission on Legal Empowerment of the Poor's final report, UNDP began to address the specific recommendations of the Report. The question of measurement was a major recurring question. This paper draws on existing methodologies and theoretical frameworks and argues that a narrowly defined, subject-centric approach to measurement of legal empowerment is key to the monitoring of progress towards legally empowering the poor. It argues that broad macroeconomic indicators and top-down assessments are fundamentally incapable of examining important aspects of legal empowerment, and that only by seeking the immediate experiences of those who are the subject of empowerment can we begin to identify the most important barriers to development and analyze their causes.

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"[Legal Empowerment of the Poor] Programmes and projects will have to develop and use their own metrics for evaluating the socio-economic environment and gauging accomplishments."⁴

INTRODUCTION

This paper is intended to provide a framework for assessing a Legal Empowerment situation within a narrowly defined context. Unlike broad-based, comparative assessment formats, such as international rankings and indices, the proposed framework is context specific and based on individual subjective experience. It is intended to assist a community, project manager or other development professional (generally, a facilitator) more fully determine the exact factors and underlying causes of a problem, with an eye towards providing the evidence necessary for a situation analysis and suggesting the parameters of a solution.

The first Part will discuss Legal Empowerment generally, as well as provide background on the Commission on Legal Empowerment of the Poor. Part 2 will examine some existing measurement frameworks in relation to Legal Empowerment, and argue that the traditional broad top-down approach must become narrowed and subject-centric in order to assess Empowerment. Part 3 will propose a framework that uses a subject-centric process-modeling analysis to measure Legal Empowerment from the perspective of those it is meant to empower.

PART 1:

LEGAL EMPOWERMENT: THE COMMISSION AND ITS REPORT

THE COMMISSION

The Commission on Legal Empowerment of the Poor was formed as an independent commission, and hosted by the United Nations Development Programme ("UNDP"). Its membership was varied and illustrious: its co-chairs were the Peruvian economist Hernando de Soto, and former US Secretary of State Madeleine Albright, both internationally known and highly respected. Its other members were no less impressive, ranging from former heads of state and government, to ministers of finance, jurists, and other policymakers. After five full meetings, and years of work, the Commission produced a final report, titled Making the Law Work for Everyone.

THE REPORT

The report, which was launched on June 3rd, 2008, sets forth the Legal Empowerment framework, making the case to facilitate development by empowering the estimated four billion people worldwide who are currently excluded from the rule of law.³

Legal Empowerment is not an entirely new concept. It has been present in the development debate for some time, but perhaps it is only now emerging as a major theme. Definitions of Empowerment are wide-ranging. Perhaps as a nod to the difficulties of precisely defining such

¹ COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE, VOL. 2: WORKING GROUP REPORTS 329 (2008), *available at* http://www.undp.org/LegalEmpowerment/docs/ReportVolumeII/making_the_law_work_II.pdf

³ COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE, VOL. 1: REPORT OF THE COMMISSION ON LEGAL EMPOWERMENT OF THE POOR 2 (2008) (hereinafter COMMISSION REPORT), *available at* http://www.undp.org/LegalEmpowerment/report/Making_the_Law_Work_for_Everyone.pdf.

a broad concept, the Commission on Legal Empowerment of the Poor ("Commission")⁴ itself declined to do so, but noted that it "understands legal empowerment to be 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."⁵

Within this process, the Commission defined Legal Empowerment as supported by four pillars, each encompassing a genre of rights that are both necessary for empowerment and frequently unavailable for the poor, vulnerable, and marginalized. The pillars, which were identified through an examination of the livelihoods of the poor,⁶ include: 1) Access to justice and the rule of law; 2) property rights; 3) labor rights; and 4) business rights.⁷ The first pillar, access to justice and the rule of law, is considered the fundamental and enabling framework through which the other rights can be realized.⁸ Each of the pillars provide an essential ingredient in providing functioning systems that operate on behalf of an entire society, providing equality under the law and the conditions necessary for economic and social prosperity. Legal Empowerment seeks to ensure that systems work for individuals, serving their constituent populations rather than creating obstacles to empowerment. The following will briefly summarize the content of each pillar as elaborated by the Commission.

ACCESS TO JUSTICE AND RULE OF LAW

This pillar embraces the right to legal identity, to laws that do not discriminate against the poor because of their economic or social status, to effective and impartial enforcement mechanisms, accessible administration systems and public institutions, the availability of information about the law, and concrete measures to empower marginalized and vulnerable groups.⁹ In short, the rule of law must be available to everyone equally, both *de jure* and *de facto*. The rights and obligations of society, and of government to society, must be enforced to the benefit of all members of that society. Access to Justice and rule of law is crucial for establishing trust between a government and its people. It is also a prerequisite to the effective enforcement of all other rights.

PROPERTY RIGHTS

The pillar of property rights is concerned with individual access to functional guarantees of security, through demarcation of, and protection for, the bundle of rights and obligations between people and assets.¹⁰ Property systems require four building blocks to function correctly: a system of rules to define the bundle of rights and obligations between people and assets; a system of governance; a market for the exchange of assets; and an instrument of social policy.¹¹ The goal of Legal Empowerment vis-à-vis property rights is to ensure that these systems serve as a vehicle for inclusion and social mobility, and are capable of providing collateral benefits such as access to credit, willingness to work outside the home, and strengthened legal identity. The major objectives outlined in the Commission report are the promotion of efficient governance of individual and collective property, integration of informal activities into the formal economy, ensuring protection of legally recognized property rights, promotion of functioning markets to exchange property, broadening availability of property rights including tenure security through social and public policy, and advancing gender-inclusive property systems.¹²

⁴ See generally Commission on Legal Empowerment of the Poor, <http://www.undp.org/legalempowerment/>.

⁵ See COMMISSION REPORT, *supra* note 2, at 3.

⁶ See *id.* at 26-27.

⁷ *Id.* at 5.

⁸ *Id.* at 27.

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 49.

¹¹ *Id.* at 6.

¹² *Id.* at 7.

LABOR RIGHTS

The underlying basis for labor rights is the recognition that labor itself is not just another commodity—human capital is the greatest asset of the world's poor, and it must be recognized and protected in the same way that individuals' property and physical assets are.¹³ Recognizing that there are significant existing labor rights institutions and frameworks in place, the Commission makes reference to the ILO's 1998 Declaration of Fundamental Principles and Rights at Work,¹⁴ as well as the *Decent Work Agenda*¹⁵ as key strategies to raise productivity and earnings while reducing risk for laborers. Major objectives outlined in the report are improved freedom of association to help the working poor represent themselves in the social and political dialogue, higher quality labor regulation and labor markets, enforcement of minimum package of labor rights for workers and enterprises in the informal economy, increased access to employment in a more inclusive market economy, expanded social safety nets, guaranteed health care, insurance, and pensions, and gender equality in the workplace.¹⁶

BUSINESS RIGHTS

Business rights compose the fourth pillar of Legal Empowerment as seen by the Commission. Although the term is new, the subject matter of the rights is not—the fourth pillar simply encompasses the existing rights of the individual to do business.¹⁷ The content of business rights, as laid out by the Commission, includes an entitlement to the basic resources required to develop a business, such as access to financial services, the ability to make and enforce contracts, to make use of financial risk reducing measures such as limited liability, to raise capital through shares, bonds, or other instruments, and to pass ownership between generations.¹⁸ Business rights remain the pillar with the greatest potential for misunderstanding, and it must be emphasized that individuals remain the relevant rights-holders—this is an important point, as many object to a rights analysis in reference to legal entities, especially within a framework designed to empower the poor.

PART 2: EXISTING MEASUREMENT APPROACHES

There are a number of development indicators available, a great many which have a bearing on Legal Empowerment. The vast majority of these provide comparisons across many countries, using a unitary framework to evaluate the structure and impact of the legal, governance, and rights structures in place in different parts of the world. While these indicator schemas provide a wealth of valuable information, they are inherently limited when it comes to ascertaining the level of empowerment at sub-national levels, and among different ethnic, economic, and social groups.¹⁹ Providing a highly aggregate, and frequently top-down approach, most indicators focus on entire systems, or prevailing perceptions of systems, but do not attempt to evaluate individuals' holistic experiences within a system. Available global-scale indicator approaches may be able to identify the existence (or relative prevalence) of a particular problem within the sphere of Legal Empowerment, but cannot pinpoint its location or cause, and thus cannot afford new solutions. In short, existing Legal Empowerment indicators may leave us knowing we have a flat tire, but cannot tell us where the hole is so that we may patch it.

¹³ *Id.*

¹⁴ See INT'L LABOR ORG., ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (Jun. 1998), available at <http://www.ilo.org/public/english/employment/skills/hrdr/instr/decla.htm>.

¹⁵ See Int'l Labor Org., Decent Work Pilot Programmes (DWPP), <http://www.ilo.org/public/english/bureau/dwpp/>.

¹⁶ COMMISSION REPORT, *supra* note 2, at 7-8.

¹⁷ *Id.* at 8 & 90 n.2.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 329.

This section will first describe the traditional approach to measuring development, and how it applies to Legal Empowerment. It will next look at some examples of the process approach. It will argue that normatively, neither approach is “better” than the other, but that they serve very different purposes, and that a process approach is more appropriate for evaluating Legal Empowerment.

THE BROAD ASSESSMENT APPROACH

In many ways Legal Empowerment is a relatively new concept, and there are few methodologies to directly measure it. However, many of the existing development assessments implicate aspects of Legal Empowerment. These indicators tend to be static, and identify the status, size, prevalence, or efficiency of a system or phenomenon. The dominant focus of these measurement techniques is to analytically quantify systemic performance in a particular domain. In the case of rankings and indices, they also compare similar systems across national boundaries, generally with the goal of prompting policy change. This subsection will discuss some of the most relevant assessments and what they tell us about Legal Empowerment.

In Annex 3 of the Commission’s Working Group Reports alone, there are listed about fifty separate reports, rankings, and indices, which target, in one way or another, the four pillars of Legal Empowerment.²⁰ This source is an excellent place to start when looking for traditional, broad-based assessments of legal empowerment. Annex 2 similarly lists a range of toolkits applicable to Legal Empowerment.²¹ Through the toolkits and the indicators, it is possible to begin to understand the pervasiveness and scope of empowerment related indicia around the world. They are extremely valuable, primarily because they lay important groundwork and help to recognize and prove the existence of a deficit in Legal Empowerment.

One excellent example of the more traditional approach is Friedrich Schneider’s 2002 estimate of informal economies.²² Schneider’s study attempts to discover the size and status of the informal economy in markets around the world—a very pressing question, and one which has direct implications for Legal Empowerment. The article describes the use of a variety of direct and indirect measurement methodologies that rely on parsing the relationship between known economic and macroeconomic indicators. It discusses several approaches: measuring the discrepancy between reported and unreported income for tax purposes, subtracting national expenditure from income, the discrepancy between the actual and official labor force, measuring the relationship between the volume of transactions and GDP, calculating currency demand for hidden(informal) transactions, measuring utilization of physical resources or energy consumption, and a “model approach” that combines known causes of informality with measurable indicators to estimate immeasurable indicators, and feeds back into an estimate of the overall size of the informal economy.²³

Although the measurements used may be quite dynamic, and recognize the underlying causes of informality, they are static in that they create a level of abstraction that is inappropriate for our purposes here. Instead of examining the system-wide impacts of informality, a Legal Empowerment measurement should focus on the daily processes and activities of individuals operating within the informal economy in order to provide a picture of the economy itself.

The Bertelsmann Transformation Index (“BTI”) is among the most well known comparative indices, and provides an evaluation of the market, political, and administrative systems of the public and private sector.²⁴ Despite its presupposition of the normative value of market-

²⁰ COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE, VOL.2: WORKING GROUP REPORTS 345-49 (2008), *available at* http://www.undp.org/LegalEmpowerment/docs/ReportVolumeII/making_the_law_work_II.pdf.

²¹ *Id.* at 342-44.

²² See Friedrich Schneider, *Size and Measurement of the Informal Economy in 110 Countries Around the World* (2002), *available at* http://rru.worldbank.org/Documents/PapersLinks/informal_economy.pdf.

²³ *Id.*

²⁴ Bertelsmann Transformation Index, <http://www.bertelsmann-transformation-index.de>.

capitalist societies, which may be considered a flaw in some contexts,²⁵ it is also one of the most relevant to Legal Empowerment.²⁶ BTI ranks countries based on a standard set of criteria, and assigns a number based on each country's performance on each criterion. The composite score allows a ranking, which shows the comparative strength of countries in the areas measured. Each of the 125 studied countries is also described in a country report, which presents some key indicators, a background of the country's political, economic, and social context, and a paragraph elaborating each criterion used in the ranking.

The fairly thorough country reports that BTI produces provide a better insight into the actual conditions than other rankings or indices which only chart objective indicators without looking in-depth at root causes. Yet BTI still takes a bird's eye view, seeing the country or the conditions from the top-down. While it may evaluate criteria that implicate Legal Empowerment, it does so, like most other development reports, from the point of view of the systems, the government, or the overall economy, not from the individual perspective of participants in each.

Many other assessments operate similarly, providing macroeconomic measurement, or broad analysis of justice and rights systems. While all assessments attempt to be objective in their measurements, the selection of indicators is itself a subjective task, as the determination of what is important to measure will vary across disciplines and focus areas. Further, many, assessments and especially rankings, like BTI, presuppose an ideal system and choose indicators based on this notion. Many have assumptions underlying their choice of indicators, and may be valid for some uses, but remain invalid for others.²⁷

What all broad comparative assessments have in common is their top-down perspective, and, to varying degrees, neglect for the importance of individual experience in making the assessment. This is the case even for studies which recognize that improvements of individual experience may be the ultimate goal of producing the assessment. This is not meant as a critique—top-down assessments frequently operate quite well, and can provide valuable insights. However, to really measure Legal Empowerment, a more subject-centric approach is needed, one which examines policies, institutions, and organizations only to the extent that, and at the moment when, they impact the lives of the poor, marginalized, and vulnerable who we wish to empower.

In short, traditional, broad assessments are not capable of a narrow analysis of the discrete issues characterizing a particular Legal Empowerment deficit affecting a specific population in a defined region. In the remainder of this paper, I will argue that to do so, a narrow, process-oriented modeling approach is required. The following sections will describe the process modeling approach, and then introduce a generalized framework to analyze multi-dimensional empowerment issues at an individual, group, or community level, with the goal of assisting development personnel determine and define the objectives for a Legal Empowerment Project.

EMPOWERMENT APPROACHES

The need for multi-level analyses of empowerment issues has been well-described before. Notably, Ruth Alsop and Nina Heinsohn provide a comprehensive analytical framework of empowerment. They first analyze empowerment along three stages: opportunity to choose; use of

²⁵ See U.N. Dev. Programme, *Governance Indicators: A User's Guide* 22-23 (2nd ed. 2007), available at <http://www.undp.org/governance/docs/policy-guide-IndicatorsUserGuide.pdf>.

²⁶ See Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone, Vol.2: Working Group Reports* 345, 346 (2008). (mentioning the Bertelsmann Transformation Index ("BTI") as relevant to both Access to Justice and Property Rights). Business rights are also implicated in parts of the study, such as questions 7.1-7.4 on market framework, anti-monopoly, liberalization, and the banking system, or question 9.2 on private companies. See Bertelsmann Transformation Index, <http://www.bertelsmann-transformation-index.de>.

²⁷ See U.N. Dev. Programme, *Governance Indicators: A User's Guide* (2nd ed. 2007) for an analysis of a variety of indicators and a methodology for determining how to interpret them.

choice; and achievement of desired outcomes.²⁸ Opportunity to choose is informed by the existence of choice. It will apply to the overall structure within which the choice must be made. Use of choice and achievement of desired outcomes are closely tied, and provide feedback to each other. Obstacles at the level of choosing will have obvious effects on the outcome, and may prevent the desired results. Likewise, failure to achieve results may lead to later decisions not to utilize the same choice again, and failure by one member of a group to enforce a right may dissuade other members from attempting to do the same. While there are strong links between the stages, the level of empowerment may vary from one to the other. This is demonstrated, for example, through a legal or constitutional system that strongly guarantees a certain right, but for which there is very weak enforcement or implementation. While the system would be empowering at the existence of choice stage, it is not be empowering at the utilization or output stages. This analysis is highly suggestive of process.

Alsop and Heinsohn further divide empowerment as taking place along two dimensions. First, within the state, market, and social domains, and second, within macro, intermediate, or local administrative levels.²⁹ The degree of empowerment may vary (it may also be constant, and correlations may be present) between dimensions. Within a domain, an individual could, for example, be relatively empowered to operate within a market, but have few political rights.³⁰ Similarly, at the administrative level, there may be variations depending on whether an individual is operating within a village, state, or federal level. However, as Alsop and Heinsohn note, the level distinction does not operate perfectly—in some circumstances, further delimitations may be necessary, depending on the relevant administrative boundaries.³¹

Elena Panaritas has developed a different kind of approach, which she used to describe and ameliorate patterns of informality in land ownership in Latin America. Rather than looking at the question of measurement as one of delimiting the scope of the subject to be evaluated as Alsop and Heinsohn do, Panaritas takes this delimitation as a given, and instead focuses on what she terms Reality Check Analysis. The method attempts a holistic analysis of the history of a country's political economy in order to understand the conditions that resulted in the status quo.³² Reality Check Analysis looks at the needs of the population and where those needs are disappointed, where the "formal rules do not and cannot cater to present market reality."³³ It can uncover the organizational and group interests that the institutions attempt to serve; the points at which those interests are in conflict with Legal Empowerment goals or otherwise evolutionarily outmoded/obsolete are precisely where institutional change must occur in order to eliminate informality.

Although Panaritas is concerned primarily with land and property rights and informality, the Reality Check approach can be generalized across other areas of empowerment. Perhaps the most important lesson from Panaritas is the focus on evaluating current demands of the population vis-à-vis institutions that fail to serve them. Reality Check Analysis looks beyond organizational reform to examine the interplay between the underserved demographic and the institutions on a process level—asking what can and can't be achieved under the existing system.

A related approach, but one focused on measuring access to justice, is discussed by Martin Gramatikov.³⁴ Gramatikov discusses the "path to justice" as a sociological (rather than legal)

²⁸ See Ruth Alsop & Nina Heinsohn, *Measuring Empowerment in Practice: Structuring Analysis and Framing Indicators*, World Bank Policy Research Working Paper 3510 (Feb. 2005).

²⁹ *Id.* at 12-13. Please note that Alsop and Heinsohn's specialized usage of the term "domain" is not identical to its meaning throughout this paper.

³⁰ *Id.* at 12. Alsop and Heinsohn further divide the three domains into eight sub-domains. The state domain contains the justice, politics, and service delivery subdomains; Market contains credit, labor, and goods; and Society contains family and community. These subdomains may be further refined—for example credit could incorporate commercial, residential, or commercial lending, or community may be tribal, regional, ethnic, religious, etc. See *id.*

³¹ *Id.* at 13.

³² ELENA PANARITAS, PROSPERITY UNBOUND 41 (2007).

³³ *Id.* at 51.

³⁴ See Martin Gramatikov, *Methodological Challenges in Measuring Cost and Quality of Access to Justice* (Nov. 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099392.

construct, which can describe a population's access to justice mechanisms.³⁵ A path to justice incorporates all "the commonly used procedures through which users of the legal system proceed in order to obtain an outcome."³⁶ Gramatikov's research paradigm tracks activities in order to determine what factors influence selection of a path to justice, and what the alternative paths are.³⁷ Through analyzing various paths, classifying them³⁸ (e.g. belonging to formal or informal justice), defining their possible start and end points³⁹ (e.g. ending by a court-imposed award or out-of-court settlement), and the barriers along the path⁴⁰ (e.g. time and cost of litigation), the methodology offers a way to evaluate the costs, quality of outcome, and procedural quality of a justice system.⁴¹ As with the previously discussed approaches, Gramatikov implicitly makes use of process analysis, tracking the activities of participants as they flow through a measured system in order to measure its effectiveness.

The Oxford Poverty and Human Development Initiative ("OPHDI") is an example of an organization doing novel research utilizing a process approach with an empowerment dimension to measure poverty.⁴² OPHDI's research is grounded in a series of working papers, including Solava Ibrahim and Sabina Alkire's discussion of Agency and Empowerment.⁴³ Ibrahim and Alkire adopt Amrtya Sen's conception of agency as "process freedom,"⁴⁴ and synthesize this with other approaches, focusing for instance on "the extent to which . . . people are able to control their own destinies" and effect a particular change or outcome.⁴⁵ Sabina Alkire and James Foster take this discussion to the next level with a rigorous methodology discarding unidimensional analyses which focus on income or well-being, instead promoting a multidimensional inquiry by assessing poverty across multiple dimensions.⁴⁶ This is done by employing a vector representation of opportunity sets to represent freedom, choice, and agency, again a refinement of Amartya Sen's work.⁴⁷ They define "Poverty as Unfreedom,"⁴⁸ and provide an outstanding technical framework for examining it. Alkire & Foster, and OPHDI's measurement methodology generally, highlight the need for process modeling as the key tool to analyze empowerment, and demonstrate another modality of its application.

The final methodology I'll discuss in this section was described by Hernando de Soto in his seminal work, *The Mystery of Capital*.⁴⁹ It utilized both a process approach and a first-person perspective, recognizing that to uncover "obstacles to legality," it is necessary to step into the shoes of the poor who are affected. De Soto and his research team attempted to perform various business operations in developing countries totally in accordance with the law, and documented their results.⁵⁰ The findings were, in many cases, shocking—the time, energy, and cost required to undertake basic operations in accordance with the law were entirely prohibitive for the average citizen, and this highlighted one of the key reasons for informality.⁵¹

³⁵ *Id.* at 11.

³⁶ *Id.* at 12.

³⁷ *Id.* at 15-17.

³⁸ *Id.* at 12.

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 21.

⁴¹ *Id.* at 4.

⁴² <http://ophi.org.uk>.

⁴³ See Solava Ibrahim & Sabina Alkire, *Agency & Empowerment: A Proposal for Internationally Comparable Indicators* 9, OPHDI Working Paper 4 (2007), available at http://ophi.org.uk/pubs/Ibrahim_Alkire_Empowerment_FINAL.pdf.

⁴⁴ *Id.* at 9.

⁴⁵ *Id.* at 10 (citing Mason & Smith (2003)).

⁴⁶ See generally http://ophi.org.uk/pubs/Alkire_Foster_CountingMultidimensionalPoverty.pdf

⁴⁷ *Id.* at 20-21.

⁴⁸ *Id.* at 20.

⁴⁹ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000).

⁵⁰ See *id.* at 18-28. Some of the case studies included registering a business in Lima, Peru; formalize informal urban property in the Philippines; and obtaining a sales contract following a five-year lease contract in Haiti.

⁵¹ *Id.* For example, de Soto's team discovered that the cost to register a one-person business in Peru was \$1,231 over the course of 289 days—an amount thirty-one times the *monthly* minimum wage. *Id.* at 20.

De Soto's work was so successful that the Tanzanian government asked his NGO, the Institute for Liberty and Democracy (Instituto Libertad y Democracia, "ILD"), to evaluate the Tanzanian formal and extralegal economic systems using the same methodology. The ILD's goal in the Tanzania study was to determine "how the nation's extralegal economy actually operates and how the official legal system interacts with it."⁵² In analyzing the functioning of Tanzania's extralegal and legal systems, ILD evaluated the processes meant to serve the population, attempting to understand exactly what was happening. The results of their analysis included the discovery of a vast number of "bottlenecks" in the legal system which required subjects to participate in the informality of a shadow economy in order to address their economic needs. In order to fully illustrate the many legal obstacles that exist, ILD published individual analyses of a wide variety of activities through formal business and property systems.⁵³ In one striking example, tracking the process to legally incorporate a private company in Dar Es Salaam revealed 10 stages, 95 different steps, \$3,916 in costs, and an estimated 283 days to complete—prohibitively high numbers, due to inefficient and self-contradictory legislation, poor communication across an array of administrative levels, and poor availability of information in the language of most users.⁵⁴ Details such as these were repeated across the spectrum of formal economic activity in the country, in each case demonstrating precisely where the Tanzanian legal system failed.

De Soto's analyses, both in *The Mystery of Capital* and in the Tanzania study, illustrate an extremely important point: To truly understand the failure of a system to serve its constituents, it is not enough to look at the symptoms, the effects, or the policies in isolation; rather, *a detailed analysis of the processes involved, as experienced by the constituents themselves is required.* By highlighting each step of each activity and viscerally revealing the complexity of the formal economic system of Tanzania, de Soto and ILD have been able to simultaneously suggest improvements and powerfully advocate for them.

Part 3 of this paper will attempt to generalize some of the lessons from the methods described above. It will also go a step further than these frameworks, recognizing that from a Legal Empowerment perspective, the only facts that matter are individual interactions with the state—and that the state's own internal perspective is only relevant to the extent that it impacts its constituents. Part 3 will provide a framework for evaluating this impact, utilizing a subject-centric, process-oriented approach to model individual experience within the machinery of the state, attempting to fully understand policy in the only way it matters: the ripples it creates in the fabric of society as it shapes the contours of individual lives.

PART 3: A SUBJECT-CENTRIC, PROCESS-ORIENTED ANALYTIC APPROACH TO MEASURING LEGAL EMPOWERMENT

This section will propose a process-model approach to situational analysis that is appropriate for defining project-level objectives by identifying the institutional or organizational bottlenecks that create an empowerment deficit. It suggests that a subject-centric process-modeling analysis is the tool required to find the leak, a pre-requisite to fixing the metaphorical flat tire.

⁵² Instituto Libertad y Democracia, Program to Formalize the Assets of the Poor of Tanzania and Strengthen the Rule of Law, Volume I: Executive Summary 1 (Sept. 2005).

⁵³ See generally, Instituto Libertad y Democracia, Program to Formalize the Assets of the Poor of Tanzania and Strengthen the Rule of Law, Volume IV: The Barriers to Using Property and Doing Business Worldwide (Sept. 2005).

⁵⁴ *Id.* at 31.

THE FRAMEWORK: WHY USE A SUBJECT-CENTRIC PROCESS APPROACH?

As noted above, there are a variety of indicators available to evaluate a wide range of empowerment concerns. They provide excellent tools for analyzing systems across borders, and can give real insight into the existence and enforcement of many of the rights emphasized in Legal Empowerment. Yet Legal Empowerment, at its core, is concerned primarily with the actual lives of its subjects—broad policies and abstract indicators that do not directly bear on their daily lives are, to some extent, always off mark.

It is clear that policy, existing laws, institutions, and systems all have an impact on the lives of the poor, marginalized, and vulnerable. Yet the impact is not expressed through the law or policy itself—it is felt by real people attempting to undertake real activities. It may be felt as a positive assisting force, a barrier, or, possibly, not at all. When evaluating the effectiveness and effects of law and policy, the only way to fully make sense of their on-the-ground impact is to model an individual's life as she attempts to navigate through the domain in question—to “step into her shoes,” so to speak, and evaluate the system from her perspective. In turn, the only way to thoroughly do so is to actually track the course an individual might follow in order to see precisely where systems fail and how.

In short, the proposed assessment requires the construction of a model of subject activities within the domain. It utilizes a narrowly framed scope to perform a subject-centric, process-modeling analysis describing subject movement through a domain. It operates on indicators tailored for the specific assessment, and which should evolve as information becomes available through the course of the assessment. The purpose is to isolate the bottlenecks in the social, market, and political realms that frustrate the goals of vulnerable and marginalized groups, in order to suggest directed institutional and organizational reforms that are preconditions for empowerment.

DOMAIN

I should first note that by domain, I mean something different from Alsop and Heinsohn's usage of the term, discussed above.⁵⁵ Rather than defining a single discrete parameter, domain encompasses the space within which the assessment occurs, both physically and conceptually. It includes all parameters defining the breadth of the assessment, other than those which define the subject group. These include, inter alia: geographic region; focus matter (which area of legal empowerment, or which particular activity, e.g. “property rights” or, more specifically, “inheritance disputes”); goal or endpoint (e.g. registration of land, or enforcement of a contract); administrative level (e.g. village, province, or country); and sector (e.g. focusing specifically on residential financing/access to credit). One of the key facets of domain is the preferred outcome—an unavoidably normative term that describes the desired end-state. The preferred outcome is the place where, from a Legal Empowerment standpoint, we would like see individuals arrive. As will be discussed below, the domain can be defined to any level of specificity desired along the parameters selected, but generally a narrower domain will produce a more manageable assessment.⁵⁶

SUBJECT-CENTRIC

The assessment is termed subject-centric because it shifts away from the top-down, policy or system-oriented approach to provide a first-person perspective of the focus area. Although the analysis remains objective in that it does not account for personal idiosyncrasies, it does include group idiosyncrasies, such as community beliefs and social structures. The subject-centric approach ensures that findings are highly relevant to the evaluated group, and provides a perspective that most clearly illustrates bottlenecks within the domain.

⁵⁵ See *supra*, notes 29-30 and accompanying text.

⁵⁶ If a wider domain is required, it is usually best to construct separate models for domain activities that are analytically discrete.

The assessment operates by emulating an idealized member of the subject demographic. It models the significant shared characteristics of the defined group, including attributes such as level of education, gender, economic resources, geographic region, and social values. Once the idealized member is defined, the assessment “steps into the shoes” of this subject demographic, and undertakes a process mapping of her course through the Domain. For simplicity, this idealized member can be referred to simply as the subject of the assessment, but it is important to remember that the subject is an abstraction (albeit one used to concretize the activities within the domain) rather than a particular individual.

PROCESS-MODELING ANALYSIS

It is not enough merely to emulate the idealized group member at a static point in time. Rather, the assessment is process-oriented because it tracks the subject as she moves through the domain. Although it may be helpful to have an understanding of the formal or official paths to the preferred outcome, the analysis is branched in that it does not presuppose a particular path within the domain. Rather, it attempts to evaluate decision-making and outcome at every stage. It can be modeled as a process flowchart of the domain, which each branch defining a possible choice, representing a chronological sequence of steps within the domain.⁵⁷ The analysis must be open, meaning that it includes all (or most) of the possible choices that an individual is likely to make when trying to achieve a goal or endpoint in the domain. It should include both formal and informal options, as well as preferred and non-preferred outcomes in order to give a full account of the range of options and endpoints available to the subject. It is also open in the sense that it can be expanded as new information is available—if in the course of the assessment it is discovered that some subjects are making a choice not previously contained in the model, then that choice should be added as an additional branch.

NARROWLY FRAMED SCOPE

Scope is the intersection of domain and subject. The scope can be arbitrarily narrow, and, up to a point, the measurement will become increasingly informative the further the target is constrained. The assessment works best when the domain and subject tightly define a group within a specific geographic region performing a particular activity.

Narrowing the scope of the assessment addresses several problems inherent in other methodologies. First, it avoids generality. By ensuring that the assessment is performed only on a specific group or subgroup, there is no risk of misleading results stemming from an average of widely disparate values. Second, it allows a closer tailoring of the paths themselves, utilizing only factors that are in fact relevant to the subjects of the assessment.⁵⁸ Third, a narrow domain makes the group of stakeholders much more apparent, which can help in forming strategic partnerships at the community level. Finally, a narrowly defined group enables a less abstract subject-centric assessment—the more narrowly a group is defined, the more characteristics will be common to the group, which in turn allows a more concrete, more relevant analysis.

PERFORMING THE ANALYSIS

The following sections will attempt to concretize the proposed framework. They will make use of a hypothetical data set in order to more fully elaborate the assessment methodology and provide insight into its inner workings.

⁵⁷ See U.N. DEV. PROGRAMME, GOVERNANCE INDICATORS: A USER’S GUIDE 11-12 (2nd ed. 2007), for a detailed discussion of the benefits of process flowcharts.

⁵⁸ See *infra*.

THE FACILITATOR

The form of analysis is quite flexible and can serve a variety of purposes, from defining the outputs of an NGO-implemented project to address a particular problem, to enabling a community to more effectively lobby their government to change some policy or procedure, to assisting the government itself in streamlining its bureaucracy or reforming its institutions. The facilitator, the person or group undertaking the analysis, will need to define the goals of the analysis, and this will largely be dependent on the stakeholders they serve. Within the UNDP context, an analysis should be undertaken as the first step of project design and addresses several goals: first, it can assist in the creation of hypotheses positing the cause of the legal empowerment deficit the project will address; second it can test existing hypotheses and verify whether experience on the ground validates the presumed scenario; finally, it can suggest the specific parameters of an intervention by identifying the most salient causes of a problem. A small-scale analysis may provide support for a situation analysis and grounding for a project description. A larger scale analysis may be a project in itself and could serve to identify wide-ranging or systemic problems within the context of a comprehensive report.

DEFINING THE SCOPE

Determining the scope of an assessment may require some amount of guesswork. The broader the domain is, the more variables, and therefore branches, will have to be mapped. It may be feasible to conduct quite broad and wide-ranging assessments, however the resources and time spent increase with broadness.⁵⁹ Therefore, the domain should be narrowed enough to do a comprehensive analysis with the resources available, and to extend only to the areas of interest for the assessment. Additionally, a broadly defined subject group will cause the sample size to grow, and can affect validity by inappropriately averaging subgroups in different situations.⁶⁰

The domain may be informed through a variety of mechanisms. Generally, the facilitator designing the assessment will be aware of a Legal Empowerment deficit, however determining the domain will be a very different activity for a facilitator working for an outside organization than for a facilitator who is a member of the community being modeled. For a project manager or other development professional, an understanding of the domain may come through analysis of international rankings—for example, the Bertelsmann Transformation Index provides country reports which may give sufficient detail on an area of interest to Legal Empowerment that the problematic area could be isolated as a domain for further research into root causes.⁶¹ In some cases, scholarly articles, news reports, or other sources that describe the symptoms of an empowerment deficit may also be helpful. For a community organizer, personal experience and information gathered from the community about systemic inefficiencies and barriers may serve as a means to identify the relevant domain.⁶² In any case, it should go without saying that the subject group must be consulted in order to ensure that the domain selected is highly relevant to their daily li

⁵⁹ See, e.g., ILD, *supra* note 38. The ILD Tanzania assessment was extraordinarily comprehensive, covering nearly every aspect of the formal business and property systems as well as their informal counterparts. It required the expertise of 42 Tanzanian and 20 ILD researchers, as well as 932 key informants, working over the course of nearly a year. See *id.* at 2-3.

⁶⁰ If there are significant discrepancies within the subject group that are attributable to subgroup differences, disaggregation of responses can resolve validity issues. For an excellent discussion of disaggregation focusing on a target group, see U.N. DEV. PROGRAMME, MEASURING DEMOCRATIC GOVERNANCE: A FRAMEWORK FOR SELECTING PRO-POOR AND GENDER SENSITIVE INDICATORS 8 (May 2006).

⁶¹ See *supra* notes 24-26 and accompanying text.

⁶² It may at first appear to be redundant for a community to want to model their collective experience. Yet, the assessment can serve at least two important purposes in the context of a grassroots movement. First, it provides a coherent framework to generalize group experience into a single model, combining each individual's understanding of the problem into a collective, cohesive whole. Secondly, it provides a powerful tool for a community to represent itself to the institutions that are failing them. It can offer strong evidence of those failures, as well as a way of determining and then targeting the specific reforms that will serve the community interest. It allows the community to speak the language of the institutions and organizations and tell them exactly how they must change.

The subject group will be determined based upon information available at the time the assessment is designed. As the framework addresses Legal Empowerment, the subject will generally be composed of a poor, vulnerable, or marginalized group. In some cases, there may be governmental recognition that could help define the group—such as the scheduled tribes in India. The sources described for narrowing domain may also be helpful. Generally, the subject should be isolated into a group of people living within a geographic region, defined by gender, ethnicity, social status, income, education level, or other relevant factors. For a community organizing itself to undertake an assessment, the group will largely be self-defined. Holding domain constant, the results of the assessment can vary a great deal as the subject group is varied—it is therefore important to determine the subject group with care.

Once the scope has been defined—that is, once a subject and domain have been selected—a model must be formulated and assessed. Construction of the model can be done in a number of ways, depending on the availability of existing data, the resources available to undertake the assessment, and the specific context of the assessment. The following subsection will discuss several methodologies for gathering and compiling data into an analytical model for evaluation.

FIRST PERSON DATA GATHERING

The goal is to create an assessment that accurately represents a composite model of individual potential paths through the domain; it is therefore essential to base the model on the first-person experiences of the subject group. Although using readily available, previously prepared data can reduce the resource investment in creating the assessment, it is unlikely that an adequate source of data will be available, given the narrowly defined nature of the assessment framework. It is a salient feature of the framework that the analysis is highly focused, context specific, and unique to the subject and domain. In a traditional assessment, the author might attempt to examine the formal systems in question from the perspective of state descriptions of the system, from the perspective of civil servants, or from the perspective of overarching judicial or administrative policy. Instead of this approach, the proposed framework will isolate the problem by modeling the system from the perspective of the individual constituents it is failing to serve.

The subject-centric analysis requires a unique dataset that is largely dependent on context. Since it is unlikely that existing studies have utilized a similarly narrow scope, the individuals conducting the assessment will probably have to collect their own data—although it is possible that there will be some elements that could be gleaned from traditional, broad assessments which have been undertaken previously. The preferred mode of data gathering for the Legal Empowerment assessment is the use of first-person methods. Surveys, interviews, focus groups, and questionnaires are all tools that are well-suited to the task, because they provide a window into subjective experience. This section will elaborate the data compilation methods, discuss some factors which the collector should be aware of, and propose a methodology for constructing and evaluating the subject-experience model based on the data.

It is well recognized that first-person studies present inherent problems in methodology. There are many risks to internal validity, including, *inter alia*: response bias due to perceived desires of the researcher; selection bias, due to fear, mistrust, or simply lack of time and resources to participate; inability to randomize respondents, often caused by selection bias, but also a problem where the subject group is widely dispersed or not equally available; and bias in the measuring instrument itself (especially for surveys and questionnaires).⁶³

Some of these are harder to overcome than others within a Legal Empowerment context. Selection bias in particular is difficult; when dealing with poor and marginalized peoples, there will likely be a high degree of self-selection or limited ability to participate in research. Mailed surveys may not be an option—especially where property rights and legal identity are at stake, it

⁶³ CfGramatikov, *supra* note 34, at 24-26 (discussing factors leading to invalidity in interview methods of research).

may be impossible to know where to mail the surveys. The diary method will be ineffective if the subject group is largely illiterate. While interviews and focus groups avoid most of these problems, they have much increased risk of response bias. Focus groups may have additional response bias caused through pressure to conform to group values. It may be impossible to eliminate all the imperfections in first-person data, but awareness of them will go a long way towards preserving validity.

COMPILATION

The gathered data must be custom-tailored to the assessment. Every domain will require different questions, and different subject groups may require varied methodologies, as well as differing phrasings in order to compensate for response bias, and, in some cases, selection bias as well. Whether the format of the data gathering is a survey, focus group, interview, or other method, the structure will be roughly the same. It consists of sets of questions designed to resolve the details of individual paths through the domain. The goal, as stated above, is to create a composite sketch of all the different possible paths through the domain in order to find out where the obstacles and bottlenecks are and why people take the actions they do. Only persons who are part of the subject group and who have had reason to operate in the domain are potential respondents; if they are outside the subject group or have not had reason to operate in the domain, they fit outside the scope of the assessment. Thus, respondents should be qualified with an initial question. The following is an attempt to broadly frame the information necessary to construct the model, in a questionnaire format.⁶⁴

- Question 1:** *What is your goal within the domain? What were you trying to accomplish?*
- Question 2:** *Have you attempted to utilize formal legal procedures and the rule of law to enforce your legal rights, to facilitate activity in the domain?*
If not, what prevented you from doing so? Please explain, and then proceed to question 4.
If so, please proceed to Question 3.
- Question 3:** *What formal (official) procedures did you undertake?*
For each procedure under question 3, describe why you chose to undertake the procedure, whether you were able to see it through to the end, and whether you achieved the result you desired through the procedure.
If you were unable to complete the procedure, please describe why not.
- Question 4:** *What informal procedures did you undertake in order to achieve your goal in the domain?*
For each procedure under question 4, describe chose to undertake the procedure, whether you were able to see it through to the end, and whether you achieved the result you desired through the procedure.
If you were unable to complete the procedure, please describe why not.
- Question 5:** *In the end, were you able to achieve the goal you described in Question 1 through either formal or informal methods? Are you satisfied with the result of your efforts?*

⁶⁴ Note that general prescriptions are not sufficient to delineate the actual methodologies or comprehensively define the questions that will be used in the field; this is merely a generic example. Further, although the questionnaire format is proposed here due to its amenability to print, the basic structure can and should be adapted to other formats, such as interviews or focus groups.

CONSTRUCTING THE MODEL

Each response uncovers an individual respondent's path through the domain. By superimposing all the responses over one another, it is possible to construct a model which will delineate all (or most) of the possible paths, showing what went right when individuals reached their goals, and what obstacles prevented others from achieving theirs. The model itself can be represented in numerous forms. For different kinds of evaluations, a different representation may be useful. The following suggests two ways of representing the composite data.

PROCESS FLOW CHART

The flow chart is the most complete, general purpose way to represent the subject paths through the domain. It is a full composite, representing all of the information from the data gathering phase, and provides a visual representation of the relationships between paths, choices, and how external factors influence both the path and the outcome. It is, in short, the full map of the model which has been described in this section. Using the questionnaire above as example, each path described in questions 3 and 4 would be included. In some cases, there may be a great many steps, which could lead to extremely long process charts—this is to be expected, and it only serves to underscore the incredible burdens that people sometimes face when attempting to operate through formal mechanisms, whether economic, judicial, or administrative. For each branch where there are multiple options, and for each outcome, it is useful to include the percentage of respondents who made each choice or experienced a particular outcome. This provides insight into the relative influence of the various factors at every branch and will help to isolate bottlenecks.

Inset is a figure [see page 17] representing a very simple flow chart from a hypothetical assessment of poor growers wishing to operate a business to sell their crops.

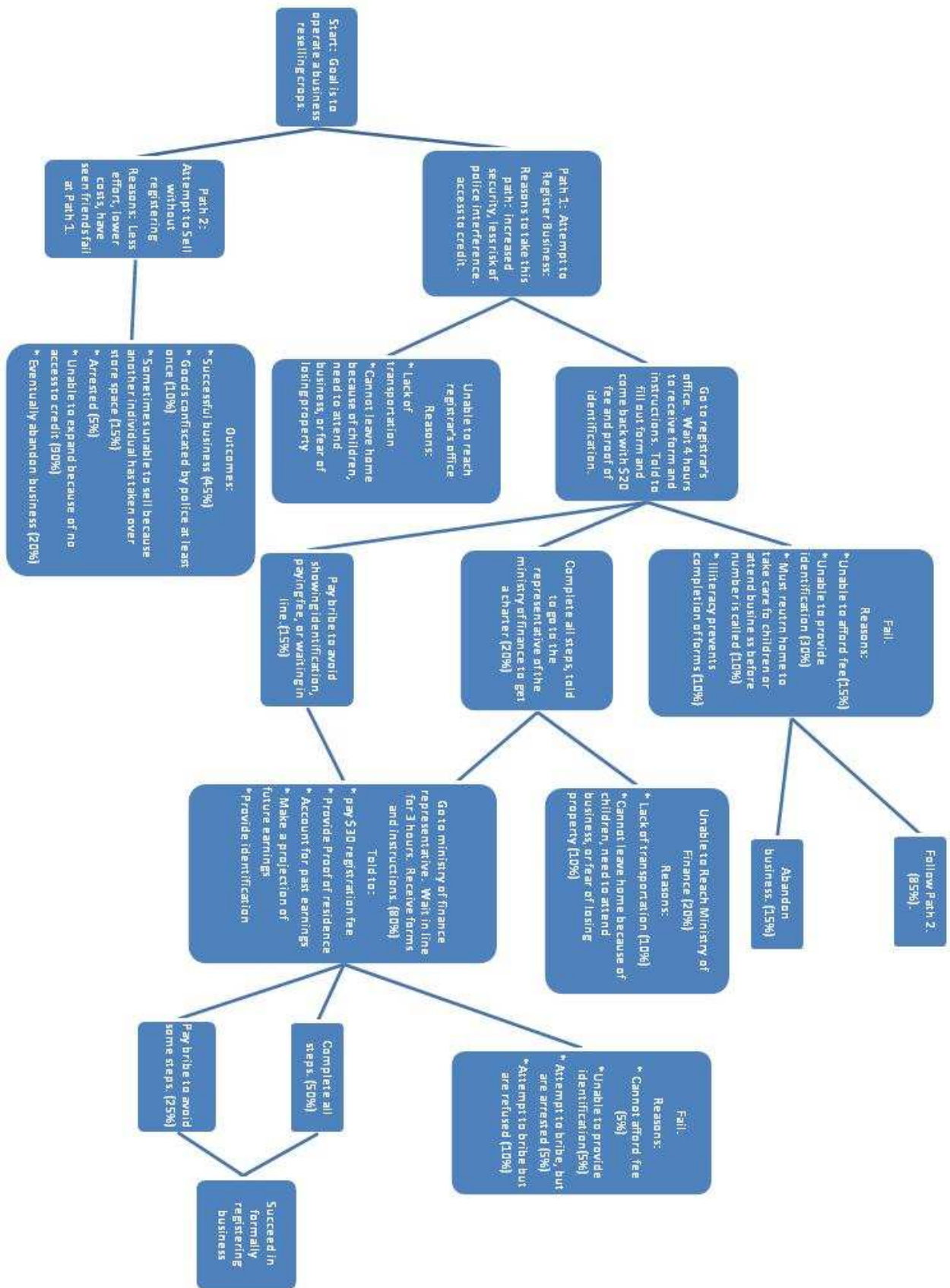
Note that every step within the analysis is subject-centric. It never asks what is going on behind the scenes while the subject waits for a clerk, or evaluates the machinery of the bureaucracy itself—it is concerned first and foremost with the experience of the individual moving through the system. Other concerns are relevant only to the extent that they bear on subjective experience.

The analysis is process-oriented because it emphasizes the active movement of the subject through the path. It is less concerned with the status at any point in the model, and more concerned with how different factors affect the likelihood of the possible outcomes.

The analysis is branched in that at each stage the path might diverge. The percentages represent actual responses from respondents, but they also represent probabilities at each stage. A bottleneck is any factor that reduces the probability that the idealized subject will achieve the preferred outcome.⁶⁵ It is open, so any new respondent reports, including the uncovering of novel barriers, can be incorporated into the model. As policies change, or a project is implemented,⁶⁶ the model can be updated with new respondents and any change in the probability of achieving the preferred outcome becomes a direct indicator of the project's effectiveness.

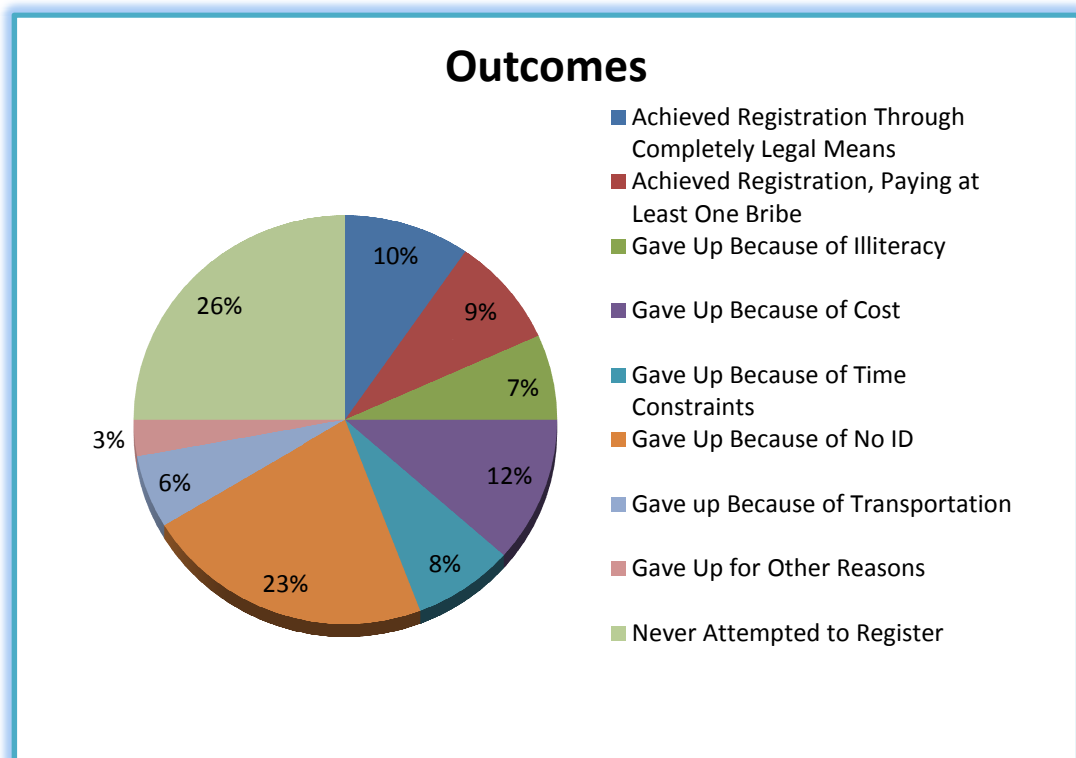
⁶⁵ Some bottlenecks might appear to improve the likelihood of achieving the preferred outcome but be undesirable for others reasons. Bribery is perhaps the archetypical example.

⁶⁶ See *infra*.



END RESULTS PIE CHART

As a supporting representation of the data, a pie chart can be used to illustrate what percentage of respondents experienced a given outcome. The pie chart will not be as complete as the process chart, and leaves out some detail, but it can also isolate bottlenecks or underlying causes of a Legal Empowerment deficit. It allows quantitative comparison between the results of one assessment and a later assessment, and provides a direct indicator of change in outcomes. Thus, this format will be particularly useful when evaluating the effectiveness of a project or policy. The following figure is a hypothetical chart illustrating outcomes from the subject group in the process flow chart.



OTHER REPRESENTATION METHODS & INDIRECT INDICATORS

There are a huge variety of ways to represent the data included in the model. Any method that illustrates the specific activities of respondents in the domain, and highlights how the system has served or failed them will lead to a better understanding of the problem. Further, a significant number of indirect indicators may be suggested by data contained in the process model. Indirect indicators, in this context, are those which are a factor at one or more branches; they may inform the shape of the paths and affect the blend of likely outcomes, but are not outcome-determinative.⁶⁷ Some examples of indirect indicators which may be mined from the model include: level of corruption, measured by the average number of respondents compelled to pay bribes or the ratio of bribes paid to official fees collected; time commitment, measured by the total amount of time from beginning the path to completing it; or financial burden, measured by the total monetary outlay required to complete the path. There are potentially a vast number of similar indicators, and they may be readily suggested as the model is evaluated. It is likely that any significant factor will have at least one, and possibly several, indirect indicators measuring it.

⁶⁷ Contrast this with direct indicators, or changes in the actual outcome. *See supra*.

EVALUATION

The vast majority of the work is in compiling the data and constructing the model. Once those steps are completed, evaluation of the model is largely reflexive. Examination of the paths that the subject group undertakes when attempting to operate within the domain clearly illustrates the relevant factors influencing each outcome. Those factors which are the most likely to steer an individual away from a preferred outcome are the most important bottlenecks.

In many cases, a bottleneck itself might require further study in order to be fully understood. For example, in the above hypothetical, the outcome likelihood chart demonstrates that, other than simply not attempting to register a business, the single most significant barrier is lack of legal identification. Thus, the analysis suggests that one approach to significantly reduce obstacles in the domain would be to assess the process to attain legal identification since it appears to be one of the root causes of failure to register businesses.⁶⁸ Further analysis of each bottleneck is likely to reveal additional obstacles. For example, an assessment of why transportation is barrier may reveal a range of reasons, from total lack of transportation options, to high cost, or even to gender or ethnicity-based discrimination on public transportation.

The final step of the evaluation is to suggest solutions tied to one or more bottlenecks. The solutions may be quite varied. Policy recommendations, such as streamlining an application process, taking steps to avoid corruption, or reducing fees, are often appropriate. Direct assistance projects, such as providing free busing to an administrative location or working with local government to bring civil servants to underserved communities, subsidizing costs, or providing legal advice or other assistance may directly address many kinds of bottlenecks, but are typically not long term solutions. Partnerships with government in order to reform the institutions and organizations that serve the subject demographic can directly address many of the underlying problems generating the bottlenecks, and are key to establishing the trust and respect of the community towards the rule of law, and the faith in the government to serve all of its citizens equally.

It is important to note that this framework does not replace other methodologies for designing and targeting organizational and institutional reforms. Existing methodologies, such as that outlined in UNDP's Capacity Development Practice Note⁶⁹ remain highly relevant as tools to address the problems once they are identified. The framework laid out above attempts only to ground project development in specific, individualized, and concrete human experience. In the spirit of Legal Empowerment, it speaks the language of the underserved population, and evaluates the legal and administrative systems first and foremost based upon their interface with constituents. It identifies the problems on the terms of those who experience them, but it leaves the choice of reform mechanism and project design to tried and true methods that are already in place.

CONCLUSION

This paper has proposed a framework for assessing specific issues of legal empowerment. The framework suggests narrowing an analysis to a definite domain, encompassing a specific set of activities within a constrained geographic region or administrative level. The analysis tracks the activities of individuals as they navigate through the domain, and models their paths. It examines the choices that individuals make, the procedures they attempt, and both the factors that influence their decisions and the factors that determine whether their efforts are successful. It asks what can be done to improve individuals' capacity to achieve preferred results—it identifies

⁶⁸ The same framework could be used to make this evaluation. Note that to adequately address the problem, although the domain will be different, the subject group must remain identical; discovering the barriers to legal identification for a different subject group may not provide insight into the barriers affecting the present group.

⁶⁹ UNDP, *Practice Note: Capacity Development* (Sept. 2007).

the obstacles and proposes how to clear them. In so doing, the assessment provides a space to discover how to reform an existing system to satisfy the preconditions of empowerment—to allow poor, marginalized, and vulnerable groups to take full control of their rights and participate in society under the protection of the rule of law.