Editorial Introduction

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1 Introduction: Law and Development

The articles in this issue of the *Bulletin* are the product of an international workshop held at IDS in June 2000, which brought together a multi-disciplinary group of scholars – lawyers, political scientists, anthropologists and sociologists – with development practitioners and legal reformers.[1] Our purpose was to examine the 'state of the art' in current thinking about law and development, focusing particularly on how the law and legal institutions affect the lives of ordinary citizens, particularly the poor and disadvantaged. It was hoped also that a new set of research agendas could be developed which would be relevant to the issues facing low- and middle-income (LMIs) countries in the first decade of the 21st century. The results more than met our expectations in that the articles presented here are representative of a stimulating set of discussions which covered an enormously wide range of evolving debates, from the nature of law itself, human rights and globalisation on the one hand, to crucial issues such as the protection of land and property rights, access to justice, the conditions of political or collective action, democratic legal reform and the regulation of international business, on the other.

What accounts for the renewed interest in the role of law in development? After a hiatus between the mid-1970s and the mid-1980s, law has re-emerged onto the international development agenda. A number of reasons may be suggested:

- First, the 'good governance' policies advocated by the international donor community, following the failure of the structural adjustment programmes of the 1980s, see reform of the state and its relations with society as key elements in promoting market-led growth. The 'rule of law' and legal reform, according to this agenda, are an essential element for creating an 'enabling environment', insofar as they can ensure the enforcement of contracts and the security of private property.

- Second, insofar as good governance means more accountable and transparent government, more legitimate and effective legal institutions are needed to protect citizens' rights, limit the actions of corrupt or oppressive state officials

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and protect the livelihoods of the poor and excluded. The need to make legal, regulatory and judicial institutions more effective in these latter roles has become even more pressing as a result of the fragmenting and destabilising effects of global marketisation.

- Third, in spite of the diversity of the huge number of new democracies (some nominal at best) which have emerged since the 1980s, there is a new concern with the legally defined concept of 'citizenship', seen as a crucial and common requisite for the operation of any effective democracy (Collier and Levitsky 1997; O'Donnell 2000).

- Fourth, rising levels of crime, civil disorder and violence in the burgeoning urban metropoles of the developing world, and the exacerbation of political conflict in many new democracies, have put questions of policing, access to justice and judicial reform near the top of many national agendas. Again, the poor and disadvantaged are often the most severely affected by this lack of security in their everyday lives (World Bank 2000).

2 Concepts of the Law and Legal Processes

Within the context of this renewed interest in law, the intention of the workshop was to go beyond the concern with law as an enabling framework for commerce and investment and to refocus on how legal processes and legal institutions affect people in their everyday lives. Both the content and the administration of land law, family law, labour law and negligence, for instance, impact on the security with which poor people can hold and use assets such as land or natural resources, obtain a fair return for their labour, or develop small business opportunities. A corrupt and ineffective criminal justice system (including policing) can have a deeply detrimental effect on the security of everyday life and on citizens' protection from arbitrary state action.[2] In short, not only is the legal system an aspect of power relations amongst (unequal) individuals and groups, it can shape how people make economic decisions, and how they invest their social capital in organisations or in political action.

One currently dominant approach to these issues is to conceptualise the problem as one of 'access to justice'.[3] It is argued that what vulnerable citizens most need is access to more effective and affordable legal remedies, administered in an honest and efficient manner through 'due process'; only in this way can they establish their rights and enforce those rights even against the state itself. The 'rule of law' is, after all, fundamentally about making the state itself subject to its own rules.

One problem with this 'rights-based' approach, however, is its rather narrow view of the law as a 'service', offering formal legal remedies through litigation or the threat of litigation. The assumption is that law, like education or health, must be available to the largest percentage of the population; if it is not, then there is a situation of unjust exclusion. Yet even in the most effective and accessible systems, litigation is almost by definition the remedy of a tiny minority of the population and therefore excludes the poor. Attempts to use 'justiciable rights' in support of poverty-reduction campaigns in India, for instance, may make good politics but are leading to a backlog of cases of Dickensian proportions before the Supreme Court.[4]

Recognising the practical impossibility of making litigation in the courts literally available to all, many legal reform advocates and development agencies are putting a new emphasis on 'alternative dispute resolution' mechanisms (ADRs).[5] One strand of this approach (much developed in the 'informal' urban areas of Latin America) aims to develop community-based forms of mediation and arbitration that avoid the expense and uncertainty of adversarial contests in state courts. Another strand is fascinated with the idea of supporting – or in some cases reviving – 'customary' and 'traditional' forms of legal regulation, which are seen as more popular, more locally based, better understood by ordinary people and more concerned with restitution and mutually agreed dispute settlement. This idea has developed furthest in the African, South and South-East Asian contexts.

The ADR movement shares with the legal pluralists the view that the pursuit of a more popular and accessible judicial system probably cannot confine itself to state law; there are other institutionalised

regulatory orders which can perform the same function, perhaps more effectively. Yet, like the access to justice approach, the ADR focus on 'law as dispute resolution', or the resolution of law-breaking, is still too narrow. As Nader argues in this issue, dispute resolution can only be truly consensual if relations of power between the parties are relatively equal. Otherwise the powerful tend to win. It is naïve, to say the least, to assume that community leaders dispensing justice in an urban 'squatter settlement' have less assymetrical power relations with the parties or are more 'accountable' than state courts. And these considerations are equally true of customary law systems, which have been, and continue to be, reinvented through the colonial and post-colonial periods in response to changes in the configuration of local economic and political power structures.

If this reality is recognised, it is also apparent that another danger of the ADR and local law approaches is that they may simply give more power to local élites to act arbitrarily. Historically, the formal equality given to litigants by the judicial institutions of a central state has often protected the weak against local tyrannies.

Law in its broadest sense is, therefore, more than dispute resolution; whether embedded in state or non-state institutions, it permeates everyday lives insofar as it is about the power to enforce or regulate social relationships. One of the classic anthropological definitions views law as those rules of 'role relationships and obligations' which are capable of being sanctioned or enforced by 'publicly acknowledged authority' (Radcliffe Brown 1952; Pospisil 1971). Law implies power and authority, and hence unequal relationships. And whether one attributes the quality of 'law' to non-state regulatory orders or not, it is clear that in empirical terms, the modern state is a primary source of the most dominant regulatory order, since the vast majority of contemporary societies exist within a state-bounded polity. It is a characteristic of the modern state that law or the legal system is a highly differentiated sphere of state action, enjoying a monopoly of both the symbolic authority of the state and its threat of coercive enforcement.[6] The law – and hence the state – is present at every point where the myriad relationships amongst individuals, families and groups in a complex economy are enforced, regulated, defined or facilitated, from marriage and sexual behaviour through to economic exchange, the disposal of property and the power to command the services of others.[7] The state determines which classes of interests are worthy of its support. In aggregate terms, the state enforces particular systems of stratification and economic distribution; sustaining the market (through law) is, of course, one such distributional mechanism. As Edelman puts it, law becomes a prize, 'a site and a stake of class struggle' (Edelman 1979).

If one is interested in how legal processes and institutions impact on people's everyday lives, it is clear, therefore, that the most salient and frequently experienced points of contact are not, in the first instance, the courts but state regulatory, administrative and quasi-judicial institutions. Particularly in the agricultural economies typical of many developing countries, these institutions are involved, for instance, in land use and allocation, including the regulation of produce marketing; more generally, quasi-judicial roles are performed through the issuing of permissions and benefits, the regulation of employment and employment status (including the crucial matter of residency status in the migrant-dominated economies of Africa) and control of access to political rights through the regulation and administration of elections and associational life. It is through these operations of the state that people experience 'law as practice' – the relationships and behaviours that are actually practiced and enforced in those realms where the state's writ runs. Whether they are perceived as legitimate and acceptable is another matter, a highly political matter, particularly if there are other, competing regulatory orders, which are regarded as more acceptable and are more 'practised' than those of the state.

3 Main Themes

The articles which follow are grouped according to the three major themes that emerged from the discussions at the workshop.

3.1 The nature of law, and legal pluralism

At the most general level was the debate over the nature and significance of law itself, or, as Houtzager puts it, 'how much does law really

matter?' His perspective on law as a politically determined resource, which is shaped and interpreted through the interactions between state power and collective action, is shared by other contributors such as Nader and Benda-Beckmann who are equally concerned with law as the embodiment of power relations. Historically, law, not least in colonial states, has been both empowering and disempowering, an instrument both of state oppression and of liberation. Although recognising that legal categories can shape social and political identities, all would reject the instrumentalist view of law as the tool of social engineering, which can determine behaviour in a linear manner. Woodman, indeed, sees law as essentially any set of 'observed social norms', i.e. it must be practised as a social fact, and therefore follows rather than determines social relationships.

The debate over legal pluralism is also continued within this collection; given that a plurality of regulatory orders is a particularly prevalent feature of ex-colonial countries, the question of the relationship between state and non-state law remains a live one. Disagreement over whether to call non-state regulatory orders 'law' is not just semantic; it signals a difference of analytical perspective and also an empirical judgement. Houtzager and Crook both argue for the primacy of state or national law as the most generally authoritative and enforceable normative order, perhaps because they are particularly concerned with the role of law as an embodiment of power relations within a national economic and political system. Woodman, on the other hand, argues that state law has 'no distinctive characteristics', in order to support his plea for customary law to be acknowledged as a living force, a deeply embedded set of rules which are 'clearer, better known and more acceptable' to the mass of the population than state law. Such an approach, as he acknowledges, leaves advocates for the rule of law with the intractable problem of the multiplicity and local character of customary laws.

The anthropological approach is represented in Benda-Beckmann's suggestion that legal pluralism is simply an acknowledgement of the *theoretical possibility* of more than one legal order; it does not imply any normative or political preference for non-state over state law. What matters, he argues, is to analyse law by its properties or functions, which are everywhere concerned with defining who has the right to exercise control over people and resources. It is essentially an empirical question to determine what the actual impact of a particular order is on the distribution of power and resources. (One might observe that the state would undoubtedly have to be acknowledged as empirically critical in such a political conceptualisation of law.)

At the other extreme lies Baxi, who attacks the contemporary globalisation of rule-of-law and human-rights discourses as a simple continuation of what the law of the bourgeois state has always done: make the world safe for capital and its interests, thus trampling on all other alternative moral orders.

3.2 Protecting land and property rights: state power and local responses

A second major theme to emerge from the workshop was the concern with the role of law and legal systems in the protection of poor people's ability to hold and exploit land and natural resources. Once again the existence of a plurality of regulatory orders appeared as central to the issue of how best to offer legitimate and effective protection against expropriation by the more powerful (including the state), as well as certainty and security where title is constantly in dispute. The latter issues clearly vary in salience according to the degree of competition and scarcity. In situations of extreme competition, where there has been extensive marketisation of land and large migrations of labour, as in the cash crop areas of West Africa, or in the squatter areas of large cities such as Karachi or Nairobi, there is a constant struggle for possession and protection against loss.

Crook argues, on the basis of a comparison of the different trajectories of the cocoa-growing economies of Ghana and Cote d'Ivoire, that a multiplicity of regulatory orders managed by local communities can only offer protection in such situations to the extent that they are 'legalised', i.e. incorporated into the formal legal system and sustained by the state. Where rights over land were built on relations of social bargaining, and competition of normative orders led to lack of

authority and enforceability as in Cote d'Ivoire, then customary forms of law were unable to protect indigenous communities either from incoming migrants or from the state itself. But this is not to argue that a strong state is always a blessing, as the cases of Indonesia, Pakistan or South Africa demonstrate. Benda-Beckmann reminds us how the state in these countries used law to expropriate indigenous land and natural resource rights, and in the urban agglomerations of Pakistan or South Africa the urban poor have lived or continue to live in a state of illegality which leaves them permanently vulnerable to arbitrary action by state agents and the socially powerful. Even in Ghana, the reformed Land Commission is, according to Kasanga, operating as an agent of central state patronage, leading to the clientelisation of public and urban land allocation. But, echoing both Crook and Woodman, he notes that the embeddedness and strength of the social forces supporting 'customary' (legalised) land rights is sufficient to support a demand that land administration be returned to local communities and 'traditional' authorities.

3.3 Legal institutions, legal reform and access to justice

The third group of articles reflects the importance in the new law and development agenda of issues relating to legal processes, the reform of legal and judicial institutions, and law reform itself. Both in Brazil and South Africa, recently established democracies are grappling with the problem of how to establish greater observance of civic rights within state administrative and criminal justice agencies, and to develop the capacity of the judicial system to hold these agencies more accountable for their behaviour – classic rule-of-law concerns. Schärf analyses the reasons for the limited achievements of new community-policing initiatives in South Africa; the police have been forced to become more accountable to local communities, and more law-abiding, but the pressures of the urban crime wave, and their own internal organisational crises have caused them to relapse into more traditional modes of policing. The sheer scale of the economic deprivation and political fragmentation afflicting poor urban communities in post-apartheid South Africa has also – as with the land issue – produced violent conflict and a rise in vigilantism which the state seems unwilling or unable to control. Like our other contributors, Schärf sees the only solution as lying in the overall commitment to reform of the political regime.

In Brazil, Sadek traces how new legal collective and individual rights embodied in the 1988 Constitution, when combined with new legal institutions and procedures such as public civil actions and the Office of the Public Prosecutor, have had a real impact on distributive justice and on pursuing political corruption. One reason for their success has been the supporting pressure generated by newly mobilised civil society associations. But the reforms could be blunted by restrictions proposed by political élites at the highest level (the presidency) who feel threatened by the Prosecutor's powers.

Finally, both Newell and Baxi draw our attention to the international and global dimensions. The contradictions between the global level of organisation adopted by multinational companies (MNCs) and the limited reach of national forms of regulation have evoked calls for reforms in the laws governing legal standing (who may sue) and a strengthening of the legal or quasi-legal mechanisms through which MNCs can be made more accountable for the social and environmental impact of their activities. Newell is sceptical of the ability of 'soft law' (informal or voluntary codes of practice) to provide real protection for vulnerable communities in developing countries, but stresses that there is still a long way to go before transnational litigation can overcome formidable legal and institutional barriers. The general agreement on the importance of political factors is confirmed by Newell, who argues that community political action is a critical element in any restraining effect that a legal case might achieve.

3.4 Globalisation and human rights

The ideological character of globalisation as a discourse facilitating the expansion of global capitalism is highlighted by Baxi, who attacks the arrogance of notions of development and the rule of law based on economic rationalism and 'progress'. In his view, the ability of world society to develop a person-centred notion of human rights is being threatened by a regressive global discourse which

he terms 'trade-related, market-friendly human rights'. His challenge is a useful corrective to easy assumptions about the inevitably progressive character of the rule of law and 'rights-based' approaches to development.

4 Conclusion

In conclusion, these articles point to a number of important themes in the current debate on how to develop more effective, accessible and legitimate legal systems which will protect and enhance the life chances of ordinary people across the developing world. First, a deeper understanding of the multiplicity of non-state regulatory orders and their relationship to state law is required before we go further into the realms of alternative dispute resolution mechanisms and community-based law. Second, whilst widening the scope of justiciable rights may be seen as a way of enhancing the claims of the poor, it must be remembered that the enforceability and legitimacy of the outcomes of legal action depend very much on the character of the state and power structure within which they are embedded. For this reason, it is important that more research be undertaken on how legal processes affect people in their everyday lives, and in particular how these processes are experienced and perceived by the subjects of those processes. Third, only if these processes and perceptions are better understood can more relevant policies for reforming the most salient points of contact between citizens and the state – local courts, police and regulatory officials – be developed. The effectiveness, fairness and legitimacy of such institutions are of crucial importance in the lives of the poor.

Notes

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2. cf. Anderson (2000).

3. Department for International Development (2000).

4. It is thought that the backlog of cases could take 300 years to clear (Debroy 2000).

5. See Nader's article in this issue.

6. The only real challenge might come from counter-state organisations such as criminal mafias, or guerrilla forces, although these are unlikely to have 'legal-rational' legitimacy. Moore suggests the term 'reglementation' to refer to 'law-like' regulatory orders which operate in non-state situations (Moore 1978)

7. cf. Poggi (1978); O'Donnell (1999).

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