

# **Civil Society and the Problem of Path Dependence: Why Legal Empowerment Constrains Corruption Yet Still Faces Severe Funding Constraints**

Prepared for the Namati Global Legal Empowerment Network

Stephen Golub\*

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## **Introduction**

In 2019 I had the honor of receiving a research grant from the Knowledge Platform Security and Rule of Law (KPSRL) unit, a Netherlands Ministry of Foreign Affairs-funded policy institute.<sup>†</sup> Through this grant, in 2019 and 2020 I conducted a literature review and related research on whether and how legal empowerment (basically, helping people to know, use and shape the law) constrains corruption. (Golub 2020). The results of that review were highly favorable in terms of ascertaining that legal empowerment indeed helps constrain many manifestations of corruption in many countries.

Those results complement findings by a number of previous inquiries into legal empowerment's effectiveness, including three papers (Golub, 2019) I prepared last year for the Task Force on Justice. They address civil society's contributions to justice, the work of paralegals and how grassroots actions fuel legal and policy reform. Though those papers do not use the term, legal empowerment runs through many of the examples and much of the analysis there.

In view of that favorable track record and in appreciation of the KPSRL grant's flexibility, I also decided to explore two additional issues: 1) The very problematic track record of donor attempts to improve governance and tackle corruption via focusing on support for state institutions. 2) Why, as documented by Namati and its Global Legal Empowerment Network, do so many legal empowerment NGOs struggle to maintain funding.?

This paper summarizes key aspects of both discussions, which are probed in greater depth in the 2020 KPSRL study.

## **II. The Problematic State-focused Governance Paradigm**

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\* Stephen Golub is a development scholar and consultant who has headed consulting and research teams for and otherwise worked with over 50 major development agencies, foundations, policy institutes, international NGOs and consulting firms. He has also taught at Berkeley Law School and the Central European University Policy School, and authored or edited approximately 50 published items on legal empowerment, anti-corruption themes, civil society, governance, democracy and related matters. The author welcomes comments on this paper. They may be sent to him at [sjgolub1@gmail.com](mailto:sjgolub1@gmail.com)

<sup>†</sup> All opinions and any errors are the author's own responsibility and should not be attributed to KPSRL.

For more than 35 years, since democratizing trends first started to sweep across much of the globe, bilateral and multilateral aid agencies have arguably poured hundreds of billions of dollars into bolstering governance and its associated fields of democratization, accountability and the rule of law. The various ways in which these agencies categorize their programs make it difficult to ascertain a breakdown between state-focused and civil society-focused funding. But my experience as a consultant for many such agencies and a review of relevant literature indicates that the bulk of the funding has fallen on the governmental side of the ledger.

That state-focused funding has proven highly problematic. There are certainly exceptions to the rule in terms of individual countries and government institutions. But it is apparent that in many nations, including those at one point considered stable democracies, it is repression, corruption and authoritarianism that are on the march.

Thus, the World Bank's aggregate World Governance Indicators for 1996 through 2018 (undated) reflect overall deterioration for most of its six governance categories throughout the globe's seven regions, as well as for Low Income Countries. The partial exceptions to this rule are Voice and Accountability, East Asia & Pacific and Europe & Central Asia. The negative trends include Control of Corruption, the category most pertinent here. The World Justice Project (2020) and Freedom House (2020) have reached similar conclusions.

A plethora of studies and analyses have discussed official aid agencies' shortcomings where they have focused mainly on state institutions in pursuit of countering corruption, building the rule of law and pursuing other good governance objectives. For example, Tamanaha's critique (2011) of international efforts to construct and reform laws and state legal institutions concludes: "Efforts at law and development have failed for decades. The underlying reasons for the failures have been understood just as long. Nevertheless, law and development initiatives are proliferating, carrying on with similarly unsuccessful projects and methods." (p. 209)

### **III. Reflections of a Development Consultant**

In addition to my KPSRL-supported research, my paper for that organization drew on my 35 years of engagement with legal empowerment, civil society, governance, the rule of law, human rights, anti-corruption work and related fields, mainly as a consultant but also as a researcher, writer, speaker and part-time professor. The time as a consultant has provided me with a sense of the business side of international development aid. I draw on that in addressing the issue of why legal empowerment generates considerable impact on corruption and other problems, yet in so many countries struggles for financial and political support.

At least one reason for this is obvious: An increasing array of political and financial restrictions, imposed by an increasing number of governments across the globe, hamper the ability of NGOs in general and advocacy-oriented groups in particular to operate. But I believe the roots of the problem go deeper.

I offer the following perspectives because they complement the aforementioned research indicating that development agencies incorrectly tend to prioritize government over civil society

support regarding anti-corruption, justice and governance programs. I make no claim as to whether and to what extent that may apply beyond those three arenas.

A few reflections and perspectives as to the roots of this problem, then:

**Path dependence.** One of the great ironies of the development field is that aid agencies are often resistant to change, yet are in the business of promoting institutional change in aid recipient countries. My experience with the rigid rules of one agency's country office is a case in point. Though repeatedly advised by a variety of sources that its requirements were undercutting its own project's effectiveness, and that in fact those requirements were subject to interpretation and flexible application, it responded with a bureaucratic shrug and the claim that it could not change.

Such a response is a product of a mindset and incentives that reflect path dependence, the tendency of institutions to develop in certain ways as a result of their histories, structural properties, beliefs, values or self-perpetuating incentive systems. Those factors in turn steer many aid agencies toward doing what they have always done. And much of what many major aid agencies do – much of what many (though not all) of their personnel prefer to do and even consider most worth doing – is work with governments.

For such organizations, civil society support as an adjunct at best. And for anti-corruption initiatives, this can translate into various plug-and-play programmatic imports rather than the messier process of sorting out which domestic or international NGOs might have ideas, personnel or track records worth supporting.

Path dependence is also reflected in the other, following factors I identify here as constituting obstacles to legal empowerment garnering financial and political support.

**Development hubris.** Whether due to internal dynamics or external political pressure, many development agencies tend to hubristically overestimate what they can control and contribute to. They similarly though perhaps unintentionally operate on the assumption that reforms devised and promoted from outside the society are better than those that spring from its own reformers. Over the years, I have been party to too many discussions and reviewed too many documents that assume that a development agency or program can steer a nation's progress in key regards. Such a perspective pushes many to favor working with governments, on the assumption that doing so is essential to important, large-scale progress.

The problem, as evinced by the stagnant or negative governance trends discussed here, is that governance of a given country hinges far more on its internal economic, political, social, cultural and historical dynamics than it does on even the most ambitious development interventions. More modest expectations for anti-corruption or other governance programs, framed in terms of benefiting specific populations or policies, would stand the development field in far better stead. Civil society usually offers more fertile ground for such assistance.

**Logical frameworks and “indicator madness.”** One widely used and counterproductive tool that in some respects reflects development hubris is the logical/results framework and its

accompanying indicators, targets and other ingredients. There is nothing wrong and much that is right with trying to quantify the results of development initiatives. But in my experience in working with this tool for three major aid agencies, such frameworks are superficial substitutes for useful applied research, something to which such agencies devote far less funding.

The upshot for this paper is that the use of frameworks nudges or sometimes outright pushes development agencies toward engaging with governments on projects that lend themselves to easy, short-term measurement – a kind of “indicator madness,” as one colleague characterized the tendency years ago. In contrast, governance-oriented civil society initiatives often feature long-term advocacy and other processes subject to challenges and changes that cannot easily be charted. As another colleague put it to me, such initiatives more easily fail to gather traction in his agency in the absence of short-term progress and indicators.

**The rise of the consulting firm.** The rising dominance of development consulting firms represents a negative trend for the field. It has been accompanied by a gutting of many development agencies’ in-house capacities to analyze, to select directions and personnel and to operate flexibly. Development efficacy and equity pay a price for this dominance. A firm that specializes in energy field development may have a unit that seeks legal empowerment or community development contracts; poverty alleviation becomes just another profit center. This not a knock on all the personnel staffing many such firms, for many are bright and dedicated. In fact, a shame about the dominance of the firms is that so many impressive people must go to work for them instead of directly for development agencies, international NGOs, policy institutes and the like.

The difference this all makes for anti-corruption and other governance work is this: Because civil society groups often are seeking flexible support for their core operations rather than extensive guidance or input from consultants, funding them through intermediaries such as consulting firms may be less lucrative for the firms than supporting consultant-intensive government programs. In addition, with less complicated and extensive needs, NGOs may be burdened more than benefited by working with firms driven less by shared missions than international NGOs often are.

#### **IV. Recommendations for the Legal Empowerment Community and Its Allies**

**Adopt legal empowerment’s own political lessons.** Even more than being about rights and law, legal empowerment is about politics and power. The legal empowerment community could benefit from exploring ways of generating domestic constituencies for its work, in high, middle and low income countries across the globe, and for influencing aid agencies, governments, policymakers and other parties to support that work.

**Better documentation of impact.** Though documentation of impact has increased over the years, the legal empowerment community would still benefit from increased research that indicates impact (or in some cases lack thereof) and generates lessons.

**Make the case for legal empowerment as the most appropriate avenue to justice.** Though there are many roads to justice, legal empowerment's largely civil society-focused track record in building justice and governance surpasses that of state-centered institutions. The legal empowerment community should make the case that it represents a preferred means of helping people to achieve justice in their lives, and build up alliances in support of that argument. Otherwise, it will remain relatively marginalized compared to state-centered approaches.

**Make the case for legal empowerment as an appropriate avenue for governance.** This would be similar to the case for legal empowerment as justice, but would also concentrate on the importance of supporting NGOs to pursue their own legal empowerment agendas across the globe rather than relying on large development institutions' social accountability programs and related initiatives.

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