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present:

Legal Empowerment of the Poor for Sustainable Livelihoods: Towards the Elaboration of a Canadian Agenda for Change

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LEGAL DISCUSSION PAPER

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1. Introduction

The Commission for the Legal Empowerment of the Poor, chaired by Madeleine Albright and Hernando de Soto, released in 2008 a comprehensive Report on Legal Empowerment of the Poor (LEP).¹ The Commission was launched in 2005 by a group of developing and developed countries, including Canada. Following the Report, the United Nations General Assembly acknowledged the importance of LEP in terms of its poverty eradication goals and initiatives.² An important emphasis of the LEP Commission Report is that **over 4 billion people are “robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law.”**³ LEP, conceptualized broadly in terms of access to justice, property rights, labor rights and business rights, can provide opportunities for those living in poverty to improve their quality of life and secure more sustainable development.

This Legal Discussion Paper sets out, mainly in a descriptive manner, a conceptual context for a Canadian Dialogue on LEP, as a background paper for a discussion on the most promising ways in which Canadian stakeholders can engage with the LEP agenda internationally. After this short introduction, the second part of this Legal Discussion Paper presents a brief overview of 2008 LEP Commission Report, emphasizing its background, framework and agenda for implementation. The third part of the Legal Discussion Paper presents a few brief case studies of how LEP can also help to address global emerging challenges that are significantly undermining sustainable development in selected sectors, such as Health, HIV & Legal Empowerment, Green Economy, Access to Climate Finance & Legal Empowerment, and Agriculture, Land Rights & Legal Empowerment. These case studies are meant to serve as examples of how LEP can be operationalized as a useful and effective tool in a variety of development endeavors. The fourth part of Legal Discussion Paper addresses, by simply raising a few initial thoughts for discussion, two sets of key issues for Canadian policy leaders, legal scholars and practitioners that are interested in advancing a Canadian agenda in promoting LEP for sustainable livelihoods.

¹ “Making the Law Work for Everyone” Report of the Commission on Legal Empowerment of the Poor, Volume I, 2008.

² UNGA Resolution A/C.2/64/L.4/Rev.2, 3 December 2009.

³ *Supra* note 1, at 1.

2. The 2008 Legal Empowerment of the Poor Commission Report: Background, Framework & Agenda for Implementation

2.1 Background

At least 4 billion people worldwide are excluded from the rule of law. The Legal Empowerment of the Poor Commission's Report (LEP Report) calls attention to their concerns and interests. The LEP Report is careful to emphasize that these 4 billion people are far from a homogeneous or monolithic category.⁴ For instance, their levels of income vary widely, and different strategies are required based on their characteristics. Nevertheless, they share the particular forms of vulnerability brought about by exclusion from the law. They often lack even a legal identity, and as noted in the LEP Report, they are bereft of legal security and protection "when it was needed the most."⁵ The LEP Report argues that "law-induced exclusion and poverty go hand in hand."⁶ The law is often used as a tool against the poor by entrenched elites. Too often the law or the lack thereof acts as a barrier to the economic, social and political enhancement of poor.

The LEP Report focuses on the informal economy which persists and prevails in many developing countries, accounting for over one third of these domestic economies.⁷ In the informal context, poor populations must live with insecurity and instability, for example with regard to the enforcement of contractual obligations or the security of property rights. Further, as noted in the LEP Report, these economic actors that cannot use the law to their advantage "are in constant danger of joining the ranks of the very poor."⁸ Yet these informal structures are created by the poor precisely to survive the deficiencies or absence of formal legal structures. The poor will often stay away from a legal system that takes too long, costs too much, and requires expertise that they lack.⁹ As such, legal empowerment can entail learning from best practices in informal structures and bringing them to the transparency and official enforceability of the formal legal realm.

The concept of LEP is based on the Universal Declaration of Human Rights (UDHR) and its subsequent developments at the international level. Article 1 of the UDHR calls for a "radical agenda of legal empowerment"¹⁰ that entails fundamental reforms. Indeed, "LEP is a bold vision, and its implementation is challenging."¹¹ LEP is a novel approach to confronting poverty, which hopes to yield significant improvements where market solutions and

⁴ *Ibid* at 19.

⁵ *Ibid* at 13.

⁶ *Ibid*

⁷ *Ibid* at 15.

⁸ *Ibid* at 20.

⁹ *Ibid* at 34.

¹⁰ *Ibid* at 20.

¹¹ *Ibid* at 79.

macroeconomic reforms have not necessarily lived up to expectations. Ultimately, the concept of LEP rests on the fundamental assumption that **“the poor can only escape poverty if they are enabled to help themselves.”**¹² LEP will allow the poor to take charge of their own destiny by becoming recognized and respected actors in the formal economic sphere, through legal empowerment. The LEP Report Commission spent 3 years carefully sifting through evidence, listening and learning from stakeholders.¹³ A significant insight that the Commission gained in this process is that in order to be effective, LEP must reflect the reality lived by poor people. The goal of LEP is that decisions on development will be those of the poor, and not of **“reports such as this.”**¹⁴ Overall, sustainable development is a moral imperative. The rich-poor divide makes our world desperately unstable. As the LEP Report makes clear, **there is a pressing need to act now “or put at risk everything we cherish.”**¹⁵

To understand the linkages between this concept of LEP, and the need for sustainable development in the global south, it is necessary to take into account the importance of legal empowerment for sustainable development, especially its role in helping the poor to secure more sustainable livelihoods.¹⁶ While legal, economic and policy analysis of these issues has only scratched the surface of what is necessary, it is clear that legal empowerment of the poor can both assist in preventing, for instance, unsustainable exploitation of resources, while also helping the poor to secure, for instance, more sustainable livelihoods to be possible. Principles of sustainable development law, such as integration of environmental and social concerns into economic development planning, inter-generational and intra-generational equity, the sustainable use of natural resources, good governance, access to information, public participation and justice, and common but differentiated responsibility, can assist in the design and implementation of global treaties and local regulations on sustainable development, and in the settlement of relevant disputes.¹⁷ Legal empowerment can also ensure that the poor are included in all aspects of sustainable development. For instance, as was argued in the 2002 Johannesburg World Summit on Sustainable Development process, and is becoming even clearer in the process leading to the 2012 UN Conference on

¹² *Ibid* at 22

¹³ *Ibid* at 15.

¹⁴ *Ibid* at 20.

¹⁵ *Ibid* at 22.

¹⁶ See G. Shabbir Cheema & V Popovski (eds), *Engaging Civil Society: Emerging Trends in Democratic Governance* (UNU Press, 2010); MC Cordonier Segger, M Gehring & A Newcombe, *Sustainable Development in World Investment Law* (Kluwer Law International, 2010); P Galizzi & A Herklotz (eds) *The Role of the Environment in Poverty Alleviation* (Fordham University Press, 2008) at Ch 4 on Legal Empowerment; MC Cordonier Segger & A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004); MC Cordonier Segger & Judge CG Weeramantry (eds), *Sustainable Justice* (Martinus Nijhoff, 2004); K Helmore & N Singh, *Sustainable Livelihoods: Building on the Wealth of the Poor* (Kumarian Press, 2001); N Singh and V Titi (eds), *Empowerment Towards Sustainability* (International Institute for Sustainable Development, 1995)

¹⁷ International Law Association, 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, online: <<http://www.ila-hq.org/en/committees/index.cfm/cid/25>> See also MC Cordonier Segger & A Khalfan, *Sustainable Development Law, ibid.*

Sustainable Development, the green economy is not just for the rich. If this becomes the case, the green economy will not support sustainable development, and ultimately, will simply fail.

2.2 The Framework: 4 Pillars of Legal Empowerment

The 4 important pillars of LEP, according to the Commission’s findings, focus on the legal accessibility of a fair and functional legal system, as well as important human rights. Empowering people to rise from poverty involves protecting and developing the essential tools that constitute reliable revenue streams: namely property, labor, and business. The LEP Report emphasizes that property rights, labor rights and business rights are all human rights, and that these 4 pillars are essential in the overall bottom-up scheme of LEP. **Indeed, LEP is about “giving a voice to the poor and teeth to their rights.”**¹⁸ Participation in the elaboration of initiatives and ownership of rights by the poor are key to any successful LEP reforms.



Pillar 1: Access to Justice and the Rule of Law.

This step is central to legal empowerment, and involves the reform of institutions to remove legal and administrative barriers. A legal identity, involving official documentation, constitutes an important step here. Similarly, access to justice entails an effective judicial system that limits backlog of cases. Effective procedural rights are essential tools that permit the appropriate exercise and recourse to various substantive rights. Access to a fair and functional judicial system is a recurring problem for the poor,

¹⁸ *Ibid* at 31.

which reinforces poverty and exclusion. Further the absence of an independent judiciary reinforces the risk of democratic institutions being captured by ruling elites.

To promote access to justice, the Report highlights the need for:

- Audits to identify laws, regulations, procedures and institutional set-ups that discriminate against the rights of the poor.
- Birth certificates to promote legal identity, as well as the minimization of any adverse consequences of formal registration.
- Improved access to justice within the government bureaucracy.
- Access to legal services for the poor, either by liberalizing the market for legal services or providing significant legal aid. Bar associations have an important role to provide information about access to justice as well as useful oversight and political support. Contingency fees and class action claims can also help in this regard.
- Improvements in the management of the courts, for example automated case management systems that increase efficiency of case loads and hamper the opportunities for corruption.
- Recognition of informal dispute settlement systems and enabling self-help.

Public participation, supported by access to information and justice, is particularly important if the poor are to gain a voice in preventing unsustainable development.¹⁹ For instance, by ensuring that the poor are informed about unsound and destructive development projects, are aware of their potential impacts, and are able to participate in decision-making, with access to justice if commitments are broken, sustainable alternatives may be considered and implemented, to the benefit of all.²⁰

Pillar 2: Property Rights.

Secure access to property is increasingly recognized as being central to strategies to overcome poverty, according to the LEP Commission. Where ownership and user rights to land are not protected by the rule of law, property cannot be securitized in order to generate livelihoods. However, the relevance of property rights far exceeds their purely **economic role**. "Secure and accessible property rights provide a sense of identity, dignity, and **belonging**."²¹ There is a growing body of evidence that secure property rights play key roles in food security, sustainable management of natural resources, environmentally protection, construction of democracy, and prevention of conflict, while making important contributions to gender equality and the empowerment of minorities. Important themes have emerged, such as security of access to property (whether individual or collective) and forms of

¹⁹ MC Cordonier Segger, A Khalfan, M Gehring & M Toering, "Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation" *RECIEL* Vol. 12 No. 1, 2003, pp. 54-68.

²⁰ N Schrijver, *Development without Destruction* (Indiana University Press, 2010).

²¹ *Ibid* at 34.

use and ownership of natural resources. Such themes require location-specific elaboration. Unclear or dysfunctional regulations with regard to the stewardship of natural resources create the possibility of mismanagement and abuse.

The Report expresses strong hope about the potential of property rights, and provides recommendations for the development of inclusive property systems, highlighting needs for:

- Extension of the legal protection of limited liability to poor entrepreneurs and clear rules regarding adverse possession.
- Promotion of housing and land associations.
- Enable community-based ownership systems when they are functional, for example in the case of natural resources. These require predictable rules and standards.
- Grant secure property rights to urban shanty dwellers. Protection from arbitrary eviction is a particular concern here.
- Establish divorce and inheritance laws that enhance gender equality.
- Recognition of a variety of land tenure systems, including customary or aboriginal systems.
- Development of property and credit markets which are accessible to the poor. The poor should be able to securitize and insure their land in accordance with private market forces.
- Recognition of movable property as collateral. This can reduce the cost of credit for the poor.

It has also been argued, particularly in economics and environmental studies, that without effective collective management regimes, or strong laws and **regulations, a 'tragedy of the commons' can make sustainable** resources management impossible.²² As it is the poor that often depend on nature for the goods and services that they need to survive, LEP may be an essential element of any efforts to improve the way people value and sustainably manage nature, and natural resources.

Pillar 3: Labour Rights.

The majority of the world's poor attempt to survive through insecure and underpaid employment in the informal economy. Women especially are victims in conditions where the work environment is squalid and salaries are below a living wage. **"A well designed system of labour rights should provide both protection and opportunity."**²³ These regulations have to strike the important balance of providing decent work for the working poor without discouraging businesses from hiring legally. Overall, **"labour is not a commodity"** to be treated like other ingredients of the production process.²⁴

²² P. Sukhdev et al, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB* (TEEB, 2010).

²³ *Ibid* at 36.

²⁴ *Ibid* at 52.

A contextualized “decent work agenda”²⁵ can operate in order to promote labour rights in different regions. Social dialogue in each area is the best manner to define the content of such an agenda. Also, voluntary codes of conduct and other elements of corporate social responsibility can encourage companies to improve their labour standards internationally.

The Report also notes several elements as basic ingredients for a decent work agenda:

- A guaranteed right to collective bargaining.
- Improved quality of workplace regulations.
- A minimum package of labour rights for workers in the informal economy.
- The promotion of education, capacity building, and anti-discrimination measures, which can create opportunities for full, productive and freely chosen employment.
- Inclusive social protection schemes, which include health insurance, old age pensions and social security.
- The promotion of gender equality, including equal opportunity and treatment.

Such labour rights are particularly important in the context of the emerging green economy. As is only starting to be shown in new studies by the United Nations Environment Program,²⁶ the International Labour Organization,²⁷ and the International Development Law Organization,²⁸ countries and companies where labour rights are respected, including where workers can be secure that appropriate environmental, health and safety standards will be provided for, are more likely to be able to secure greener and more sustainable employment.

Pillar 4: Business Rights.

The success of small and medium enterprises is a key ingredient of poverty reduction. Unfortunately, most of the world’s poor entrepreneurs are forced to operate informally. This seriously impairs their ability to develop and finance their business, to reduce their level of personal liability to their creditors, and also increases their vulnerability, for example when faced with corrupt government officials. Better laws are required to regulate small businesses. Limited liability is a key concept, as “limited liability companies are amongst the most productivity enhancing legal institutions.”²⁹ This structure encourages entrepreneurs to take bigger risks, which will yield higher returns.

²⁵ *Ibid* at 68.

²⁶ ILO / UNEP / IOE / ITUC, *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World* (UNEP/ILO/IOE/ITUC, 2008).

²⁷ UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2011).

²⁸ IDLO, *Legal Preparedness for the Green Economy* (IDLO, 2011).

²⁹ *Ibid* at 53.

In many developing countries, poor quality of lawmaking created tangles of legislation that only serve to benefit corrupt officials. Heavy-handed regulations hinder the development of businesses in the formal sphere. The Report recommends a series of steps in order to promote the emergence of healthy small and medium enterprise:

- A package of business rights underlined in policies, and instituted and enforced through regulatory bodies. The main idea is to encourage businesses to emerge from informality by developing the advantages and security offered by formal operations.
- Streamlining administrative procedures, which involves slashing all unnecessary red tape.
- Broadening access to financial services and supporting innovation in financial products. Innovation here is meant in the sense of deepening the outreach of financial services to promote accessibility by poor entrepreneurs.
- Developing rules in a contextual and consultative manner, in collaboration with the business community and focusing on the expressed needs and challenges of poor entrepreneurs.

There is a need for new efforts to design, adopt and implement effective law and policy measures to secure business rights for small and medium sized enterprises (SMEs), as part of the emerging green economy. As argued by the United Nations Environment Program,³⁰ the International Labour Organization,³¹ and the International Development Law Organization,³² the poor have an essential role to play in the global green economy. In the LEP Report, for instance, there is particularly emphasis on the importance of ensuring that the benefits of carbon offsets are equitably shared. As reflected in the 2010 Cancun Agreements, these issues are central to both global and local efforts to reduce emissions from deforestation and resources degradation (REDD+). Legal preparedness for the green economy means that the poor, especially entrepreneurs and SMEs among them, are able to access sustainable and socially responsible investment, fair trade opportunities, payment for ecosystem services, climate and other sustainable finance schemes,³³ in order to secure the benefits of participation in the global green economy.

2.3 Implementing Legal Empowerment of the Poor: Suggested Methodologies

³⁰ ILO / UNEP / IOE / ITUC, *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World* (UNEP/ILO/IOE/ITUC, 2008).

³¹ UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2011); See also P. Sukhdev et al, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB* (TEEB, 2010).

³² IDLO, *Legal Preparedness for the Green Economy* (IDLO, 2011).

³³ Ibid.

The LEP Agenda involves not only a theoretical framework and an agenda of priorities to legally empower the poor. It is also a distinct and novel methodology for implementing change. The Commission suggests 5 conditions that, taken together, distinguish LEP from “**traditional approaches to legal and institutional reform.**”³⁴ These characteristics are:

- **Bottom-up and pro-poor:** LEP is based on the needs of the poor and geared at empowerment.
- **Affordable:** in the sense that measures are within the means of the poor population involved.
- **Realistic:** endeavours need to be contextualised and take into account obstacles and opportunities.
- **Liberating:** the focus is more on removing legal barriers to empowerment than creating new legal schemes.
- **Risk-Aware:** potential harm as a side-effect of LEP measures should be minimised and monitored to allow compensatory mechanisms.

The development and implementation of LEP in any context will necessarily progress incrementally, and involve multiple initiatives at various levels. Gradually, LEP should establish “**more open, inclusive and accountable systems across the political and economic spectrum.**”³⁵ LEP calls for courageous political leadership and innovative endeavours by government, civil society and the private sector to implement its bold vision. The Report encourages a pragmatic outlook on societal change. The idea is to take advantage of ripe political environments in order to promote the LEP agenda. Furthermore, LEP will necessarily be controversial. Vested interests will perceive LEP as a threat, and attempt to quash or minimize the impact of initiatives. The “**most common mistakes are to underestimate the impediments to implementation and to not foresee unintended consequences for the poor.**”³⁶

Social change is a challenging goal, and LEP proposes several areas of focus in order to optimally and efficiently organise implementation:

- i. **Getting it right from the start.** A contextual analysis should serve to determine which reforms are the most in demand, and which have the greatest likelihood of success. This analysis should observe elements such as the social structure, the economic context, the characteristics of the state, and the extent of informality and tensions with the formal system.
- ii. **Managing stakeholders and mobilising allies.** Stakeholders are all interested parties with the capacity to advance or hinder a policy change. As mentioned, some stakeholders (for instance government officials) might believe that they have something to

³⁴ *Ibid* at 76.

³⁵ *Ibid* at 75.

³⁶ *Ibid* at 76.

lose from LEP, as current practices and legislation constitute their source of power and of revenue. Also, the poor must be involved and gain ownership of endeavours for implementation. To be successful, LEP requires the formation of broad political coalitions with the capacity to overcome obstacles.

- iii. Action at the international level.** Most international development strategies dealing with poverty reduction aim at **overall economic growth, with reliance on the “trickle down”** effect, or on redistribution of wealth. These methods are insufficient. The LEP agenda can effectively complement traditional approaches to poverty reduction, and must be engaged with by international aid agencies and fora. Also, civil society organisations and multinational corporations have a large and growing potential for creating change. These actors must also be involved with the LEP agenda, to organise, support and promote initiatives. The various endeavours should operate with a solid empirical and analytical basis.

It is important to note, in terms of the roles that Canadian and international partner organisations can play, that the Commission has recommended assistance, at the international level, specifically with the following elements:

- Establish a virtual LEP forum geared at spreading information internationally and at allowing LEP actors around the world to interact and exchange strategies.
- Encourage the development of agendas by regional entities (i.e. ASEAN etc.)
- Provide coherent support to LEP efforts at the country level, which involves policy and technical support as well as funding mechanisms.
- Provide for sustained reflection on LEP through institutional and academic research, teaching and debate.
- Create innovative international mechanisms to support LEP, for example a more comprehensive LEP-oriented human rights framework or the observance of an international LEP day.

2.4 Reactions to the Legal Empowerment of the Poor Commission’s Report

The LEP Report was widely praised for bringing legal empowerment issues to the attention of policymakers, international development organisations, researchers and academics worldwide.³⁷ It has gathered increasing support from international institutions such as the UN Development Program and the World Bank. In response to the considerable efforts of the LEP Commission, which produced a compelling Report based on thorough empirical analysis, LEP is positioned to make a significant and promising impact on development agendas. The LEP Commission was careful to focus on the concrete needs of

³⁷ See e.g. Dan Banik. “Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication” (2009) 1 Hague Journal on the Rule of Law 117 at 127.

impoverished populations, and therefore departed from traditional approaches to legal empowerment which focused on the role of the courts and other government institutions in a top-down perspective. Further, the Report provides a refreshing discourse on business rights in the context of small and medium businesses, thereby also recognising and validating the often overlooked work of CSOs in this field. Overall, the Report is already an influential document that can be used as a tool for advocacy, for the elaboration of promising new development initiatives and agendas as well as further research.

Various stakeholders in the development field have engaged with the ideas and the agenda set forth in the Report, and several useful critiques and case studies have been published. Three main areas of constructive critique have emerged:

(1) Few Surprises in the LEP Agenda: As recognised in the Report, legal empowerment has been taking place all over the world through CSO and government initiatives long before the publication of the report. The bottom-up and pro-poor approach of the Report is hailed as a significant and positive turn in LEP implementation. Yet, the recommendations in the report remain in a top-down formulation, “telling leaders what to do rather than advising the poor.”³⁸ The Report might focus too heavily on government action rather than CSOs, which could be among the most effective actors in terms of legal empowerment in a context where the vested interests of government elite do not align with the LEP agenda.

(2) Need for Priorities and Practical Guidance: From a practitioner’s perspective, the Report has been criticized as lacking guidance in terms of prioritization and sequencing. The Report offers many recommendations, but without a clear sense of which initiatives should be prioritized, beyond the need to seize political opportunity for change.³⁹

(3) Overstating the Benefits of Formalization: The emphasis in bringing various actors in the informal sphere into formality might overstate the potential of formalisation and underestimate the challenges. Empirical research does not necessarily support the argument that formalisation results in economic benefits for the poor, for example in terms of increased access to credit.⁴⁰ Three of the four LEP pillars focus on economic rights, yet LEP is also about justice. Some commentators would have preferred gender or education to complement the pillars of LEP chosen by the Commission.⁴¹

³⁸ Stephen Golub. “The Commission on Legal Empowerment of the Poor: One Big Step Forward and a Few Steps Back for Development Policy and Practice” 2009) 1 Hague Journal on the Rule of Law 101 at 110.

³⁹ Matthew Stephens. “The Commission on Legal Empowerment of the Poor: An Opportunity Missed” 2009) 1 Hague Journal on the Rule of Law 132 at 134.

⁴⁰ Daniel W. Bromley. “Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady” (2008) 26 Land Use Policy 20 at 21.

⁴¹ Golub, *supra* note 27, at 112.

3. Illustrative Case Studies on the Contribution of Legal Empowerment to More Sustainable Livelihoods for the Poor

Legal empowerment lies at the intersection of many of the chief challenges of our era. It cuts across the main international cooperation agendas: development, security, and human rights. Evidence overwhelmingly suggests a strong correlation between rule of law and sustainable development. Legal empowerment is simply indispensable to achieve global sustainability. Legal and judicial institutions must uphold the rule of law foundations for all citizens across all three interdependent and mutually reinforcing pillars of sustainable development: economic development, social development, and environmental protection.

Although the international community is increasingly recognizing the critical role legal and regulatory reform can play in achieving broader development objectives and there is extensive growth of international law in the form of treaties and international trading regimes to guide domestic legal orders, the legal empowerment aspects of sustainable development are often forgotten or considered as secondary rather than as foundational. Historically, when legal empowerment has been considered, development assistance has often favored a prescriptive approach. This approach is characterized by taking institutional models or legal reform processes from countries with effective rule of law and good governance and attempting to replicate them in those countries where consistent good governance have not yet been achieved. The underlying assumption of this approach is that the introduction of pre-set institutions and processes can result in legal change and provide a platform upon which economic and social development can take place, leading eventually to the poor gaining access to their legal rights. This understanding has been criticized as overly rigid and static as well as inconsistent with the manner in which legal change actually occurs. Indeed, rule of law terminology has at times obscured what is really required to improve the legal systems of developing countries, and secure bottom-up legal empowerment.

An alternative model has now emerged based on the findings of leading social scientific and historical studies of legal change. This new model shows legal change to be non-linear, long term and iterative. This view also recognizes that legal change is driven by societal demand that emerges on a rolling basis alongside the process of economic and social development. This model also implicates that, as a practical matter for sustainable development assistance purposes, legal empowerment is an incremental process, not one that occurs at once through a great leap forward. As such, legal empowerment for sustainable development involves many layers of legal institutions from global to national to local.

These are other issues are best explained in a practical way, by offering 'case studies' of the links between legal empowerment and sustainable livelihoods in a few illustrative sectors.

3.1 Health, HIV & Legal Empowerment

Poverty and poor health go hand in hand. Without social insurance or other sources of support, a breadwinner who loses her health rapidly faces poverty, as does her family. Loss of income is compounded by treatment costs, forcing impossible choices. The global HIV epidemic is noted for striking people in their economically most productive years. Although HIV infection can usually be avoided, rational choices about safe behavior can be severely constrained by social, economic, legal and cultural forces. Discrimination **against people living with HIV and groups perceived to be most at risk ('key populations')** contributes to the spread and impact of HIV and AIDS. Hence international best practice now promotes measures to protect rights and ensure an enabling legal and policy environment as part of national HIV policy.⁴²

Positive legal frameworks must be supported by accessible legal services for people living with HIV and key populations. Skilled lawyers can improve outcomes for clients even when protective laws are absent or defective.⁴³ More research is needed on the public health impact of legal empowerment. Nonetheless, as the example below shows, accessible legal services for people living with HIV can help keep individuals and families out of the poor health / poverty trap.

Legal action combined with social mobilization has driven down the prices of HIV drugs in many developing and transitional countries. This also offers the possibility of newly affordable treatments for other infectious and non-communicable diseases. Cardiovascular diseases, cancers, chronic respiratory diseases and diabetes are responsible for more than 80% of deaths in the majority of developing countries and economies in transition. Such premature deaths are largely preventable by tackling four common modifiable risk factors: tobacco use, unhealthy diet, physical inactivity and the harmful use of alcohol.⁴⁴ Can we envision a world where poor and disadvantaged communities, rather than be the advertising targets of tobacco and junk food companies, are empowered to demand government regulation and protection from harmful products and unhealthy environments?

These issues are tellingly illustrated by an example from the work of the Justice and Freedom Organization in Egypt in 2010, when a widow who is HIV+ was threatened, as a co-owner of a shop that her husband had previously owned before he died. When her husband died, her brother in-law

⁴² International Guidelines on HIV/AIDS and Human Rights (UNAIDS & OHCHR, 2006)

⁴³ Toolkit: Scaling Up HIV-related Legal Services (IDLO, UNAIDS & UNDP, 2009)

⁴⁴ Preventing Chronic Diseases: a vital investment (WHO, 2005)

threatened to disclose her HIV status and take custody of her children if she refused to give him full ownership of the shop. A staff lawyer and a volunteer lawyer worked on this case and obtained a certificate from a doctor from the Ministry of Health explaining that the HIV status of the widow does not prevent her from having custody of her children. The brother in-law and the widow made their cases separately before the prosecutor and on the day that the judge gave a ruling on the case, the brother in-law did not come to court. It was ruled that the widow would maintain her ownership of the shop.⁴⁵

3.2 Green Economy, Access to Climate Finance & Legal Empowerment

Poverty is a symptom of unhealthy natural ecosystems. The poor depend most on and are disproportionately vulnerable to the availability of natural resources for their income, subsistence and socio-economic resilience.⁴⁶ Whereas the international approach to sustainable development once held poverty as **responsible for "increased pressure on environmental resources"** and economic growth as the solution to environmental degradation,⁴⁷ the relationship could very well be the inverse.⁴⁸ Most recently, the UN and others have recognized the immense importance of natural capital as a springboard for socio-economic development due to the services that ecosystems provide to human-well being, including the preconditions for agriculture, aquaculture, forestry and climate regulation themselves.⁴⁹ However, many ecosystems are nearing critical thresholds, beyond which their ability to provide such essential goods and services to the poor will be drastically reduced.⁵⁰

The 'green economy' approach to sustainable development law and policy promotes a portfolio of economic instruments that increase the co-benefits of natural capital and poverty alleviation. It sees investment in natural capital as a critical economic asset for the poor.⁵¹ The green economy is not limited to UN initiatives, and it is not simply a niche market for the rich. Instead, it is stimulated by grassroots, local, national, regional and international financial instruments that level the playing field for green products through subsidies, incentives, market-based mechanisms and redirection of public and private investment. Climate finance, in particular, involves low-carbon and climate resilient pathways that are already being employed in Official Development

⁴⁵ IDLO provides financial and technical support to Justice and Freedom to strengthen HIV-related legal services in Egypt. Financial support is provided by OFID and the Ford Foundation.

⁴⁶ P. Sukhdev et al, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB* (TEEB, 2010).

⁴⁷ World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, A/42/427 (1987), "From one earth to one world,"s.21.

⁴⁸ United Nations Environment Programme, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication- A Synthesis for Policy Makers* (UNEP, 2011) at 01-02.

⁴⁹ UN Conference of the Parties to the Convention on Biological Diversity, Update and Revision of the Strategic Plan for the Post-2010 Period Decision as Adopted (advance unedited version), Art. 8, online: <http://www.cbd.int/>.

⁵⁰ *Supra* note 35 at 9.

⁵¹ *Supra* note 37.

Assistance for sustainable growth and disaster risk management;⁵² foreign direct investment in renewable and efficient energy; and many other trade and investments in key sectors (energy, agriculture, transport, forests, tourism).⁵³ As committed in the 2010 Cancun Agreements on climate change, with pledges of \$100 billion by 2020 towards climate finance, there is intense effort being placed on identifying and mobilizing public and private, bilateral and multilateral, and alternative funding sources.⁵⁴ This climate finance must reach the poor, or it will fail.

Climate finance can foster and accelerate socio-economic development by directly and indirectly enhancing, inter alia: employment; new low-carbon industries; existing sectors; local and national capital investment; infrastructure development; adaptive capacity building; and sustainable energy, water and sanitation. However, it is only under specific enabling legal and institutional conditions that those benefits are channeled to the most in need.⁵⁵ Regrettably, at this early stage in the green economy, those conditions are inadequate: there are common barriers between climate finance and poverty alleviation.⁵⁶

Legal barriers to climate finance can be overcome using an LEP methodology for legal and institutional reform. With access to justice and the rule of law, formal institutions can guarantee stakeholder participation in environmental decision-making, rights of recourse and culturally sensitive practices. With property rights that clearly delineate land tenure and ownership of assets, the poor can contract directly with climate investors. With labour rights, increased green employment can ensure fair wages, safe working conditions and freedom of association. With business rights, small to medium size enterprises can access climate finance market mechanisms, credit advances, manage capital and transfer assets.⁵⁷

Much work lies ahead to amend climate finance instruments and domestic legal systems in order to realize a pro-poor green economy. At least the first

⁵² OECD, "Rio Makers: Climate finance bilateral ODA by donor, DAC Total," online:

<http://webnet.oecd.org/dcdgraphs/climatechange/>.

⁵³ Examples of climate finance initiatives include the following: Guyana Skeldon Bagasse Cogeneration

Project, online: <http://wbcarbonfinance.org/Router.cfm?Page=Projport&ProjID=33533>; Trinidad and Tobago Nariva Wetland Restoration, online:

<http://wbcarbonfinance.org/Router.cfm?Page=BioCF&FID=9708&ItemID=9708&ft=Projects&ProjID=9643>

; Vietnam UN-REDD+ Pilot Project, online: :

http://www.unredd.net/index.php?option=com_docman&task=cat_view&gid=942&Itemid=53; Senegal;

Improved Cookstoves in Fatick Region, online:

<https://gs1.apx.com/mymodule/ProjectDoc/EditProjectDoc.asp?id1=583>; Senegal- Climate Change

adaptation project in the areas of watershed management and water retention, online:

<http://gefonline.org/projectDetailsSQL.cfm?projID=4234>; Membertou Mi'kmaq Nation and GrupoGuascor

partnership, Anaia Global Renewable Energies, online: <http://anaiaenergy.com>; Tseil-Waututh Nation and

Endurance Wind Power collaborative initiative for wind power, online:

<http://www.intertribaltimes.com/canada/b-c-first-nation-puts-2-million-behind-wind-power>.

⁵⁴ UNFCCC, Draft decision -/CP.16, "Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention" (29 Nov - 10 Dec 2010).

⁵⁵ *Supra* note 37.

⁵⁶ *Supra* note 1 at 52-53.

⁵⁷ *Ibid.*

steps must involve: sharing legal best practices; conducting context specific impact assessments; consulting with stakeholders to build consensus on desired outcomes; amending regulatory frameworks; and, above all, building capacity for ongoing reforms driven by the poor themselves.

3.3 Property Rights, Tenure and Food Security & Legal Empowerment

Secure property rights can play a fundamental role in enabling poor households in both rural and urban areas to overcome their poverty. In rural areas, hunger and poverty are most prevalent among those who grow food, smallholder farmers and agricultural workers. In urban areas, the lack of housing rights is a fundamental obstacle to seeking income opportunities. Fostering more sustainable livelihoods for the poor means providing greater **levels of tenure security, which has been defined by FAO as “the certainty that a person’s rights to land will be recognised by others and protected in cases of specific challenges.”**⁵⁸ In both rural and urban areas, tenure security involves ensuring the existence and enforcement of legal instruments that “guarantee... legal protection against forced evictions, harassment, and other threats.”⁵⁹ Security of land tenure provides farmers with the basis to invest in making their land more productive, thereby not only improving family nutrition but also producing surpluses that contribute to overall food security.

Improvements in tenure and food security have obvious positive implications for improving the livelihoods and resiliency of groups, such as women, indigenous communities, and minorities – people who often lack legally secure over the land upon which they live or depend.⁶⁰ However, for the livelihood and empowerment benefits of property rights to be fully realized, policy-makers must adopt locally appropriate solutions that are embedded within broader reforms aimed at securing land and other economic and legal rights for the poor.⁶¹ Indeed, alongside measures aimed at securing property rights for the poor, it is also of critical importance to ensure that the poor have access to the knowledge, resources, legal capacity and institutions for collective action in order to draw all of the benefits offered by secure

⁵⁸ FAO, Land Tenure and Rural Development, FAO Land Tenure Series no 3, 2002, available at: <ftp://ftp.fao.org/docrep/fao/005/y4307E/y4307E00.pdf> at para. 3.31.

⁵⁹ Committee on Economic, Social, and Cultural Rights, General Comment no 4 (1991), UN ESCOR, Supp. (No. 3), Annex III, para. 8(a).

⁶⁰ See U.N. Centre for Human Settlements, “Women’s Rights to Land, Housing and Property in Post-Conflict Situations and During Reconstruction: A Global Overview,” United Nation Centre for Human Settlements Land Management Series No. 9 (1999); A.K. Barume, *Land Rights of Indigenous Peoples in Africa, with Special Focus on Central, Eastern and Southern Africa* (Copenhagen: IWGIA, 2010); I.G. Shivji, *Not Yet Democracy: Reforming Land Tenure in Tanzania* (Dar Es Salaam: ARDDHI, 1998).

⁶¹ See M. Lipton, *Land Reform in Developing Countries Property rights and property wrongs* (New York: Routledge, 2009) at 171-189; N. Kanji *et al.*, “Can Land Registration Serve Poor and Marginalised Groups?” (London, UK: IIED, 2005) at 26; U.N. Human Settlements Programme, “Secure Land Rights for All” 2008, at 20.

property rights,⁶² a key aspect of the strategy for the legal empowerment of the poor.⁶³

For instance, land titling is one policy approach for the legal empowerment of the poor that has gained significant traction among development theorists and practitioners. This involves: “State registration of written, publicly accessible, legally enforceable guarantees of (1) borders among land controllers (owners, tenants, farmers), (2) the scope of each land controller’s rights to use, rent in or out, sell, give away, mortgage, or bequeath land within the borders.” However, there are a number of significant challenges associated with land titling programmes as a measure for the legal empowerment of the poor. First, land titling programmes are an extremely expensive way of securing property rights and other alternatives for doing so may be more effective in some circumstances. Second, many land titling programmes have adopted the practice of granting land titles to the male heads of households to the detriment of women. Third, land titling programmes may in of themselves lead to the displacement of individuals and groups with lesser or unrecognised rights, such as women and Indigenous communities. In sum, while land titling programmes could have important benefits for fostering pro-poor growth, they are only one approach among others, rather than a plan to be pursued in isolation from other important objectives and aspects of the strategy for the legal empowerment of the poor.

⁶² See generally J.M. Ubink, A.J. Hoekema and W.J. Assies, ed., *Legalising Land Rights. Local Practices, State Responses and Tenure Security in Africa, Asia, and Latin America* (Leiden: Leiden University Press, 2009).

⁶³ See *Making the Law Work for Everyone*.

4. Advancing the LEP Agenda: Future Directions for Canadian Law & Policy Makers

There is a great deal left to do, to advance the LEP agenda. Very specific indicators of the need for greater attention to the legal and regulatory aspects of sustainable development assistance are visible.⁶⁴ For example, only one-quarter of States with Poverty Reduction Strategy Papers (PRSPs) have elaborated separate strategies related to the law, or legal empowerment. In the areas of social development and environmental protection, further evidence suggests that legal empowerment considerations remain unanswered or undervalued. Worldwide governance indicators developed by multilateral agencies also note that for a significant number of nation states, sizeable improvements in access to justice, quality of regulations, rule of law and government effectiveness remain possible. Such improvements are indispensable for global sustainability.

In anticipation of the 2011 LEP Roundtable at the University of Ottawa, numerous legal scholars and practitioners contributed to this Discussion Paper with their ideas for future directions in Canadian law and policy. Those contributions, reproduced below, provide a rich initial survey of ongoing endeavors and to key priorities for further action.

4.1 Legal Empowerment of the Poor in Principle and in Practice

What are our concepts of LEP, are there common visions? What are leading examples of LEP Practices among Canadians and our partners in developing countries? What are key barriers, and successes, and how can we be more effective?

There are many examples of LEP Practices led by Canadians and partners, in Canada. These initiatives are linked and connected through diverse networks and partnerships across Canada, and internationally.

CISDL & International Development Law Organization (IDLO)

CISDL and IDLO work in close collaboration on cross-cutting aspects of LEP through the International Law for Sustainable Development (ILSD) Partnership, which was launched at the Johannesburg World Summit on Sustainable Development in 2002. CISDL, together with the International Law Association, brings to the ILSD a roster of honoured international legal experts and advisors, a legal working group of engaged and active sustainable development law practitioners, professors and law students, and a commitment to high quality legal research, analysis and publications on sustainable development aspects of legal empowerment. The IDLO contributes its deep experience of legal practice, training and technical

⁶⁴ IDLO / CISDL / ILA ILSD, *Legal Empowerment and Global Sustainability* (IDLO / CISDL / ILA ILSD Partnership, 2011).

assistance in developing countries, as well as strong engagement in international policy-making on legal empowerment and development, as the **world's top** intergovernmental organization focused on justice sector reform and development. Together, supported by donor countries, they have led several LEP related programs, including the research and publication of legal scholarship, field operations in developing countries and dialogue / knowledge building events. A few brief examples include:

- Legal Empowerment Programs, which use IDLO and CISDL knowledge generated in their projects and research to anchor and advance legal empowerment approaches to secure the legal rights of vulnerable populations in developing countries including through targeted projects on Community Land Titling Initiative; Enhancement of Legal Empowerment Through Engagement with Customary Justice Systems; and Protection of Traditional Knowledge and Cultural Heritage of Indigenous Communities in the Agriculture Sector.
- Environment and Sustainable Development Programs, which lead three global initiatives piloted in five regions on legal and institutional reform for sustainable development. Initiatives include Legal Preparedness for Climate Change, Legal Preparedness for the Green Economy and Legal Aspects of Sustainable Resources Management.
- Health and HIV Law Programs, which seek to protect and promote health through law by improving legal and policy environments with a focus on HIV in China, Indonesia and Nepal.
- Dialogues and legal experts events with policy-makers and practitioners focused on legal empowerment aspects of the agendas of major UN treaties on sustainable development (UN Framework Convention on Climate Change, UN Convention on Biological Diversity). Recent examples include *International Law & Policy for a Low Carbon Economy: Developing Sustainable & Equitable Legal Frameworks for the Global Low-Carbon Economy*, a side-event at the UNFCCC COP 16 in Cancun; *Legal Empowerment of the Poor in the Green Economy*, a legal workshop at the UN CBD COP 19 in Nagoya, and *Impacts and Opportunities for Indigenous Peoples: Developing Indigenous-Led Climate Ventures for a Sustainable Future*, a workshop at the UNFCCC COP 15 in Copenhagen.
- The CISDL-IDLO also lead Legal Working Paper Series on these issues, such as the Legal Empowerment for Sustainable Development Legal Working Paper Series, launched in 2011 as part of the preparations for the 2012 UN Conference on Sustainable Development, and the Sustainable Development Law and Climate Change which has published 15 papers to date, including: Legal Frameworks to Support REDD Pro-Poor Outcomes; Making Jobs Work: The Right to Work, Jobs and Green Structural Change and Rights-Based Framework for Climate Finance.

International Development Research Centre (IDRC)

IDRC's *Social and Economic Policy Program Area* focuses on public policies that can help to reduce poverty and enhance social equity in developing countries through three broad thematic areas- Peace Conflict and Development (PCD) which addresses issues of governance and justice in conflict and post-conflict situations including issues of transitional justice; Globalization Growth and Poverty (GGP) which focuses on national and international policies towards inclusive growth, including development of **small and medium enterprises**; and **Women's Rights and Citizenship (WRC)** which aims at identifying and eliminating the barriers to women exercising their rights as citizens- including women's access to justice, sexual and reproductive rights and economic rights.

IDRC's ethos is based on the belief that **legal empowerment, and empowerment more generally, is fundamental to sustainable and holistic development.** Toward that end, IDRC supports research that learns, not just from best practices, but from a variety of complex contexts. IDRC shares the goal of LEP in promoting more open, inclusive and accountable systems across the political and economic spectrum and further agrees that **"institutional and legal reforms" alone will not do the job. An empowerment approach is required.**

Over the past decade, IDRC has supported research to understand how informal/traditional/alternative practices and structures work and also on how they interface with more formal structures and practices of the state. In many cases, this has led to the conclusion that one cannot separate formal from informal, as is so often done in conventional research and policy making. **Much of IDRC's work on Legal Empowerment of the Poor has been with a strong gender focus.** Two salient IDRC projects on LEP are:

- ***Exploring Women's Citizenship through the International Applied Research Learning Network on Poverty and Human Rights:*** IDRC supports this network created by the University Winnipeg Global College- an open source portal designed as a collaborative space for researchers and practitioners to share research and learning materials on LEP. The network aims to promote LEP with a particular focus on economic rights (labour, business, property), access to justice and **women's citizenship and governance.**
- ***Legal Empowerment of the Working Poor:*** A project led by Women in Informal Employment: Globalizing and Organizing (WIEGO) to study the laws, regulations and policies affecting the work, working conditions and livelihoods of workers (specially women) in the informal economies of Peru, Ghana and Thailand. The aim is to contribute to an enabling legal and regulatory environment for informal worker organizations to engage on legal issues and take advantage of legal gains.

IDRC has also supported research on **women's access to land rights**, particularly in Africa. A number of projects analyze issues such as social, institutional and legal structures that shape land tenure regimes and the **specific barriers to women's** access to land. For example, one project studies the effect of new land laws and policies towards decentralization of land **administration on women's entitlement to land in Kenya, Tanzania and Uganda.**

As much of the developing world is subject to customary and informal, rather than formal laws, IDRC supported work on LEP has tended to focus on formal as well as informal legal frameworks. This will continue to be a priority in **IDRC's programming**- for example, the interaction between formal and informal courts for access to justice and implications of this for the rights of citizens. The gender dimension of LEP also continues to be a priority and IDRC programming hopes to generate further knowledge on the implications **of legal frameworks on women's economic** opportunities.

University of Winnipeg Global College (LEPnet.org)

The University of Winnipeg Global College has hosted significant national and international events focused on the LEP Report, convening policy makers, rights advocates from Chief Strategy Officers focused on Aboriginal and women's rights based at the UN and in several countries, researchers, and representatives from multilateral agencies such as CIDA, World Bank, Asian Development Bank, Women's World Banking and UNDP.⁶⁵

A top priority identified in these events was the development of a collaborative website to facilitate multi-sectoral national and international collaborations on LEP. With support from CIDA, Peaceworks and IDRC, LEPnet.org was developed at the University of Winnipeg Global College and launched in August 2010. Still in its early stages, LEPnet is dedicated to fostering collaborations at the nexus of human rights and poverty, offering secretariat support for LEP practitioners and projects through Global College staff, including a knowledge facilitator. Currently, the knowledge facilitator supports groups, research centres and members in ten countries, including Canada, providing assistance to LEPnet members, for example by: (a) tracking funding opportunities and calls for papers and proposals and assisting members apply for human rights and poverty related projects; (b) building a research network among international human rights and poverty researchers, policy-makers, academics, and practitioners; (c) providing a secure online forum for research and policy development through publication dissemination and dialogue; and (d) creating and supporting networks of Canadian legal professionals and students who are building LEP international internships.

⁶⁵ Participants included members of the UN LEP Commission, President Allan Rock of the University of Ottawa and President Lloyd Axworthy of The University of Winnipeg.

Rights & Democracy

Rights & Democracy's approach to legal empowerment for socio-economic development is human rights based and considers the relationship between citizen and state. The International Bill of Human Rights is the relevant legal framework provided for their work. The Bill of Human Rights recognizes the Universal Declaration of Human Rights as well as treaties on Civil and Political, and Economic, Social and Cultural Rights (ESCR). Rights & Democracy supports projects that promote access to justice for human rights violations. In relation to ESCR specifically, this often means arguing in favour of justiciability itself as a legitimate human rights objective. In this respect, the LEP initiative can provide some valued support.

For Rights & Democracy, human rights are the first obligation of states (Vienna Declaration, Article 1) and in any situation of a conflict with other standards human rights obligations prevail (UN Charter, Article 103). They therefore do not consider business rights to be comparable on an equal status with human rights. We therefore do not endorse the view that **Industry Canada's efforts to conclude more BITS will result in a "win-win"** situation for the poor and disempowered. For example, investment treaty disputes bypass national legal processes and go straight to international adjudication with little or no transparency and participation for local stakeholders. Moreover, their work has noted that increasingly, international investment treaty provisions interfere with access to justice at the national level and/or put a chill on state efforts to legislate in the public interest.

Specifically on land, titling is often helpful but can sometimes be a source of disempowerment. There are many examples where titling programs have led to evictions, homelessness, hunger and loss of livelihoods. Some attention to conditions necessary for titling to be a positive contribution would be helpful.

Rights & Democracy's work includes advocating for human rights by (a) assisting with framework legislation on the right to food; (b) participating in research consortiums on extra-territorial obligations; (c) human rights impact assessments of investment projects/trade agreements; (d) a campaign to ratify the Optional Protocol on ESCR; case documentation; and (e) strategic litigation as an amicus curiae.

Kenya Ethical and Legal Issues Network

The Kenya Ethical and Legal Issues Network (KELIN), which received funding from the CIDA Partnerships Branch through the Canadian HIV/AIDS Legal Network, works with village elders to secure property rights for widows, particularly when their husbands have died from AIDS. The LEP agenda is usually framed in terms of access to justice through formal legal avenues but justice can also be secured through traditional legal systems. In both cases, of course, we have to be sensitive to gender bias. In the case of KELIN and the Luo tribe of Kenya, women and their children are benefitting from this

intervention. Funding for the work with the Luo tribe was also provided by OSI. However, the CIDA funding and support from the Legal Network was particularly important in building KELIN.

Indeed, Health Canada has conducted extensive work for the adoption of guidelines on HIV in the workplace for Asia-Pacific Economic Cooperation (APEC). Development of the guidelines was supported by Health Canada during its period as Chair of the APEC Health Task Force. The guidelines pay particular attention to vulnerable groups such as migrants, women and children.

A lesson from this and the KELIN example is that legal empowerment is a cross cutting intervention, and can support our efforts to promote human development in all other areas, such as health. Effective efforts for LEP require a more comprehensive government approach that includes departments such as Health Canada and PHAC.

North South Institute

The NSI President has represented the World Bank as a member of the Global Task Force on the Right to Development, and worked closely with the UN High Commissioner for Human Rights. He strongly believes that human rights and notably economic, social and cultural rights, have been under-utilized as a development tool for the poor, especially by the donor community. Depending on how it is packaged to governments and donors, he firmly believes that its time has come, noting that whilst the MDGs may in some cases be on target, unfortunately in most cases they miss the point.

He is committed to a revised policy research strategy that will build on research that the NSI has been doing over the past eight years and focus more broadly, in a scaled-up fashion, on how to govern more effectively the exploitation of natural resources, especially in sub-Saharan Africa and the **world's low-income** countries. **Rather than seeking to create a "win, win",** NSI will pursue a policy research agenda which will seek to produce a win, win, win. In others words in a sustainable manner seek to create conditions in which negotiations/discussions around access to resources (extractives, arable land, water) include not just the governments and the private companies involved in formulating the consent/access protocols, but equally the local communities, usually amongst the poorest, affected by the activities. What this implies, is application of the concept of Free, Prior and Informed Consent, a principle central to the convention on aboriginal rights. NSI is just completing extensive research with aboriginal communities in Colombia, Peru, Surinam, Guyana and Canada examining the extent to which Canadian extractive companies have been respecting their own CSR policies. Some of this work will be published very shortly. In the process, the experience of Canadian aboriginal communities has been transferred to their counterparts in Latin America, and has been instrumental in helping us

prepare and publish with these communities a manual, which effectively empowers those affected by such activities in their negotiations with governments and mining companies. One of the conclusions generated by **NSI's** research is that while CSR is perhaps a necessary behavioural principle, it is far from sufficient in producing the sort of sustainable outcome that the communities and even the governments concerned would desire.

Based on this work, NSI will be embarking in a next phase on scaling-up the bottom-up approach that the NSI have been taking and applying the lessons increasingly to sub-Saharan Africa where the scramble for natural resources is intensifying and governments and civil society organizations generally are weaker and less equipped to deal with the growing demand for resources. It is also in sub-Saharan Africa where the majority of low-income countries are, and where the income gaps are widening most. The NSI is currently in negotiations with a number of potential partner institutions in Africa and the UK interested in collaborating with them in this work. They are also in discussion with other groups in the US and Europe interested in identifying a more holistic approach to the governance of natural resources so that indeed a win, win, win can be produced. Not only can such an outcome produce sustainable development, it also reduces the risk of conflict over access to rents from those resources.

On a related front, NSI is working with researchers at two US universities to apply a newly developed methodology which will allow one to assess state expenditure performance in the progressive provision of certain basic services to the poor and most marginalized. The services measurable numerically are covered by the Universal Convention on Economic, Social and Cultural Rights and are especially critical for the poorest and most marginalized. With the methodology, we would in theory be able to numerically rank governments, which have signed or ratified the Convention, as duty bearers. Ultimately, NSI hopes to publish a report annually ranking the performance of governments, much as Transparency International has done with its corruption index, and the WEF has done with its competitiveness index. Publicly naming and shaming governments through such a ranking exercise would not only help donors in directing their assistance more effectively, but would also empower the poor and those who represent them in their interactions with governments on how scarce resources should be spent, including in the PRS process.

These vignettes simply provide a few examples of the work of Canadians on the linkages between LEP, human rights, health and sustainable development issues. The final version of this Discussion Paper aims to provide a more comprehensive and succinct survey of these efforts, without losing the richness of detail provided by these illustrations.

4.2 Improving Canadian Understanding and Support for Legal Empowerment of the Poor

What are the most important roles of Canada, and Canadians, in promoting legal empowerment of the poor, including through law and policy research, action and policy leadership? How to build understanding and support for legal empowerment in Canada, and among partners?

Canada plays a special role in promoting LEP internationally and at home. Through its various federal government departments, including the Canadian International Development Agency (CIDA), Industry Canada and the International Development Research Centre (IDRC), Canada provided Official Development Assistance of almost \$5 billion in 2009-2010.⁶⁶ That estimate, **however, truly underestimates the qualitative value of Canada's potential** support to developing countries, measured in research, education, technical assistance and other capacity building.

Canada's strong commitment to development aid and its relative advantage internationally with respect to professional legal expertise place our country in an opportune position to lead the implementation of LEP in a manner **consistent with the Report's recommendations**. LEP implementation must be strategic, practical and go beyond rhetoric. While LEP is a principled approach to development, it also implies simple nuts-and-bolts matter of aid **effectiveness. The Report's mission is clear: without the functioning and** appropriate legal and institutional frameworks, projects in socio-economic development whether for health, food security or environment, will not achieve their sustainable development objectives.

In addition to supporting legal empowerment programs and projects, donor countries, such as Canada, can also integrate legal empowerment methodologies into existing development activities and departments, for instance at the project planning stage in assessing aid.⁶⁷ With reference to **the Report's findings, a Canadian** LEP methodology could require project proposals to include social, economic and environmental impact assessments that, inter alia: identify and plan to mobilize key stakeholders in recipient countries; provide a diagnosis of legal empowerment challenges; and devise strategic plans for pilot activities, scaled-up actions and eventual institutionalization of legal reforms.⁶⁸ The same LEP methodology could be used to promote sustainable development goals here in Canada among our most vulnerable populations, such as indigenous communities, some of which have been proactively engaged in renewable energy business opportunities.⁶⁹

⁶⁶ CIDA, *Report to Parliament on the Government of Canada's Official Development Assistance 2009-2010*, online: <http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/NAT-112101555-JQZ#a2>.

⁶⁷ *Supra* note 1 at 278-279.

⁶⁸ *Supra* note 1 at 85.

⁶⁹ See for instance: Membertou Mi'kmaw Nation and GrupoGuascor partnership, Anaia Global Renewable Energies, online: <http://anaiaenergy.com>; Tseil-Waututh Nation and Endurance Wind Power collaborative initiative for wind power, online: <http://www.intertribaltimes.com/canada/b-c-first-nation-puts-2-million-behind-wind-power>.

However, as the work of the IDRC has demonstrated, a “cookie-cutter” approach to LEP cannot be applied. For example, IDRC supported research **on how women claim their rights or challenge a state’s failure to provide gender equitable justice** underscored the plurality of mechanisms that **women used to claim their rights in contexts of “state failure” or state absence**. LEP efforts also need to focus not only on formal systems and legal frameworks but also informal, traditional and alternative systems, which are particularly relevant in developing countries. International actors, especially Canadian actors, need to ensure that recommendations and actions are evidence based. If they are not, policy prescriptions can end up further marginalizing and disenfranchising the already marginalized and disenfranchised.

With respect to domestic actions, government agencies such as Industry Canada might create guidelines to encourage LEP in private-sector transactions. Formalization of the 4 pillars of LEP in specific investment agreements can increase bilateral trade in a fair and competitive marketplace, and improve performance of innovative Canadian-based low-carbon and climate resilient industries abroad, thus giving rise to win-win outcomes.

In order to create a structured policy for LEP implementation, including in instances of particular projects, Canada should also engage with members of civil society, such as legal research professionals with specialized expertise in the pro-poor green economy, gender issues, health and food security and other aspects of sustainable development.⁷⁰ Civil society partnerships can provide Canada with cost-effective information concerning the common legal barriers to poverty alleviation for specified project types; context specific reviews; recommendations for domestic and international institutional reform; and a compendium of best-practices for LEP effectiveness.

Further, academic and educational organizations can assist with knowledge-sharing initiatives to disseminate information on LEP tools for capacity building at the local level. This might include organizing conferences or Symposia on key issues related to Legal Empowerment of the Poor, hosting workshops and further roundtables on these issues, and otherwise promoting understanding and engagement with the approach in legal, academic, teaching and student experiences across Canada, and with partners abroad.

⁷⁰ *Supra* note 1 at 326.

The Centre for International Sustainable Development Law (CISDL)

The mission of the Centre for International Sustainable Development Law (CISDL) is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

The CISDL is an independent legal research centre which collaborates with the McGill Law Faculty in engaging students and interested faculty members in sustainable development law research and scholarly initiatives. The CISDL also works in cooperation with a network of developing country faculties of law, and holds close ties with Cambridge University, the Université de Montreal, Yale University, Capetown University, Hanoi University of Law and the University of Costa Rica. It has guidance from the three Montreal-based multilateral treaty secretariats, the World Bank Legal Vice-Presidency, the United Nations Environment Programme and the United Nations Development Programme, and memorandums of understanding with the International Institute for Sustainable Development (IISD) and the International Development Law Organization (IDLO).

With the International Law Association (ILA) and the International Development Law Organization (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership Initiative, International Law for Sustainable Development that was launched in Johannesburg at the 2002 World Summit for Sustainable Development, to build knowledge, analysis and capacity about international law and legal empowerment of the poor related to sustainable development.

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