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Legal empowerment and group-based inequality

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Abstract: Legal empowerment has become widely accepted in development policy circles as an approach to addressing poverty and exclusion. At the same time, it has received relatively little attention from political scientists and sociologists working on overlapping and closely related topics. Research on legal empowerment has been largely applied, with its clearest grounding in the fields of law and economics. This is an introductory/framing paper for a collection of studies on legal empowerment and group-based inequality to be published in a special issue of the *Journal of Development Studies*. It provides a brief introduction to legal empowerment and advances two broad arguments. First, that an ethnic group-focused approach is a useful starting point in considering the impact of legal empowerment and other development interventions. Second, that the state, via the law, contributes to ethnic inequalities in four broad ways—via its written laws, via their implementation and actual practice, through historical legacies of law and practice, and through the ethnic hegemony embedded in the system. Thinking about legal empowerment initiatives within this framework provides understanding of both their potential and their limitations.

Keywords: legal empowerment, ethnicity, horizontal inequality, inequality, exclusion, human rights
JEL classification: K00, K4, D63, I30, D71, A12

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1 Introduction

Inequality and exclusion, which have persisted and deepened even amidst economic growth in many contexts, are core challenges for international development. Standard policies to support equality and promote inclusion are social protection schemes, affirmative action, efforts to close gaps in access to public services, and anti-discriminatory legislation (UNDP 2013). An additional set of strategies fall under the label of 'legal empowerment'. Legal empowerment has been defined by the Commission on Legal Empowerment of the Poor (CLEP) as 'a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors' (CLEP and UNDP 2008: 3). It is sometimes explicitly linked with social transformation and efforts to support broader social accountability, i.e. helping people to use and understand the law, as well as to 'shape' it.[1] In turn, it has been connected with a human rights-based approach to development (see Miller 2017; United Nations 2009; Uvin 2007). Such initiatives exist throughout the world and take a variety of forms, but Timap for Justice, a community-based paralegals programme in post-conflict Sierra Leone, is a standard-bearer (see Dale 2009; Maru 2006).

Since the 2000s, legal empowerment initiatives have established a widely recognized record of success in development policy circles. Such initiatives have received significant attention in particular in work on inclusive development and the prevention of conflict (ADB 2009; Cissé et al. 2014; United Nations 2009; Waldorf 2015). By contrast, among social scientists, 'legal empowerment' is not a term in common use. Although core literatures in political science and sociology address overlapping and closely related topics—the rule of law, the functioning of judicial systems, property rights, labour politics, and business and governance, among others—these have unfolded in parallel. Research dealing explicitly with legal empowerment is largely applied, with its clearest grounding in the fields of law and economics. This disconnect is the starting point for this paper.

This is an introductory/framing paper for a collection of studies on legal empowerment and group-based inequality to be published in a special issue of the *Journal of Development Studies*. These studies were developed as part of a UNU-WIDER research initiative on 'Addressing group-based inequalities through legal empowerment'. Six studies form the core of this collection.[2] Four speak to key areas of legal empowerment highlighted by the CLEP—access to justice (Brinks 2016), property rights (Boone 2017), labour rights (Agarwala 2017), and business rights (Taylor 2016). The other two speak to legal identity (Hunter 2016) and legal empowerment in post-conflict situations (Waldorf 2017)—also key areas. Drawing on established literatures in political science and sociology and their own ongoing research, each invited contributor was tasked with exploring how legal empowerment-type efforts should be expected to affect social exclusion and group-based inequality, with particular attention to ethnic dimensions and to underlying mechanisms or processes. Rather than prioritizing comprehensive coverage of each topic, contributors were asked to build specific theoretically and empirically grounded arguments. In other words, these studies are not intended to be reviews, and are aimed more at hypothesis building than hypothesis testing (Eckstein 1975; Lijphart 1971). Collectively, the studies draw empirical illustration and support from multiple regions and countries.

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[1] See Namati's mission statement at https://namati.org/about/ourmission/ (last accessed 8 March 2018).

[2] This paper cites the WIDER Working Paper versions of these studies. Revised versions are forthcoming in the *Journal of Development Studies*.

This paper provides a brief introduction to legal empowerment and advances two broad arguments. The first, a starting point for the development of this collection, concerns the relevance of a group-focused approach to politics—and in particular an ethnic group-focused approach—in exploring the impact of legal empowerment, as well as other policy interventions, on 'the poor and excluded'. Further, while it is important to recognize tensions between this approach and now well accepted constructivist and instrumentalist research programmes in ethnic politics, the two are not necessarily incompatible; such an approach need not reify groups or ignore within-group diversity.[3] Because poverty and exclusion often vary systematically across ethnic lines for a variety of reasons, this approach offers new insight when considered against more standard approaches to assessing impact in development, in particular those rooted in methodological individualism. It has some passing similarity to applied 'political economy analysis', but core differences.

The second broad argument advanced in this paper concerns the types of channels through which the law in modern states effectively excludes and oppresses some ethnic groups, and by extension the types of channels through which the state, via the law, contributes to ethnic inequalities. This discussion draws heavily on the studies in this collection. In broad strokes, I make the case that, for states operating within the contemporary international system, persistent ethnic inequalities are rooted not so much in written laws that *explicitly* exclude on an ethnic basis—with key exceptions—as in exclusion that is *implicit* in written laws, in legal practice and implementation, in the long-run systemic effects of historically discriminatory law and practice, and in the ethnic hegemony embedded in state (and non-state) institutions. This broad argument resonates in particular with established literatures in comparative politics on the state and institutional reform, underscoring the distinction between formal institutions and state functioning, and the significance of historical legacies and path dependency (Jackson and Rosberg 1982; Thelen 1999). It points both to considerable promise and to hard limits for legal empowerment in addressing poverty and exclusion. Arguably more interesting in this discussion, however, are more specific points with reference to the processes through which change nevertheless may occur within such contexts. These points suggest promising areas for future research, which, in addition to their scholarly contribution, could have clear implications for legal empowerment practice.

The rest of this paper proceeds as follows. Section 2 provides a brief introduction to legal empowerment, discussing 'broad' and 'narrow' approaches and the recognized need among practitioners for a stronger evidence base. Section 3 makes the case for an ethnic group-focused approach to understanding the impact of policy interventions on poverty and exclusion. Section 4 explores the types of channels through which the law in modern states effectively excludes and oppresses some ethnic groups, and highlights the implications for future research and legal empowerment practice. Section 5 concludes by turning to several broader implications of these arguments for impact assessment and evidence-based policy-making in development.

2 Legal empowerment

Multiple definitions of legal empowerment are used in practice and the 'fluidity of the concept' is well noted in the literature (Palacio 2006: 15). Golub (2003), who is credited with coining the term, defined it as 'the use of legal services and related development activities to increase disadvantaged populations' control over their lives' (Golub 2003: 3).[4] This is contrasted with the 'rule of law

[3] For discussion of these approaches, see, e.g., Chandra (2001), Hale (2004), Varshney (2007).

[4] Golub (2010: 6) offers a revised definition: 'legal empowerment is the use of law to specifically strengthen the disadvantaged'.

orthodoxy' of prevailing 'top-down' and 'state-centred' approaches to international law and development. The definition employed by the CLEP (and noted above) is another in common use. The UN Secretary General (UNSG) refers to legal empowerment as 'the process of systemic change through which the poor *are protected and enabled* to use the law to advance their rights and their interests as citizens and economic actors' (United Nations 2009, italics mine). In recent years, Namati, a leading non-governmental organization in the area, identifies itself as a 'global movement of grassroots advocates who empower people to understand, use, and shape the law'.

Conceptual confusion over 'legal empowerment' and the specifics of competing definitions and efforts are well reviewed in other work (Bruce et al. 2007; Golub 2010; Waldorf 2015). For our purposes, it is worth highlighting in particular a distinction between 'narrow' and 'broad' approaches. The CLEP, co-chaired by Madeleine Albright and Hernando de Soto, is associated with a narrow approach. Its intellectual roots can be traced to de Soto's work on the informal economy and the importance of property rights and legal structures for a strong market economy (De Soto 1989, 2000). The straightforward links between this work and legal empowerment are succinctly (if critically) suggested in one review of De Soto (1989): 'its seductive quality stems from its optimism and the simplicity of its message: a sensible legal system and reduced interference from state bureaucracy are all that is necessary and sufficient for "escape from backwardness and advance towards a modern society"' (Thorp 1990: 403).

The CLEP identifies legal empowerment as resting on four pillars (CLEP and UNDP 2008: 31):

> Access to justice and the rule of law as the fundamental and enabling framework is the first pillar of legal empowerment. The three other pillars are the domains of empowerment derived from the livelihoods of the poor: property rights, labour rights, and business rights.

Its report offers a number of recommended reforms in these four areas. Particularly developed is its list relating to property rights, which provides a sense of the sort of efforts most associated with its work (CLEP and UNDP 2008: 60):

- Institutionalize an efficient property rights governance system that systematically and massively brings the extralegal economy into the formal economy and that ensures that it remains easily accessible to all citizens.
- Promote an inclusive property rights system that will automatically recognize real and immoveable property bought by men as the co-property of their wives or common law partners, as well as clear inheritance rules.
- Create a functioning market for the exchange of assets that is transparent and accountable.
- Ensure that all property recognised in each nation is legally enforceable by law and that all owners have access to the same rights and standards.
- Reinforce property rights, including tenure security, through social and other public policies, such as access to housing, low interest loans, and the distribution of state land.
- Legal guidelines for forced relocation, including fair compensation.
- Recognition of a variety of land tenure, including customary rights, indigenous peoples' rights, group rights, certificates, etc., including their standardisation and integration of these practices into the legal system.
- State land audits with findings published to discourage illegal taking possession of public land.
- Simplified procedures to register and transfer land and property.

Broad approaches to legal empowerment are associated with (among those listed above) Golub, Namati, and the UNSG, as well as the World Bank's Justice for the Poor Programme and the Open Society Justice Initiative, among others. Waldorf (2017: 1–2) contrasts the UNSG's definition with the CLEP's. He notes that the former 'is systemic: it connects the top-down/supply-side (the state's protection of the poor) and the bottom-up/demand-side (the poor's use of law)'. Furthermore, the UNSG's approach goes 'beyond the CLEP's market-driven emphasis on property, labour, and business rights to include education, health, and housing rights that are just as essential, if not more so, for empowering the poor'. It is worth noting also the challenge of drawing distinctions here too sharply: the CLEP's report explicitly identifies its approach with increased 'voice' for the poor and 'systemic change', and 'its normative basis in globally agreed standards of human rights' (CLEP and UNDP 2008: 27–28). However, the distinction is drawn in practice; as Golub (2010: 11) argues, 'although CLEP merits praise for putting legal empowerment on the development map, in some respects it contradicted its own broad definition of the concept by narrowly emphasizing the three livelihood-oriented "pillars" of legal empowerment'. Still, focus on justice for the poor, social accountability, community-based programmes, and attention to customary law may be seen as hallmarks of broad approaches.

With respect to disadvantaged groups in particular, the broad camp is more associated with targeted and 'activist' efforts, including affirmative action (ADB 2009; Bruce et al. 2007), and consideration of equality of outcomes, as well as of opportunity (Taylor 2016). Here too, the CLEP's report is inconsistent with too sharp distinctions, noting: 'Women, indigenous peoples, and vulnerable groups must be fully and fairly included in all phases of the legal-empowerment process. For them "equal" access may not be enough; active promotion and facilitation of these groups' meaningful participation may also be necessary to ensure just outcomes and their full participation in the process' (CLEP and UNDP 2008: 27–28).

Finally, the broad camp also is associated with embracing a much wider set of initiatives to support voice and accountability, as well as rights to health, education, and housing. Goodwin and Maru (2017: 161), for instance, include various 'social accountability' initiatives in their review of the evidence on legal empowerment (see also Joshi 2017). Support for improved public service provision is regularly considered under the legal empowerment label. Efforts to support accountability through national and local elections—e.g. via support for electoral reform or political party training—would also seem to fall under a broad approach. Under a broad definition, therefore, the boundary between what is and is not legal empowerment becomes very blurred. Broad approaches in particular can be criticized for in effect treating legal empowerment like any activity that functions to support disadvantaged populations. This usage is not useful if we seek to analyse whether and how legal empowerment initiatives impact disadvantaged populations and the sort of efforts that are more/less effective. For this reason, we take as a starting point in this collection of studies a more narrow approach, working with the definition and four 'pillars' of legal empowerment explicitly given by the CLEP. In considering different areas of legal empowerment, the articles in this collection probe alternative approaches further. Waldorf (2017), for instance, makes a case for his use of the UNSG's definition.

Stepping back, the legal empowerment effort can be seen as emerging in the field of development at the intersection of law and economics, in conversation with discussions around the rise of the 'good governance' agenda in the 1990s. In her 2006 'action agenda' for the World Bank on legal empowerment, Palacio, then Senior Vice-president and General Counsel, describes legal empowerment as reflective of 'the collision of two tectonic plates […] changing the landscape of the development field'—the Poverty Reduction Agenda and the Governance Agenda—implying recognition that

> effective reforms cannot focus on the economy alone; that the state (at all levels of government) has to be brought out of the closet, fully into the spotlight; that without a capable state, developing countries cannot make and/or sustain the investment in health, education or infrastructure which has been at the core of cooperation programs to date; and finally, that an effective state is not possible where a substantial part of the population is excluded. (Palacio 2006: 3).

While legal empowerment has evolved considerably over the past decade, having been 'embraced' by world governments both 'as an end in itself and as an essential element in the fight against poverty', there is also clear recognition within the field of the need for better understanding and demonstration of 'impact' (Goodwin and Maru 2017: 157). Golub (2012), for one, deals at length with issues in evaluation and provides a guide for legal empowerment practitioners. Domingo and O'Neil (2014: 7) find that

> at present, the evidence base remains highly uneven, concentrated mostly on particular activities (e.g. legal literacy) and on claim-formation and adjudication, rather than on the implementation and outcomes stages of the dispute resolution and redress process. Indeed, there is almost no systematic, comparative analysis of key factors that shape effective implementation and deliver tangible results. Moreover, the empirical observation of the bigger questions regarding whether and when such legal action contributes to structural or transformative change or results in, for instance, better health outcomes for the poorest or most vulnerable, or more equitable land distribution at a more aggregate level, remains underdeveloped and lacking in evidence.

Goodwin and Maru (2017) offer arguably the most comprehensive discussion of the evidence base to date, providing 'the first review and mapping of existing evidence on legal empowerment'. Drawing on 199 studies, they find evidence for the positive impact of 'civil society legal empowerment efforts' in terms of stronger agency, increased legal knowledge, 'acquisition of legal remedies, effective conflict resolution, and even improvements in health and education outcomes', as well as in changes in law, policy, and practice at various administrative levels (Goodwin and Maru 2017: 157–58). Its important contribution to the legal empowerment literature notwithstanding, this study is not so much a final word as a solid stepping-off point. The authors themselves identify multiple priority areas for future research. More critically, it is worth noting inter alia that the conclusions drawn from such a mapping are only as rigorous as the underlying studies. Bias in the publishing of positive results is well documented (Esarey and Wu 2016; Franco et al. 2014). The authors recognize the possibility of bias, noting in their mapping a 'tendency to share positive results' and 'very few instances of negative impact' (Goodwin and Maru 2017: 168). Further, given the very broad scope of work considered within the review—from studies on community scorecards to right-to-information campaigns, community paralegal programmes, participatory land reform, and incentives to get teachers to come to school—there is clearly space for more disaggregated consideration of different types of legal empowerment initiatives. Revisiting some of these studies and systematically reviewing studies in a more disaggregated way would be two interesting areas for future research, with clear potential to inform practice.

3 Why an ethnic group-focused approach to poverty and exclusion?

An approach focused on groups is particularly relevant to exploring the impact of legal empowerment, as well as other policy interventions, on 'the poor and excluded'. This is not to say that all individuals within particular groups are poor and excluded to the same degree, or that

poverty and exclusion are not also meaningfully studied at the individual and household levels. However, in many contexts, knowing the group(s) to which an individual 'belongs' provides information about her economic, social, and political status, including whether she is likely to be among 'the poor and excluded' (see Selway 2011). Moreover, individuals, organizations, governments, and states regularly discriminate against individuals on a collective basis—i.e. not because of their individual characteristics, but on the basis of the groups into which they might be categorized—whether, for instance, according to ethnicity, religion, class, or gender.

This approach can be broadly situated within a pluralist (and neopluralist) tradition, emphasizing the distribution of power among groups and the role of competition between groups in political outcomes (see Baumgartner and Leech 1988; Berger 1981; Lowery and Gray 2004; McFarland 2007; Truman 1951; Young 1976). A classic example of pluralist theory is Dahl (1961), which explores competition and the unequal distribution of power among interest groups in a US city (New Haven).[5] While pluralist theories of politics are diverse enough that summarizing them is well beyond the scope of this discussion, contrast with other theoretical traditions is informative. Pluralist theories have been contrasted, for instance, with elite theories, which emphasize the determinative role of a small group of powerful individuals (Hunter 1953; Mills 1956). By contrast, Dahl (1961) argues that, while power in New Haven was more concentrated in earlier periods, at the time of his study, there was no cohesive power elite, but instead multiple centres of power, and that community support was critical for political leaders.

Contrasting pluralist theories with statist theories, which posit a more autonomous role for institutions and public actors, is also informative (Almond 1988; Krasner 1984; Stepan 1978). Krasner (1984: 227) argues that, in 'pure interest group versions of pluralism', for instance, public institutions appear to act either as a 'cash register that totals up and then averages the preferences and political power of societal actors' or a 'referee', 'to make sure that the game is played fairly'. Even while institutions play a more autonomous role in some pluralist arguments, the boundary between state and society in pluralist theories is weaker than in statist analysis; 'pluralism does not sharply differentiate public actors from their own society' and envisions them more constrained by social pressures (Krasner 1984: 228–29).

Power is distributed among multiple types of groups in most societies, and interaction among them influences political outcomes. However, those defined in 'ethnic' terms in particular are politically salient in a wide variety of country contexts and may be especially relevant to a consideration of disadvantage and exclusion (see also Stewart 2008). It should be noted that in using the term 'ethnic' I refer to categories based on ascriptive attributes that are generally inherited at birth, including skin colour, language, tribe, caste, religion, region, kinship, and other communal identity markers (Chandra 2004; Horowitz 1985; Htun 2004). This is now a standard definition in work on ethnic politics, but it is worth highlighting that it is broader than some others in common usage, and considers, for example, race and religion under a broad 'ethnic' umbrella.

The literature on democracy and democratic transition points to conflicts among ethnic groups as among the most contentious and problematic for democratic governance (Dahl 1971; Lijphart 1977; Rustow 1970). Among state strategies to address group-based inequalities, policies of affirmative action or positive discrimination in particular have targeted ethnic minorities and

[5] Dahl later argued, however, that 'the book was not written to advance a general "pluralist theory of polities"' (Dahl 1984: fn. 13).

women (Brown et al. 2012; Sowell 2005).[6] Examples include affirmative action in the USA, reservations in India, employment equity in Canada, positive action in the UK, the New Economic Policy in Malaysia, and Black Economic Empowerment in South Africa. Such policies have in many cases been deeply controversial (Brown et al. 2012). They have been criticized as being unfair to other groups, inconsistent with liberal values, and linked in some situations to increased ethnic tensions. In this context, consideration of the effect of (narrow) legal empowerment efforts on ethnic groups may be particularly interesting: while policies of positive discrimination can be controversial due to their 'unequal' treatment of groups, legal empowerment efforts that aim to make access to justice and the rule of law a reality for all could be perceived as more 'universal' and less divisive.

It is also clear that non-ethnic groups are as salient (if not more so) in many political contexts. Class and political ideology stand out as bases for political organization via political parties and elections in many countries. The extent to which analyses of different types of groups are comparable—i.e. do legal reforms influence in the same ways groups defined by ethnicity, class, gender, or ideology?—remains a question for continuing research (Htun 2004). In this collection of studies, Agarwala (2017) focuses on labour in India, offering insight into the similarities between class and ethnic groups and building the case that, even while many in the field have turned to a focus on ascriptive identities, class remains at least as fundamental and relevant in development.

The definition of 'ethnic' as given above is a now standard one in the literature on ethnic politics, and is grounded in constructivist and instrumentalist frameworks (Bates 2016; Chandra 2001; Hale 2004; Varshney 2007).[7] Yet scholars in these traditions might note several tensions with the ethnic group-focused approach proposed here. A major tension concerns whether we can treat ethnic groups as fixed units of analysis at all, given that research demonstrates the fluidity of ethnic identity and, with it, of groups and group boundaries (e.g. Barth 1969; Brubaker 2004; Okamura 1981). Furthermore, the adoption of a group-focused approach could result in policies and institutions that treat individuals first and foremost as members of ethnic groups, even when they might not identify as such themselves. The allocation of political offices on an ethnic basis, or the granting of land rights to ethnic groups, for instance, run the risk of 'requiring' or incentivizing individuals to identify in ethnic terms. Such institutional incentives could effectively 'fix' ethnic divisions when they might otherwise naturally become less salient over time (e.g. Chandra 2005; Horowitz 1985). Likewise, constructivists and instrumentalists might point out, the literature demonstrates that identifying relevant ethnic groups is far from obvious, not only because salient groups shift and change but also because individuals may be nominal members of multiple intersecting and overlapping groups (e.g. Posner 2004; Scarritt and Mozaffar 1999). A related set of tensions is the existence of diverse interests, conflicting claims, and inequalities within ethnic groups (e.g. Canelas and Gisselquist, forthcoming; Dunning and Harrison 2010; Huber and Suryanarayan 2016).

While the ethnic group-focused approach adopted here is not consistent with all constructivist and instrumentalist theories of ethnic politics, I submit that it can be consistent with many. The approach here does not rest on a claim that ethnic groups are unchanging, but that they can be

[6] Such policies seek to address past discrimination and inequality through preferential selection or quotas for members of disadvantaged groups, particularly in education and employment.

[7] Scholars of ethnic politics classify approaches in different ways. The point I seek to highlight here is the rejection of 'essentialist' or 'primordialist' approaches. In this section, I loosely follow Chandra (2001) in treating instrumentalist work under a broad constructivist umbrella. Varshney (2007) draws a sharper distinction between the two, arguing that, while both reject essentialism, constructivism is about the long-run formation and stickiness of identities, while instrumentalism is about short-run fluidity.

fixed enough over relevant periods for analysis. Furthermore, as the sheer volume of work in the constructivist and instrumentalist literature on ethnic politics suggests, consideration of ethnic groups sheds light on political processes and outcomes in many contexts. To recognize challenges in identifying salient groups or in determining whether such groups are indeed meaningful units of analysis, is not to say that wrestling with the slippery concept of ethnic groups is not worthwhile.

Finally, to the extent that we might be concerned about the real-world implications of such analysis—does it incentivize stickiness in ethnic identities or mobilization along ethnic lines?—it is worth highlighting two points. First, arguing for the relevance of an ethnic group-focused *analysis* of impact is not the same as arguing that legal empowerment policies should be designed to explicitly target ethnic groups in the manner, for instance, of affirmative action policies for ethnic minorities. Legal empowerment as understood here could be framed in more universalist terms while still having equalizing impact among groups. Second, if we accept the constructivist proposition that ethnic boundaries may be constructed around economic and political differences, policies that lessen these differences should support, over time, a lessening of ethnic salience.

In this collection of studies, Boone (2017: 13) in particular can be seen to push back against essentialist treatments of ethnicity in her discussion of tensions and trade-offs within visions of legal empowerment through registration and titling that institutionalize ethnic entitlements. 'In the ethno justice vision', she notes, 'these political collectivities are recognized as the natural constituent units of the modern nations that the postcolonial state seeks to bring into being'. In another vein, Hunter's (2016) analysis of identity documentation offers an example of within-group diversity: not only do we find indigenous populations excluded, but also in particular women and the elderly.

In their discussions of individual versus collective legal agency and rights, Brinks (2016) and Taylor (2016) explore yet another side to these issues. Brinks, for instance, explicitly considers 'both the individual problem of enabling indigenous *persons* to protect their rights and achieve legal agency, and the collective problem of empowering indigenous *peoples* to exercise their rights as a community' (p. 8).

Prevailing approaches to the analysis of impact on poverty and exclusion in development economics in particular—including in analysis of legal empowerment—contrast with the approach adopted here. Just as research into inequality within development economics has tended to focus on 'vertical' inequality between individuals and households in preference to 'horizontal' inequality between groups in society, so too has it focused on poverty and exclusion in individual and household terms rather than in group terms (see Harriss 2002; Stewart 2002). Ravallion's (2017) review of the evidence on interventions against poverty in poor countries provides just one illustration. The review draws on wide-ranging consideration of multiple initiatives, grouping them into two broad types—redistributive transfers in cash or kind, generally targeted at poor households, and policies to address market and institutional failures. Yet, adopting the ethnic group-focused approach outlined here, it is striking that 'the poor' are conceived primarily in individual terms, not also as members of groups or categories—even though, in many of the cases discussed, members of certain groups and categories (e.g. indigenous populations, ethnic minorities, and women) are disproportionately poor. Group-targeted efforts to address such poverty and inequalities are also a significant component of anti-poverty interventions in some countries.

Finally, it is worth commenting briefly on some resemblance of the approach adopted here to 'political economy analysis' (PEA) as employed in development (Booth et al. 2016). Developed as a corrective to the apolitical analyses standard in development economics, 'political economy analysis aims to situate development interventions within an understanding of the prevailing

political and economic processes in society—specifically, the incentives, relationships, distribution and contestation of power between different groups and individuals—all of which greatly impact on development outcomes' (Mcloughlin 2014: 2). The approach here thus shares with PEA a more political focus and explicit recognition of the importance of groups to political outcomes. However, the two should not be confused. For one thing, PEA is much more operationally focused as a method relevant to donor consideration of aid effectiveness. It is also more agnostic about how politics is taken into account. The approach cannot be situated within a pluralist tradition any more than within an elitist or statist one, nor within a constructivist approach to ethnic groups; the distribution and contestation of power among groups in general is only one of multiple factors it identifies for consideration of political processes.

4 Ethnic exclusion and oppression via the law

The articles in this collection explore the ways in which legal empowerment-type initiatives affect poverty and ethnic exclusion. Implicitly, such initiatives aim to do this by reforming or remedying an existing state of affairs. One way, then, to consider collectively the arguments presented in this collection is to compare what they imply about how this existing state of affairs is linked to poverty and exclusion. Put another way, implicit—and often explicit—in each of these articles are claims about *how* the law in modern states effectively excludes—and oppresses—some ethnic groups, and by extension the processes through which the state, via the law, contributes to ethnic inequalities.[8] Such processes can be grouped into four categories:

- Exclusion by existing laws/statutes
- Exclusion by current legal practice/implementation
- Exclusion traceable to historical law and practice
- Exclusion traceable to systemic ethnic hegemony.

The first category highlights the exclusion or oppression of ethnic groups rooted in laws currently on the books. 'Law' is used in a broad sense here to refer to legislation, as well as regulations and policy (Goodwin and Maru 2017: 160). These may be laws that explicitly exclude certain populations on an ethnic basis—for instance, in Myanmar, under the 2008 Constitution and 1982 Citizenship Law, citizenship is linked to membership in one of the country's officially recognized 'national races' ('*taingyintha*'), implying that those identified or identifying as Rohingya (and other groups not on this list) are excluded from citizenship (Cheesman 2017).[9] This category also includes laws that explicitly exclude on the basis of something coinciding with ethnicity. A law requiring that government business be conducted only in an official language is one example. While not explicitly excluding on an ethnic basis, such a requirement may effectively exclude ethnic minority groups—whether intentionally or not. I return later in this section to the question of intentionality, which is an important one in a consideration of reform.

The second category highlights exclusion or oppression of ethnic groups traced to the current practice or implementation of law. This may be linked to institutional failures and a lack of state capacity to implement the law as intended. For instance, the state may fail to provide public services in remote rural areas, a failure that may in effect exclude ethnic minority groups. Public

[8] To avoid repetitiveness, I refer in this section more to exclusion than oppression, but have both in mind.

[9] While it is the 1982 Citizenship Law that is often credited with making the Rohingya 'stateless', Cheesman (2017: 12) notes that section 6 of the law in fact 'provided that nobody who already had citizenship would lose it'.

institutions such as courts, hospitals, and secondary schools may be more cost-effective to maintain in larger communities, but these may be difficult for some populations to access. This sort of exclusion by the state may also be linked to situations of conflict, where the official state is effectively absent in regions controlled by non-state rebel groups.

Alternatively, exclusion and oppression via current practice and implementation can be linked to individual public officials. For instance, a judge may be known to apply more punitive sentences to members of certain ethnic groups. In some cases, there may be more systematic problems of implementation, with evidence that public officials of one group tend to favour their co-ethnics or to discriminate against other groups in the exercise of their official duties. Racial inequality in voter registration in the USA is one example, where (predominantly) white officials have discouraged registration by African Americans, whether through explicit intimidation or extra demands not required by the law, such as documentation of residence or age (Lewis and Allen 1972). While there may be considerable diversity within groups with respect to their attitudes toward ethnic 'outsiders', group leaders may in effect police their own members to ensure greater conformity. One example, also from the USA, in Little Rock, Arkansas, during the crisis over school desegregation in 1959, was the firing of 44 teachers and administrators for 'integrationist' activity by pro-segregation members of the School Board (see Kirk 2008).

The third category is the exclusion or oppression of ethnic groups that can be traced to historical laws and/or practice. As in the first category, this could be the result of exclusion in law explicitly on the basis of ethnicity, or something coinciding with ethnicity. It also could be the result of historical practice and implementation. For instance, Hunter (2016: 3) notes that in many countries, colonial administrations 'did not consider [birth] registration a right of indigenous populations'. Even once such discriminatory law is changed, parents' identification may be needed to register a child's birth, an additional hurdle for birth registration of indigenous children. Other examples can be found in the large body of research on the legacies of apartheid laws in South Africa and links to current inequality, as well as residential and occupational segregation, among racial groups (Clark 2018).

The fourth category speaks to the exclusion or oppression of ethnic groups traceable in a more generalized way to the hegemony of one ethnic group within the state (Gramsci 1971). Think here also of hegemony in Laitin's (1986: 107) terms, in relation to which sociocultural divides or lines of ethnic cleavage are salient. This in turn may have implications inter alia for the distribution of political power among groups. Such hegemony may be maintained via 'consent' as well as force, with the dominance of one group and the subordination of others (or the dominance of a particular cleavage) having an 'aura of moral authority' (Lears 1985: 569). While explicitly exclusionary law and practice might accompany hegemony, it also can be legitimated via norms and ideas reflected within and outside state institutions. Brinks's (2016) discussion of justice systems in Latin America, for instance, is suggestive of such hegemony in the sense that notions of 'justice' as embodied within the formal state-based system are often rooted in Western law and differ substantially from those of indigenous communities. In other words, the state legitimates 'justice' as defined in some cultural traditions over others. Justice, Brinks argues, 'is less like a fruit that can be picked by whoever manages to get "access" to it, and more like a terrain upon which contested notions of substantive justice get fought out' (p. 1).

Considering these categories and the arguments advanced in the other articles in this collection, it appears broadly that for states operating within the contemporary international system, persistent ethnic inequalities are rooted not so much in current written laws that *explicitly* discriminate on an ethnic basis—with key exceptions—as in written laws that *implicitly* discriminate against ethnic groups, in the practice and implementation of law, in the legacies of historical law and practice, and in ethnic hegemony embedded in state (and nonstate) institutions. International norms and

law place clear limits with respect to explicitly discriminatory legislation[10], but *de facto* discrimination may exist nonetheless. This echoes broadly two well documented phenomena in comparative politics. First, as Jackson and Rosberg (1982) showed, it is useful to draw a distinction between the 'empirical' and the 'juridical' in statehood, between a state's *de facto* and *de jure* attributes. Modern states may 'look like' states even if they do not 'function' like states (Pritchett et al. 2013). Or, in terms of our focus here, a state may ratify all the international conventions that limit explicitly discriminatory legislation and implement them into domestic law, while maintaining legal practice and implementation that is inconsistent with international norms. Second, historical and institutional legacies deeply influence and constrain contemporary reform efforts (Thelen 1999). Current law and practice may be exemplary from the standpoint of support for ethnic inclusion, but a state may still wrestle with the long-running effects of discrimination in historical law and practice.

In this sense, the discussion here is not 'surprising' within the context of the research literature on the state and governance. By contrast, what is 'new' here is more precision in respect of the contextual conditions that mediate how legal empowerment efforts support (or not) ethnic inclusion. This frames important questions for future research. For instance, in a context in which actual legal practice and implementation, historical legacies, and the ethnic hegemony embedded in state institutions all work to enforce ethnic exclusion, to what extent should we expect 'narrow' legal empowerment efforts to succeed in overcoming this exclusion? Or, given the same context, what are the conditions under which more far-reaching institutional reforms would work to address such exclusion? How might a government build and sustain the domestic political will for extensive reform—particularly when it offers greater relative benefits to some ethnic groups over others? For instance, how does the sort of constitutional reform in support of indigenous rights that was undertaken in some Latin American states become possible (Van Cott 2000)? How do governments build and sustain support for policies of affirmative action (Brown et al. 2012)?

Consideration of these four categories can also inform by extension our expectations about the sort of legal empowerment reforms and initiatives that are most likely to have the greatest positive impact on ethnic exclusion in different contexts. For instance, if exclusion is rooted in current written law, we should expect some result via reform of written laws. The 'easier' cases are when such exclusion is unintentional and not especially costly to remedy. For instance, several Latin American countries have taken steps to make the civil registry more 'user-friendly' to those who do not speak the official language (Hunter 2016).

More difficult is when group-based exclusion is the intention, or not recognized. Agarwala's (2017) discussion of legal empowerment and labour rights in India, for instance, explores the significant role played by labour in the fight for expanded legal recognition to address exclusions. The prescription for legal empowerment practitioners in such cases may be to convince, inform, and otherwise influence law-making authorities—whether via support for civil society pressure from below, or for international pressure from above.

To the extent that exclusion is rooted in gaps between current law and practice linked to poor state capacity, we should expect positive results from efforts like community paralegal programmes, which can serve as extensions of the state, intermediating between individuals and public

[10] Relevant conventions and declarations include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on All Forms of Racial Discrimination; the Convention on the Rights of the Child; the Convention on the Prevention and Punishment of the Crime of Genocide Convention; the International Labour Organization's Indigenous and Tribal Peoples Convention; and the United Nations Declaration on the Rights of Indigenous Peoples.

authorities to improve access to justice (Dale 2009; Gramatikov et al. 2015). The reach of the formal state may be especially weak in conflict and post-conflict situations, which could suggest that such initiatives may hold particular promise in post-conflict situations. Waldorf (2017), however, is less optimistic. He concludes that legal empowerment has 'modest potential' to address group-based inequalities in this context, while cautioning that 'post-conflict environments are particularly "inauspicious" environments for legal empowerment, and even more so where horizontal inequalities contributed to conflict in the first place'. Such efforts could 'wind up reinforcing group identities, reducing social cohesion, and, in the worst case, triggering conflict' (pp. 13–14).One of the most challenging contexts for legal empowerment is when gaps between law and practice can be traced to intentional group-based discrimination and favouritism in public institutions (in the examples above, evidence of systematic discrimination by white public officials against African American citizens). The existence of such ethnic conflict within the public service may be among the legacies of ethnic exclusion in historical law and practice. Consider, for instance, the racially divisive legacies of apartheid for policing and law enforcement in South Africa (Gastrow and Shaw 2001: 262):

> The liberal use of force had been central to policing under the apartheid regime. This was true not only of the white South African Police (SAP), but also of the other police forces that existed in the country. When the new government took over in April of 1994, there were ten independent police forces in each of the black African 'homelands.' The KwaZulu and Bophutatswana police were notorious for their harsh policing of antiapartheid activists, perhaps because they were closely tied to Pretoria and the SAP.
> The majority of South Africans had been policed more for control than for crime prevention. As a result, large sectors of South Africa's population, particularly black South Africans, regarded the police force as racist, oppressive, and illegitimate.

With law and order a major concern, the new government set about addressing challenges quickly, including forming a new national South African Police Service (SAPS). Still, in 2001, policing was 'wildly uneven', with skilled officers serving mainly areas that had been 'white' and 'more than 90 percent of the present members of the police [having] received their basic police training and orientation under the former regime or in the various former "independent" territories' (Gastrow and Shaw 2001: 264–74).

Legal empowerment practitioners are not well equipped to directly address such historical legacies, which may be expressed in group-based inequalities in economic, social, and political spheres. Social protection schemes and targeted public transfers, for instance, provide support for economically disadvantaged populations and greater inclusion, but are not clearly within the legal empowerment toolkit. Support for affirmation action policies to address past discrimination and inequality through preferential selection or quotas for members of disadvantaged groups, particularly in education and employment, would fall within a broad approach to legal empowerment. But there are substantial political hurdles to adopting and sustaining such policies, and legal empowerment practitioners have ambiguous influence over political processes.

When ethnic exclusion is traced to ethnic hegemony embedded in state institutions, the sort of reforms proposed by Brinks (2016) hold potential. Brinks makes a case for the expansion and strengthening of alternative, community-based justice systems as a way to secure legal agency for culturally distinct groups. Support for various forms of affirmative action in political office, as well as public employment, should also be considered, with the assumption that representation improves voice.

5 Conclusion

In summary, while legal empowerment has become a core area of work in development policy circles, it has received relatively little attention from political scientists and sociologists working on overlapping and closely related topics—the rule of law, the functioning of judicial systems, property rights, labour politics, and business and governance, among others. Research on legal empowerment has been largely applied, with its clearest grounding in the fields of law and economics. The collection of articles to which this paper provides an introduction speaks to this gap.

This paper argues: (1) that an ethnic group-focused approach is a useful starting point in considering the impact of legal empowerment (and other development interventions) on poverty and exclusion, and (2) that the state, via the law, contributes to ethnic inequalities in four broad ways—via its written laws, via their implementation and actual practice, through historical legacies of law and practice, and through ethnic hegemony embedded in the system—and that this is a useful framework within which to consider the possibilities and limitations of change through legal empowerment. In short, I argue here, 'research meets practice' on legal empowerment can inform both practice and research. In terms of legal empowerment practice and applied research, for instance, this article points to the value of more precision in respect of the contextual conditions that mediate how legal empowerment efforts support (or not) social inclusion. This has direct implications for consideration of the scalability and transferability of 'successful' programmes—which, this paper suggests, depend critically on the contextual factors explored above. In terms of scholarly research, new consideration of legal empowerment sheds new light on the relationships between the state, the law, and diverse groups (and individuals) in society. Among other topics, it points, for instance, to promising areas for future research on how change occurs and inequalities are reduced, despite major institutional and structural constraints.

Finally, it is worth highlighting two broader implications of this collection for impact assessment and evidence-based policy in development studies. In many circles, impact and evidence-based policy have become synonymous with quantitative impact evaluation and, in particular, with randomized controlled trials (RCTs) and experiments more generally. The first implication of the present study, then, is that the limitations of experimental approaches (see Deaton 2010; Pritchett and Sandefur 2015) and the particular challenges in the area of governance broadly defined (Gisselquist 2015; Gisselquist and Niño-Zarazúa 2015) are perhaps greater than are generally supposed. As this collection of studies illustrates, changing legal institutions can be a slow process, and inequality responds to institutional reforms only with delay. Our time horizons go well beyond those of most experimental studies. One might also consider the ethics and practicalities of designing experimental interventions in areas discussed here. While some initiatives lend themselves to experimental approaches, many reforms in other areas—such as constitutional reform—do not. The group-focused approach proposed in this paper points to another possible challenge: experiments are often run on discrete communities of individuals or households, and are thus likely in some contexts to study only members of the same ethnic group and to have no traction on impacts at the group level. Even in larger studies, samples may be too small to consider how interventions may have different impact across ethnic groups.

A second implication is that we might, as a result, think about impact and evidence-based policy in different terms. This collection points towards an alternative way to consider the likely effects of various governance- and legal empowerment-type interventions: through theoretically grounded analysis of other historical and contemporary reforms and initiatives—whether labelled 'legal empowerment' or not—within a framework that maps how the state, via the law, contributes to ethnic inequalities in different contexts. In other words, the best way to identify the likely impact

of a legal empowerment programme is not necessarily to roll out a randomized pilot programme. Nor is it necessarily to conduct a systematic review of other legal empowerment programmes of the same type in other countries. More promising may be to place context at the centre of the analysis and to return to well developed research literatures and 'big' theories.

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