

**LEGAL EMPOWERMENT OF THE POOR:
DOES POLITICAL PARTICIPATION MATTER?**

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ABSTRACT

This article elaborates on a specific limitation of the recent emphasis on formalisation in a particular aspect of the practice of international development. Through a case study of the recent legal empowerment of the poor initiative, the article demonstrates that the value of political participation and its potential effect on poverty alleviation is illustrative of the type of values that are misplaced as a result of the pursuit of formalisation. After outlining the specific elements of this argument, the article shows that there is a stronger appreciation of political participation among the poor in the informal sphere in Africa and other parts of the third world. Apart from firmly grasping the significance of political participation, the expansiveness of diverse forms of activity in the informal sphere provides a significant medium to concretise this value, particularly in ways that can compete with mainstream initiatives aspiring to do the same. The article concludes by sketching out key features and the potential of the informal political participation of the poor, including the advantage this model holds over the human right to political participation.

INTRODUCTION

Is it possible to think of political participation outside the human right to vote for representatives at periodic elections? Is political participation also a method of securing non-political goods? Is political participation an intrinsic value, something that should be promoted regardless of consequences, owing to its significance to individual and collective flourishing? Visit any village or city in Sub-Saharan Africa and answers will be found, inclusive of a different notion of political participation. That nearly all essential public goods and services in cities across Africa are provided by one or another form of informal activity supports this. Political participation, therefore, is both intrinsic and instrumental to the poor. It is something upon which their livelihoods depend.

Disillusioned by failed promises of corruptly elected representatives and by the inability to participate in the market, the poor have had no choice but to devise practices, associations, networks and other forms of cooperation to escape these problems, including the limited opportunities to challenge them offered by dominant formal models such as the human right to political participation. The emphasis on formal institutional practices of voting and representation, for

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instance, has been of little value or use to the struggles of the poor in private, economic, cultural and social domains. This may explain why, although there are exceptions, these informal activities and strategies have barely been pursued under the rubric of human rights. As the informal activities discussed in this article attest, the poor are disenchanted by having to rely heavily on a political system that either misrepresents or simply fails to take their interests into account. The human right to vote has functioned as the right to vote for one corrupt representative after another. It can be discerned from the range of informal activities in that the poor want more than the right to vote; they also want autonomy and direct control over important decisions that affect their lives. Collective or self-provisioning of essential public goods and services is used in this article to illustrate not only the type of informal political participation articulated by the poor but also the autonomy they derive from it in administering their affairs, apart from the independence this autonomy gives them from formal political institutions.

On the whole, the aim of this article is to bring attention to a certain generalisation in recent development thinking about the perceived benefits of formalisation on poverty alleviation. There are different dimensions to this generalisation. It is the reasoning behind claims about the potential benefits of the formalisation of property,¹ business and labour rights² on poverty alleviation.³ What has also been noted but not sufficiently addressed is the impact that formalisation has had on the value of political participation. Not only is this impact responsible for misunderstandings about that value, it is also to blame for the failure to provide an inclusive model of political participation capable of challenging economic or material inequality. It is this argument that is taken up in this article. Thus, it is argued that, apart from firmly grasping the instrumental and intrinsic value of political participation, the expansiveness of diverse forms of activity in the informal sphere provides a significant medium to concretise this value, particularly in ways that can compete with mainstream initiatives aspiring to do the same. They may not have the financial, institutional or intellectual clout of mainstream development initiatives, yet the dispersed, permanent, ad-hoc or unpredictable non-institutional activities command a presence across every city or village in Africa, as indeed in other parts of the third world. It is a reflection of the spirit of Africa, something that extends political participation beyond its actual

¹ Celestine Nyamu-Musembi, 'De Soto and land relations in rural Africa: breathing life into dead theories about property rights' (2007) 28, 8 *Third World Quarterly* 1457-1478. For a general critique of the general assumptions behind property rights, see Benjamin Barros (ed.), *Hernando de Soto and property in market economy* (Great Britain: Ashgate, 2010).

² Julio Faundez, 'Empowering Workers in the informal economy', (2009) 1, 1, *Hague Journal on the Rule of Law* 156-172.

³ Jan Michiel Otto, 'Rule of law promotion, land tenure and poverty alleviation: questioning the assumptions of Hernando de Soto' (2009) 1, 1, *Hague Journal of Rule of Law* 173-194.

institutionalisation. Informal political participation, the term given to these activities in this article, is embedded in the grassroots and covers grounds that even the best-intentioned, planned and supported formal initiative can only aspire to cover.

The United Nations Development Programme's (UNDP) legal empowerment of the poor initiative is used as a case study for this argument. It is a recent, but also an important, initiative that pursues the logic of formalisation to the fullest at the expense of values such as political participation. Despite emerging in an era in which voice, ownership, participation and good governance serve as institutional mantras, legal empowerment can hardly be said to articulate a model of political participation, let alone one reflective of the voices, struggles and aspirations of the poor. Although it recognises that the lack of political participation can be a factor of poverty, legal empowerment fails to offer a comprehensive policy in response to this problem. This article highlights the misunderstandings around the value of political participation, which has led to the failure of the legal empowerment initiative to adopt a related model; the article then discusses the opportunities that such informal strategies may open for social and political transformation. In conclusion, it sketches out certain key features and important lessons that can be drawn from informal political participation, including the advantage the model holds over the human right to political participation.

LEGAL EMPOWERMENT OF THE POOR

Legal empowerment of the poor seeks to address the misery of poverty in developing and transitional societies. It unites and generates support from the most influential figures and institutions in international development circles. The initiative has been notable among other things for the calibre of the figures who graced the meetings that led to the report which currently shapes UNDP's legal empowerment work. It is those proposals, encapsulated in the two-volume report *Making the Law Work for Everyone*, that are analysed in the present article. Legal empowerment of the poor is simply described as an approach against poverty through law. To date, law has failed to provide comprehensively such a window of opportunity. Addressing exclusion of the poor from law should be at the core of any attempt to liberate the millions around the world who are in the shackles of poverty. As the UNDP report argues, poverty results from the failure of both public policy and markets. Legal protection, particularly the creation of tradeable assets, labour rights, venture capital and intellectual property, is the route to the creation of wealth among the poor. Wealth, on the other hand, is considered a route out of poverty, even though the legal empowerment approach is more nuanced. Wealth creation is not necessarily a ticket out of poverty, and there is

some recognition of this in the UNDP report. Despite this, legal empowerment is another term for the legal foundations of entrepreneurship. It relies on law to unlock the wealth-creating potential of the poor.

In addition — and the main subject of concern for the legal empowerment approach — the majority of the poor survive in the informal economy. This excludes them from the type of protections and opportunities that can be gained from the formal system. Informal norms and institutions not only do not protect the poor but also contribute to their oppression.⁴ The approach treats informality as a central factor of poverty and exclusion. It sees it as a symptom of poverty that ought to be remedied by the creation of formal and clear regimes of law, economic management and organisation. Informality is equated to illegality and poverty, just as formality is equated to wealth and legality. According to the UNDP report, the advantages of the formal legal system are self-evident. Formality provides certainty and predictability, attributes that cannot be associated with informality. Rights, particularly legally enforceable property, business and labour rights, are therefore the main pillars and building blocks of legal empowerment of the poor.

The report acknowledges, however, that all the permutations regarding the constitutive rights of legal empowerment can succeed only within a thriving democratic environment. It suggests that, in addition to a functional democracy, the poor need those rights that have an effect on the political system. The report thus proposes that ‘democracy and legal empowerment are kindred spirits, and are better synchronised than sequenced’.⁵ This means that, together with the constitutive rights of legal empowerment, the poor must also have access to the rights to vote, freedom of expression and some limited procedural rights. Looked at this way, it would not be wrong to conclude that political participation is implied by the broader objective of legal empowerment. Any doubts about the importance of political participation are quashed when the report states that ‘legal empowerment can only be realised through systematic change aimed at unlocking the civic and economic potential of the poor’.⁶ This not only implies the importance of political participation but also the need for an inclusive concept, one comprising interconnecting political and economic components.

It is disappointing that there are few details as to how this ideal can be realised except through passing references to the right to vote. Surely, political participation, particularly in Sub-Saharan African country contexts, where voting is

⁴ Commission on Legal Empowerment for the Poor (“CLEP”) Making the law work for the everyone: Volume I, (United Nations Development Programme, 2008) 2.

⁵ *Ibid.*4.

⁶ *Ibid.*5.

often corrupt, fraudulent and violent, must have greater meaning than implied by the casual references to voting rights? Political participation must also mean reconstituting politics in such a way that decision-making power can be delegated and dispersed down to the most basic levels and to various facets of society. This is one way of ensuring that everyone, particularly the poor, meaningfully take part in matters that affect their lives. In this context, again, legal empowerment of the poor is disappointing. In contrast, and as demonstrated later in this article, this is the strength of informal political participation.

Considering the significance given in this article to political participation, attention is paid to the (mis)treatment of this ideal by proposals for legal empowerment. In the following section, I identify and unpack certain themes from the UNDP report that highlight (but fail to deal with) the relational dimension between legal empowerment and political participation. I demonstrate the systemic failure to address sufficiently the political dimensions of economic inequality. In spite of noting that participation is pivotal to attaining legal empowerment, the report does not address political participation in a programmatic way.

THIN VISION OF POLITICAL PARTICIPATION

No better words can introduce the significance of political participation than those of the title of chapter three of the first volume of the UNDP report. It boldly claims that legal empowerment is not only good economics but also smart politics. On the surface, this claim appears to appreciate the economic and political dimensions of poverty as part of the broad objective of making law work for the poor. Indeed, the report proceeds from the point of view (and rightly so) that, at present, both law and politics work only for rich, powerful elites. They do not for the poor.⁷ It notes that political and economic inequalities have contributed to the deficiencies of law and related institutions and, furthermore, have impeded access to justice. In instrumental terms, the failure of the legal system impedes economic growth, apart from causing instability and sustaining corruption.

Against this status quo, the report argues that the formalisation of law is central to responding to the needs of the poor, including to politics that would otherwise descend into informal channels. If governments fail to assist the poor, the significance of the formal legal system will lose its legitimacy, leading to further decay of such legal institutions and, ultimately, the fragmentation of society. The failure of law, in this respect, is a precipice for catastrophe. Not only would the economy stagnate, the whole fabric of the state would collapse. Inequality in societies is singled out for making the poor suspicious of the state. According to

⁷ *Ibid.* 44.

the UNDP report, the poor have good reason for being suspicious, because institutions of the state arguably determine all the rules, including key ones relating to economic activity.

PARTICIPATION AND EMPOWERMENT

The message, then, from legal empowerment is that governance matters, particularly where the poor are vulnerable to crime or corruption or lack meaningful access to courts. Good governance is thus seen as the remedy to such problems; it is defined as the ‘form of institutions that establish a predictable, impartial, and consistently enforced set of rules’⁸ that will have a cumulative effect on the creation of just, prosperous and sustainable societies. Good governance unites legal empowerment with the mainstream development orthodoxy that has promoted this mantra since the early 1990s.⁹ Apart from contributing to good governance, legal empowerment seeks to give voice and identity to the poor. Indeed, identity and voice are preconditions of legal empowerment.¹⁰ Identity simply refers to legal recognition,¹¹ meaning proof of identity before the law. Lack of such identity, according to the report, facilitates exclusion; identity would make it more difficult to exploit the poor. In a related context, a strong assertion of identity translates into ‘civic and economic agency as citizens, asset holders, workers, and businessmen/women’.¹²

On the other hand, voice refers to information and education, organisation and representation. This suggests that the poor need to be informed and educated about their rights and how they can shape decision-making processes. The poor also require representative organisations (cooperatives, trade unions, small-business associations, community and women’s associations, etc) that can demand and negotiate reforms to advance their rights. Voice here seems to mirror (with certain distinctions) Albert Hirschman’s work.¹³ There, voice is synonymous with participation in various aspects of public life. Voice, in contrast to what it entails to legal empowerment, means more than traditional forms of electoral and representative participation.

⁸ *Ibid.*

⁹ For a critique of good governance, see James Theo Gathii, ‘Retelling good governance narratives on Africa’s economic and political predicaments: continuities and discontinuities in legal outcomes between markets and states’ (2000) 45 Villanova Law Review 971-1034. See also, Giovanni Arrighi, ‘The African crisis: world systemic and regional aspects’ (2002) 15, 5, New Left Review 31-36.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See generally, Albert Hirschman, *Exit, voice and loyalty: responses to decline in firms, organizations and states*, (Massachusetts: Harvard University Press, 1970).

In development discourse there are two generally opposing (but sometimes mutually supporting) views of participation. The first view originates from the emphasis on civil society by neoliberal development initiatives. It is based on an acknowledgment of the limitations of the first-generation neoliberal market reforms and the incursion into institutional and social reforms.¹⁴ Participation is linked to empowerment, with power conceptualised in harmonious terms. The presupposition is that power is vested in individuals in various communities, who can utilise it to achieve individual and collective goals. To achieve this vision of empowerment, individuals share power and do not necessarily have to dislodge the power of elites. Participation and empowerment are mainstreamed through concepts such as stakeholder participation, local governance and social capital. Organisations like the World Bank (WB) have been the main institutional advocates of such initiatives.

Participation and empowerment often feature as mutually supporting concepts, even though both are rarely clearly defined. Although they appear to emerge from bottom-up processes, a prevailing criticism is that neoliberal participation and empowerment programmes are still determined in the cosy offices of international development institutions, government agencies and non-governmental organisations. Looking at the twin concepts of empowerment and participation in neoliberal development discourse, Mick Moore argues that their emergence has more to do with the organisational needs of the major development institutions than those of the poor. It reflects the recent reluctance and reduction of borrowing by member countries and, as a consequence, the search for new outlets to disburse funds by the WB. The emergence of social funds is a good example. It is one of the most expanding components of the WB's lending portfolios.¹⁵ In the end, empowerment and participation, concepts with considerable political connotations, appear watered down and too weak to dislodge the social, political and economic power structures that affect the poor. As such, participation and empowerment in dominant neoliberal discourse promise more than they can deliver.

Secondly, and in contrast with the first view, participation and empowerment enjoy a radical interpretation, thanks to critical development scholarship. Power is both relational and antagonistic. It rests on the premise that the transformation of economic and political structures would lead to a radical democratic society, which can in turn be enhanced by participation and empowerment. Empowerment

¹⁴ Giles Mohan and Kristian Stooke, 'Participatory development and empowerment: the dangers of localism' (2002) 21, 2, *Third World Quarterly* 247-268.

¹⁵ Moore Mick, 'Empowerment at last?' (2001) 13, *Journal of International Development* 321-329.

entails the collective participation of the marginalised in civil society to challenge the structures of the state and market. Indeed, the emphasis on civil society sometimes makes it difficult to differentiate between the dominant and the radical view of participation and empowerment. However, it would appear that the main distinguishing feature is that the radical view is vehemently opposed to capitalism and markets and sometimes surfaces as anti-western. Apart from that, participation and empowerment are celebrated as authentic bottom–up processes.

Neither participation nor empowerment is sufficiently defined by the report. In relation to participation, empowerment receives negligible attention in several lines of the report. It is mainly apparent in discussions about the importance of democracy to legal empowerment.¹⁶ To summarise this viewpoint, and to reinforce similar arguments about democracy noted above in section 2 ‘Legal empowerment of the poor’, the report suggests that a democratic ethic is a precondition for implementing successful policies, which in turn would increase the inclusion of the poor. No further explanation is given as to how this would be achieved. All that is provided are a few statements that further outline the importance of participation. A good example of this can be seen in what may be the most affirmative statement in favour of participation: ‘[t]here is no substitute for a truly inclusive, participatory, and deliberative process, where alternative viewpoints are considered and the interests of the poor and marginalised citizens are taken into account’.¹⁷ The report then proceeds to recognise (again without specifying) what the requirements for such types of inclusion might entail. It suggests that citizens need to be encouraged to organise and participate effectively in decision-making processes and that centralised forms of government impede such forms of participation. As already noted, it fails to indicate the various policy options for this sort of inclusion, even if it is reluctant to impose a specific policy.¹⁸

Empowerment, like participation, is not defined by the report, but it is clear that it is highly unlikely to subscribe to the radical view of the concept. Not even the definition of ‘legal empowerment’ given in the report clarifies the underlying concept of empowerment. However, the report does give some indication of what it means by empowerment, as extrapolated from the emphasis on three core rights: property, business and labour. Legal empowerment is defined as ‘the process through which the poor become protected and are enabled to use the law to advance’¹⁹ such rights against the state and in (but not against) the market. Rights are compatible with the agenda for markets, particularly the rights prioritised by

¹⁶ *Ibid.* 20, 44.

¹⁷ *Ibid.* 47.

¹⁸ *Ibid.*

¹⁹ *Ibid.* 26.

legal empowerment. According to the report, property, business and labour are the most significant rights that affect the livelihoods of the poor, inclusive of an enabling framework of law and justice. Access to justice and rule of law also become another central tenet of the approach. Read together, these components of legal empowerment would enable the poor to become better citizens, asset holders, workers and business people.

HUMAN RIGHTS

Legal empowerment is couched further in the language of human rights, which implies a wider notion of empowerment. The emphasis on three core rights is justified on the basis of a wider framework of human rights.²⁰ The approach emphasises at length that property, business and labour rights are a species of human rights; as such, they must be developed further through international, regional and national human rights regimes. Here the importance of participation re-emerges in the report. It claims that the poor must be given the opportunity to participate and own the processes leading up to these rights.

A preliminary conclusion that can be drawn from the discussions above is that participation refers to economic participation. Despite these claims, legal empowerment emerges as too narrow in relation to political participation. By focusing on property, business and labour rights, legal empowerment cannot disguise its economic bias. The report appears to repackage older contestable debates about the relationship between law and development, particularly those that conceive economic growth as development. Although it attempts to align itself with more recent development thinking (ie. the capabilities approach), it fails to do so convincingly. Its selection of human rights makes it appear constricted and even parochial: it places almost total emphasis on realising its narrow vision of rights through the market. The market, it says, not only reflects basic freedoms such as association and movement, but also generates the resources necessary to provide, uphold and enforce the full range of human rights. According to the report, it is these processes that would enable the poor to realise their rights and provide new opportunities for the full realisation of citizenship. Not surprisingly, the report says nothing about market exclusion and how this can also affect the realisation of rights and citizenship.

If empowerment, as the report suggests, means more than realising economic growth, as the capability approach in particular implies, it begs the question: why do property, business and labour rights appear to be more important than water,

²⁰ *Ibid.* 31.

healthcare or education rights?²¹ In short, why does legal empowerment not promote a more comprehensive human rights approach? From the perspective of this article, if we take its claim that legal empowerment is smart politics, why is the right to political participation not among the core rights promoted? These are, of course, rhetorical questions, but the point in raising them is to suggest that the failure to anticipate such issues leaves us with no choice but to conclude that, unlike questions of economic participation, political participation is not taken seriously. With its narrow emphasis on market or economy-related rights, legal empowerment of the poor may be good economics. But by failing to be more specific on political participation, legal empowerment does not live up to its claim that it is smart politics.

INFORMAL POLITICAL PARTICIPATION

This section makes the case for informal political participation, arguing that it sufficiently grasps and responds to the multiple nature of exclusion, especially exclusion from the formal sphere. In particular, I argue that the vast amount of associational or organisational forms in nearly every village and city of Africa elaborate on the types of political participation that are taken for granted by dominant narratives. These activities point to a notion of political participation that is wider than that available through human rights. While questions relating to human rights are dealt with in more detail in subsequent sections, what follows here is an attempt to clarify what the idea of informal political participation means. In doing so, I also sketch out certain key characteristics and strengths of informal political participation.

Informal political participation means several things, defying neat distinction. Each use of the term tends to reinforce or contradict another. There are also regional differences between its use within and between the global north and global south. Nonetheless, I attempt to distinguish between three different but related meanings of informal political participation. In doing so, I emphasise the last notion. What this preliminary exercise shows is that it is always important to distinguish between the different uses because the term has positive and negative connotations. The point of making this distinction is to try to separate the positive from the negative.

First, informal political participation generally refers to the politics of protest movements, whether this is on the domestic or global sphere. The issues that underpin this sort of politics range from identity, inequality, poverty and war to environmental sustainability, among other forms of political and economic

²¹ Martha Nussbaum, *Creating capabilities: the human development approach* (Massachusetts, Harvard University Press, 2011) 17-45.

injustice. The old and new social movements or the anti-globalisation and anti-poverty movements of various persuasions adhere to this type of informal political participation. Although the movements are composed of independent groups who differ both in their objectives or in the methods they deploy, they are often united against a common problem: the undemocratic or unaccountable nature of global and domestic formal political and economic institutions of governance. For instance, the unrepresentative nature of global and domestic political systems is the common complaint uniting the recent and diverse Occupy movements. Corporate corruption and greed may have provided the impetus for these movements; however, the grievance is also about the unrepresentative nature of the system of political representation.²² Participants of such movements are aggrieved because they have lost patience with the system of formal political participation, particularly political parties and politicians who ill-represent their interests. This is a similar theme among participants of the third version of informal political participation described below.

It is impossible to understand the deep-seated nature of the grievances of the protest movements without understanding how they are precipitated by a second dimension of informal political participation. In this context, informal politics means the ability of power actors such as multinational corporations and elites like the Bretton Wood Institutions (BWI) to manipulate global and domestic political systems to suit their interests. Through unofficial channels such as corruption, clientelism, lobbying, personal networks and conditionalities, or other carrot-and-stick devices, these transnationals and their local counterparts affect formal political and economic institutions in more effective ways than democratic elections and other formal devices of political participation. There is a clear relationship between the local and global dimensions of informal participation, just as there are distinct local dimensions. Apart from the role of multinational corporations, a good example of how global and local informal political participation interact is the continuing impact of BWI policy initiatives on formulating local government policy. The Structural Adjustment Programmes and now good governance are some well-known examples of policies that have been produced by this form of informal political participation.

The hardships that such policies have created add another layer to the meaning of informal political participation. It is this notion of informal political participation that is emphasised in the remainder of this article. By informal political

²² Michael Hardt and Antonio Negri, 'The fight for 'real democracy' at the heart of occupy wall street', (2011), *Foreign Affairs*, accessed online at <http://www.foreignaffairs.com/articles/136399/michael-hardt-and-antonio-negri/the-fight-for-real-democracy-at-the-heart-of-occupy-wall-street>

participation, in this context, I refer to the range of survival mechanisms, activities and forms of organisation that transcend social, cultural, legal, economic and political boundaries, which are often generated to respond to or compensate for the inadequacies and exclusions of formal political systems and the forms of participation that they engender.²³ They are generated informally since, for various reasons, there are very limited opportunities within the formal political system for such forms of participation. Informal political participation captures the considerable associational life that is symptomatic of most African cities as well as those in other parts of the third world.

Informal political participation also captures the great degree of creativity and inventiveness, apart from the solidarity, reciprocity and cooperation, particularly among those excluded from formal systems, whether these are state or market-based institutions. To give a good example: in both qualitative and quantitative terms, this notion of informal political participation is central to understanding how or in what ways Sub-Saharan African townships and villages work.²⁴ Informal forms of organisations are arguably the most important survival mechanism in African societies for the poor. They react to or attempt to escape the harness and rigidity of formal systems. Varying in shape, size or structure, they range from the network of neighbourhood associations, kinship groups, community-based organisations, cooperatives and trade unions to human delivery systems, thrift associations, women's associations, widows' associations, work-based associations, religious organisations, ethnic-based associations and other organisational forms that cannot be captured conceptually.

Informal political participation arises out of uncertainty, the uncertainty of living in the present and future. Uncertainty is positive and negative, creative and destructive. It points to the advantages and disadvantages of living in the informal world, which is one of resourcefulness and hope on the one hand and on the other of selfishness, exclusion and insecurity. Thus, we must be careful not to overgeneralise about the strengths of this notion of informal political participation. The degree of cooperation that often exists among members of the same group or community can be used to fuel the exclusion of non-members of this group or community. Despite these shortcomings, uncertainty is one of the salient aspects and advantages of informal political participation.²⁵ There is a correlation between the uncertain futures of those who are excluded from the formal systems and the

²³David Hetch and Maliqalim Simone, *Invisible governance: the art of African micropolitics*, (New York: Automedia, 1994) 11-23.

²⁴*Ibid.* See also AbdouMaliq Simone, *For the city yet to come: changing life in four African cities*, (London and Durham: Duke University Press, 2004).

²⁵*Ibid.*

innovative or emancipatory organisational forms that emerge in response.²⁶ The rather ad-hoc, experimental and uncertain nature of the organisational forms is a result of the uncertain environment in which they are nurtured. Such organisations lack a definitive character; they are often open-ended and flexible. This is why they are quick to adapt to different situations. They are as embryonic as the series of problems that give birth to them. They are resourceful, dispersed and sometimes invisible and spontaneous. As long as there are problems, new collaborative forms between individuals and groups will emerge to address them. This means that, although informal political organisations may be ad-hoc and arise from uncertainty, they are as permanent as the problems that give rise to them. While they may not intentionally be collaborative or mutually supportive, pockets of solidarity, including networks of cooperation, are often built when various groups attempt to expand their range of activity.

Informal political participation is more than the antithesis to formal political participation. Both activities share a complex and ambivalent relationship. Indeed, informal political participation can sometimes be understood as the alter ego of formal political participation. A good analogy is how participants in the informal sphere are not opposed to participating in the formal sphere. For instance, opportunities may be sought in the formal sphere to sustain a variety of activities in the informal sphere, including the support of immediate or extended family members, or religious and ethnic associations, or simply to pay healthcare bills. In another sense, as is often the case in many African cities, workers in the formal political sphere must engage in several informal activities, such as thrift to augment their inadequate wages. Although this is not strictly a political activity, the point is that it is analogous to the way that informal political organisations creatively engage, disengage, embrace, adapt, transform and reinvent formal political forms of participation and organisation. As a more general claim, it shows how informal and formal political participation blur the distinctions and reinforce each other. The boundaries between what is formal and informal, and what is legal and illegal, constantly shifts from one ground to another in space and time.²⁷

IN WHAT SENSE IS INFORMALITY POLITICAL?

It is important to clarify the political dimensions or context of these informal activities. Because they are not always clear, highlighting this is significant to further our understanding of the full dimensions and implications of the notion of

²⁶ Colebrook Claire, 'The politics and potential of everyday life' (2002) 33, 4, *New Literary History* 689.

²⁷ Ilda Lindell, 'Informality and collective organising: identities, alliances and transnational activism in Africa', (2010) 25,1, *Third World Quarterly* 207-222.

informal political participation articulated in this article. After all, it is relatively easy, as commonly the case, to describe these activities as merely economic survival strategies that have nothing to do with politics. Although insights from feminist theory on the political nature of the private and social sphere are helpful in dispelling such perceptions, there are other important political implications of informality that need to be brought to attention. The economic sphere is arguably the most important area to have felt the impact of various forms of informal activity. In Sub-Saharan Africa, for instance, it is estimated that 75% of public goods and services are provided by one form or another of informal activity.²⁸ An interpretation that can be given to these events is that informality has replaced state (and more recently market) institutions with a type of politics of survival, association, cooperation and solidarity. This is the first sense in which such activities can be described as political. By taking direct responsibility for the provisioning of public goods and services, traditionally a responsibility of the state, the various informal groups are indirectly effecting social change politically. They are not just making demands for better provisioning of public goods and services; rather, they are seizing the type of political power necessary to directly control, allocate and distribute (according to their own rules) public goods and services among themselves. What is arguably the most important lesson that can be drawn from such forms of activity is that the provisioning of public goods and services is sustained politically through, among other things, collective action. Moreover, the informal provisioning of public goods and services points to the limitations and the need to look beyond the inadequacies of the recent policy emphasis on markets and privatisation.

Looking at the purpose behind collective or self-provisioning of public goods and services, we can perceive further political dimensions of such forms of informal activity. First, because most of the activity is driven by the desire of participants to live dignified lives, it is political in the sense that it is irreducibly moral. The means deployed to achieve the essential goods that contribute to dignity do not really matter. In certain situations, illegal squatter settlements, street hawking in public places and siphoning water or electricity would be morally justified from the standpoint of survival. In another sense (and connected to the moral aspect), there is a relational aspect to this politics, a type of politics in which kinship, family, religious and ethnic ties take the centre stage. There is an interaction between the household or extended family network and economic, religious, social and political forms of organisation. This is so confusing that it is difficult to separate one pattern of organisation from another. They all share a degree of interdependence. The externalities generated from one unit of organisation tend to affect the other.

²⁸ See Abdoumalig Simone, 'Straddling the divides: remaking associational life in the informal African City', (2001) 25,1, *International Journal of Urban and Regional Research* 103.

When a problem is resolved within one unit of organisation, it has a ripple effect on problems in another unit of organisation.²⁹ Another way, in which this manifests is that, not only do these organisations always offer something new, but they also retain something from the past. Africa's brand of informal political participation is a hybrid of the traditional and modern. It responds to modernity by assimilating it with traditional African values of compassion, care, solidarity, reciprocity, community and collaboration. The amalgamation of the traditional and modern is an example of the creativity and imagination that is borne out of the exclusion, hardship, disorder and impoverishment caused by modern formal political institutions.

In addition to the moral and relational dimension, informal activities are political in the sense that they are distributive. In other words, legal or illegal distribution of public goods and services is arguably the core objective of informal activities. The presupposition is also that distribution will be guaranteed if individuals and groups exercise autonomy over decisions regarding the distribution of public goods and services. Autonomy over decision-making processes points in two directions in which informality takes a political turn.³⁰ First, it shows that there is an internally democratic element to these activities. Although the groups are as diverse as the activities they carry out (and they vary in the internal quality of democracy), they nonetheless have democratic features such as rules of participation, decision-making, membership, and internal and external dispute-resolution mechanisms. Informality offers individuals and groups the autonomy to make collective decisions as well as conduct other affairs free from the rigid restrictions and rules of the formal sphere. These are not, as commonly regarded, straightforwardly lawless or illegal activities; rather, they are activities sustained by moral economies such as trust, solidarity and cooperation.

Second, distribution through autonomy over decision-making paves the way for the formation and proliferation of legal and illegal problem-solving organisations, something which strikes a family resemblance with theories of associational democracy.³¹ It is indicative of the role that politics ought to play in economic life, among other areas. The share volume of informal activity, as for instance in Africa,³² is not only an empirical illustration of this, but also shows how the existence of such activity, no matter how minimal the internal level of

²⁹ AbdouMaliq Simone, 'Emergency democracy and the "governing composite"' (2008), 26,2, *Social Text* 9516.

³⁰ Asef Bayat, 'Uncivil Society: the politics of the informal people'(1997) 18,1, *Third World Quarterly* 55-58.

³¹ See, Paul Hirst, *Associative democracy: new forms of economic and social governance*, (Great Britain: Polity Press, 1994) 49-59.

³² See Abdoumaliq Simone, above n 28, 103.

participation, could (even if this were nominal) deepen the quality of democracy in the societies concerned. The failure to appreciate this is perhaps due to the standard parameters for measuring the quality of democracy. We look to different institutions or a set of institutional practices to measure democracy. What does not count as democratic or political are the vast sets of associational practices of the informal world.

From the perspective of this article, a further point can be made about the contribution of informal political participation. It widens commonly held perceptions such as those in human rights of what political participation should mean. It moves the focus beyond its narrow attention to voting, elections and representation. These informal practices point to a wider notion of political participation, even though they do not claim to be the alternative or are unclear as to what this notion should be. Informal political participation reinvigorates the very idea of participating in virtually all aspects of life, with the democratising effect that it has on the economy arguably its single most important contribution. In this context, it works with a background notion of politics that mirrors the Aristotelian concept of politics. It rediscovers, and goes beyond, the Aristotelian ethical notion of politics, to offer a type of politics that encompasses and involves everyone in decision-making over almost all aspects of life.³³ It is indeed another way of understanding what Aristotle meant when he asserted that we are all political animals.

This democratising quality may originate from the definitive character of informal political participation. From the foregoing discussions, it appears to be more a combination of moral, social and cultural norms that nurtures a type of political agency, which in turn underpins the highly innovative practices and modalities of organisation. What should be taken from the multiplicity and interaction of various spheres is how they intermingle to produce a distinctive brand of politics, one that is not political (in the traditional formalistic sense of the term) nor authentically cultural, economic and social. Traditional distinctions between economics and politics, public and private, family and society, and religion and secularity are blurred in the context of informal political participation.³⁴ Africa is again a good reference point for this, because there these categories are not separated. What is typical about informal Africa is the porous and interlocking relationships between such spheres. Indeed it is through these sorts of activity that political concepts such as citizenship are realised, not through political institutions or abstract concepts of constitutional rights. The inclusions and exclusions that originate from

³³Aristotle, *Nicomachean ethics* Ross D (Trans.) (Oxford: Oxford University Press, 2009) 5 -10.

³⁴AbdouMaliq Simone, above n 24, 14.

the assertion of citizenship are better appreciated through local and daily social practices in the informal world.

THE LIMIT OF POLITICAL PARTICIPATION THROUGH HUMAN RIGHTS

Having set out above the rudiments of informal political participation, I explore and consider the options for political participation offered through human rights. Apart from tilting in favour of formal politics (i.e., elections, representation and political party politics), this model of politics fails to offer a comprehensive notion of participation that is capable of capturing the range of informal activities described in the previous section. Moreover, by maintaining strict boundaries between the public and private sphere, human rights contribute to sustaining a similar asymmetry between the political and economic sphere. As such, there is good reason to be sceptical about a dependence on human rights to diffuse the notion of political participation within the legal empowerment agenda. There are two other reasons that human rights should invite scepticism. First, ‘participation’ is conceived narrowly to mean political participation in the traditional sense of the term. The emphasis is on ways in which individuals can influence the political system through democratic elections or representative forms of government. The human rights doctrine of participation can be found in a combination of the right to self-determination³⁵ and the right to political participation.³⁶ Although political participation is further broken down into the right to vote (and to be voted for) in elections and the right to participate in public affairs, the meaning of the latter part of this right is vague. Unlike the right to vote, which remains largely uncontroversial, it is not clear what participation in public affairs is or what sort of activities constitute public affairs. In particular, it is not clear whether the economic sphere should benefit from political participation.

However, doubts over this have been clarified by what is arguably the most inclusive definition in the human rights corpus of the right to participation. This is

³⁵ It may not be a coincidence from the point of view of the argument here that the human right to self-determination emerges as a political and not an economic right. On the right to self-determination, see Article 1(1) of the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights.

³⁶ On the right to political participation see, Article 25 of the International Covenant for Civil and Political Rights. See General Comment 25 for an expansion of the right to political participation. Paragraph 1, General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96 CCPR/C/21/Rev.1/ Add.7. The Universal Declaration of Human rights (UDHR), which preceded the two covenants is also vague on this point when it deals with political participation. Article 21 (a) seems to restrict political participation to the right to take part in government, omitting any form of political and non-political activity unrelated to government. Most of these observations apply to regional human rights agreements like the African Charter on Human and Peoples Rights.

provided by the Convention on the Elimination of all Forms of Discrimination against Women 1981, which extends participation beyond the traditional and formal political circles mentioned above. It includes participation in various aspects of civil society, from public boards, trade unions and professional associations to community-based organisations. This expands the notion of political participation, even though it privileges women. In addition, others have argued that the narrow conception of political participation in human rights can be remedied by a more integrated reading of human rights norms by, for instance, interpreting freedom of expression, assembly, speech and anti-discriminatory rights in relation to political participation.³⁷ While the arguments above are plausible, there is a second and more fundamental reason that raises doubts about whether human rights can provide the foundation for political participation. Because of its significance, it is discussed in detail in the next section.

THE AUTONOMY OF THE ECONOMIC SPHERE FROM POLITICAL PARTICIPATION

The problem is the binary distinction between public and private that is foundational to human rights. Among other consequences, this may reinforce the autonomy of the economic sphere from the political, particularly excluding democratic forms of participation in the economic sphere. This is an old problem, even though it may not often be highlighted. Its antecedents can be traced to the emergence of natural rights. In its historical dimension, natural rights were responsible for insulating politics from society and, thereby, contributing to separating the unity of political and economic forms of domination.³⁸ This was first witnessed in Europe, during the period when feudal society transitioned to bourgeois society. Unlike feudal societies, where there were no clear distinctions between economic wealth, social status and political power, in bourgeois society, politics became confined to the realm of the state, while property and religion, which were previously instruments of class domination, became transformed into private institutions of civil society and protected by natural rights from state intervention.

³⁷ For a good example of the comprehensive reading of human rights in the light of participation, see; Emile Secker, 'Expanding the concept of participatory rights' (2009) 13, 5, *International Journal of Human Rights* 657- 715. For older attempts to expand on the right to political participation, see; Henry Steiner, 'Political participation as a human right' (2009) 77 *Harvard Human Rights Yearbook* 77-134; Thomas Franck, 'Emerging right to democratic governance' (1992), 86,1, *American Journal of International Law* 46-91.

³⁸ See, Costas Douzinas, 'Adikia: On communism and human rights', in Costas Douzinas and Slavaj Zizek, *The idea of communism* (New York: Verso Books, 2010) 81-100.

In the private realm, property became the dominant form of relations. The cumulative effect was that it did not just insulate the (private) economic realm from the (public) state: it was responsible for failing to extend political controls on the economy. Rights, politics and the state existed as abstract and transcendental entities, far removed from social and economic divisions in society. These developments produced tragic consequences for citizens. They ended up living dual lives, one consisting of ‘strife in the pursuit of personal economic interest’,³⁹ and the other ‘devoted to political activity and the common good’.⁴⁰ Equality and liberty, as such, were at best fictitious concepts, ones that were key to holding the state and rights apart and distanced from the daily sites of oppression and exploitation. Rights, as a consequence, succeeded in making the cleavage in levels of accountability between the economic and political spheres appear natural.

The emergence of the right to vote is another way of understanding how the economy became de-politicised. Universal adult suffrage or the right to vote generated mixed reactions and unintended consequences. This became evident through the prohibition of the requirement of property qualification as a core aspect of the right to vote.⁴¹ Although this was desirable, it reinforced (without intending to) the insulation of the economic sphere from political accountability. Ideals of equality, freedom and citizenship were distinctive characteristics and rights to be enjoyed from the political sphere. Apart from lacking similar rights and freedoms, the economic sphere became normalised as a regime of domination and exploitation. From then on, there were two different standards of participation and representation in each sphere, apart from the fact that the economic and political spheres became known as distinct and autonomous entities. Regardless of the underlying political undertones in the activities taken by economic actors, these would, under this climate, elide democratic or political standards of accountability. As mentioned in section 3 ‘Informal political participation’, the informal role that certain transnational actors play in influencing the content of policies of the formal political system is a good illustration of this problem.

LAW

Rights are not the only reason for the minimal levels of political accountability in the economic sphere. Law is also partly a factor, if not a major one, particularly if

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ See, Scot Veitch *Law and irresponsibility: on the legitimation of human suffering* (London: Routledge, 2007) 64-65.

the close relationship between law, property and capitalism is scrutinised.⁴² Different republican constitutional traditions, from the American to the French and the British, and the colonial projects that result from them, place private property as the central 'regulative idea of the constitutional state and the rule of law'.⁴³ Under such republican regimes, law exists as both an abstract and concrete phenomenon. In the abstract sense, law is transcendental, detached or even apathetic to social and material reality. In the concrete sense, on the other hand, law (particularly through the institution of property) concretises the materiality of exploitation and domination. Although property, central to the capitalist economy, possesses its own laws, these exist only to sustain exclusions in society.⁴⁴ The economy is insulated from the sovereign political controls of economy, which is in turn to be controlled by 'invisible and internalized'⁴⁵ economic or market-related rules. Private property simultaneously conceals the materiality of human poverty and concretises inequality and exploitation.

CIVIL SOCIETY

At a more basic or societal level, the de-politicisation of the economic sphere is also made possible by the concept of civil society.⁴⁶ This is often defined as a state-free zone, in which citizens exercise their political freedoms. The difficulty with civil society is traced to the premise behind it, particularly simultaneous evolution with capitalism, the market economy and property rights. As discussed earlier, the emergence of capitalism not only led to the separation of the state from civil society, but also united civil society with the market without extending political forms of accountability. This created a different political system than that which had prevailed in history, as it contributed to the preservation of politics and economics as separate spheres. Without the backing of state or political power, civil society is incapable of restraining the economic power of the market. As a political-free zone, civil society is too weak to confront the market, or as is sometimes the case, civil society co-opts or becomes an agent of the harms produced by the market.

All these elements can be discerned from the proposals for legal empowerment of the poor, whether it is through the emphasis on legal formalisation of property rights, markets, human rights or civil society. First, the emphasis of legal

⁴²Michael Hardt and Antonio Negri, *Commonwealth* (Massachusetts: Harvard University Press, 2009).

⁴³ *Ibid.* 7.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Ellen Meiksins, *Democracy and capitalism: renewing historical materialism* (Cambridge: Cambridge University Press, 1995) 252.

formalisation of property rights is consistent with discussions above about the transcendental and abstract nature of law and human rights. Law and rights can be both an abstract and concrete reality in the lives of the poor. This abstraction and concretisation is made possible by property rights. Second, the emphasis on the market, often characterised by the absence of any meaningful political controls, only leaves the poor vulnerable to exploitation. The third point is similar. Civil society is powerless in the face of forms of economic domination and exploitation without any meaningful political mechanisms of accountability. Cumulatively, legal empowerment of the poor neither anticipates nor responds to these problems. The assumption seems to be that answers can be found by creating and formalising opportunities to participate in the economy. What this achieves, on the contrary, is a further reinforcement of the economic sphere, thereby making it autonomous from political controls and political participation.

These historical arguments do not completely explain why human rights have not featured prominently in the informal sphere. It may simply be the importance of cultural, ethnic, religious experiences or other moral economies of groups in the informal sphere. Not only do these influence their version of informal political participation, they simply have nothing to do with human rights. Indeed, some of the activities in the informal sphere would be at odds with human rights. It is also important to add problems recently noted about the way in which human rights can selectively be deployed to make them compatible with free-market initiatives. For instance, civil political rights such as freedom of expression, association and anti-discrimination are deployed in ways that support market activity. Property and contractual rights also have this characteristic, as they are also pivotal to market participation. It is not surprising that property rights, in particular, take centre stage in proposals for legal empowerment of the poor. The wisdom of prioritising property rights so much that they should deserve more protection than healthcare, water or education rights can certainly be questioned. This is apart from the fact that the formalisation of property rights does not necessarily guarantee exclusive rights of the poor. Legal formalisation, as has been noted, also contributes to making the property of the poor vulnerable to capture.⁴⁷ This is increasingly evident in the privatisation of traditional knowledges, plants or other life forms, the extension of human rights to corporate entities⁴⁸ and, more recently, the phenomenon of land grabbing.

⁴⁷ Nyamu-Musembi, above n 1.

⁴⁸ Upendra Baxi, *The future of human rights* (India: Oxford University Press, 2008) 132. See also, Anne Grear, 'Challenging corporate humanity: legal disembodiment, embodiment and human Rights' (2007) 7, 3, *Human Rights Law Review* 511-543.

Having said that, the exclusions and vulnerability within the informal sphere make it impossible to totally write off international human rights law. It is also valid to argue that because human rights were exclusive in the past does not necessarily mean they would be exclusive in the future. It would be too naive to suggest this, just as it would also be too naive to suggest that providing a clear regime of human rights can resolve the forms of exclusions in the informal sphere. Given that construction of inclusion and exclusion takes place on a daily basis, informal political participation may provide an avenue to also concretise human rights norms. That way, human rights may cushion the effect of the vast range of collective activity on vulnerable minorities. As such, my argument is not against human rights per se; rather it has been against thinking that the human right to political participation offers a silver bullet. It has shown that there is a case to be made for the politics of the poor, which has been rendered invisible by dominant perceptions of political participation. Answers do not always imply formalising the informal sphere. Solutions may lie in recognising the informal sphere as it is, particularly the scope and opportunity that it can offer for social and political transformation.

CONCLUSION

In this article, I have attempted to make a case for a broader understanding of political participation that can be appreciated by discursively drawing lessons from the real and everyday struggles of the poor and the marginalised in the informal sector. What should be taken from the informal sector is how such activities yield to a type of politics that is not public or private, economic or political. Not only does informality provide a prism to grasp how to escape the dichotomy between these spheres, informality also provides a basis for the imagination and creation of diverse and new regimes of organisation and ownership. Informal political participation offers a means of comprehending how to conceive new democratic organisations devoted to management of a variety of public-owned goods and services. If there is one distinctive area of contribution that is made by informal political participation, it is to increasing the democratic content of economic activity through the array of rich, dispersed and innovative forms of organisation. As such, my argument has also been to show how informal political participation challenges us to think more carefully about what it means to participate politically.

Given the role that these activities play in securing livelihoods, there is an undeniable instrumental nature to this form of politics. It should be no surprise that the existent forms of collaboration are truly motivated by greed and self-interest. But this is only part of the picture. The desire to cheat is often compensated by the desire to be kind and compassionate. There is often an

underlying intrinsic element to informal political participation. It is also characterised by strong outpourings of solidarity, care and compassion among participants. The presence of the family or religious groups throws more weight on its underlying caring element. This makes informal political participation intrinsically moral as much as many other things. Indeed, whatever anxieties may exist over informal activities more generally, they can be dispelled by widening the scope or the very action of political participation. After all, it is through political participation, in Aristotelian terms, that we learn, nurture or develop as good moral beings.

Informal political participation gives the fullest expression to what feminists in another context called the 'personal is political'. It brings attention, with great distinction, to the political implications and consequences of everyday life. The activities and struggles in the informal sphere blur distinctions between public and private, political and economic. As exclusion and oppression has multiple dimensions, so are the struggles that are waged against them. Informal politics unites against the public and private, political and economic. It demonstrates that the unity of economic and political disadvantage or domination also requires commensurate forms of participation that can confront such forms of exclusion. It shows that political and economic disadvantage often have the same origins. The everyday struggles in the informal world can hardly be described as political or economic; rather they mutually reinforce one another. Thus, my argument has been that we can renew or reinvent, through readings of these struggles against exclusion, the idea of political participation in very inclusive ways. If legal empowerment of the poor is to be true to its word that this requires voice, then there is no better way to achieve this than by paying attention to the politics of those it seeks to assist. Voice not only implies ownership and participation but also authorship, which can be appreciated by close attention to the everyday struggles of inclusion by poor and marginalised communities in the informal world.