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Alexa Jeremy 18/2/2013

A 'Power' Deficit? A Discussion of the Limitations of the 'Legal Empowerment of the Poor' Approach to Development

Unlike traditional approaches that integrate law and development, the Legal Empowerment of the Poor approach claims to focus more upon 'power' than law, and as a result, is a paradigm with ground - breaking potential.

The Legal Empowerment of the Poor approach ('LEP approach') is heralded as a 'new conceptual and operational tool for poverty eradication'¹ that typifies a broader and more inclusive understanding of poverty than traditional approaches to law and development. What differentiates this approach from the dominant law and development approaches² is its recognition that for the majority of the world's poor, laws exist on paper rather than in practice and that central to this problem is not the need for economic growth or law reform, but the powerlessness of the poor. Accordingly, the approach aims to strengthen the power and of the poor, so they may exercise greater control over their lives.

This thesis will argue that although the LEP approach offers much potential for empowerment of poor and marginalized people it fails to engage with or incorporate a framework for the concepts of power or empowerment. This results in a lack of conceptual clarity, which renders the approach open to a variety of interpretations and operational outcomes. One outcome is a neglect of formal institutions and organizations that are typically the focus of traditional approaches to development. This thesis argues that neglecting such institutions both hampers the process of empowerment and risks ignoring the structural systems that are responsible for people becoming and remaining poor.

¹ Dan Banik 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication' (2009) Hague Journal on the Rule of Law Vol 1: 117-131 at 117.

² I refer to law and development as the relationship between two concepts as opposed to the movement known as 'law and development'.

This thesis proposes a model that incorporates an understanding of how empowerment works. It further develops this model by proposing a power framework to operate alongside this empowerment model, to enable a more comprehensive understanding of how different types of power operate.

Chapter One: Understanding ‘Development’ and the Role of Law in Development

Chapter one gives an overview of how scholars and actors within global institutions have interpreted development from post war history to modern day. Although this history is nuanced, development has been largely influenced by dominant economic theories and has been understood as economic growth. The chapter shows how the narrow model of development has been challenged as the limitations of markets have been recognised, and as it has become evident that a set of economic prescriptions do not work for all countries in the same way. The chapter describes how attitudes to the role of law in development have changed over time, and demonstrates the way in which these attitudes have influenced development interventions. Attitudes range from the post-war understanding of law as subordinate to and instrumental in fulfilling the requirements of the state, to the dominant rule of law approach with its emphasis on private law, the role of the markets and economic growth.³ This chapter seeks to demonstrate that despite having historically been framed in a variety of ways, law has in fact functioned as a tool to achieve the objectives of economic growth. The chapter argues that despite the incorporation of social concerns, such as poverty alleviation, gender equity and human rights, the current, dominant approach to rights is still controlled by economists, development experts and politicians and the rationale behind it continues to be economic growth. The chapter ends by introducing the Legal Empowerment of the Poor (LEP) paradigm and argues that LEP address the limitations of the dominant approach.

³ David Kennedy, ‘The “Rule of Law”, Political Choices and Development Common Sense’ *The New Law and Economic Development, A Critical Appraisal* (2006) at 102.

Chapter Two: The Potential and Limitations of the Legal Empowerment Approach

Chapter two builds upon this discussion and argues that the LEP approach has a broader and more inclusive understanding of poverty than the dominant rule of law approach, namely poverty as a lack of control over one's life. The LEP approach aligns itself with Amartya Sen's concept of 'freedom,'⁴ whereby 'empowerment' is seen as both 'a process and a goal'⁵ towards poverty alleviation. The *process* involved aims to increase disadvantaged populations' control over their lives, and the *goal* is the achievement of that control. It is this notion of control that equates to increased power for disadvantaged populations. As a consequence, and as Stephen Golub, one of the pioneers of the LEP concept argues, the key concept of the LEP approach is not law but power. The second half of Chapter two argues that the LEP approach has a number of failings. First, despite claims that the approach is more about power than law, the approach neglects to examine the concept of power and empowerment respectively. Second, the LEP approach fails to incorporate a framework for either power or empowerment, thereby rendering the approach vulnerable to a number of operational outcomes.

Chapter Three: The Relationship between Power and Empowerment

Chapter three begins with an acknowledgement that the concepts of power and empowerment are fluid and complicated. The first section of this chapter builds upon this discussion, by analyzing in greater depth, both concepts of power and empowerment and how they relate to one another. The discussion aims to demonstrate why the LEP paradigm would benefit from incorporating a conceptual framework to understand and analyse power and empowerment. The second section of the chapter discusses the Holland and Brook empowerment model (the 'Empowerment Model'), which suggests that empowerment comprises the interplay of 'agency' and 'opportunity structure' as a framework for empowerment. Agency is about having the power to make meaningful choices about one's life, and the consciousness of this action. According to the Empowerment Model, a person's

⁴ Amartya Sen, *Development as Freedom* (2000) at 3.

⁵ Stephen Golub 'Beyond rule of law orthodoxy: The Legal Empowerment Alternative' (2003) Working Paper Rule of Law Series No 41 Carnegie Endowment for International Peace at 26.

agency is determined by their ‘asset base,’ which consists of a range of assets including human assets (for example levels of education), psychological assets (such as the capacity to envisage change) or material assets (such as levels of income). Opportunity structure is defined as the context (constituted by formal and informal institutions) within which actors operate, that has the potential to assist or constrain their ability to transform agency into effective action. Formal institutions refer to those institutions comprised of formal rules such as Constitutions, firms, laws, regulations or contracts. Informal institutions refer to those institutions comprised of informal rules, for example, sanctions, taboos, customs, traditions and codes of conduct. However, this chapter also argues that the Holland and Brooks model should be developed further to analyse how and why empowerment comprises the interplay of agency and opportunity structure. The chapter introduces John Gaventa’s theory of power, which has been employed by development scholars to understand how different levels, forms and spaces of power operate. The section proceeds to apply Gaventa’s power typology to the Empowerment Model, to more fully understand the types of power involved at both agency and opportunity structure components of the Empowerment Model. Finally, the chapter argues that use of the Empowerment Model and Power Framework enables a more comprehensive understanding of the power relations at work in a local, national and global context and therefore aids a more effective and targeted implementation of LEP strategies to aid the poor.

Chapter 4: The TAC – A Realisation of the Potential Power of the Legal Empowerment Approach

Chapter Four introduces South Africa’s Treatment and Action Campaign (‘TAC’) as an example of a campaign which recognized from the outset that empowerment depends upon a complex interaction of levels, forms and spaces of power, and its success was due in part to the recognition of this fact. The TAC was launched in South Africa in 1998 in response to the actions of international pharmaceuticals that aimed to prevent the passing of the Medicines Act of 1997. The Medicines Act allowed for the production and importation of cheaper anti-retrovirals, which would facilitate access to cheaper anti-retroviral medicines to millions of South Africans affected by the virus. However, the pharmaceuticals argued that the Act infringed

their intellectual property rights and would result in a loss of revenue to them. The TAC challenged the actions of the pharmaceuticals and campaigned for the passing of the Act in order to improve the affordability and access of quality health care to millions of South Africans affected by the HIV virus.

The first part of chapter four provides an overview of the TAC campaign from 1999 to 2003,⁶ and sets out the challenges the campaign faced during this period. The second part of the chapter acknowledges the internal and external obstacles and barriers limiting access to ARV treatment inherent within individuals, organizations and formal and informal institutions. Using the Holland and Brook Empowerment Model and Gaventa's Power Framework as lenses, the second section argues that the TAC's founders recognized that overcoming barriers to access would depend upon a combination of strengthening the individual agency of those affected by HIV/AIDS and harnessing the support and strength of organizations and institutions that comprised the opportunity structure. In this respect, the chapter demonstrates how the campaign leaders' awareness and use of power allowed the campaign to use the 'rules of the game' to its best advantage.

Chapter 5 - Conclusion: The LEP Approach – Limitations posed by a failure to engage with, or incorporate a framework for, power or empowerment.

The thesis concludes by asserting that although Golub's formulation of the LEP approach has significant potential to facilitate empowerment, the approach is limited in a number of ways and as a result, fails to achieve its full potential. The LEP approach's failure to engage critically with, or incorporate an understanding of power or empowerment, results in the approach lacking conceptual clarity. A lack of conceptual clarity or framework for power or empowerment has a number of implications for the approach, not least the tendency of LEP interventions placing too much emphasis on individual agency or institutions respectively. The conclusion asserts that Golub's formulation of the LEP approach places too much emphasis on individual agency and neglects the formal institutions and organizations that the ROL approach supports. As a result, the LEP approach fails to address the structural

⁶ Whilst the TAC continues its activities to the present day, due to the time frame examined in this chapter, the past tense will be used to describe TAC's activities.

systems that are responsible for people becoming and remaining poor. The thesis concludes by arguing that LEP approach must incorporate a framework for power and empowerment in order to depart from the limitations of the ROL approach and fulfil the approach's significant potential to facilitate empowerment.

Chapter One – Understanding ‘Development’ and the Role of Law in Development

1. Introduction – Understanding ‘Development’

The way in which ‘development’ is understood is influenced by social, political and economic factors and differing development narratives influence the way in which underdevelopment is defined, measured and addressed. Similarly, different development discourses frame what counts as knowledge, whose voices have the most influence in political and institutional contexts and which issues remain unaddressed. To understand contemporary mainstream development discourse calls for a historical perspective, one that situates it in relation to antecedent narratives. Therefore the first section of this chapter provides a brief overview of the various ways in which mainstream development has been understood. It seeks to show how the narrow model of development as economic growth has been challenged, as the limitations of markets have been recognised and as it become evident that a set of economic prescripts do not work for all countries in the same way. The chapter traces how conceptions of development have expanded from a post-war focus on industrialisation to a current broader understanding that places greater focus on social concerns such as poverty alleviation, gender equity and human rights.

The chapter also describes the changing relationship between law and development. Attitudes towards the role of law in development range from, post-war attitudes to law being subordinate to and instrumental in fulfilling the requirements of the state,⁷ to the present belief that the rule of law is synonymous with development,⁸ a development objective in itself, rather than a vehicle through which to achieve development. The dominant expression of this contemporary theory that is geared

⁷ David Kennedy (see note 3) at 102.

⁸ David Kennedy (see note 3) at 167.

towards bringing about the rule of law, and one which this chapter explores, is defined as the Rule of Law approach.⁹ The chapter shows that development policy has been dominated by neo-classical economic theory,¹⁰ the broad objective of which is the liberalisation of markets for global capital.¹¹ This theory presents poverty as something that can be objectively and scientifically measured and means that development is framed in terms that are presented as technical and apolitical. Similarly, this chapter seeks to demonstrate that despite the fact that the current Rule of Law approach to development purports to empower the poor and marginalised by making justice accessible to them, in practice, the approach has a neo-liberal agenda of economic growth and its strategy of strengthening formal institutions often reinforces the inequitable status quo. The rationale behind this institutional focus, namely courts and a functioning judiciary, is that the rule of law is essential for long-term development because it provides security for foreign and domestic investment and international trade, by protecting property, intellectual property and enforcing contract rights, thereby advancing economic growth.¹² As a result, economic outcomes are a direct goal of the approach, in contrast to the goal of poverty alleviation, which is indirect.

The second section of this chapter argues that the Rule of Law approach's focus on formal institutions neglects the fact that the poor and marginalised, for a host of financial, psychological, and geographical reasons are unable to access such institutions.¹³ Thus, the chapter argues that irrespective of what it is to achieve, the dominant Rule of Law approach serves as a medium through which the objectives of the neoliberal approach to development is furthered.

This chapter concludes by introducing the Legal Empowerment of the Poor ('LEP') paradigm as a new approach to law and development, formed as a reaction to the limitations of the dominant Rule of Law approach. The LEP approach purports to

⁹ Alvaro Santos 'The World Bank's uses of the "Rule of Law" Promise in Economic Development' (2006) Georgetown Public Law and Legal Theory Research Paper No. 12-053 at 253.

¹⁰ The neo-liberal approach is the name given to the policy outcomes of the neo-classical economic theory, which is dominated by Chicago economists.

¹¹ Joseph E. Stiglitz 'Capital Market Liberalization, Globalization and the IMF' Oxford Review of Economic Policy, vol 20, no 1 (2004) at 1, accessed at http://www.relooney.info/00_New_951.pdf on 15 November 2012.

¹² Stephen Golub, (see note 5) 5.

¹³ Stephen Golub (see note 5) at 15.

have the poor as its central focus, and understands poverty, in the broad sense, to mean a lack of control over one's life. This chapter shows that development narratives have often marginalised poverty alleviation and prioritised other concepts of development, such as modernisation or economic efficiency. However, in order to provide context to the LEP approach's understanding of and focus upon poverty, the chapter pays particular attention to how the various development discourses have framed poverty.

2 The Post-war period

The following section provides an overview of how post-war attitudes towards development prioritised 'modernisation' over poverty reduction as a policy outcome, and how the role of law was instrumental in furthering this outcome.

2.1 Post war attitudes towards Development

Prior to the Second World War, mainstream development was dominated by economists and focused upon the state, macro-phenomena,¹⁴ and the accumulation of capital and economic growth. Social aspects of development¹⁵ were considered secondary to the goal of economic growth.¹⁶

The immediate post war period linked poverty to the notion of 'underdevelopment.' Newly independent 'southern' countries were conceptualised as being at the beginning of a linear path towards the more 'modern' societies of the North. Brock et al¹⁷ write that:

'In this post-war model of development, poverty is an effect rather than a cause of underdevelopment and is not therefore the direct focus of policy.'¹⁸ Instead, policy outcomes prioritised modernisation¹⁹ over poverty reduction.

¹⁴ Hans-Otto Sano, Development and Human Rights: The Necessary but Partial Integration of Human Rights and Development, *Human Rights Quarterly* (2000) 734-752 at 739.

¹⁵ Such as the environment and poverty alleviation..

¹⁶ Hans Otto Sano (see note 14) at 739.

¹⁷ Brock, Cornwall, Gaventia, Institute of Development Studies, Working paper 143, P
faming of poverty policy, Oct 2001 at 11.

spaces in the

¹⁸ *ibid*

In this context of modernisation, emphasis was placed on and technology, with the concomitant presumption that scientific knowledge is objective and free of value judgements. Within this narrative, poverty was defined as a material phenomenon, which was based on the positivist assumption that poverty is measurable and could be quantified by monetary indicators.²⁰

The way in which poverty is framed has a direct influence on the ways in which poverty reduction policies are shaped. So, during this post-war period, interventions focused on industrialisation, productivity gains and capital accumulation, which would promote growth and, as a corollary, alleviate poverty. Furthermore, by presenting poverty as something scientific, measurable, and apparently objective, it meant that development policy was framed in terms that were technical and politically neutral.²¹

2.2 Law and Development in the Post-War Period

In the post-war era, law served a mainly instrumental role in furthering developmental objectives and ‘development policy focused on the role of the state in managing the economy and transforming traditional societies.’²² In practice, the implementation of economic theories of modernisation required an expansive legal regime. Industrialization required the establishment of many public law institutions, which in turn required legislation and policy with which to establish and administer the various elements of the system (eg controlling borders, implementing tariffs and collecting taxes).²³ Emphasis was placed upon the value of public law, (which, at this time played a far more prominent role in society private law) and its potential to translate economic theories and policy objectives into action. Rather than setting limits upon society, or expressing commitments to be adhered to, law was understood as being subordinate to the objectives of society, which were ostensibly concerned with economic development. This was reflected in the language of

¹⁹ The term modernisation in this period focussed on the truction of infrastructure such as universities and hospital-effectively industrialising the economy/or ‘repeating transformations that had occurred in the north during the industrial revolution’ Kennedy (see note 3) at 98.

²⁰ Brock, Cornwall, Gaventa, (see note 17) at 10.

²¹ Brock, Cornwall, Gaventa (see note 17) at 10.

²² David M. Trubek and Alvaro Santos, ‘Introduction, The Third moment in Law and Development Theory and the emergence of a new critical practice’ (2006), *The New Law and Economic Development* pp 1-18 at 2.

²³ David Kennedy (see note 3) at 102.

development policy, which David Kennedy asserts was ‘made by politicians and development experts, in the vocabulary of economics.’²⁴

3. The 1970s.

The following section describes how 1970s attitudes towards development were formed in reaction to the economic objectives of 1960s development aims.

3.1 Attitudes towards Development in the 1970s

In the 1970s however, the belief that poverty existed a result of economic disparity began to be challenged.²⁵ This was partly a response to the increasing realisation that the growth that stemmed from the previous post-war development model had not translated into redistribution of the benefits of growth to the poor. A political vocabulary came to replace one of economics, which changed thinking as to what development meant and how it should be achieved.²⁶ As a result, discussions regarding development focused far less than before on ‘modernization’ and ‘industrialization’ and more on multi-disciplinary and more micro-oriented²⁷ indicators which reflected an improvement in quality of life.²⁸

As a result, poverty began to be described in terms of other physical and material factors, such as ‘education,’ ‘literacy,’ ‘infant mortality rates,’²⁹ ‘nutrition,’ ‘low health standards’ and ‘adequate shelter.’³⁰ The World Bank’s agenda of ‘basic needs’ under Robert McNamara’s presidency (1968 to 1981) put social goals and women’s concerns on the agenda and epitomized this change in thinking.³¹ This emerging trend placed poverty alleviation at the forefront of the Bank’s mission and led to an emphasis in funding of urban infrastructure and services in both the health and education sectors. Indeed, these new development indicators were the focus of direct and targeted government programs, both nationally and internationally and they allowed progress to be measured and global comparisons to be made.³² Concomitant with this development in World Bank thinking was an emphasis on an integrated

²⁴ David Kennedy (see note 3) at 105.

²⁵ David Kennedy (see note 3) at 112.

²⁶ David Kennedy (see note 3) at 111.

²⁷ Hans Otto Sano (see note 14) at 739.

²⁸ David Kennedy (see note 3) at 112.

²⁹ Ibid.

³⁰ Misturelli Federica and Heffernan Claire What is Poverty? A diachronic exploration of the discourse on poverty from the 1970s to the 2000s. *The European Journal of Development Research* Vol 20 No.4 December 2008 666-684 at 671.

³¹ David Kennedy (see note 3) at 113.

³² Ibid.

approach to development, arising from the popularization of political science's world systems theory. This 'highly structural and systematic exercise'³³ regarded all facets in the system of development as vital for the roles they play both individually and collectively. The systems perspective envisaged a pivotal role for the state, as well as social infrastructure. Together with dependency theory, the systems perspective reinforced the idea that development would require significant changes to the global political and economic system³⁴ and simultaneously framed the poor as part of the development system rather than simply a problem that needed to be solved.

However, the greater global forces that were at work in this era, such as the 1973 oil crisis, rising interest rates, and floating exchange rates³⁵ meant that the evolving economic context of this era was that of rapidly slowing economic growth and the provision of 'cheap' development loans primarily by first world private banks to third world governments to finance basic needs. These 'facilitated unprecedented and unsustainable levels of national indebtedness across the developing world.'³⁶ Fiscal policy replaced development policy and national governments gradually lost their margin to negotiate with foreign private banks, monetary authorities and to the IMF. Meanwhile, a new development vision was taking shape that refuted the economic ideas of the post-war period and the political ideas of the 1970s. These ideas found their proponents in institutions such as the IMF and the private banks of the north.³⁷

3.2 Law and Development in the 1970s

The shift in thinking from economic theory to more political ideas regarding development, also meant that to an extent, in the 1970s 'legal ideas became more significant to development policy expertise than economic theories.'³⁸ As with its forerunners in the post-war period, law was an instrument of social purpose, its function largely to perform an instrumental role in implementing an economic, but now also political development agenda.³⁹ Public law remained salient, its role being to empower the state, which (unlike private markets which were assumed to be too

³³ Brock, Cornwall and Gaventa (see note 17) at 11.

³⁴ Ibid.

³⁵ David Kennedy (see note 3) at 117.

³⁶ Ibid.

³⁷ Ibid.

³⁸ David Kennedy (see note 3) at 111.

³⁹ David Kennedy (see note 3) at 117.

weak to ensure growth) played a commanding role in the economy.⁴⁰ However, during this decade, the legal ideas of development experts began to change.⁴¹ One important development was a newfound appreciation for the significance of formal rights.⁴²

The influence of the 'law and development' movement (which originated in the United States in the 1960s) was one reason behind a change in attitudes. Law came to be understood less as an instrument to express social needs as dictated by economic theory, and more as a medium that 'expresses competing social needs and purposes, which the jurist, no less than the administrator or political leader, must weigh and balance.'⁴³ As a result, law became regarded as an instrument for balancing and selecting among diverse claims.

Against this backdrop, a new legal order began to emerge. This new order placed emphasis on legal education in developing societies, the assertion of rights and self-determination of the peoples of newly independent states, and international legal obligations.⁴⁴ The international human rights movement was borne in this period, and as a result, the humanitarian objectives of development policy began to be articulated as social and economic rights⁴⁵ and a call arose for development itself to be transformed into a right. This focus on rights was accompanied by a turn to the judiciary to enforce these rights, as opposed to the action of states or international institutions.⁴⁶

4. The 1980s

The following section however describes how the 1980s represented a reversal of much of the 1970's thinking and how the decade was dominated by neoliberal policies and characterized by structural adjustment policies.

⁴⁰ David M. Trubek and Alvaro Santos (see note 22) at 29.

⁴¹ David Kennedy (see note 3) at 120.

⁴² David Kennedy (see note 3) at 120.

⁴³ David Kennedy (see note 3) at 121.

⁴⁴ David M. Trubek 'The Political Economy of the Rule of Law: The Challenge of the New Developmental State' (2008) Hague Journal on the Rule of Law, Vol 1, No 1 at 6.

⁴⁵ David Kennedy (see note 3) at 123.

⁴⁶ David Kennedy (see note 3) at 123.

4.1 Attitudes towards Development in the 1980s

The 1980s was characterised by a 'neoclassical contraction'⁴⁷ and a reversal of much of the previous decade's thinking where development was concerned. Widespread disillusion with the outcomes of state-led development resulted in economic growth being reinstated as the most effective means for poverty alleviation, and a move away from interest in social sectors and micro-orientation.⁴⁸ This neoliberal understanding of economic development saw a limited role for the state in the economy and a view that the private sector would deliver economic growth, only if free from state regulation. As a result, the idea of a free market (an economy controlled by supply and demand without state intervention) prevailed.

The focus on poverty reduction of the 1970s was cast aside and the structural adjustment policies ('SAPs') of the IMF and World Bank came to dominate the decade. These policies were presented as matters of necessity to stabilise failing economies and restore economic growth, and were in fact closely aligned with political conditionality. This conditionality was imposed on Southern country governments and resulted in the decreased autonomy of such governments and the increased power of donors and lending institutions to shape policies. SAPs included the removing of excessive government controls such as import taxes, cutting public expenditure on health and education and eliminating all industry subsidies, including those to agriculture.⁴⁹ The narrative of development as economic growth assumed that such austere measures would result in economic growth and the benefits of which would 'trickle down' to the poor. However, in reality, these measures resulted in exacerbated levels of poverty due to decreased provision of basic social services, rising unemployment, falling wages, increased infant mortality rates, lack of food security and declining school enrolment rates.⁵⁰

⁴⁷ Hans Otto Sano (see note 14) at 739.

⁴⁸ Hans Otto Sano (see note 14) at 740.

⁴⁹ The World Health Organization website, Structural Adjustment Programmes accessed on <http://www.who.int/trade/glossary/story084/en/index.html> on 1 July 2012.

⁵⁰ A broad discussion in respect of SAPs is beyond the scope of this thesis, but for further information, Joseph E. Stiglitz details this point in his book 'Globalization and its Discontents' (2002).

4.2 Law and Development in the 1980s.

The emergence of neo-liberal ideas about development as economic growth meant that during the 1980s, law functioned as the instrument for neoliberal policy.⁵¹ Unlike the post-war view that the state was best placed to orchestrate the economy, neoliberalism posits that the private sector is the engine of economic growth. The state was to play an enabling role, but not interfere the market. The role assigned to law was to limit the role of the state and facilitate the development of the private sector.⁵² In neoliberalism's premise that markets were necessary for economic growth, the primary role attributed to legal institutions was that of a foundation for market relations.⁵³ Completely new legal regimes were necessary to achieve policies of structural adjustment and conditionality, domestically and internationally in order to support markets, financial and, intellectual property regimes. New statutes and regulations were required to structure the privatization of state d enterprises, establish financial institutions and support new capital markets. As a result, private law became more salient than public law and courts played an increasingly significant role as they were regarded as central to enforcing market transactions by enforcing contracts and upholding property rights,⁵⁴ and 'protecting business against the intrusions of government.'⁵⁵ This role of law, specifically the judiciary in enforcing such rights was thought to be universal, the attitude being that 'markets were markets and therefore the same legal foundations ould be needed and could operate anywhere.'⁵⁶ Trubek and Santos summarise the 1980s as a time in which 'neoliberal law and development thought focused primarily on the law of the market' and one in which 'relatively little concern was shown for law as a guarantor of political and civil rights or as protector of the weak and disadvantaged.'⁵⁷

5 The 1990s

The following section sets out how attitudes to development in the 1990s were shaped to a large extent by disillusion with the effects of structural adjustment policies.

⁵¹ David M. Trubek and Alvaro Santos, (see note 22) at 2.

⁵² David Kennedy (see note 3) at 139.

⁵³ David M. Trubek and Alvaro Santos, (see note 22) at 2.

⁵⁴ David Kennedy (see note 3) at 139.

⁵⁵ David M. Trubek and Alvaro Santos, (see note 22) at 2.

⁵⁶ David M. Trubek and Alvaro Santos, (see note 22) at 6.

⁵⁷ David M. Trubek and Alvaro Santos, (see note 22) at 2.

5.1 Attitudes towards Development in the 1990s

During the early 1990s, growing opposition in the South to structural adjustment policies, the Asian and Latin American currency crises, and a widespread feeling of vulnerability to globalisation in the North were some of the many reasons which fuelled widespread disappointment with the economic, political and social results of the neoliberal paradigm. This opposition was reflected in the publications of international development agencies, such as UNICEF's 'Adjustment with a Human Face'⁵⁸ report, which documents the failures of SAPS as having neglected society's most poor and vulnerable. The real backlash came in 1990 when the UNDP released its Human Development Report.⁵⁹ The focus of the UNDP report in particular departed from the economically motivated attitudes of the 1980s to a concern for human development and the ability of people to choose their livelihoods.⁶⁰ The thrust behind this report was that development should be people-centred and should lead to the empowerment of the poor as opposed to their marginalisation.⁶¹ Critiques levelled at neoliberal policy makers questioned the exclusive focus on economic growth that had previously dominated development thinking and which had not necessarily lead to poverty alleviation.⁶² In addition, critics such as Joseph Stiglitz questioned the lack of attention paid to existing local institutions and the assumption that laws and legal institutions which were thought to reflect best practice could be transplanted (by top down development interventions) into any context. Critics noted that an understanding of local context was paramount to effective economic policies and in practice, disregarding the importance of this had often led to results diametrically opposed to those that had been intended.⁶³

Economist Amartya Sen had considerable influence on the reframing of poverty and development in this period. The core principle behind the 'capabilities approach' is

⁵⁸ Note this was published in 1987.

⁵⁹ UNDP, Human Development Report 1990 (1990).

⁶⁰ UNDP report (see note 59) at 10.

⁶¹ Ibid.

⁶² See here Stiglitz, who was World Bank vice-president. He wrote 'Globalisation and its discontents' which critiqued structural adjustment.

⁶³ David M. Trubek and Alvaro Santos, (see note 22) at 6.

that poverty is a multifaceted phenomenon, at the heart of which is a lack of freedom. His book, *Development as Freedom*⁶⁴ articulates the idea that all individuals are equipped with a set of capabilities which determine what an individual is able to do, or is capable of.⁶⁵ Poverty is a denial of capabilities and freedoms to achieve what each individual is capable of and freedoms include for example, being well nourished and healthy, having access to information and to be able to participate in community life. Development is a process of expanding the real freedoms that people have cause to value. Expansion of freedoms is seen as both the principal means and the primary end of development.⁶⁶ In this sense, Sen draws parallels between freedoms and rights when expounding the intrinsic and instrumental importance of democracy and human rights in achieving developmental goals.⁶⁷

Set against a backdrop in which efforts were made to define development as freedom and not just economic growth, and focus was placed on poverty reduction and concern with local context,⁶⁸ attitudes to the role of law also began to change. In addition to creating the infrastructure for markets, law, in the form of human rights (which included socio-economic rights) gained ascendancy as a means to social needs that markets could not meet.⁶⁹

The international backlash therefore ensured that the development agenda once more took social and environmental considerations into account. Developmental lessons learned from the neoliberal era included respecting existing institutions, social networks, and peoples' livelihoods and being cautious of their destruction in the name of development.⁷⁰ In addition, development policy makers placed greater emphasis than before upon participation by the poor in poverty alleviation efforts and ensuring that the goals of development come from the choices and decisions made by development actors themselves.⁷¹ During this post neo-liberal era, neo-classical assumptions had not essentially shifted, but rather had just reformed. The focus of

⁶⁴ Amartya Sen, *Development as Freedom* (2000).

⁶⁵ In addition, Sen also played a major role in developing tools to measure human development, beginning with the Human Development Index (HDI), leading to the Gender Empowerment Measure (GEM) and Gender –Related Development Index (GDI) which covered issues of gender equality. Finally, the Human Poverty Index was developed and published in the 1997 HDI, which aims to measure poverty in terms of human lives rather than incomes.

⁶⁶ Amartya Sen (see note 4) at 3.

⁶⁷ Bhupinder Chimni 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels' *The Law and Development Review*, Vol 1, Iss.1 (2008) Art. 2 at 12.

⁶⁸ David M. Trubek and Alvaro Santos, (see note 22) at 2.

⁶⁹ David M. Trubek and Alvaro Santos, (see note 22) at 2.

⁷⁰ David Kennedy (see note 3) at 154.

⁷¹ Hans Otto Sano (see note 14) at 740.

development policy was provided less by economics and more from the concept of the ‘nature of the good state,’⁷² which it was envisaged would define the framework and create an enabling environment for human development. There was increasingly a more balanced view of the role of the state, which was understood to be neither minimalist (as heralded by neoliberals in the 1980s), nor interventionist (as reflected by the post-war state model). Rather, the state was viewed as stable, striking the balance between public and private and ‘oriented toward maintaining a social democratic market, integrated with the world economy.’⁷³ In this period, the meaning of development came to correspond with definitions of ‘human rights’ – the ‘rule of law’ whereby the promotion of human rights became synonymous with the promotion of development itself.⁷⁴

It is important to note however, that despite this incorporation of attention to peoples’ livelihoods, and human rights into the meaning of development, the neoliberal agenda of the previous decade continued to prevail, albeit now with a softer face.

5.2 Law and Development in the 1990s

In the 1990s, the rule of law came to be seen as an end in itself, a development objective, rather than a means to achieve development. What the ‘rule of law’ meant varied over time. Attention shifted from legal reforms to support market institutions such as a stock exchange, a system of banking and corporate law, to an increasing importance placed upon elections, courts, judicial review and local human rights commissions. Kennedy highlights the increasing importance of law and legal institutions in the 1990s when he asserts ‘it now seemed that building the rule of law - the whole rule of law, all the institutions and all the rules would be necessary, one that...substantively respected human rights and market freedom.’⁷⁵ Indeed, courts were regarded as central to market transactions such as the enforcement of contracts, property and other private rights, and a means to resist encroachment by the state.⁷⁶

⁷² David Kennedy (see note 3) at 156.

⁷³ *ibid.*

⁷⁴ David M. Trubek and Alvaro Santos, (see note 22) at 1.

⁷⁵ *Ibid.*

⁷⁶ David Kennedy (see note 3) at 141.

6. The Contemporary Period

The following section provides an overview of how contemporary development ideas, whilst incorporating a range of social concerns such as rights, gender and poverty alleviation, in fact continues to reflect mainstream neoliberal attitudes.

6.1 Contemporary Attitudes towards Development

Development practitioners today do not share the consensus that characterized the post-war and neoliberal periods about what constitutes development.⁷⁷ Policy ideas that dominate the development field include macroeconomic stability, engagement with the international trade system, anti-corruption and transparency as prescriptive for government reform, and the pursuit of human rights.⁷⁸ The increasing emphasis given to social concerns within development discourse is reflected in the contemporary rhetoric of the World Bank's Comprehensive Development Framework (CDF), which states that development theory must consider the structural, social and human dimensions of development. In practice this translates into greater concern for direct poverty alleviation, democracy, access to justice, gender equity and human rights.⁷⁹ Whereas the neoliberal development agenda presents itself as technical, apolitical and necessary for economic growth, the inclusion of social concerns into development rhetoric and practice has the potential to re-politicise development by introducing concepts such as accountability into the development framework. One outcome of this potential re-politicisation of development is that existing unequal power structures and relationships which previously worked to benefit elites could potentially now be challenged. Although development discourse has incorporated a *number* of social concerns, a brief discussion regarding the incorporation of a human rights narrative into the development agenda is a useful illustration of their overall potential.

The incorporation of human rights into the development agenda is known as a 'rights based approach' to development. There are numerous interpretations of how human

⁷⁷ David Kennedy *Law and Development Economics: Toward a New Alliance* (2008) at 49 available at www.topwongs.org/law-and-development-economics-toward-a-new-alliance, accessed on 24 January 2013.

⁷⁸ *Ibid.*

⁷⁹ David M. Trubek and Alvaro Santos, (see note 22) at 11.

rights and development relate and what is meant by a ‘human rights based approach to development (‘HRBA’). Theoretically, there are divergent views on the way the two paradigms frame and work together. DIFD’s report on Human Rights for the Poor states that an HRBA states that:

‘...all people...have a right to demand that governments fulfil their duties to respect, protect and promote civil, cultural, economic, social and political rights. Because these obligations are internationally agreed and monitored, citizens can use them to hold their governments to account.’⁸⁰

Cornwall and Musembi extend this notion of accountability by stating that ‘the language of a ‘rights-based approach’ in the development context also offers the possibilities for an expanded notion of accountability for rights to non-state actors.’⁸¹ This assertion is reflected in the Draft Guidelines for a Human Rights Approach to Poverty Reduction Strategies wherein the UN High Commissioner for Human Rights states that ‘accountability of policy makers and other actors whose actions have an impact on the rights of people...is perhaps the most important source of added value in the human rights approach.’⁸² By providing a normative framework of ‘rights’ to ‘development’ the Human Rights- based approach frames poverty as an issue of justice. The ability to demand rights, coupled with the ability to hold states to account if one’s rights are not realised means that rights are essentially ‘a priori about power relations.’⁸³ It is this political nature of rights which brings ‘power relations centre stage in poverty reduction’⁸⁴ and gives the Human Rights based approach the potential to re-politicise development.

However, despite the fact that current dominant economic theory social concerns, such as rights, gender issues and poverty alleviation, it is important to note that this dominant theory does not constitute a new development model. Rather, it reflects an incorporation of social considerations into the mainstream neoliberal

⁸⁰ Department for International Development ‘Realigning Human Rights for Poor People’ Strategies for achieving the International Development Targets, (2000) Strategies Paper at 10.

⁸¹ Andrea Cornwall and Celestine Nyamu-Musembi ‘Putting the ‘rights-based approach’ to development into perspective’ (2004) Third World Quarterly, Vol 25, No.8 pp 1415-1437 at 1417.

⁸² CESR Human Rights insights no.1 Draft for comments accessed at <http://www.cesr.org/downloads/CESR%20Briefing%20-%20Human%20Rights%20and%20Poverty%20-%20Draft%20December%202009.pdf> in December 2010.

⁸³ Caroline Moser ‘Rights Power and Poverty reduction’ (2004) Power, Rights, and Poverty: Concepts and Connections, World Bank Publication (Ruth Alsop (ed)) at 30.

⁸⁴ Ruth Alsop and Andrew Norton ‘Power, Rights and Poverty Reduction’ (2004) Power, Rights, and Poverty: Concepts and Connections, World Bank Publication (Ruth Alsop (ed)) at 8.

paradigm. Mainstream development attitudes continue to stress the importance of markets as the central mechanism for economic growth. Although social concerns such as health and education are valuable goals in themselves, arguably the current approach to development incorporates such considerations because they are instrumental in providing a secure framework for economic growth. For example, an educated and healthy population is better able to generate and make use of economic opportunities. The resulting increase in income allows people to generate more employment opportunities and re-invest in society, expanding and contributing to a better standard of services and facilities that public enjoy. The underlying assumption is that a secure and stable environment better attracts foreign and domestic investment, as it is better equipped to safeguard property and contract rights. As such, the incorporation of social concerns into neoliberal rhetoric does not reflect deep structural changes in policy and practice, and the overarching narrative regarding poverty is that economic growth reduces poverty through the trickle down effects of economic growth.

6.2 Law and Contemporary Attitudes to Development

Similarly, the role of law in development continues to codify these neo-liberal interests and in effect, operates as a tool in the hand of the neoliberal agenda. The alignment of the role of law with a neoliberal agenda is well illustrated by Santos and Trubek's assertion that the 'development world's continued faith in markets' is reflected in the 'World Bank legal projects which still focus primarily on creating the conditions of market activity.' Indeed, the idea that the legal system is essential for economic growth now forms part of the conventional wisdom in development theory.⁸⁵ The idea's most common expression is the 'Rule of Law' ('ROL'): 'a legal order consisting of predictable, enforceable and efficacious rules required for a market economy to flourish.'⁸⁶ It is important to differentiate between conceptions of the rule of law⁸⁷ and traditional rule of law development ideas, strategies and practices aimed at bringing about the rule of law often as means to achieve good governance,

⁸⁵ Santos (see note 9) at 253.

⁸⁶ Stephen Golub (see note 5) at 9.

⁸⁷ While defined in various ways, the rule of law prevails where (i) the government itself is bound by the law, (ii) every person in society is treated equally under the law, (iii) the human dignity of each individual is recognized and protected by law, and (iv) justice is accessible to all. (citing World Bank, *Legal and Judicial Reform: Observations, Experiences, and Approach of the Legal Vice Presidency* (Washington D.C: World Bank, July 2002) at 1.

poverty alleviation and economic growth.⁸⁸ For ease of reference, rule of law practices, (as distinct from rule of law per se) will in be referred to as the 'ROL approach.'

One assumption of the ROL approach is that institutions are fundamental for economic growth, and by corollary, for development. The approach understands 'institutions' narrowly to mean institutions as organizations, with a particular focus on state institutions.⁸⁹ As a result, the approach places strong emphasis on the strengthening of institutions such as prosecutorial services, judiciaries and the police, and more recently new state initiatives, which are designed to empower the private sector and ensure competitiveness— such as public private partnerships and new forms of social policy.⁹⁰

The ROL approach's neoliberal agenda of presenting development interventions as technical and with 'objective scientificity,'⁹¹ is reflected in the World Bank's powerful rhetoric, which '[justifies] the Bank's involvement in reforming developing countries' legal and judicial systems [by portraying] this endeavour as an apolitical one.'⁹²

Whilst legal language may give the appearance of being logical, analytical and apolitical, ROL approach interventions reflect the interests and power of certain groups and are therefore always political. As Kennedy states, such legal vocabulary 'emphasise(s) some things and leaves others behind.'⁹³ This reasoning is exemplified by the ROL approach's emphasis upon the importance of in particular the judiciary, and its failure to address the fact that in reality, such institutions are often inaccessible to the poor. Institutions, in particular access to justice is inaccessible to poor people owing to substantive or procedural barriers (such as lack of financial means, physical inaccessibility, language issues and low legal literacy,

⁸⁸ Stephen Golub (see note 5) at 7.

⁸⁹ This narrow interpretation is to be contrasted with Douglass North's all encompassing definition of 'institutions' as 'the rules of the game in a society, or... the humanly devised constraints that shape human interaction...both formal constraints- such as rules that human beings devise-and informal constraints- such as conventions and codes of behaviour' (Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge, U.K: Cambridge University Press, 1990) at 110.

⁹⁰ Trubek (see note 44) at 30 and 31.

⁹¹ Andries du Toit 'Poverty Measurement Blues: Some Reflections on the Space for Understanding 'chronic' and 'structural' poverty in South Africa' (2005) 5 *Chronic Poverty and Development Policy* at 7.

⁹² Santos (see note 9) at 256.

⁹³ Kennedy (see note 3) at 105.

unfamiliarity of court procedures) psychological barriers (a mistrust or fear of the law), unequal power relations, lack of procedural information, and the length of time it takes to process cases.⁹⁴ As a result, the majority of poor rely on other formal non-judicial institutions or informal justice mechanisms to provide quick, inexpensive and culturally relevant remedies.⁹⁵ The ROL approach's focus upon formal institutions, and its neglect of the litany of reasons which make these institutions inaccessible to many, detracts attention away from the key structural and relational factors which cause poverty, and limits the way in which both development and poverty are understood. In addition, the typically top down and contextually blind interventions of the ROL approach have been criticised as being a 'breathtakingly mechanistic approach.'⁹⁶

Legal Empowerment of the Poor ('LEP') is a 'new conceptual and operational tool for poverty eradication'⁹⁷ that has emerged as a reaction to the 'limitations'⁹⁸ and 'structure blindness'⁹⁹ of the ROL approach.

6.4 The Legal Empowerment Approach - A departure from the ROL approach

The LEP approach typifies a broader and more inclusive understanding of poverty, and offers a new paradigm for integrating law and development.¹⁰⁰ Stephen Golub, the pioneer of the LEP approach, refers to the ROL approach as being 'top-down, state-centred' and based on 'questionable assumptions, unproven impact and insufficient attention to the legal needs of the disadvantaged.'¹⁰¹ By contrast, the LEP approach recognises that development need not only be confined to institutions and policies, but should explore the broader cultural, social political and socio-economic

⁹⁴ Ewa Wojkowska, *Doing Justice*, 'How informal systems can contribute' UNDP Oslo Governance Centre (December 2006) accessed on 1 May 2012 at 13.

<http://www.democraciaejustica.org/cienciapolitica3/sit/default/files/doingjusticeewawojkowska130307.pdf>

⁹⁵ Wojkowska (see note 94) For this reason, Wojkowska states that 'Informal justice systems are often more accessible to poor and disadvantaged people and may have the potential to provide quick, cheap and culturally relevant remedies. Informal justice systems are prevalent throughout the world, especially in developing countries. They are the cornerstone of dispute resolution and access to justice for the majority of populations, especially the poor and disadvantaged in many countries, where informal justice systems usually resolve between 80 and 90 percent of disputes.'

⁹⁶ Martin Krygier, *The Rule of Law and 'The Three Integrations'* (2009) *Hague Journal on the Rule of Law* 1:21-27 at 24 citing Thomas Carothers 'The Problem of Knowledge' in *idem*, *Pursuing the Rule of Law Abroad. In Search of Knowledge*, (2006), pp. 15-30 at 21.

⁹⁷ Dan Banik (see note 1) at 117.

⁹⁸ Stephen Golub (see note 5) at 7.

⁹⁹ Stephen Golub, (see note 5) at 3.

¹⁰⁰ Stephen Golub (see note 5) at 3.

¹⁰¹ *Ibid.*

structures within society and their impact on the ability of the poor to access justice. Central to the LEP approach is the understanding that at the heart of poverty lies the powerlessness of the poor. In addition the LEP approach recognises that rather than provide an accessible vehicle through which to seek and access justice, the formal institutions supported by the ROL approach entrench existing unequal power relations and limit the opportunities, choices and well being of the poor. LEP addresses these limitations by focusing on that which the ROL approach neglects, that being, without sufficient power to enforce laws that benefit them, legal rights for the poor will exist on paper, but not in practice.¹⁰² For this reason, although the approach understands poverty alleviation as ‘material improvement,’¹⁰³ its primary goal is ‘empowerment’. What LEP seeks to achieve is a redistribution of the power and capacities of the poor, so that they may have greater control over their lives.

In a departure from the economic end goals of ROL approaches, and reminiscent of Sen’s Capability Approach, empowerment is seen as both a ‘process and a goal’¹⁰⁴ towards poverty alleviation. The process involved aims at ‘increasing the disadvantaged populations control over their lives and as a goal is their actual achievement of that goal.’¹⁰⁵ In this respect, LEP claims to be more focused on power than law.¹⁰⁶ Since previous development models have neglected to incorporate a power analysis into programs and strategies, a failure that Thomas Carothers refers to as ‘the missing link of power,’¹⁰⁷ the LEP claim to focus upon power more than law promises an approach with ground-breaking potential.

Chapter two discusses the LEP approach and how it has been operationalised in more detail. It argues that in order to fully realise its potential at both the analytical and operational levels, the LEP approach must incorporate a power framework with which to analyse power. Analytically, this will allow a better understanding of exactly how the dominant approach fails to empower, and equally how the LEP approach is better equipped to do so. Operationally, a power framework will enable a more

¹⁰² Stephen Golub (see note 5) at 26.

¹⁰³ Stephen Golub (see note 5) at 26.

¹⁰⁴ Stephen Golub (see note 5) at 26.

¹⁰⁵ Stephen Golub (see note 5) at 27.

¹⁰⁶ Stephen Golub (see note 5) at 7.

¹⁰⁷ Thomas Carothers, Power and Empowerment available at http://www.powercube.net/wp-content/uploads/2009/11/newweave_chapter3.pdf accessed on 1 July 2010 at 40.

comprehensive understanding of the power relations at in any given context and therefore aid a more effective and targeted implementation of LEP strategies to aid the poor.

Chapter Two: The Potential and Limitations of the Legal Empowerment Approach

7. Legal Empowerment of the Poor – A reaction to the Rule of Law approach

Legal Empowerment of the Poor ('LEP') is a 'new conceptual and operational tool for poverty eradication'¹⁰⁸ that has emerged as a reaction to the 'limitations'¹⁰⁹ and 'structure blindness'¹¹⁰ of the ROL approach. Central to LEP theory is the recognition that at the heart of poverty lies the powerlessness of the poor and that the formal institutions typically supported by the ROL approach to development, often serve to entrench existing unequal power relations and limit the opportunities, choices and well being of the poor. By contrast, the LEP approach states that development need not only be confined to institutions policies, but must explore the broader cultural, social political and socio-economic structures within society and their impact on the ability of the poor to access justice. As a consequence, the LEP approach focuses on that which the ROL approach neglects, that without sufficient power to enforce laws that benefit them, legal rights for the poor will exist on but not in practice.¹¹¹ For this reason, although the LEP approach understands poverty alleviation as 'material improvement,'¹¹² its primary goal is 'empowerment'. What the LEP approach seeks to achieve is a strengthening of the power and capacities of the poor, so that they may have greater over their lives. In this respect, the LEP approach claims to be more focused on power than law.¹¹³ Since previous development models have neglected to incorporate a power analysis into programs and strategies, a failure that Thomas Carothers refers to as 'the missing

¹⁰⁸ Dan Banik (see note 1) at 117.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Stephen Golub (see note 5) at 3.

¹¹² Stephen Golub (see note 5) at 7.

¹¹³ Stephen Golub (see note 5) at 7.

link of power,¹¹⁴ the LEP claim to focus upon power more than law promises an approach with ground-breaking potential.

Chapter two explores in more detail the LEP approach to development as a new and alternative paradigm to the ROL approach to development. The first section of this chapter argues that the LEP approach has a broader and more inclusive understanding of poverty than the dominant ROL approach to development, its primary goal being empowerment and its main focus being power as opposed to law.¹¹⁵

Section two argues that despite the fact that the concepts of power and empowerment are integral to the approach, the approach neglects to examine or engage with either concept, and fails to incorporate a coherent framework to understand, analyse or operationalise strategies in respect of either empowerment or power. This section discusses how this failure limits the potential of the LEP approach, which results in both a disregard for many ideas that define and distinguish the LEP approach from the traditional ROL approach and a lack of clarity as to how the LEP approach is operationalised. To exemplify this point, the section the discordance between the way in which the 2008 report of the Commission for the Legal Empowerment of the Poor ('CLEP') purports to interpret the LEP approach and the way in which it has in fact been implemented.

Section three discusses the intangible and multifaceted concepts of power and empowerment and how they may best be understood for the purposes of the LEP approach. Caroline Moser's gender planning framework is introduced in this section to distinguish between internal and external processes of how power operates. Moser's framework is used to exemplify how strengthening individual internal processes may result in the expansion of freedom of choice and action to a degree, but the way in which power operates externally is required to challenge and affect inequitable beliefs and norms embedded within institutions.

¹¹⁴ Thomas Carothers, (see note 107) at 40.

¹¹⁵ Stephen Golub (see note 5) at 7.

Finally, the chapter introduces the Holland and Brook's Empowerment Model comprising the interplay of internal and external processes of power, which it defines as 'agency' and 'opportunity structure' respectively, a framework to understand empowerment.

7.1 Legal Empowerment of the Poor

The LEP approach typifies a broader and more inclusive understanding of poverty than the ROL approach, and offers a new paradigm for integrating law and development.¹¹⁶ It is premised on the claim that poverty persists partly because the poor do not enjoy legal rights or the power to exercise those rights.¹¹⁷ Stephen Golub, the pioneer of the LEP approach asserts that the goal of the LEP approach is poverty alleviation,¹¹⁸ and at its core is the concept of 'empowerment.'¹¹⁹ The LEP approach understands empowerment to be a dynamic process, resulting in the expansion of freedom of choice and action and the ability to influence the behaviour of other agents and social arrangements.¹²⁰ In a departure from the economic end goals of the dominant Rule of Law approach,¹²¹ and aligning itself with Amartya Sen's concept of 'freedom,'¹²² 'empowerment' is seen as both 'a process and a goal'¹²³ towards poverty alleviation, whereby the *process* involved aims to increase disadvantaged populations' control over their lives, and the *goal* being the achievement of that control. It is this notion of control that equates to increased power for disadvantaged populations.

Definitions of 'Institutions' and 'rules of the game'

By contrast to the ROL approach, which understands 'institutions' to mean formal, state institutions, in particular the judiciary, the LEP approach regards 'institutions' in a broad sense as,

¹¹⁷ Ibid.

¹¹⁸ Stephen Golub (see note 5) at 7.

¹¹⁹ Stephen Golub (see note 5) at 7.

¹²⁰ Arjun Sengupta 'The Political Economy of Legal Empowerment of the Poor' (2008) Rights and Legal Empowerment in Eradicating Poverty at 32.

¹²¹ Note that Golub (see note 5) at 3 uses the term 'ROL Orthodoxy' to define the ROL Approach

¹²² Amartya Sen, (see note 4) at 3.

¹²³ Stephen Golub (see note 5) at 26.

‘the rules of the game in a society, or... the humanly devised constraints that shape human interaction...both formal constraints - such as rules that human beings devise - and informal constraints - such as conventions and codes of behaviour.’¹²⁴

By encompassing informal structures within its definition of institutions, the LEP approach distinguishes itself from the restrictive ROL approach to institutions, which ‘places great faith’¹²⁵ in the common usage and narrow understanding of the word ‘institutions’ as organizations (ie legislatures, universities, firms, regulatory bodies).¹²⁶ Furthermore, the expansive LEP definition serves to broaden our understanding of how in reality the poor use justice systems and interact with the law.

Golub asserts that the narrow ROL approach definition of institutions is built upon weak assumptions and a disregard for the real needs of the poor.¹²⁷ One such assumption is the ‘supposed centrality of the judiciary’¹²⁸ to poverty alleviation, which Golub argues ignores many of the other ‘roads to justice’¹²⁹ for serving the poor. Indeed, in practice the ROL approach tends to overlook civil society and its efforts are top down and centred around the state, where funding is channelled through government institutions, with a particular emphasis on the judiciary.¹³⁰ To summarise the assertion of chapter one, it is precisely the unequal power relations, lack of trust in the judiciary and ‘lack of proximity legal institutions, financial affordability, language and procedural difficulties,’¹³¹ that have rendered the poor unable to access the ‘justice’ of the institutions which the ROL approach speaks to.¹³² As a consequence, the judiciary is often the last place through which the disadvantaged seek justice,¹³³ and in reality, in the majority of cases, the

¹²⁴ Stephen Golub (see note 5) at 14.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Stephen Golub (see note 5) at 5.

¹²⁸ Stephen Golub (see note 5) at 15.

¹²⁹ Ibid.

²¹ Stephen Golub (see note 5) at 15.

¹³¹ Dan Banik ‘Introduction’ Rights and Legal Empowerment in Eradicating Poverty (2008) at 5.

¹³² Stephen Golub (see note 5) at 3.

¹³³ Stephen Golub (see note 5) at 15.

disadvantaged seek justice via these other ‘roads,’¹³⁴ namely the formal, but ‘non-judicial institutions’¹³⁵ or the informal justice sector.

The ROL approach places great faith in the equity of both laws and institutions. It assumes that the laws it supports are fair and equitable, and the institutions it supports will enforce these laws in a neutral and just manner. Similarly, ROL approach interventions to strengthen and support such institutions are often justified as being apolitical and neutral.

By contrast, the LEP approach regards laws and institutions as a reflection of political, historical, cultural and social processes that shape the formal and informal ways in which the poor interact with the law.¹³⁶ Rather than presenting interventions as apolitical, the LEP approach recognises that the ‘rules of the game’ in society are often made and manipulated by the most powerful actors within it and are therefore inherently political. As a result, LEP interventions seek to identify and provide the poor and marginalised with an understanding of how the rules of the game operate and the potential to affect them.¹³⁷

Development activities

In addition to understanding institutions more broadly, what further distinguishes the LEP approach from ROL is the wide range of services it employs to equip people with skills and knowledge. Having identified through participatory methods, the needs and preferences of the poor, legal empowerment interventions include,

‘[legal] training, media, public education, advice and other mechanisms; litigation, both on an individual basis and through public interest lawsuits, services by paralegals and counselling, mediation, negotiation and other forms

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Stephen Golub (see note 5) at 14.

of non judicial representation'¹³⁸ through which to enhance people's legal knowledge and skills.

Golub stresses that legal work is often only a part and 'not necessarily the most important part'¹³⁹ of an integrated strategy that features other development activities such as community organising, use of the media, micro-credit provision, and literacy training or reproductive health services.¹⁴⁰ The recognition that law is not necessarily the most valuable or useful intervention is another departure from the ROL approach. Similarly, although acknowledging the importance of state involvement, the LEP approach looks to civil society to carry out such work in the belief that 'most successful and creative legal services for the poor across the globe generally are carried out by NGOs or similar such organisations.'¹⁴¹

As set out above, the LEP approach's broad understanding of what constitutes poverty is reflected in its all encompassing approach poverty alleviation, both in its wide interpretation of and engagement with a number of informal and formal institutions, and the way in which it seeks to combine with other development related disciplines.

7.2 LEP Approach Limitations - lack of engagement with concepts of power or empowerment

As demonstrated above, the LEP approach is conceptually and operationally ambitious, and distinguishes itself from the ROL approach in a number of ways. Many of these distinguishing features, such as the approach's broad definition of 'institutions', and greater focus upon power as opposed to law, provide the LEP approach with potential to better understand how the poor interact with the law and are therefore better able to assist individuals in the empowerment process. However, despite the fact that Golub states that the LEP approach is focused far more on power than law,¹⁴² the approach fails to engage with the meaning of empowerment or power

¹³⁸ Sumaiya Khair, 'Evaluating Legal Empowerment: Problem of Analysis and Measurement' (2009) Hague Journal on the Rule of Law Vol 1, Issue 1 pp 33-37 at 33.

¹³⁹ Stephen Golub (see note 5) at 25.

¹⁴⁰ Stephen Golub (see note 5) at 26.

¹⁴¹ Stephen Golub (see note 5) at 28.

¹⁴² Stephen Golub (see note 5) at 7.

and as a result, lacks a coherent framework by which to understand, analyse and apply each concept to LEP strategies. By failing to engage with, to incorporate a framework for the concepts of power and empowerment, the success of the LEP approach is restricted. Firstly, a failure to engage with the concepts effectively undermines the idea of power being at the heart of the approach, and prevents those using the LEP approach from analysing in a clear or structured way the power relations involved in the various relationships, formal or informal structures or interventions in any given development context. As a result, the LEP approach risks being as Mona Elisabeth Brother points out, a ‘disengaged model [since]... good ideas need a structural approach to be made sustainable.’¹⁴³ Ultimately and most importantly for the LEP approach, these failures hinder the ability to build a coherent and sustainable strategy of empowerment.

Secondly, a lack of conceptual clarity allows LEP theory to be interpreted in a number of different ways. This increases the potential for the dilution of or disregard for a number of ideas that define and distinguish the LEP approach. For instance, Golub’s expansive definition of institutions as constituting ‘the rules of the game’ in society is a central idea within the approach, which increases our frame of reference as to how the poor may interact with the formal and informal rules and processes that constitute this broad definition of institution. However, although Golub acknowledges that the rules of the game are about human interactions and therefore about power,¹⁴⁴ the LEP approach fails to examine the power relations – power interests at work behind the rules of the game. As a result, although the frame of reference regarding institutions has expanded, the *depth* of understanding as to how such institutions work and how best to engage with them is limited. Since the LEP approach recognises that an ‘understanding of the “rules of the game” count just as much as pipes, fertilizers and access to credit,’¹⁴⁵ a lack of proper understanding of this important concept is a significant limitation for all those involved in designing, implementing or benefitting from an LEP intervention.

¹⁴³ Mona Elisabeth Brother, ‘Legal Empowerment as a New Concept in Development: Translating Good ideas into Action’ (2009) *Banik Dan, Rights and Legal Empowerment in Eradicating Poverty* at 49.

¹⁴⁴ Stephen Golub (see note 5) at 7.

¹⁴⁵ Matthew Stephens ‘The Commission on Legal Empowerment of the Poor: An Opportunity Missed’ (2009) *Hague Journal on the Rule of Law* Vol 1, Iss 1 pp 132-155 at 144.

¹⁴⁵ Stephen Golub (see note 5) at 7.

As set out above, a lack of clarity leaves the LEP approach open to broad interpretation, and as a result of this, also vulnerable to a number of divergent ways in which the LEP approach may be operationalised. LEP theory as described by Golub places huge emphasis on individual empowerment, as well as the importance of informal institutions, whilst distancing itself from placing too much importance upon formal institutions as is common practice with traditional ROL approaches to development. However, a lack of clarity within the theory may, upon implementation, result in a neglect of the relationship between institutions and individuals and too much or too little emphasis placed on of each respectively.

The fact that LEP is open to broad interpretation and a subsequent imbalance in the way in which interventions may be implemented is demonstrated by the divergence between the way in which the 2008 report of the Commission for the Legal Empowerment of the Poor ('CLEP') purports to interpret the LEP approach and the way in which it has in fact been operationalised.

The Commission for the Legal Empowerment of the Poor

The CLEP was established in 2005 with the mandate of 'exploring how nations can reduce poverty through reforms that expand access to legal protection and opportunities for all.'¹⁴⁶ One aim was to re-address the weaknesses of the dominant ROL approach and change the focus to 'examine poverty through the lens of "legal exclusion" – that is, exclusion from protection by the rule of law.'¹⁴⁷ This section will look to the first volume of CLEP's report of 2008 ('Report'), which constitutes the research findings and subsequent recommendations of the Commission, in order to examine how the CLEP has interpreted the LEP approach.¹⁴⁸

¹⁴⁶ High Level Commission on Legal Empowerment of the Poor at 4, available at http://www.statkart.no/Engelsk/Cadaster_and_Land_Regis_Property_Centre/Legal_Empowerment_of_the_Poor/filestone/Eiendomsdivisjon/PropertyCentre/Vette/20060609_HighlevelCommissiononLegalEmpowermentofthePo or.pdf (Cadastre & Land Registry Norwegian Mapping and Cadastre Authority). Accessed on 5 June 2011

¹⁴⁷ Stephen Golub 'One Big Step Forward and A Few Steps Back for Development Policy and Practice' (2009) Hague Journal on the Rule of Law Vol 1, Iss 1, pp 101-116 at 102.

¹⁴⁸ The second volume consists of findings of five working groups which, although contributing to the Commission's thinking, reflect the opinion of the respective working groups rather than those of the Commission.

Structurally, the Report is based around four ‘pillars’ or ‘empowerment domains.’ The first three are: ‘property rights,’ ‘labour rights’ and ‘business rights,’ and the fourth pillar being what Golub refers to as the ‘enabling framework’, namely ‘access to justice and the rule of law.’¹⁴⁹

Conceptually, the Commission defines legal empowerment to be a process of systemic change through which the poor and excluded become able to use the law, through legal systems and legal services to protect and advance their rights and interests as citizens.¹⁵⁰ The Report aligns itself with Golub’s description of the LEP approach in a number of ways. Firstly, the Report asserts that legal empowerment should primarily be based on local conditions and should revolve around the needs and priorities of the poor. Secondly, it takes informal structures into account and claims that the approach should be realistic in its assessment of the relationship between formal and informal legal mechanisms. Finally, the Report notes that legal structures may create barriers that hinder development, and their removal may encourage economic activity, which the LEP approach recognizes as a contributory factor to development.

However, the report diverges from Golub’s interpretation of the LEP approach by presenting a far narrower interpretation of legal empowerment, which emphasises legal services yet excludes other development related activities. The implications of this omission are important since it reveals a narrowing of the understanding of development as something that can be achieved with legal mechanisms, and by doing so thereby making invisible a whole host of other important development considerations. Beyond the semantics of the definition of Legal Empowerment however, it is useful to look to the general themes of the report to see how the LEP approach has been interpreted. An immediately apparent theme, and one which pervades the Report, is that such exclusion deprives people of ‘livelihoods, income and assets.’¹⁵¹ Interestingly, the focus on the economic impacts of exclusion aligns

¹⁴⁹ Making the Law Work for Everyone’ Volume I Report of the Commission on Legal Empowerment of the Poor (‘CLEP REPORT’) at 27, available at [www.undp.org/publications/Making_the_Law_Work_for_Everyone%20\(final%20draft](http://www.undp.org/publications/Making_the_Law_Work_for_Everyone%20(final%20draft) accessed on 5 February 2010.

¹⁵⁰ CLEP Report (see note 149) at iii.

¹⁵¹ Stephen Golub (see note 5) at 112.

itself with the notion of material improvement as development, which, (although recognised by the LEP approach as a contributory factor to development) is advocated as the central means to development by the ROL approach.

Property rights are assessed to be central to ‘security and livelihood’¹⁵² and essentially, the Commission advocates the formalisation of land systems (and the formalisation of the informal economy in general) in order to ‘extend the protections of the law and to unlock billions of dollars of untapped capital.’¹⁵³ Indeed, the market-based slant of the Report is highlighted in the belief that ‘integrating the extralegal economy into the formal economy [will create] a functioning market for the exchange of assets.’¹⁵⁴

Criticism levelled at this approach warns that such an indiscriminate broad brush approach to land titling may prove more harmful than beneficial, since without the presence of a range of other social, political and economic factors, it is unlikely that the benefits of land titling will be realised.¹⁵⁵ Brother¹⁵⁶ argues that the introduction of individual titles or the formalisation of informal may not be appropriate to ancestral or traditional communal land systems. To highlight this point, Brother notes that the formalisation of informal lands has often only served to entrench power and economic imbalances within informal systems, leading to the disempowerment and increased vulnerability of women, pastoralists, small-scale farmers and urban and rural tenants.¹⁵⁷

Similar criticism can be applied to the Report’s approach to the regulation of labour and business rights which broadly state that the process of making the formal market increasingly more ‘inclusive and attractive,’¹⁵⁸ will allow disadvantaged workers to be legally empowered, by being brought into the ‘framework of effective legal regulation.’¹⁵⁹ Whilst this proposed solution of regulating business rights and labour

¹⁵² Matthew Stephens (see note 145) 145.

¹⁵³ Matthew Stephens (see note 145) at 148.

¹⁵⁴ CLEP Report (note 149) at 6.

¹⁵⁵ Jan Michiel Otto ‘Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto’ (2009) *Hague Journal of Law* Vol 1 Iss 1, pp173-194 at 190.

¹⁵⁶ Mona Elisabeth Brother, (see note 143) at 51.

¹⁵⁷ Mona Elisabeth Brother (see note 143) at 51.

¹⁵⁸ CLEP Report (see note 149) at 62.

¹⁵⁹ *Ibid.*

markets makes workers more ‘visible’ from a regulatory perspective, it simultaneously renders as invisible the range of political, social and economic obstacles that the poor encounter in their struggle for empowerment.¹⁶⁰ In this respect, the balance of power is tipped, and the process of empowerment is redefined and simultaneously reduced to being understood as ‘formalisation’, which by corollary narrows the scope of interventions used.

The Report further lacks an in-depth analysis of gender needs and a much needed ‘gender’ lens through which each pillar could be analysed. This lack of analysis is surprising given that the Report acknowledges that although women constitute half of the world’s population and are more likely to work in the informal economy,¹⁶¹ they paradoxically only own a disproportionate ten percent of the property in the world.¹⁶²

Similarly, whilst the Report acknowledges that education, investment in infrastructure and other public goods, as well as addressing climate change are important to reduce poverty, these assertions remain at the level of rhetoric. The primary emphasis of the report is on legal interventions, which is reflective of the ROL approach to development.

Although the Report recognises the importance of the informal justice sector, it does not fully explore the implications of retaining, supporting or strengthening the informal economy, nor how this might better assist the poor. Rather, the Report unequivocally assumes formalisation to be the only solution and advocates the integration of the informal into the formal justice system. In this sense, the Report advocates formalisation without recognising that it is often this formality in itself and what it represents which results in the poor seeing law as ‘tools of oppression and not empowerment.’¹⁶³ Thus what is needed is not an ‘extension of formality’ but a transformation of the way in which the poor relate with the law.

¹⁶⁰ Julio Faundez ‘Empowering Workers in the Informal Economy’ (2009) *Hague Journal of Law* Vol 1, Iss1 pp 156-172 at 158.

¹⁶¹ CLEP Report (see note 149) at 38.

¹⁶² CLEP Report (see note 149) at 6.

¹⁶³ Matthew Stephens (see note 145) at 134.

It seems that while the Report proclaims that ‘politics cannot be ignored,’¹⁶⁴ the Report tends to examine legal considerations in isolation and neglects to consider the ‘political economy for reform.’¹⁶⁵ The Report does recognise that those in power may discriminate against or seek bribes from the poor – side with powerful figures who may have vested interests in preventing the poor from competing economically.¹⁶⁶ However, as Stephens argues, the Report fails to engage with political challenges such as elites sharing power with the poor. One explanation for failing to address such key issues is Stephens’ suggestion that the Report is in fact aimed at such governments and national leaders (ie a top down approach) as opposed to being addressed to the poor, whom it purportedly concerns.

To conclude, on a positive note, the Report should be commended for raising international awareness to the link between ‘poverty, and legal exclusion’¹⁶⁷ and opening up a ‘political space for legal empowerment work.’¹⁶⁸ It recognises important, often overlooked factors, such as the importance of business rights,¹⁶⁹ and the crucial role that ordinary members of a community, trained in law, can play. However, whilst the Report purports to be structured around LEP concepts, and acknowledges key factors for consideration in how legal empowerment can alleviate poverty, it often fails to address these factors substantively, or in a way which can be easily operationalised. In addition, much of the substance of the Report emphasises the importance of formal institutions, formalisation of informal systems, and economic growth as means to achieve development. In this respect, the Commission aligns itself with attitudes that shape the ROL approach.

The discordance within the Report could be due to a number of factors, ranging from the differing interests and influences of those commissioning the Report, to the fact that the lack of a coherent framework leaves the LEP approach open to broad

¹⁶⁴ CLEP Report (see note 149) at 3.

¹⁶⁵ Matthew Stephens (see note 145) at 153.

¹⁶⁶ Matthew Stephens (see note 145) at 110.

¹⁶⁷ Matthew Stephens (see note 145) at 133.

¹⁶⁸ Ibid.

¹⁶⁹ Matthew Stephens (see note 145) at 145, who states that business rights are ‘the right of people to start a legally recognized business without arbitrarily applied regulation or discrimination.’

interpretation and therefore a greater likelihood that it will be operationalised in a number of ways. Whatever the reasons, arguably, if the LEP approach was less conceptually vague and had a coherent framework, the likelihood of the approach being used as a useful rhetorical tool behind which in practice traditional ROL approach objectives are achieved, would be significantly reduced.

Both power and empowerment are complex concepts that are challenging to define and as a result, incorporating a framework in respect both into LEP theory, presents a key conceptual challenge for the approach.

7.3 Conceptual Challenges- Understanding Empowerment and Power

A key conceptual challenge for the LEP framework is what ‘empowerment’ means, and how it relates to ‘power’. Both are contested terms that encompass different and often conflicting aspirations. Should, as Arjun Sengupta proposes, empowerment be understood as a ‘relational concept,’¹⁷⁰ in that power is exercised relative to the structures of authority and power in place in society?¹⁷¹ Implicit in this view of empowerment is the assumption that one side’s gain in power would result in another side’s loss. Alternatively, should empowerment be understood in terms of Caroline Moser’s more individualistic notion, as an increase in ‘self reliance and internal strength?’¹⁷² While these constructs of empowerment are not mutually exclusive, for conceptual clarity, Kabeer’s¹⁷³ distinction between external and internal power relations, or ‘power’ (being external) and ‘empowerment’ (being internal) is helpful. Kabeer argues that ‘people with power may not necessarily be *empowered* (my italics) as they may not have been denied their ability to make choices in life.’¹⁷⁴ Similarly, if one can be ‘empowered’ does this necessarily equate to having ‘power’? If we understand and organise the concept of ‘power’ as relational ‘vis a vis the prevailing structures of power and authority’¹⁷⁵ in society but ‘empowerment’ as

¹⁷⁰ Sengupta (see note 120) at 34.

¹⁷¹ Ibid

¹⁷² Caroline Moser ‘Gender Planning in the Third World: Meeting Practical and Strategic Gender Needs’ (1989) World Development vol 17 No 11, pp 1799-1825 at 1815

¹⁷³ Naila Kabeer ‘Reflections on the Measurement of Women’s Empowerment’ (2002) Discussing Women’s Empowerment: Theory and Practice, Sida Studies at 19.

¹⁷⁴ Banik, ‘The Political Economy of Legal Empowerment of the Poor’, Rights and Legal Empowerment in Eradicating Poverty at 12, citing (Kabeer 2002) .

¹⁷⁵ Sengupta (see note 120) at 34 citing Moser (2004) ‘Rights Power and Poverty Reduction’ Power Rights and Poverty: Concepts and Connections (Washington DC: DFID and World Bank).

individualistic, then those using the LEP approach may become empowered by learning about their rights and entitlements or the ‘rules of the game.’¹⁷⁶ However, if pro-poor or democratic legal and political power structures are not in place, for any reason, be that lack of funding, lack of political will, corruption, despite being ‘empowered’ arguably they lack ‘power.’

Practical and Strategic needs

Caroline Moser’s gender planning framework is a useful tool to distinguish between internal and external power relations and how the two operate in this respect. The framework distinguishes between what Moser terms ‘practical’ needs and ‘structural’ needs. Practical needs are those perceived to be immediate and are formulated in response to daily conditions. Structural needs may be regarded as those, which demand equality in the laws, policies, attitudes and operations of institutions and power structures, which comprise the ‘rules of the game.’

Drawing parallels between Moser’s gender planning framework and the needs of those living in poverty, practical needs are those immediate, daily needs, such as food on the table, clean water, clothing and shelter. Immediate needs are best accessed by harnessing and strengthening a person’s internal sense of strength to participate in, control, negotiate with or influence decisions and actions that affect their lives. This increased sense of internal strength and shift in consciousness may be achieved for example, by greater access to information, food, clothing or shelter. Although the process and achievement of this internal strength inevitably involves interaction with external power structures such as institutions in the broadest sense of the word, (ie community conventions, customs or codes of behaviour) these are less likely to include engagement with formal institutions such as the judiciary, regulatory bodies or government departments, and are best understood to be an internal process of empowerment.

¹⁷⁶ Golub (see note 5) at 14.

Strategic needs

Application of the meaning of strategic needs to the context of poverty alleviation, equates to the need to challenge prevailing power structures or institutionalised inequality. Examples include asserting ones rights to or food, with the aim of changing legislation and influencing judicial decisions. In recognition of the fact that the realisation of strategic needs inevitably operates in tension with such institutional structures, Moser states that that their achievement demands intellectually a certain ‘level of consciousness,’¹⁷⁷ and practically, an element of ‘struggle.’¹⁷⁸ In contrast to immediate needs therefore, structural needs challenge embedded power relations and therefore require access and engagement with formal and informal institutions, and the forms, levels and types of power most commonly associated with such institutions. Unlike the internal, individual strength required to access practical needs therefore, strategic needs demand engagement with external power structures.

8. A Proposed Empowerment Model and a Power Framework for the LEP Approach

As further discussed in the following chapter, Holland and Brooks’ Empowerment Model demonstrates that empowerment as envisaged by the LEP approach depends upon an interplay between internal processes of empowerment and external workings of power. However, in order to fully understand the manifold forms of power that may exist and operate in tension with each other as a result of this interplay, a framework to analyse power is also necessary. Chapter three proposes Gaventa’s Power Framework to work in conjunction with Holland and Brooks’ Empowerment Model as analytical and operational tools to be used for the LEP approach. Analytically, this will allow a better understanding regarding the potential of the LEP approach, and operationally, will enable a more comprehensive understanding of the power relations at work in any given context thereby aiding a more effective and targeted implementation of LEP strategies.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

Chapter Three: The Relationship between Power and Empowerment

9. Understanding Power and Empowerment

The concepts of power and empowerment are intangible by nature, and as a result, understanding what each term means and how both concepts interact with one another, is fraught with conceptual challenges. Consequently, both terms suffer from a lack of clarity and common agreement and unsurprisingly, current uses remain contentious.

Chapter two introduced the complex, fluid and interrelating concepts of power and empowerment. The first section of this chapter builds upon this discussion by analysing the two concepts and how they relate to each other in greater detail. This discussion demonstrates why the LEP paradigm would benefit from incorporating a conceptual framework to understand and analyse power and empowerment. The second section of the chapter discusses the Holland and Brook empowerment model (the 'Empowerment Model'), which suggests that empowerment comprises the interplay of 'agency' and 'opportunity structure' as a framework for empowerment. In order to more fully understand the types of power involved at both agency and opportunity structure components of the Empowerment Model, the third section of this chapter uses Gaventa's power typology ('Power Framework') to understand how different levels, forms and spaces of power operate. It argues that this Power Framework enables a more comprehensive understanding of the power relations at work in a local, national and global context and therefore aids a more effective and targeted implementation of LEP strategies to aid the poor.

To conclude, the chapter introduces South Africa's Treatment and Action Campaign as an example of a highly successful legal empowerment initiative, the success of which is due in part to its recognition that empowerment depends upon a complex interaction of different types of power at the agency and opportunity structure components of the Empowerment Model.

9.1 An Analysis of Empowerment and Power

Understanding Empowerment

The term 'empowerment' has many different meanings according to the political or socio-cultural context within which it is used.¹⁷⁹ Empowerment has social, political or economic dimensions, and is applicable to both individuals and groups on a local, national or global scale. It was initially most commonly associated with the women's movement,¹⁸⁰ but contemporary associations encompass a wide range of meanings depending from which social, political or economic school of thought they stem.

It is useful to understand empowerment as analogous to Sen's concept of freedom. Sen understands empowerment as improving the quality of people's lives by enabling them greater control over the decisions and resources that affect them.¹⁸¹ In this respect, the expansion of freedom and the gaining of control both equate to gaining greater power over one's life.

Power relations and perceptions of power are normative, in the sense that both relations and perceptions are influenced by the context within which we live, our experiences of the world and our place within it. Indeed, when considering how power relations affect society's most marginalised, the assumption that society's marginalised or poor constitute a homogenous 'other' must be discarded. Rather, it is essential to appreciate that the poor are a heterogeneous group, varied according to many other factors such as ethnicity, caste, age, gender, family position or class, as well as cultural or geographical distances. A range and variety of factors also means that individuals or groups may be disempowered in a number of different ways and by corollary, the ways in which people are empowered will also vary accordingly.

On an individual level, a person's individual needs, perceptions and behaviour are often conditioned by historical events and unequal conditions of society.¹⁸² This historical shaping of needs, perceptions and behaviour serves to highlight how

¹⁷⁹ Andrea Cornwall and Karen Brock write that within development terminology 'empowerment' [has] gained the most expansive semantic range of all, with meanings pouring into development from an enormous diversity of sources, which include feminist scholarship, the Christian rights, New Age self-help manuals and business management.' A Cornwall and K Brock 'Beyond Buzzwords "Poverty Reduction", "Participation" and "Empowerment" in Development Policy' (2005) 10 United Nations Research Institute for Social Development Overarching Concerns Programme Paper 1 at 5.

¹⁸⁰ Cecilia Luttrell et al available at <http://www.odi.org.uk/resources/download/4525.pdf>, accessed on 4 October 2011.

¹⁸¹ Amartya Sen (see note 4) 36-37.

¹⁸² David Mosse 'Power Relations and Poverty Reduction' (2004) Power, Rights, and Poverty: Concepts and Connections (Ruth Alsop (ed)) 52 at 53.

empowerment is affected by both internal psychological factors, and external factors, both of which influence and shape each other.

External factors include institutions and organisations. The LEP paradigm uses Douglas North's broad definition of 'institutions' as distinct from organisations, as a frame of reference. According to North, institutions are systems of established formal and informal social rules that structure political, economic and social interactions in society.¹⁸³ Informal rules include sanctions, taboos, customs, traditions and codes of conduct, for example table manners, how one speaks, dresses, behaves in a business environment, or what one expects of others. These informal rules are what North would describe as 'informal institutions.'¹⁸⁴ Once informal institutions are codified by a specific set of laws or acknowledged guidelines, they cease to be informal and become formal rules or institutions. As a result, formal rules are easier to see and understand and include Constitutions, laws, regulations or contracts, and comprise what North would define as formal institutions. For example, the South African Constitution or South African Labour laws are formal institutions that shape the South African political economy, and govern labour practices respectively. As discussed in Chapter one, North describes these formal and informal 'institutions' collectively as the 'rules of the game' in society.

By contrast, organizations are narrower in scope and both impact upon and are influenced by institutions. Organizations may include such as regulatory bodies, universities or unions, all of which have established boundaries, and rules and regulations which operate to establish the mandate of the organization, distinguish members from non members, and establish chains of command and responsibility within the organization. Therefore, whereas the South African Constitution exemplifies a formal institution, the Human Rights Commission is an organization with a Constitutional mandate to investigate and report on the observance of human rights and take steps to secure redress where human rights have been violated. Similarly, distinct from the formal institution of South African Labour Law is the organisation of The Commission for Conciliation, Mediation and

¹⁸³ Gun Eriksson Skoog, 'Supporting the Development of Institutions – formal and informal rules: An evaluation Theme, Basic concepts' UTV working paper 2005:3, Swedish International Development Cooperation Agency at 5, accessed online at <http://www.sida.se/Publications/Import/pdf/sv/Supporting-the-Development-of-Institutions---Formal-and-Informal-Rules-An-Evaluation-Theme-Basic-Concepts.pdf> on 20 December 2012.

¹⁸⁴ *ibid.*

Arbitration (CCMA), which provides South Africa with a labour dispute resolution system. According to North's definition therefore, 'organisations' are a component of formal 'institutions' and by corollary also comprise 'the rules of the game' in society.

Golub asserts that traditional ROL development strategies equate 'institutions' with 'organisations', thereby limiting focus to 'organizations' such as the judiciary and legal institutions such as laws. By contrast, Golub advocates that in order to fully understand how the poor interact with the law, and to assist the poor to affect the rules of the game, 'the historical, cultural, social political factors' that shape how the poor interact with both informal and formal institutions must be taken into account.

Crucially, however, Golub fails to incorporate a framework into the LEP approach by which to understand or analyse the various ways in which the poor interact with informal or formal institutions. This chapter proposes the Holland and Brooks empowerment model ('Empowerment Model') as a framework to enable this analysis.

9.2 The Holland and Brooks Empowerment Model

The Empowerment Model understands empowerment to be dependent upon the interplay of a person's 'agency' and the context in which a person operates ('opportunity structure'). The opportunity structure component of the Empowerment Model comprises both informal and formal institutions in line with North's broad definition and therefore opportunity structure can also be understood to comprise the 'rules of the game' in society. By locating the 'interplay' between individuals and the rules of the game as the site for empowerment, the Empowerment Model compliments Golub's assertion that only a thorough understanding of how the poor interact with informal and formal institutions will empower the poor to understand and affect the rules of the game.

Agency

Agency is about intention, the power to envisage and make meaningful choices, to act as one would wish, and the consciousness of this action.¹⁸⁵ According to the Holland and Brook model, a person's agency is determined by their 'asset base'. The asset base is similar to Amartya Sen's 'capabilities' consists of a range of assets, ranging from human assets; (such as levels of education, skills and literacy), psychological assets; (such as self perceived exclusion from community, levels of interaction with people in different social groups, as well as the capacity to envisage change, or have aspirations for change to happen) material assets; (such as land ownership) access to information; (such as access to the radio, television or newspapers, in addition to proximity to roads, telephone and post offices) organizational capacity; (membership to groups and leadership abilities) and financial assets (employment history and sources of credit).¹⁸⁶ In the same way that Sen describes freedoms impacting upon and interacting with one another,¹⁸⁷ so too do assets. For example, the human asset of education, gives an individual more access to information (in itself an asset) as well as the psychological asset of having a greater sense of there being alternative options to All of these assets contribute to an individual's capacity to make meaningful choices.¹⁸⁸

Opportunity structure

Opportunity structure is defined as the context (constituted by formal and informal institutions) within which actors operate, that has the potential to assist or constrain their ability to transform agency into effective action. As set out above, formal institutions refer to those institutions comprised of formal rules such as Constitutions, firms, laws, regulations or contracts. Informal institutions refer to those institutions comprised of informal rules, for example, sanctions, taboos, customs, traditions and codes of conduct. Alsop and Heinsohn depict the dependency of agency on many institutional structures when stating that,

¹⁸⁵ Rosalind Eyben: 'Linking Power and Poverty Reduction' (2004) in *Power, Rights, and Poverty: Concepts and Connections* (Ruth Alsop (ed)) at 17.

¹⁸⁶ Ibid.

¹⁸⁷ Amartya Sen (see note 4) at 37.

¹⁸⁸ Ruth Alsop and Nina Heinsohn 'Measuring Empowerment in Practice: Structuring Analysis and Framing Indicators' (2005) 3510 World Bank Policy Research Working Paper 1 at 8.

‘the presence and operation of the formal and informal laws, regulations, norms and customs determine whether individuals and groups have access to assets, and whether these people can use the assets to achieve desired outcomes.’¹⁸⁹

Viewed through the Empowerment Model, the LEP ‘Court Accompaniment Programme’ for unwed mothers in Morocco, provides a useful example of how informal and formal institutions comprising opportunity structure affect the ability of unwed mothers to obtain official identity papers in the form of birth certificates and family booklets, without which they are unable to access a range of fundamental rights or a legal identity.¹⁹⁰

Due to the conservative and discriminatory legal, religious and social context surrounding women’s rights in Morocco,¹⁹¹ unmarried mothers face legal discrimination and social stigmatization. The Court Accompaniment Program aims to promote the rights of these women, with a two-fold strategy of legal and human rights education and a court accompaniment program (together the ‘CAP’). The scheme involves the intensive training of hundreds of local NGO members (primarily young women) as program facilitators, and implementation of the program by partner NGOs, which provide legal and human rights education (with themes identified by the recipients of the training), training, health awareness, literacy programs and assistance with income generation projects, to thousands of women across Morocco. The legal and human rights programs involve group field trips to local public institutions, such as the police station, the court house and the civil status office, for question and answer sessions with the relevant employees there.¹⁹² During these sessions, women learn about the services these institutions offer, the paperwork needed for various applications, and the procedures

¹⁸⁹ Ruth Alsop and Nina Heinsohn (see note 188) at 99.

¹⁹⁰ Stephanie Willman Bordat and Saida Kouzzi ‘Legal Empowerment of unwed Mothers: Experiences of Moroccan NGOs’ 179-203 at 185 ‘Legal Empowerment Practitioners’ Perspectives’, (Stephen Golub (ed)), International Development Law Organisation, Legal and Governance Reform, Lessons Learned, No.2/2010. The Family Booklet is the main official document proving one’s legal identity and civil status, and is of utmost importance in one’s daily life. It is drafted upon marriage and contains all personal information about the Family Booklet’s owner (the husband), his wife/wives, and any children born of the marriage(s). Names, places and dates of marriage, eventual divorce, births, and deaths of each family member are recorded and, if necessary, modified later. Only one original Family Booklet is issued – in the husband’s name, given to him, and deemed his property. A wife, divorced woman, widow or legal tutor may request a legalized copy. The Family Booklet is the single most essential document in people’s lives – it is on this basis that other official papers attesting to one’s legal identity and civil status necessary to carrying out most daily acts may be obtained. The Family Booklet is required for, inter alia, obtaining a National Identity Card, a passport, a driver’s license, free medical care and other social services, legal aid assistance in courts, and a vaccination booklet. Also, to request an official birth, marriage or residence certificate, one needs to present the Family Booklet. Without a Family Booklet, people simply do not legally exist. (Extract taken from Bordat and Kouzzi).

¹⁹¹ *ibid*

¹⁹² Stephanie Willman Bordat and Saida Kouzzi (see note 190) at 193.

to follow. In addition to familiarizing themselves with forms and procedures, women also become familiar with the offices and personnel within these offices.

CAP Strategies - Agency

Viewed through the Empowerment Model, the CAP reveals its strategies worked upon levels of both Agency and Opportunity Structure components. With regards to the Agency component of the CAP, program strategies worked to strengthen a range of unmarried mother's assets; ie the provision of legal, literacy, health and other professional training (human assets) and holding group meetings between unwed mothers and other women in Moroccan society in order to increase unwed mother's levels of interaction with people of differing social groups, thereby reducing unwed mother's sense of exclusion from the community (increased psychological assets). In addition, the CAP's NGO partners reported that amongst themselves, groups of unwed mothers also formed independent discussion, peer education and support groups to share and analyze experiences (organizational capacity).

CAP Strategies - Opportunity Structure

The Opportunity structure component of the Empowerment Model assists identification of the existence of various formal and institutions in local, national and global contexts.

Formal institutions- criminal and civil laws

Formal institutions include criminal and civil laws in Morocco that directly impact upon unmarried mothers by acting as barriers to accessing official identity papers for their children, and remaining silent where their rights are concerned. Criminal laws impose penalties (including imprisonment) for sexual relations outside of marriage, which is illegal in Morocco. Rape is regarded as a crime against morality, although non- consent is very difficult to prove and victims may be charged with having had illicit sexual relations. In addition, abortion is illegal. There are also a number of administrative hurdles and other constraints to obtaining a birth certificate or a

Family booklet that involve prohibitive administrative costs, travel expenses¹⁹³ or language barriers.¹⁹⁴

Informal institutions- Attitudes towards women

Informal institutions include societal attitudes towards the status of women in Morocco, which is characterized by inequality, discrimination, economic dependence and marginalization. This affects the way women behave, their attitudes towards themselves, and how they are treated by family, society and the state.¹⁹⁵ Women remain under the authority of fathers, brothers or husbands. With regards to attitudes about female virginity, significant importance is placed upon women being ‘intact’ before marriage, and discussion about contraception outside of marriage is taboo. As a result, unwed mothers are ‘considered by many as criminals who deserve their fate’¹⁹⁶ and are often left marginalized with no social networks or financial support.

Informal institutions in the form of societal attitudes pervade formal institutions. Local Moroccan NGOs describe how civil servants take advantage of unwed mother’s lack of knowledge of the law and exploit their vulnerability by blackmailing them for large sums of money. Similarly, hospital personnel are reported to inflict verbal abuse, insults, humiliation and interrogation upon unwed mothers, and in rural areas, when hospital staff suspect a mother is unmarried, they will inform the police who will question the mother, and, if unmarried, arrest her and launch criminal proceedings for illicit sexual relations.¹⁹⁷

The CAP employed a number of strategies in order to engage the institutions at the opportunity structure component of the Empowerment Model. One such strategy included the aforementioned field visits to Civil Status authorities, which aimed to build upon the working relationships and contacts between women and NGOs with public officials. This strategy provided a forum in which mothers could ask questions

¹⁹³ The Civil Status Law requires parent’s birth certificates [in order to register the birth of a child] This will often involve a trip to the local administration at the person’s place of birth which often involves prohibitive administrative costs and travel expenses.

¹⁹⁴ Arabic is the official language for administrative purposes, although Tamazight is more typically spoken with the private sphere of the family, a realm occupied by women. As a result, women will often speak only the Tamazight dialect, and are therefore prevented by a language barrier from accessing the formal justice system.

¹⁹⁵ Stephanie Willman Bordat and Saida Kouzzi (see note 190) at 187.

¹⁹⁶ Stephanie Willman Bordat and Saida Kouzzi (see note 190) at 188.

¹⁹⁷ Stephanie Willman Bordat and Saida Kouzzi (see note 190) at 189.

about the administrative procedures involved in the provision of their identity documents. Anecdotal evidence from local NGOs reports how, as a result of the field visit programme, attitudes of public officials changed and staff became ‘friendly, polite, respectful and willing to provide unmarried mothers with information, and try to simplify procedures for them.’¹⁹⁸

Viewed through an Empowerment Model lens, the CAP example demonstrates how, in addition to working with the opportunity structure component of the Empowerment Model, CAP strategies also worked to strengthen the agency of unmarried mothers. CAP strategies impacted upon both formal and informal institutions by working to ease the administrative burdens faced by women, and influenced informal institutions by beginning the process of changing attitudes towards unmarried mothers. In this respect, CAP strategies assisted in empowering unmarried mothers to better understand, engage with, and realise the potential to transform the rules of the game within Civil Status authorities.

Whilst an Empowerment Model lens may locate the interaction between a person’s agency, and informal and formal institutions as the site for empowerment of individuals, the model is limited in that it does not identify the types of power at work at either the level of individuals agency or institutions, or where the two interact. In this regard, the Empowerment Model is unable to demonstrate *how* the power of the poor is strengthened nor how institutional power impacts upon individuals.

A Power Framework provides a tool for this closer analysis by making visible the various types and forms of power at work be they visible, hidden or invisible, thereby providing a more in depth insight into how the rules of the game affect the poor, and how LEP strategies may assist in the empowerment of individuals to engage with and affect the rules of the game.

The Power Framework developed by John Gaventa, addresses the limitations of the Empowerment Model and examines the way in which power operates at the levels of agency, opportunity structure, and where the two interact.

¹⁹⁸ Stephanie Willman Bordat and Saida Kouzzi (see note 190) at 195.

10. Gaventa's Power Framework

Gaventa expands upon Stephen Lukes'¹⁹⁹ theory regarding the study of power to include additional levels and forms of power and the spaces in which it may operate. The following section draws upon the Gaventa Power Framework to examine how it may be applied to the Holland and Brooks Empowerment model.

10.1 Levels of Power

Power to

The first component of Gaventa's power typology describes one form of power as 'power to.' This refers to the capacity to act, exercise choice and shape one's life without domination or necessarily removing power from her party. The rationale behind this type of power is that it is not simply about relocating power, but rather about changing the *nature* of power relations. Having 'power to' results in an increased awareness and recognition of what is in one's best interests and the ability for a person to define his/her goals and affect the outcomes that reflect these. This understanding of power informs Sen's capability approach which states that people are not free when they do not have the 'power to' make choices about their lives.²⁰⁰ Drawing from the above CAP example, the legal and human rights program sought to enhance women's legal knowledge and skills with the aim of increasing their 'power to' recognize and assert their rights through legal action or the 'power to' challenge policy or regulatory decisions.

Power with and Power within

Two further components of Gaventa's typology are '*power with*' and '*power within*'. '*Power with*' can be understood as collaborative power, the sharing combining of individual power leading to collective action in reaction to powerlessness. It concerns finding commonality among differing interests and the building of collective strength through organization and development of shared values.

¹⁹⁹ Steven Lukes, author of *Radical Power* (1976)

²⁰⁰ Amartya Sen (see note 4) at 87-90.

In a practical context, ‘power with’ may involve power with individuals, or engaging the expertise, resources or support of formal or informal institutions. In the CAP example, due to their marginalized roles in society, unmarried mothers lack the social connections and traditional family support networks which offer a form of ‘power with’ to assist them to navigate the complicated bureaucratic procedures to obtaining a Family Booklet. The NGOs of the CAP programme recognize that there is this void and fill in this role as intermediaries between unmarried mothers and local authorities, until women are able to perform this role independently of the NGOs.

Second, visits by unmarried mothers to public administrations resulted in their building relationships with the personnel of these institutions and the demystifying of processes involved. These field visits resulted in increased solidarity between marginalized unwed mothers and administrative officers. NGOs that officials began to make procedures easier for women in addition to providing them with procedural shortcuts. ‘Power with’ in this regard can help build bridges across differing interests, thus reducing or transforming social conflict, and building more equitable relations.²⁰¹ Due to the fact that this type of power is based on solidarity, collaboration and the multiplication of individual power, this type of power (along with ‘power within’ and ‘power to’) can be categorized as ‘positive power.’²⁰²

One effect of an increase in ‘power to’ and ‘power with’ is an increased sense of ‘power within’. ‘Power within’ works on a psychological level in that it requires that a person’s own perceptions about his or her capacities, potential and rights also change. ‘Power within’ can be described as the capacity to imagine alternatives and have hope, and, working in conjunction with ‘power to’, encompasses the ability to define ones goals and act upon them. In this respect, ‘power within’ resonates with the concept of ‘critical consciousness’, a term which was popularized by Paulo Freire, and one which relates to an increased understanding of and exposure to structural inequality inherent in social, economic and political systems. Critical

²⁰¹ Fruzina Csaszar ‘Understanding the Concept of Power’ (2004) *Power, Rights, and Poverty: Concepts and Connections* (Ruthe Alsop (ed)) at 144.

²⁰² Ibid.

consciousness is also understood as acting against oppressive forces in one's own life as a result of this increased awareness.²⁰³

In the Empowerment Model, and as the above CAP examples reveal, 'power to', 'power with' and 'power within' are intrinsically linked to the strengthening of assets such as increased levels of education or literacy (human assets), or confidence or sense of alternative options (psychological asserts). In this respect, 'power to', 'power with', and 'power within' are linked to the agency component of the Empowerment Model. By contrast 'power over' is most associated with the opportunity structure component of the Empowerment Model.

Power over

The most commonly recognized form of power is 'power over', which is relational in the sense that it is described as the ability to act upon a person or thing. The underlying rationale for this form of power is that, unlike the aforementioned forms of power, it is seen as a zero sum game as having this level of power necessarily involves taking it from someone else. In this respect power over is about a transfer or re-location of power. Sarah Mosedale writes that 'this dimension of power is concerned with the rules and methods of legitimizing some voices and discrediting others'²⁰⁴ or, in effect, pitching people against each other. More often than not, having this type of power involves dominating and preventing others from gaining it and as a result it has a number of 'negative manifestations such as repression, force, coercion, discrimination, corruption, and abuse.'²⁰⁵ In a political arena, those who control decision-making and resources have power over those who do not. When these are denied access to crucial resources, such as jobs, land or healthcare, *power over* serves to perpetuate injustice, inequality and poverty. The CAP example demonstrates how discriminatory societal attitudes towards unmarried mothers are entrenched in both informal and formal institutions in Morocco, and act as a form of 'power over' women. Formal institutional 'power over' women is reflected in restrictive legislation, and complicated and time-consuming administrative

²⁰³ Elena Mustakova- Possardt 'Is there a roadmap to critical consciousness?' Available at http://www.onecountry.org/e152/e15216as_Review_Consciousness_story.htm, accessed on 1 October 2011]

²⁰⁴ Sarah Mosedale 'Assessing women's empowerment: towards a conceptual framework' (2005) 17 2 Journal of International Development 243 at 250.

²⁰⁵ Fruzsina Csaszar (see note 201) at 145.

requirements to obtaining a family booklet. The ‘power over’ of informal institutions over women is reflected in the way in which personnel in institutions such as the hospital, civil status office, or police station are able to use the vulnerability of unmarried mothers for bribery or hostile behaviour towards unmarried mothers.

In addition to discriminatory perceptions of unmarried women being entrenched in various formal and informal institutions, forms of ‘power over’ may also shape how women behave and how they see themselves. In this respect, ‘power over’ can also be used to create the aforementioned ‘false consciousnesses’ by manipulating the consciousness of subordinate groups and rendering them incapable of seeing that inequality exists. In this respect, power over is associated with the idea of hegemony and ideology and an understanding that the world can exist the only way it does exist. Here, power is seen to shape perceptions and preferences in a way that ensures acceptance of the status quo as unchangeable and natural. This precludes challenges to the existing order because of the difficulty in imagining any other alternatives.

In addition to organizing power into the differing levels in which it can be applied, Gaventa proposes that power can also be distinguished to how visible it is. As a result, forms of power can also be distinguished on a scale of ‘visible’, ‘hidden’ or ‘invisible’ in its.²⁰⁶ These categorizations allow more effective navigation to what the different levels of power entail and also serve to enhance understanding as to how different strategies may be used to influence and engage different forms of power.

10.2 Forms of Power

Visible power

Visible power includes the observable and definable aspects of political power such as the formal rules, authorities, structures, institutions as well as decision-making procedures that perpetuate inequality. Examples of visible power include laws, legislatures, elections, budgets and corporate policy. Visible power can be said to discriminate against interests and people in two main Firstly, those laws and

²⁰⁶ John Gaventa, ‘Reflections on the Uses of the ‘Power Cube’ Approach for Analyzing the Spaces, Places and Dynamics of Civil Society Participation and Engagement’(2003-2006) CFP evaluation series no 4 at 23.

policies which may seem neutral, but which are in fact biased towards one group of people at the expense of others (ie in the CAP example, expressions of visible power include criminal and civil laws which discriminate against unmarried mothers.) Secondly, it may involve decision-making structures that are unrepresentative; by failing to adequately reflect the interests of the people those structures are intended to serve.²⁰⁷

Hidden power

Hidden power is less overt and therefore more difficult to engage. Essentially, hidden power is demonstrated via certain powerful interests and institutions that maintain power by influencing political agendas and control decision-making. Society and government institutions (both formal and informal) exclude certain groups from such decision-making, their grievances made invisible (through means such as intimidation or co-optation) and issues such as domestic violence are effectively removed from being subject to state influence by being consigned to the realm of the private.²⁰⁸ As a result, political agendas are often self-serving and entrench inequality within systems as opposed to representing the concerns of other less powerful groups. In the CAP example, hidden power manifests itself in vague laws and procedures which are difficult to understand, or gaps where legislation is silent as to women's rights. Lack of clarity inevitably results in laws and procedures being open to interpretation, as well as abuse of power by the authorities.²⁰⁹ Arguably, vague and incomplete laws could be the result of poor drafting, although may equally be attributed to a hidden, but very much conscious agenda by an elite few, whereby the interests of those whom the legislation purports to protect are neglected. The result is that due to their marginalized and unequal status, unmarried mothers are most likely to suffer from these legislative 'oversights'.

²⁰⁷ Power and Empowerment Available at <http://www.justassociates.org/chapthreepower.pdf>, accessed on 29 September 2011.

²⁰⁸ Lisa VeneKlasen and Valerie Miller 'A New Weave of Power, People & Politics: The Action Guide of Advocacy and Citizen Participation' Available at <http://www.justassociates.org/tableofcontents.pdf>, accessed 14 December 2009.

²⁰⁹ Stephanie Willman Bordat and Saida Kouzzi (see note 190) at 188 at 191.

Invisible power

Invisible power can be said to shape meaning, and can be attributed to both the aforementioned notions of critical consciousness and the Marxist idea of false consciousness. Invisible power can work as a tool of socialization and a means of controlling information, and may render competing interests or problems invisible, not only from policy making decisions, but so too in the minds and consciousness of the various actors involved.²¹⁰ In this respect it can prove to be the most insidious form of ‘power over’. It is this invisible dimension of ‘power over’ which relates to hegemony and influencing how individuals see the world and their place and their sense of self and inferiority or superiority within it.²¹¹ For example, in many societies, the poor have been taught to accept their levels of poverty as inevitable and have internalized feelings of worthlessness and their assigned roles in society as natural. This form of socialized consent or willing compliance prevents individuals both from envisaging or aspiring to any other possibilities and from questioning or acting to change the roles or the injustices that cause them.²¹² In this regard, although ideology pervades a variety of types, forms and spaces of power, it is best defined as ‘invisible’ power. Ideology is a complicated structure of attitudes, values and beliefs and it shapes the way social reality is perceived and analyzed.²¹³ Ideologies are disseminated through various formal and informal social, political, economic and religious structures and institutions, such as the church, the media, the economy, and the state²¹⁴ which may present apparently egalitarian visible objectives, but which in fact conceal unequal power relations that only serve to reinforce inequality.

In the CAP example, the ‘culture of silence’²¹⁵ surrounding the circumstances of unwed mothers operates as an invisible form of ‘power over’ unwed mothers, which is created and sustained by Moroccan societal attitudes towards them. The *power over* of an culture of silence also in part depends on the aforementioned ‘false consciousness’ ie-internalized attitudes which prevent the questioning or challenge to the hegemony of such institutions and which are in effect a form of invisible power.

²¹⁰ Institute of Development Studies ‘Powercube: Understanding power for social change’ Available at <http://ids.ac.uk/go/idsproject/powercube-understanding-power-for-social-change>, accessed 15 December 2009.

²¹¹ John Gaventa (see note 206) at 29.

²¹² Institute of Development Studies ‘Powercube: Understanding power for social change’ Available at <http://ids.ac.uk/go/idsproject/powercube-understanding-power-for-social-change>, accessed 15 December 2009.

²¹³ Lisa VeneKlasen and Valerie Miller (see note 208) at 49.

²¹⁴ Ibid.

²¹⁵ Stephanie Willman Bordat and Saida Kouzzi (see note 190) at 193.

Indeed, the strength of this form of power lies in its ability to either conceal (unequal power relations and objectives) or be concealed (by power relations and objectives which appear equal). Foucault's assertion, 'power... is tolerable only on condition that it mask a substantial part of itself' and that 'its success is proportional to its ability to hide its own mechanisms'²¹⁶ demonstrates the potential for the oppressive effects of this form of power to be far-reaching. Indeed, one such effect is that of false consciousness, whereby powerful interests are able to suppress the minds of subordinate groups to such an extent that they appear to operate within and be in consensus with a system that oppresses them.

10.3 Spaces of Power

In addition to understanding how the different *types and forms* of power operate, consideration must be given as to *how* citizens can act in relation to these power structures. From a development perspective, on a theoretical level, this requires an understanding of the notion of the 'space', surrounding these power structures or interests. This thesis understands 'space' to be the formal and informal institutions or channels, discourses and practices through which the poor or those working with them, can affect the decisions, relationships and policies that affect their lives.²¹⁷ Lefebvre asserts that 'space' is intrinsically linked to the notion of power,²¹⁸ and the corollary of this assertion is that space is also a key component of empowerment. Building upon the notion of empowerment as dependant on the interplay of agency and opportunity structure, space exists and operates at both individual and institutional levels. Individual spaces include those political, cultural, social and psychological spaces which people occupy and institutional spaces include those at local, national and global levels. What gives the notion of space such potential in a development context is a person's ability (agency) to create, shape, re-shape, affect, or subvert spaces through a number of forms of engagement (such as participation or activism) with formal and institutions (opportunity structure). Gaventa (citing Lefebvre) reinforces this point when describing space as a 'social

²¹⁶ Timo Airaksinen, 'The Rhetoric of Domination' (1992) *Rethinking Power*: Thomas E Wartenberg (ed) at 115.

²¹⁷ John Gaventa (see note 206) at 26.

²¹⁸ *Ibid.*

product...not simply 'there', a neutral container, waiting to be filled, but...a dynamic, humanly constructed means of control and hence domination, of power.²¹⁹

Similarly, levels of power do not exist in a vacuum and hidden, visible and invisible power occupy all forms of space. Some forms of power are more closely aligned with certain types of space than others, and the creation of and the way in which space can be engaged, will vary according to the type and form of power at work. At both individual and institutional level, spaces exist and change alongside each other, with types, and forms of power as distinct as well as related dimensions.²²⁰

Gaventa states that spaces are 'constantly opening and closing through struggles for legitimacy and resistance, co-optation and transformation.'²²¹ In this sense, spaces that have closed may look to re-open by creating invited spaces, or indeed provide the perfect platform for groups or movements to create their own enforced spaces.²²²

Closed spaces

Spaces can be best understood as existing on a continuum and for purposes of this thesis, three points on this continuum will be examined. The first point is that of 'closed spaces', which are closely aligned with the workings of hidden power. Spaces are effectively 'closed' by decisions, policies or regulations being made by certain actors, behind closed doors without any transparency or room for inclusion.²²³ In this sense, closed spaces are closely linked to 'hidden power' and I would argue that it is closed spaces, which allow hidden power to become 'power over' whereby the unchallenged voices of a select group of actors are legitimized through rules, policies which may very well be self serving, or at least not benefit a majority. In this regard, closed spaces are fertile grounds for discrimination, corruption and abuse.

²¹⁹ Ibid.

²²⁰ John Gaventa (see note 206) at 25.

²²¹ John Gaventa (see note 206) at 27.

²²² Ibid.

²²³ John Gaventa (see note 206) at 26.

Invited spaces

Another type of space is that which is 'invited', and can be linked more to visible power structures. Invited spaces are those in which people are invited to participate, by local, national or global authorities, be they governmental or non-governmental. Spaces in which people are invited are (as with all spaces) never neutral. Cornwall comments on the potential of invited spaces to become sites for resistance when she asserts that due to the 'strategic reversibility'²²⁴ of power relations, 'governmental practices, such as invited participation are in themselves...productive of possibilities for subversion, appropriation and reconstitution.'²²⁵ However, when considering invited spaces, such as arenas for participation, it is worth questioning *who* did the inviting, the interests involved and the types of power that may lie behind the invitation. Indeed, issues of power operating behind spaces, such as hidden and invisible which can shape the 'rules of the game' may serve to undermine what appears to be equitable participation, but in fact only re-enforce hegemonic thinking.

Claimed or created spaces

Finally, there are the claimed, or created spaces²²⁶ which are claimed or created by the less powerful, against power holders. These are spaces that are chosen and therefore have an identity different from invited spaces. These can be created by community groups, social movements or places where discussion, debate and resistance is generated outside of the institutionalized policy forums.²²⁷ It is worth noting that although new spaces can have transformative potential, institutions and patterns of power are often deeply embedded within society. In this sense, existing rules of the game can be replicated and essentially limit the involvement of or indeed silence those participating.

²²⁴ Andrea Cornwall, 'Making spaces, changing places: situating participation in development' (2002) IDS Working Paper 170 at 9, citing Foucault 'Governmentality' (1991) in G Burchell et al, *The Foucault effect: Studies in Governmentality*, Chicago: University of Chicago Press at 5.

²²⁵ Andrea Cornwall (see note 224) at 9.

²²⁶ John Gaventa (see note 206) at 27.

²²⁷ John Gaventa (see note 206) at 27.

The CAP field visits to the Civil Status Office arguably initially occupied the realm of invited space, in which unmarried mothers were invited by the authority to ask questions to officials about the processes behind administrative decisions. Use of this invited space gave rise to the opening of closed spaces by making visible those previously hidden decision making procedures into public forums. By doing so, this process made officials more accountable and decreased opportunity for officials to abuse their power over women in the form of bribery or abuse, and increased power of women to challenge officials, should they renege on what they have stated publically. The overall change in attitudes of public officials towards unmarried mothers, the breaking down of the culture of silence and the newly acquired power of unmarried mothers to question power structures are all examples of creation of a new spaces in both personal and social levels.

10.4 The Potential of an Empowerment and Power Framework for the LEP approach

The above discussion provides a framework by which practitioners of the LEP approach may analyse and understand the various ways in which power operates and how empowerment may be achieved. The chapter demonstrates how use of the Empowerment Model reveals both the various sources of individual and institutional power, and the interface between agency and opportunity structure as the site with the most potential for empowerment. The power framework builds upon this model and makes visible the range of ways in which power may operate, be harnessed or challenged. Together, the models make visible the types of interventions that are best placed to build upon agency, and those best suited to accessing opportunity structure.

As discussed in Chapter Two, Moser's gender planning framework reveals how strengthening agency alone lends itself to accessing practical needs, and how structural needs are better accessed by utilizing the power (such as power over) within the institutions (such as formal institutions) comprise opportunity structure. However, as postulated by Holland and Brooks, the site for empowerment does not lie with either agency or opportunity structure alone, but at the interface between the two. As a result, interventions that place too much emphasis on agency, may result in the strengthening of assets and ease access to practical needs, to the

detriment of making long term, strategic changes to benefit the poor. Similarly, as has been the case with traditional rule of law interventions, too much emphasis on those institutions which comprise the opportunity structure limb of the Empowerment Model result in laws which seem beneficial to the poor on paper, but in practice are of little or no benefit since the intended beneficiaries are not fully equipped with the assets to enable them to access laws and related legal institutions.

South Africa's AIDS activist organization Truth and Action Campaign ('TAC') is an example of a successful legal empowerment initiative which recognized from the outset that empowerment depends upon a complex interaction of levels, forms and spaces of power and its success is due in part to the recognition thereof. Using an Empowerment Model and Power Framework lens, and drawing from Moser's gender planning framework, chapter four examines how the TAC works with both individuals and institutions and utilizes a number of different forms and levels of power, in addition to the various spaces in which it operates in order to impact upon both practical and strategic needs of those affected by HIV or AIDS. The campaign's awareness of and tactical engagement with the variety of ways in which power operates, demonstrates how the campaign is able to use the LEP approach to maximum effect, and how the approach is able to fulfil its full potential.

Chapter 4: The Treatment and Action campaign (TAC) – A Realisation of the Potential Power of the Legal Empowerment Approach

11. An Overview of the Treatment Action Campaign

In 2001, the Pharmaceutical Manufacturers Association, representing 47 international pharmaceutical companies, abandoned their court action that aimed to prevent the South African government from passing the Medicines Act of 1997 (the 'Act'). This Act allowed for the production and importation of cheaper anti-retroviral medicines (ARVs) in South Africa than ARVs sold by the pharmaceutical companies. The pharmaceutical companies argued that the production and importation of cheaper medicines allowed for by the Act would infringe their intellectual property rights and result in a significant loss of revenue for them. The Treatment Action Campaign ('TAC') is a campaign launched in South Africa in 1998 in response to the actions of the pharmaceuticals. The TAC's objectives are to improve the affordability of and access to quality health care, and to

prevent and eliminate new HIV infections. The TAC acted as *amicus curiae* (friend of the court) in support of the government, and on behalf of people living with or affected by HIV or AIDS in South Africa to argue in support of the Act. To strengthen its campaign, the TAC mobilized local and international activist support, held public demonstrations which were designed to embarrass the companies²²⁸ and to influence global public opinion in favour of the government.²²⁹ The case was dropped in the face of significant international public pressure and increasingly negative perceptions about the pharmaceutical industry. In 2003, the South African government agreed to distribute anti-retroviral medication ('ARVs') to people living with or affected by HIV or AIDS,²³⁰ a course of action it had previously resisted. These events can mainly be attributed to the work of the TAC. The TAC combined number of legal and other development related strategies (such as human rights education, HIV treatment literacy, public demonstrations) and enlisted the support of a broad cross section of society (ranging from church groups, politicians, scientists, NGOs, gay rights groups to trade unions) to campaign for the right to health. As a result, many TAC strategies may be identified with the Legal Empowerment Approach to development, and exemplify how the Legal Empowerment Approach may empower citizens, in this case, those affected by HIV or AIDS. A central concept of each campaign strategy and one vital to its success was its recognition both of how power works at the level of agency and opportunity structure and how power at both levels may be harnessed to empower those affected by the HIV virus. As a result of its strategies, the TAC ensured the reduction of the price of ARV medicine, prevented thousands of HIV-related deaths and redirected state resources into the health system and towards the poor.²³¹

The first part of this chapter provides an overview of the TAC campaign from 1999 to 2003,²³² details the various challenges the campaign faced during this period and discusses the link between poverty and HIV/AIDS. The second part of the chapter

²²⁸Sean Jacobs and Krista Johnson 'Media, Social Movement and the Construction of HIV/AIDS in South Africa' (2007), *African Studies Quarterly*, Vol 9, Issue 4 at 8.

²²⁹Ibid.

²³⁰Note that HIV is a virus, and AIDS is a clinical syndrome, but for the purposes of this thesis, reference will be made to 'people affected by HIV' in order to encompass all those affected by the virus or syndrome. This reference term is recommended by UNAIDS Terminology Guidelines, October 2011, accessed at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2118_terminology-guidelines_en.pdf on 9 November 2012.

²³¹Mark Heywood, 'South Africa's Treatment Action Campaign: Combining Legal and Social Mobilization to Realise the Right to Health' (2009). *Journal of Human Rights Practice* Vol 1, Number 1, pp 14-36 at 24.

²³²Whilst the TAC continues its activities to the present day, due to the time frame examined in this chapter, the past tense will be used to describe TAC's activities

acknowledges the internal and external obstacles and barriers limiting access to ARV treatment inherent within individuals, organizations and formal and informal institutions. Using the Holland and Brook Empowerment Model and Gaventa's Power Framework as lenses, the chapter proceeds to argue that the TAC's founders recognized that overcoming barriers to treatment would depend upon a combination of strengthening the individual agency of those affected by HIV/AIDS and harnessing the support and strength of organizations and that comprised the opportunity structure.

11.1 Treatment Action Campaign- an overview of the campaign from 1997 to 2003.

The TAC was launched on 10 December 1998 ('Human Rights Day' in South Africa) by a small group of political activists, led by Zackie Achmat.²³³ The TAC was launched in response to a court action brought by pharmaceutical companies against the South African government. The action brought by the pharmaceuticals aimed to prevent the passing of the proposed Medicines Act ('the that allowed for the importation of cheaper generic medication to South Africa, including ARVs. The pharmaceutical companies argued that the production and importation of cheaper medicines would infringe their intellectual property rights and result a significant loss of revenue for them. Acting as amicus curiae to the government and on behalf of people affected by HIV in South Africa, the TAC argued in support of the Act. The fundamental belief shared by TAC activists was that equitable access to health care, in particular HIV medicines, is a human right.²³⁴ The TAC argued that the cost of medicines, including ARVs supplied by the maceutical companies was prohibitively expensive for the majority of South Africans affected by HIV, thereby preventing those affected from accessing treatment, and in effect, denying their right to health care. The TAC argued that the de of the right to health care also violates a range of other human rights such as the right to dignity, equality and education that had been, since 1996, entrenched in the South African Constitution. The TAC campaign involved the mobilization of thousands of people affected by HIV and the influence of national and international supporters ranging from non -

²³³Mark Heywood (see 231) at 15.

²³⁴Ibid.

governmental and community based organizations to famous individuals, to strengthen its campaign. The case was dropped under significant national and international pressure on the pharmaceuticals and in 2003, the South African government agreed to distribute ARVs to people living with HIV or AIDS,

Following this victory, TAC expected that the government would begin to distribute ARVs at various public health facilities. However, instead, the government rejected or delayed implementation of HIV/AIDS prevention and treatment regimes 'either on principle or until lengthy 'pilot programs' were undertaken to test them.'²³⁵ In practice, this meant that access to ARV drug therapy for those living with HIV was also denied. The government cited a number of interrelated reasons for this intransigence. President Thabo Mbeki and the incumbent health Minister Manto Tshabalala-Msimang questioned the accuracy of HIV testing, the link between HIV and the viral cause of AIDS, and doubted the efficacy and safety of HIV treatment.²³⁶ AIDS activists refer to this set of beliefs as AIDS 'denialism.'²³⁷ The cost of rolling out comprehensive HIV prevention and treatment plans was another issue raised by the government. From as early as 1998, the government raised the question of affordability as the principle reason behind its inability to introduce a drug based prevention and treatment regime.²³⁸ The government's reasoning related not only to the costs of procuring drugs, but also those associated with a treatment plan, such as the costs of providing counselling and formula milk.²³⁹ As a result of the government's reticence to roll out prevention and treatment programs, a lengthy and bitter battle from 1999 to 2003 between TAC and the government ensued. This was dominated by issues pertaining to AIDS denialism and the affordability of HIV prevention and treatment programs.

²³⁵ Steven Friedman and Shauna Mottiar 'A Rewarding Engagement? The Treatment Action Campaign and the Politics of HIV/AIDS' at 514 available at http://www.newschool.edu/uploadedfiles/tcds/democracy_and_diversity_institutes/friedman%20and%20mottiar_rewarding%20engagement.pdf accessed on 27 October 2012.

²³⁶ Note that although this chapter focuses upon the decisions made by President Mbeki and Health Minister Manto Tshabalala-Msimang, a number of national ministers such as finance, trade and industry, have key roles with regards to AIDS policy and implementation. Similarly, provincial governments have a key role in implementing AIDS treatment and prevention strategies. This thesis will refer to the 'government' for ease of reference.

²³⁷ Led by President Thabo Mbeki and supported by the Health Minister Manto Tshabalala-Msimang.

²³⁸ Neil Overy, 'In the Face of Crisis: The Treatment Action Campaign Fights Government Inertia with Budget Advocacy and Litigation' (2011) International Budget Partnership, Study No. 7, at 2.

²³⁹ Ibid.

In July 2002, the Constitutional Court found that the government had acted in an 'unreasonable and unconstitutional'²⁴⁰ way in its failure to provide a comprehensive program to prevent the transition of HIV from mother to child ('MTCT'). As a result, the court ordered the government to supply the ARV 'Nevirapine,' to prevent MTCT.²⁴¹ This was followed by an even greater victory in August the following year, when the national Cabinet decided to extend the availability of ARVs to everyone living with HIV.²⁴² In August 2003, the government announced that the DoH had been instructed to draw up a plan for an ARV program in S.A and a plan was approved in November 2003 by the cabinet. To date, the TAC continues its campaign to ensure that people living with HIV have access to comprehensive HIV prevention and treatment services. However, this chapter will explore TAC's campaign from its inception, until the approval of the ARV plan in 2003, and as a result will use the past tense when referring to TAC campaigns. The following section provides an overview of the individual and structural barriers behind the HIV epidemic and the various ways in which TAC strategies sought to overcome these.

11.2 The TAC Campaign - Recognition of the Structural Causes behind the HIV Epidemic and the Barriers Preventing Access to Treatment

South Africa is the region of the world most affected by the HIV epidemic.²⁴³ The relationship between poverty and HIV transmission is complex and linked to a number of structural inequalities (for example those pertaining to race or gender) including those which give rise to poverty. It is beyond the scope of this chapter to examine the relationship between poverty and HIV in detail, but it is significant to note that economic, social and physiological factors that render people vulnerable to and therefore at a higher risk of HIV infection are aggravated by poverty. Risk factors which result in the poor being more vulnerable to HIV on health grounds include; limited access to health care (for example due to the lack of availability of health services in poor areas, and the concomitant cost of accessing and paying for such services), which in turn decreases the possibility of having sexually transmitted

²⁴⁰ Friedman and Mottiar (see note 235) at 514.

²⁴¹ Amy Kapczynski and Jonathan M. Berger The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa, at 20 available at <http://www.law.berkeley.edu/php-programs/faculty/facultyPubsPDF.php?facID=7238&pubID=2> accessed on 10 November 2012.

²⁴² Ibid.

²⁴³ Mark Heywood (see note 231) at 14.

infections treated thereby increasing the risk of HIV infection; lack information about their HIV status; and the crowded and unsanitary conditions in which many poor are forced to live, with limited access to clean water, and increased exposure to other diseases such as malaria or tuberculosis.²⁴⁴ In addition to the risk of HIV infection being aggravated by poverty, the impact of living with HIV or AIDS can further impoverish people and thereby intensify the epidemic.²⁴⁵ Those affected are often unable to maintain jobs due to the effects of the disease. This may lead to a reduction in their household income, or require household resources to be diverted to their medical, care and funeral expenses. Those affected may pass away leaving elderly or very young in their households who need care, thereby placing additional burdens on households, and other family members or friends with the increased costs associated with this care.²⁴⁶

Much of the success of the TAC campaign was due to the recognition that transmission of the HIV virus is often via ‘social fault lines created by poverty, inequality and social injustice’²⁴⁷ and that the HIV epidemic is therefore a symptom of a social and political imbalance of power, money and resources. This close correlation between structural inequalities giving rise to poverty, social injustice and the transmission of the virus would suggest that ‘any barrier or obstacle ... that limits access to treatment for HIV in the public and private sectors as set out in TAC’s Constitution’²⁴⁸ also correlate closely with those barriers or obstacles that create and sustain poverty.

TAC leaders recognized that the obstacles and barriers that were limiting access to treatment comprised both external and internal obstacles. External obstacles included the way that power manifests in formal and informal institutions, (collectively defined by North as the ‘rules of the game’) and organizations (as distinct from, but exerting influence upon and influenced by formal and informal institutions). Internal

²⁴⁴ M.J. Kelly C. Desmond D. Cohen, The impacts of HIV/AIDS on development at 36, available at http://www.iiep.unesco.org/fileadmin/user_upload/Cap_Dev_Training/pdf/1_1.pdf accessed on 15 November 2013.

²⁴⁵ Economic and Social Development Department, Food and Agricultural Organisation of the United Nations – The impact of HIV/AIDS on rural households and land issues in Southern and Eastern Africa page 1 available at <http://www.fao.org/wairdocs/ad696e/ad696e04.htm> August 2002

²⁴⁶ Ibid.

²⁴⁷ Mark Heywood (see note 231) at 15.

²⁴⁸ Treatment Action Campaign 2004 Constitution of TAC.

obstacles comprise individual barriers such as the psychological barriers of those affected by HIV.

Informal and formal institutions and organizations comprise the 'Opportunity Structure' component of the Empowerment Model, ie the context within which those affected by HIV operate, and which have the potential to assist or constrain their ability to transform agency into effective action, or, specifically, accessing ARVs.

Formal institutions include, for example, laws codifying pharmaceutical companies' patent rights, thereby preventing access by South Africans to inexpensive medicines, including ARVs. Informal institutions include accepted societal norms, such as the stigma attached to HIV and its treatment, and the way in which those affected could be ostracized from their communities.²⁴⁹ The way in which power was manifested through organizations is exemplified by the choices made by decision makers within the DoH not to proceed with the roll out of PMTCT or ARV programs, thereby denying life saving drugs to millions affected by HIV.

Internal obstacles comprise the 'Agency' component of the Empowerment Model. These are factors such as psychological barriers that constrain individual agency, and reminiscent of Golub's definition of the LEP approach, are factors that limit the control that affected persons have over their lives. Internal barriers are influenced by external factors such as the stigma (informal institutions) attached to HIV and its treatment. The remainder of the chapter sets out a number of TAC strategies to illustrate how, by working on both the level of agency and opportunity structure components of the Empowerment Model, TAC strategies empowered those affected by HIV to challenge and overcome internal and external obstacles, and access ARV treatment. TAC strategies worked to strengthen individual assets of thousands of people affected by HIV who were able to collectively mobilize, assert their rights, challenge government decisions, and campaign for change. TAC strategies also accessed and engaged the support of a number of institutions and organizations comprising opportunity structure. A number of TAC strategies identified below as

²⁴⁹ Steven Robins 'Khululeka – From Social Movement to Men's Support Group A Case Study of Aids Activism in Guguletu, Cape Town', *Participatory Governance?* (2007) *Citizens and the State in South Africa* (Lisa Thompson (ed)) African Centre for Citizenship and Democracy at 15.

directly affecting individual agency, such as the Openness Strategy and the Treatment Literacy Campaign, were also responsible for influencing and engaging informal and formal institutions and organizations com opportunity structure. Similarly, campaigns more focused upon engaging the opportunity structure component, for example the formal institution of the media, also had implications for individual agency. In order to analyse *how* such strategies were able to empower people affected by HIV, the chapter analyses TAC strategies using the Power Framework to highlight how different forms of power operating at the levels of agency and opportunity structure were engaged, harnessed, strengthened and challenged.

11.3 TAC Empowerment Strategies – Strengthening Agency and accessing Opportunity Structure

TAC leaders had a keen awareness of the existence of barriers at both individual (agency) and structural (opportunity structure) levels to accessing ARV treatment. This awareness influenced the way in which TAC strategies were shaped, and the tools and tactics it used to both challenge and harness the ways in which power operates at the structural and individual agency levels.

The following section provides a brief overview of how TAC's campaign strategies were able to strengthen the agency of people affected by the virus by building a variety of assets, engaging interrelated forms of power and creating spaces for action.

11.4 The Strengthening of Agency and the engagement of inte ted forms of power

TAC strategies that aimed to strengthen individual agency ranged from human rights education, HIV treatment literacy and civil disobedience campaigns to holding mass demonstrations and undertaking litigation. Such strategies strengthened a range of assets. For example, TAC strategies equipped those affected with HIV with both a comprehensive understanding of the virus and health related issues, and an awareness of the structural inequalities underpinning epidemic. Strategies sought

to enable those affected by HIV to envisage and campaign for change, and build the confidence and ability of those facing the stigmatizing epidemic to speak out in public places.²⁵⁰ The corollary of strengthening individual assets was an increase in individuals' 'power to' act, exercise choice and make affecting their lives. As examples of 'power with,' thousands of individuals ed by HIV mobilized to form collective strength and joined forces with institutions and organizations to challenge the pharmaceuticals and government decisions. Arguably, a combination of individual and collective strength also facilitated an increased sense of self esteem and ability within affected persons to imagine alternative options ('power within').

Such large-scale mobilization also exemplifies how the TAC created a democratic space in which newly active citizens affected by HIV were able to mobilize, protest, assert their rights and challenge the prevailing power structures and actions of government and multinational pharmaceuticals.²⁵¹ By doing so, the campaign was able to exercise 'power over' the actions of the pharmaceuticals and the DoH, with the threat of international disdain, and negative publicity. In this sense, the TAC created a space by which the power of individual agency (ie power to, and power within) became the power of collective agency (power with) to prevent, challenge or influence the actions of organizations, formal and informal institutions comprising opportunity structure (power over). In this respect, and reminiscent of Golub's definition of 'empowerment', TAC members were able to the rules of the game.'

The next section examines in more detail how two campaign strategies worked to strengthen agency, by analyzing both how assets were strengthened and the way in which power operated could be influenced. Firstly, the section will examine the TAC's 'Openness' strategy, which facilitated 'power within' by strengthening individuals' psychological assets by challenging the culture of silence surrounding the HIV epidemic and enabling those affected by HIV to construct a new identity in relation to the virus. The section proceeds to discuss the Treatment Literacy Campaign which built upon the human assets of education and literacy, to enable

²⁵⁰ Steven Robins (see note 249) at 12.

²⁵¹ Neil Overy (see note 238) at 12 citing S. Friedman and S. Mottiar, 'Seeking the High Ground: The Treatment Action Campaign and the Politics of Morality', in R. Ballard (et al), *Voices of Protest: Social Movements in Post-Apartheid South Africa*, Scottsville, 2006 at 32.

individuals the 'power to' access information about the virus, the capacity to envisage change, challenge accepted norms and demand their rights.

A Strategy of Openness- strengthening agency and influencing opportunity structure

Describing the social and cultural dimensions of the e Steven Robins²⁵² highlights how the profound stigma surrounding the HIV virus resulted in the virus being consigned to the realm of the individual and the private, in which those affected suffered in silence. In addition to the threat of a physical death, those living with HIV also experienced a 'social death' in which they were often ostracized from their communities, to suffer or die of AIDS in silence and relative anonymity. In his 'Case Study of AIDS Activism in Guguletu, Cape Town,'²⁵³ Robins illustrates the reality of this when recounting the film 'Yesterday' which depicts a true story of a migrant miner returning from Gauteng to his home villa in KwaSulu-Natal to prepare to die from AIDS. Robins describes how 'both the dying man and his wife are stigmatized and isolated by most of the villagers'²⁵⁴, resulting in his eventual 'painful and humiliating death.'²⁵⁵

In effect, the culture of silence and stigma surrounding the HIV virus and its treatment operates as an invisible form of 'power over' those affected by the virus, which is perpetuated by societal attitudes (an informal institution), which operate as a form of external barrier to accessing treatment by s the way HIV is perceived in society. Arguably, these informal institutions also shape how those affected behave and see themselves by preventing them from speaking openly about their HIV status due to the shame and stigma surrounding the virus, and the threat of being ostracized from their communities should their HIV status be revealed. In effect, these informal institutions operate as a form of 'false consciousness'²⁵⁶, acting as a tool of socialization in the minds and consciousness of those affected by HIV. The power of a culture of silence depends upon the way in which 'false consciousness' prevents those affected by HIV questioning or challenging the

²⁵² Steven Robins (see note 249) at 10.

²⁵³ Ibid

²⁵⁴ Steven Robins (see note 249) at 9.

²⁵⁵ Steven Robins (see note 249) at 18.

²⁵⁶ as more fully set out in chapter 2.

difficulties in accessing HIV treatment. In this regard, false consciousness operates as an internal (psychological) barrier of those affected to access to treatment.

One of the TAC's political strategies that sought to counteract the culture of silence surrounding the HIV virus,²⁵⁷ was its campaign of 'Openness.' The Openness campaign worked at both the level of agency by encouraging the assertion of identity of those affected by HIV, and on a structural level by promoting HIV activism on a wider scale. The campaign,

'successfully advocated for the transformation of the [culture] of living with HIV into a "badge of pride" that was displayed publicly on T-shirts at demonstrations, township funerals, and other public spaces.'²⁵⁸

This courageous approach was adopted by thousands of HIV activists, and carried significant political potential by creating new space [for] the re-framing of the way HIV was perceived by both civil society and those living with the virus.²⁵⁹ Applying the Empowerment Model lens to individual agency, the Openness strategy built upon psychological assets by facilitating contact and information sharing and building strong supportive communities between affected persons, AIDS organizations and other supporters. Arguably, membership of such communities facilitated 'power within' those affected by HIV by counteracting any self-perceived exclusion from the community, enabling people to '[construct] a new p[er]sonal HIV positive identity'²⁶⁰ and to envisage change.

Moreover, the fostering of a new culture of openness, [and] the power of those affected to envisage and create change. The articulation by those with HIV of the fact that they were living with the virus, not only subverted the culture of silence, but also became an assertion of identity and fostered a culture of openness and belonging.

On a structural level, the Openness Strategy operated [by] subverting informal institutions such as negative, uninformed attitudes in order to foster a more

²⁵⁷ Steven Robins (see note 249) at 12.

²⁵⁸ Steven Robins (see note 249) at 15.

²⁵⁹ Mark Heywood (see note 231) at 28.

²⁶⁰ Ibid.

understanding and supportive culture in both national and international communities of people affected by the virus. Furthermore, the strategy served to situate the epidemic firmly within systemic issues of contemporary South African issues pertaining to race, class and poverty. This was achieved by locating the virus within activists' bodies, as opposed to confining it solely to private arenas (such as the courtroom) for debate, and thereby succeeded in providing a running political commentary, in which activists 'ill bodies...were living reminders of national and global inequality with respect to drug availability.'²⁶¹ Indeed, the epidemic was transformed from something invisible and deniable to one affecting the lives of millions of very visible and vocal people. The disclosure of the virus on a massive scale by millions suffering from it, and the elimination of the culture of silence and taboo surrounding HIV and AIDS was vital to the demand and the success of the campaign. This culture of openness in turn helped to raise public awareness and understanding about issues surrounding the affordability, availability and use of HIV treatments which strengthened the TAC's campaign by engaging public national and international support and creating a large constituency of people demanding their rights. In this respect, personal empowerment also became political empowerment. The above example is illustrative of the way in which the strengthening of individual agency on a large scale had implications for the institutions and organizations comprising opportunity structure. An increase in public awareness and support for the campaign also resulted in increased pressure on the pharmaceutical companies to drop their action against the government, and later, pressure on the government to roll out a comprehensive HIV treatment and prevention plan. In this respect, collective agency impacted both informal inst and organizations comprising opportunity structure.

Treatment Literacy Campaign

A second campaign was the Treatment Literacy Campaign which focused upon building individual agency by teaching those affected by HIV to understand

²⁶¹Ibid.

and become literate about the virus²⁶² whilst simultaneously locating the virus within its wider political and social context. In this regard, the TLC also engaged the ‘critical consciousness’ of those affected by raising their awareness of the structural inequalities inherent in the social, economic and political systems affecting the virus and its treatment.

The philosophy behind the TLC campaign was that by understanding the virus, people would take more ownership of their bodies in respect of preventative measures and treatment of their illness. Treatment literacy information was disseminated through a range of educational materials, including: booklets, posters and videos, which were combined with a comprehensive training program. Training topics included (a) the science and epidemiology of HIV (b) nutrition (c) the benefits of treatment, prevention, mother to child transmission (‘MTCT’) as well as (d) legal rights, and global issues involving HIV and AIDS.²⁶³ People who received training and reached a satisfactory standard were appointed as ‘treatment literacy practitioners’ (‘TLPs’). TLPs were assigned to conduct education workshops in clinics, NGOs, villages, churches and community organizations to ensure continuity of education on all aspects of the epidemic. Workshops created space for people to disclose their stories, ask questions and experience group solidarity, whilst simultaneously promoting a political and social underpinning to their education by linking it to human rights, equality and the political economy (ie how the interplay of politics and economics shaped government decisions regarding treatment). In this regard, the TLC encouraged a form of critical consciousness in individuals (a form of ‘power within’), regarding their place and situation within society, and the social and political factors underpinning this. Thus, an informed understanding of the illness - its causes, effects and treatments - and the ability to locate this within the broader political context created ‘empowered citizens.’²⁶⁴ TAC leaders recognized that treatment literacy increased individuals’ capacity to change, challenge accepted societal norms, exercise choice and demand their rights. In this regard, access to information was an essential tool of citizenship, which enabled those affected by HIV to tackle the inequalities of power inherent within the South African healthcare system.

²⁶² Steven Robins (see note 249) at 11.

²⁶³ Mark Heywood (see note 231) at 17 and 18.

²⁶⁴ *ibid.*

11.5 TAC Empowerment Strategies at the level of Opportunity Structure

The last section considered how TAC strategies worked to strengthen the agency of people affected by HIV and how agency on a collective level had implications for the institutions and organizations comprising opportunity structure. This included subverting the culture of silence surrounding the virus and raising the profile of the campaign, which worked to increase pressure on the government to roll out a comprehensive HIV treatment and prevention plan. This section considers the TAC strategies that worked directly towards engaging and harnessing forms of power within organizations (such as the DoH), formal and informal institutions (such as the South African Constitution and national and international public opinion) comprising opportunity structure. Strategies included negotiations with executive government (DoH), utilizing the power of decisions made by the Constitutional Court over the DoH, and harnessing the power of mass mobilization and civil disobedience campaigns to engage support within the international community to influence the government.

Unlike many other African countries, South Africa has a number of strong, working institutions, (for example, a well developed legal system, a Constitutional Court, a free press, and a Constitution which enshrines the human rights of South Africans). However, the TAC recognized that despite the existence of institutions and of enshrined rights or pro-poor laws, in reality a gulf exists between rights and their realization. Rather, the translation of rights on paper into rights in practice depends upon how power is exercised by the politics and interests of decision makers. The Minister of Health and the President were the key decision makers regarding access to ARV and PMTCT treatment. Their decisions regarding treatment were influenced by the interplay of politics and economics. The Minister of Health's decision that the costs associated with the roll out of PMTCT and ARV programs were unaffordable, and President Thabo Mbeki's questioning of the 'toxicity' of ARV treatments and the link between HIV and AIDS, shaped a political economy which led to significant delay in treatment for millions of people living with HIV. The government's inaction was exacerbated by the fact that Mbeki employed a number of consultants who reflected his own denialist beliefs to advise him in ways which, added weight to his dissident views and refuted the legitimacy of science. Whilst the act of this

‘consultation’ may have appeared to have invited advice or challenge by consultants and thereby occupy the realm of ‘visible power’ and ‘invited space’²⁶⁵ in reality, decisions continued to be made in closed spaces in accordance with beliefs held by a minority of people in politically powerful positions. an example of how closed spaces are closely aligned with hidden power, space for civil society participation in government decision making processes was effectively closed by its being denied access to government plans and policy documents that would ordinarily be in the public domain.²⁶⁶ Natrass asserts that throughout Mbeki’s presidency, ‘important reports on causes of death, maternal mortality and HIV prevalence were delayed and sometimes doctored.’²⁶⁷ The process of non-disclosure, delay and doctoring, acted as a form of hidden ‘power over’ those affected by HIV. By perpetuating the politics of the situation in closed spaces, keeping items off the political agenda and leaving voices of a select minority unchallenged, hidden power was able to become ‘power over’ millions of less powerful people affected by HIV, thereby limiting their choices and denying them their right to health.

The following section provides examples of how TAC strategies engaged, utilized or challenged forms of power within institutions and organizations comprising opportunity structure. The section proceeds to focus on the TAC’s PMTCT and ARV programs respectively, and the particular strategies used to counteract government claims regarding the toxicity and unaffordable nature of such programs.

12. Engaging Opportunity Structure - Strategic alliances with institutions, organizations and powerful individuals.

In order to challenge, influence or counteract the claims of the Health Minister and President, TAC strategies sought to harness equally powerful political, scientific, or legal support, make visible hidden government agendas, and create spaces²⁶⁸ for lobbying, protest and resistance.

²⁶⁵ Note the typology referred to in chapter 3 which depicts different types of ‘space’ in which power may operate.

²⁶⁶ Heywood, Civil Society and Uncivil Government, *The Treatment Action Campaign (TAC) versus Thabo Mbeki, 1998-2008* (In publication ‘In Mbeki and After, Reflections on the Legacy of Thabo Mbeki, Ed D Glaser, Wits University Press, 2010)) at 15.

²⁶⁷ Ibid – Heywood citing Natrass at 15. (Natrass, N. 2007. *Moralism and the Struggle for Antiretrovirals in South Africa*. Pietermaritzburg: University of KwaSulu-Natal Press.

²⁶⁸ Steven Robins (see note 249) at 15.

On a domestic scale, the TAC built large networks of local supporters, ranging from influential political figures, such as Nelson Mandela, to alliances with organizations such as the Catholic Church (despite the Catholic church's opposition to the use of condoms). In addition, the TAC aligned itself to South Africa's largest and extremely powerful trade union, the Congress of South African Trade Unions ('COSATU'), despite COSATU's partnership with the ANC government. In this respect the TAC sought commonality among differing interests and built collective strength with COSATU and the Catholic Church. These alliances demonstrate the TAC's use of 'power with' such organizations to develop shared values and foster critical and strategic political support. On an international scale, the TAC found support in civil society organizations (such as the Stop AIDS Campaign) that organized worldwide events in support of the TAC, enabling the TAC to gain leverage and power to secure international disdain for and opposition to both pharmaceutical company actions and ANC government policies.²⁶⁹

The TAC used the South African Constitution as a legal, moral and political tool by which to discredit the DoH's claims and to frame its campaign for the right to life, health, and other socio-economic rights (such as the right to social security and social assistance,²⁷⁰ which are enshrined in the Constitution). The purpose of the campaign's use of the Constitution was two-fold: judicial enforcement of socio-economic rights, and to use the moral and legal weight of the Constitution to influence public opinion and garner national and international support. This strategy demonstrates how the TAC used a formal institution to exert power over the government by using the Constitution as a tool to inform the campaign's lobbying, strengthen its protests, and ultimately force the government to be accountable for its actions.

Furthermore, campaign strategies sought to harness the power and support of the mass media (formal institution), using newsprint, the radio, television and Internet as

²⁶⁹ Neil Overy (see note 238) at 9.

²⁷⁰ The South African Constitution, Section 27.

a tool by which to broadcast its messages, lobby, and a high profile and constant visibility for the campaign. One political analyst noted that the TAC ‘achieved extraordinary media visibility and shaped public opinion through sophisticated networking and media imaging.’²⁷¹ The support of the media also assisted the TAC campaign to bolster its Openness Strategy by bringing the discussion of HIV from previously closed, private spaces, into a public space, thereby also working to transform the informal institution of a culture of silence.

The following section demonstrates how, through the use of formal institutions and organizations, the TAC’s campaign sought to influence the political and economic reasoning relied upon by the government to inform its decisions to delay the roll out of both ARV and PMTCT treatment.

PMTCT Program Strategies: The use of formal institutions to challenge government claims

The TAC conducted extensive research to demonstrate that preventing new HIV infections by implementing PMTCT was cost effective. The TAC’s research was strengthened by using scientific opinion contained within a series of affidavits to counteract Thabo Mbeki and the Minister of Health’s claims regarding the unaffordable cost of PMTCT programs and the toxicity of treatment. Affidavits by experts included Dr Mark Wainberg, one of the world’s most prominent virologists²⁷² and Professor Nicoli Natrass, a health economist. Natrass showed that public funds could be saved by spending money on PMTCT programs that would reduce future HIV infections.²⁷³ In December 2001, the High Court found in favour of the TAC, and ordered the government to draw up a national programme for the PMTCT using Nevirapine.²⁷⁴ An appeal by the government to the Constitutional Court, in July 2002 failed. The TAC’s use of medical professionals and health economists demonstrates how the TAC moved beyond demands that the government

²⁷¹ Steven Robins, ‘Long Live Zackie, Long Live’: AIDS Activism, Science and Citizenship after Apartheid at 14, available at http://www.dfid.gov.uk/r4d/PDF/Outputs/CentreOnCitizenship/long_live_zackie.pdf accessed on 1 November 2012.

²⁷² Amy Kapezynski & Jonathan M Berger The Story of the TAC case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa, at 16, available at (<http://www.law.berkeley.edu/php-programs/faculty/facultyPubsPDF.php?facID=7238&pubID=2>) accessed on 15 October 2011.

²⁷³ Affidavit C.C Natrass, 15 August 2001, section 23, available at, www.tac.org.za/documents/MTCTCourtCase/ccmnatt.rtf, accessed on 10 November 2011.

²⁷⁴ Nevirapine was cleared for use for PMTCT in SA by the Medicines Control Council in April 2001,

comply with legal obligations and used scientific and economic opinion to counteract the Ministry of Health claims that PMTCT or ARV programs were unaffordable or toxic. Scientists and researchers also developed policy proposals that met the ‘reasonableness’ requirements that jurisprudence of the Constitutional Court had repeatedly said the government must comply with, thereby increasing pressure on the government to comply with TAC’s demands.²⁷⁵

ARV Campaign Strategies: The use of formal institutions and organizations to counteract government claims

On 1 December 2000, the South African Minister of Health announced the government’s decision not to implement a large- scale antiretroviral program, echoing its previous argument that the program was ‘unaffordable.’²⁷⁶ In order to counteract these claims, the TAC formed a committee of medical professionals and health economists to produce a draft National Treatment Plan (NTP) based on the costs of medicines and the associated delivery costs. This NTP became pivotal to TAC advocacy, and in 2002, the TAC and the Congress of South African Trade Unions (COSATU) convened a National HIV/AIDS Treatment Congress. Following the congress, the TAC began negotiations for a NTP with labour, business leaders and government representatives at the National, Economic, Development and Labour Council (NEDLAC). This enabled formal engagement with labour and business leaders, whilst simultaneously creating a new space for the discussion of HIV related issues and moving it ‘beyond the exclusive power of the Minister of Health- over these decision, but still keeping government within discussions.’²⁷⁷ This demonstrates how, from a previously closed forum, (NEDLAC was tripartite in its composition and excluded civil society), the TAC used ‘power with’ COSATU to strategically ‘create space’ for itself at the negotiating table.

The TAC placed two research papers that considered the effect a NTP would have on AIDS related deaths, and a costing exercise of a NTP before NEDLAC. At the end of

²⁷⁵ Heywood, South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right of Health at 21, quoting Berger, J 2008 ‘The ABC of Drug Access: Reflections of a Pharma-basher.’ Paper presented to SA HIV Clinicians Society, February 2008.

²⁷⁶ (Minister of Health, Speech on World Aids Day, 1 December 2000).

²⁷⁷ Neil Overy (see note 243) at 5.

2002, NEDLAC reached a draft agreement on a national plan for the roll out of ARVs. The government immediately rejected this draft agreement. In response, the TAC announced a civil disobedience campaign that included public demonstrations, refusal to leave police stations until the TAC's demands were met, and heckling the Minister of Health at public events, all of which generated significant amounts of publicity. The heckling at public events exemplifies how the TAC used subverted the use of a public space to create a site for resistance. Other civil disobedience strategies reveal how the TAC was able to create new spaces for debate and discussion outside of typical forums and increase pressure on the government to implement ARV programs.

On 8 August 2003, the government announced that the DoH had been instructed to draw up a plan for an ARV program in S.A and a plan was approved in November 2003 by the cabinet.

12.1 – The Treatment Action Campaign – An Awareness of the many forms and uses of power

As set out above, the main obstacles to accessing ARV treatment can largely be grouped into two categories: the internal psychological obstacles of those affected by HIV and external obstacles in the form of decisions, actions and inaction of organizations such as the pharmaceuticals and the DoH respectively. The TAC leaders recognized that the changes required by the TAC strategies to overcome both forms of obstacles were intimately bound to how power manifests.

As a result, TAC strategies demonstrated a keen awareness of who has power, how it changes according to who is using it (ie individuals affected by HIV, government officials, scientific institutions or famous individuals) where it is being used, (ie locally, nationally or globally), which form it takes (ie visible, hidden or invisible) and which type of space it operates within (invited, closed, created).

From an Empowerment Framework perspective, TAC strateg such as the Openness and Treatment Literacy campaign worked directly to strengthen the agency

of individuals and the types of power such as ‘power to’, ‘power with’ and ‘power within’ usually associated with it. The Treatment Literacy Campaign worked by building human assets, including levels of education and literacy regarding the virus; psychological assets whereby membership of the TAC arguably worked towards counteracting self perceived exclusion from the community, increased levels of interaction with people in different social groups, and encouraged those affected by HIV to envisage change; access to information, such as increased access to information concerning the virus and the broader socio-economic structures surrounding it; and organizational capacity, such as the membership of TAC. Viewing such strategies through the Power Framework reveals how building the assets of individuals strengthens agency by increasing a sense of ‘power within’ to envisage change and feel a sense of belonging. Another type of power associated with Agency, and one increased by the TLC’s was the ‘power to’ question power relations and the structural inequalities embedded within institutions and organizations that underpin the HIV epidemic. Finally, the Openness Strategy strengthened the form of ‘power with’ by creating a community of activists with common concerns and a campaign with a unified voice and fostering a sense of belonging.

TAC leaders recognized that while strengthening individual agency is a vital component of empowerment, power relations in society are shaped by wider political systems. In the TAC example, the wider political system included the decisions of powerful actors such as President Mbeki and the Minister of Health to determine who has access to HIV treatment. As a result, TAC campaigns focused on harnessing or challenging the power embodied within the institutions and organizations comprising opportunity structure or the ‘rules of the society in order to shift the balance of power between powerful individuals within such institutions and those living with HIV. In order to do so, TAC strategies focused both directly and indirectly on the opportunity structure component of the Empowerment Framework.

Although working to increase the agency of individuals, the Openness strategy gained significant momentum and turned a large group of individuals into a political

force with visible and politicized demands. By simultaneously engaging the support of a range of organizations, (for example trade unions, scientific bodies, and NGOs) and the strength of formal institutions (such as the socio-economic rights enshrined in the South African Constitution or the far reaching influence of multiple forms of media) the campaign was able to use ‘power with’ other institutions and organisations in order harness ‘power over’ the actions of the pharmaceuticals and the DoH with the threat of international disdain, and negative publicity.

By understanding how different forms of power operated within agency and opportunity structures, TAC leaders were also better equipped to understand how the different types of ‘space’, could be used by its campaigns to affect power structures. As a result, TAC strategies used spaces tactically as well as strategically to exert pressure and influence government decision-making. The Openness strategy subverted the invisible ‘power over’ of the culture of silence and the ‘false consciousness’ it engendered in those affected, by creating a space in which newly active citizens affected by HIV were able to mobilize, protest, assert their rights and challenge the decisions and actions of the DoH and multinational pharmaceuticals.²⁷⁸ This reveals how the TAC relied upon the transformative potential of created spaces for the less powerful against power holders. Other TAC strategies such as its discussions with NEDLAC sought to open previously closed spaces and subvert typical channels of communication, thereby creating new spaces to protest, debate and negotiate.

TAC leaders recognized that ‘agency’ does not work in isolation, and an enabling environment in which those affected could organize, campaign, create networks and alliances was also vital to the success of the campaign. As a result, TAC campaign strategies actively used organizations and informal and formal institutions to inform and strengthen its campaign. Ultimately, by engaging with both components of the Empowerment Framework, and by being actively aware of many ways in which power can operate, TAC campaigns were able to empower those affected by HIV to influence government decisions and access life saving treatment. In this respect, those affected by HIV were able to both understand and affect the rules of the game.

²⁷⁸Neil Overy (see note 238) at 32.

Chapter 5: Conclusion: The LEP Approach – Addressing the Limitations

13. Putting power back into the heart of the LEP approach

In a world in which the role of law in development continues to be instrumental in furthering the neoliberal objectives of economic growth, LEP can make a potentially important contribution to eradicating poverty. The LEP approach challenges conventional discourses on the rule of law by going beyond the confines of the purely legal formal system and engaging with both informal and formal institutions, and incorporating other development related disciplines.

The LEP approach objectives are to strengthen the power and capacities of the poor, so they may exercise greater control over their lives. In order to achieve this, LEP interventions focus less on law, lawyers and state institutions, and more on increasing the capacities, opportunities and most fundamentally, power of the poor concerning actions and decisions that affect their lives. Indeed, ‘the key concept in legal empowerment is not law; it is power.’²⁷⁹

However, as I have argued, Golub’s formulation of the approach neglects to engage critically with, or incorporate a sophisticated understanding of power or empowerment, which results in the approach lacking conceptual clarity. Golub, the architect of LEP, asserts that LEP interventions prioritize civil society as the ‘best route to strengthening the legal capacities and power of the poor.’²⁸⁰ He understands empowerment in individual terms, arguing an increase in *individual* power (my italics) can have an impact at the institutional level and can impact upon ‘national laws and institutions.’²⁸¹ Furthermore, he argues that ‘where the poor have more power they are better able to make government officials implement the law and influential private parties abide by it.’²⁸² However, he fails to analyse *how* the power of the poor may be strengthened, what form this power takes, *why* civil society is the

²⁷⁹ Stephen Golub (see note 5) at 7.

²⁸⁰ Stephen Golub (see note 5) at 3.

²⁸¹ Stephen Golub (see note 5) at 5.

²⁸² Stephen Golub (see note 5) at 7.

best route or indeed *how* the poor are better able to influence government officials or influential private parties to implement the law.

This thesis argues that the LEP paradigm also fails to incorporate a coherent framework for either power or empowerment, despite Golub's claim that power and empowerment are central to the LEP approach. A lack of engagement with the complexities of power, how empowerment is best achieved, or what each concept means within the LEP framework, undermines the commitment to the centrality of power to the approach and limits the approach in a number of ways:

First, a lack of framework results in lawyers and development practitioners being unable to analyse in a clear or structured way, the power relations or power interests at work within informal or formal institutions. These represent structural systems that are responsible for people becoming and remaining. By corollary, without an empowerment or power framework to structure and inform analysis, lawyers and development practitioners are unable to analyse how empowerment of poor and marginalised people may be best achieved. This lack of framework results in the LEP approach being open to a variety of interpretations and operational outcomes. The fact that LEP is open to interpretation the approach vulnerable to being co-opted into dominant rule of law approaches to development. Dominant approaches emphasize 'top-down' strategies which assume that 'professional' external leadership and the imposition specific, pre-determined development models into communities is the most effective way to plan and implement development programs. Top-down approaches exclude partnerships with the poor, and the emphasis is on law and not on power. The fact that the LEP approach is not conceptually clear about what it means by power and empowerment and how these could be operationalised, means that the LEP approach risks being operationally irrelevant. The 2008 CLEP²⁸³ report illustrates that the LEP approach is open to broad interpretation and therefore how LEP interventions risk placing too much emphasis on either individuals or institutions respectively. The report focuses upon legal interventions and advocates the notion of material improvement as the central means to development, in accordance with traditional rule of law approaches to development. Dan Banik's assertion that 'the CLEP's recommendations remain

²⁸³ Commission for the Legal Empowerment of the Poor 2008 Report.

very top-down, state-centred and orthodox in nature' further highlights the report's alignment with the dominant rule of law approach.

A second implication of the LEP approach's failure to incorporate a framework for power and empowerment is the tendency for LEP interventions to over-emphasize institutions or individual agency respectively. Golub states that the formal institutions and organisations traditionally supported by the ROL approach operate to benefit elites rather than the poor.²⁸⁴ However, I argue that the LEP approach places too much attention upon interventions that seek to strengthen individual agency and too little focus on harnessing or challenging the way in which power operates in organizations and formal institutions. I introduce the Holland and Brooks Empowerment Model to demonstrate that empowerment is dependent on the interplay between both individual agency and institutions comprising opportunity structure. Agency is the ability to choose, and to make meaningful, informed choices about one's life. Opportunity structure is the context within which people operate, which is shaped to an extent by informal and formal institutions (traditionally the focus of the ROL approach). These institutions have the potential to assist or constrain the ability to transform agency into effective action, and as a result, I argue that in order to realise the full effects of strengthened agency, whereby individuals are able to make meaningful choices about their lives, LEP interventions must take into account the informal and formal institutions comprising opportunity structure. The LEP approach's lack of conceptual clarity also increases the potential for important concepts such as the 'rules of the game,' that define and distinguish the LEP, approach to be undermined. I propose Gaventa's Power Framework to work in conjunction with the Empowerment Model to enable a deeper understanding of how, at the agency and opportunity structure components of the Empowerment Model, the various forms and levels of power exist and operate in tension with one another. I argue that Gaventa's Power Framework also provides a tool to understand how the notion of 'space' can be used to challenge or influence the ways in which power is exerted by organizations, and formal and informal institutions. In this respect, Gaventa's Power Framework facilitates a better understanding of how the 'rules of

²⁸⁴ Golub (see note 5) at 27.

the game' operate, and how they can be affected, which is something I argue the LEP approach neglects to do.

I use the Empowerment Model and Power Framework to show how the TAC's success is due in part to its recognition of the many ways that power takes, and the many ways in which it may operate. I show how the TAC sought to strengthen the agency of people affected by HIV, by building upon individual assets and engaging inter-related forms of power as well as harnessing the power wielded by formal and informal institutions comprising opportunity structure. I argue that by being actively aware of the many ways in which power can operate, TAC campaigns were able to empower those affected by HIV to influence government policies and access life saving treatment for those affected by HIV in South Africa.

Finally, this thesis acknowledges that the ROL approach prioritises economic objectives, presents poverty as something that can be objectively and scientifically measured and frames development in terms that are presented as technical and apolitical. However, I argue that by neglecting the formal institutions and organizations that the ROL approach supports, the LEP approach fails to address the structural systems that are responsible for people becoming and remaining poor and as a result, risks being another disengaged model that reinforces the 'limitations'²⁸⁵ and 'structure blindness'²⁸⁶ of the ROL approach. Singular focus on building the agency of poor and marginalized people ignores the structural systems that are responsible for people remaining poor. Such a focus risks depoliticizing poverty and maintaining a status quo that reflects elite power and interests. Indeed, as the Empowerment Model and Power Framework demonstrate, powerlessness does not occur in a vacuum but within existing political and social structures. I argue that the LEP approach must incorporate a framework for power and empowerment in order to mark a genuine departure from the limitations of the ROL approach and fulfil the approach's significant potential to facilitate empowerment.

²⁸⁵ Stephen Golub (see note 5) at 7.

²⁸⁶ Stephen Golub (see note 5) at 3.

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