Customary Law in Common Law Systems

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IDS Bulletin Vol 32 No 1 2001

Drawing on the experience of the operation of customary law accumulated in common law colonial and post-colonial African countries, I seek to contribute some answers to two questions. The first concerns the significance of the rule of law in development; my tentative answer will be that it is indeed significant, but not at all in the manner or for the reasons sometimes supposed. The second concerns the possibility of designing agendas for research in law that may assist development; there my conclusion is that only limited optimism is justified.

1 The Rule of Law: A Conceptual Framework for Discussion

We may initially note the perspective which is usually adopted in debates about the rule of law. This views the rule of law as arising from the form and effectiveness of the law of the state. Law means state law. State law is seen as a normative and institutional system which is by and large distinguishable from other social phenomena. State law may have an effect upon these other, distinct phenomena. This effect is generally seen as good in so far as it entails the prevalence of the rule of law. This perspective is often supposed to be that of the practitioner working in the state legal system, or at least is that which the foreigner with an interest in aid and development expects the legal practitioner to have adopted as an appropriate ideology for working purposes. In reality the experienced practitioner may be too well acquainted with the other normative orders that affect deeply the lives of his or her clients, and which are discussed below, to believe the claim of the state to hold a monopoly of the legal field.

This viewpoint, thus simply expressed, presents an obvious problem with respect to African states. As this article is concerned with common law systems in Africa, the problem may be put in their terms, although I believe exactly the same applies to all other states. Common law is in origin an alien body of norms. It was imported into Africa and now forms the basis of the legal systems of many African states notwithstanding local legislative amendment, as a consequence of colonial domination (Doucet and Vanderlinden 1994; Woodman 1995). Students concerned with the rule of law thus must acknowledge that the origins of state law were not

obviously conducive to the establishment of the rule of law. But these foreign origins do at least render the problem relatively clear-cut. The law of the state is in its historical origins distinct from most other aspects of social order in Africa. This is the context in which debate still often occurs about the rule of law and the means by which it may be achieved. In this debate there is consideration of devices (such as better training for the police) which may make more effective existing law. There are also calls to reform the law to make it more commensurate with the needs of society, and thus more likely to 'rule' social conduct.

These debates about the rule of law would, if no additional elements were added, be based on an excessively simple view of state law. State legal systems in common law Africa do not consist exclusively of received common law and a few local statutory additions. They have all, from their inception in the later years of the nineteenth century or the early years of the twentieth, given recognition to indigenous African customary laws. 'Recognition' means that state laws treat the institutions or norms of customary law as if they were institutions or norms of state law, giving effect to them and enforcing them in the same way as the institutions and norms of received law. Recognition takes one of two forms. First, institutional recognition of customary law occurs when institutions of that law are incorporated into the state legal system, as for example when customary chiefs become administrative officials or judges of the state. The British colonial policy of indirect rule is the best-known instance. Second, normative recognition occurs when norms of customary law are incorporated into the body of norms of state law and enforced by the state's institutions, such as courts. Instances occur when state law provides that rights in land may be transferred by procedures specified by customary law, or that the inheritance of property may be determined by customary norms.

This phenomenon in state laws gives rise to two sets of issues. First, it appears that state law follows social conduct in the field of recognition. The rule of law or a semblance of it, and indeed development in general, is sought not by bringing social conduct into accord with the law, but by adjusting the law to accord with existing social conduct. This poses a conundrum for those who promote a simple notion of the rule of law as a potential producer of development. But that is not the most important set of issues raised by the phenomenon of recognition of customary law. This arises from an implication of the concept of recognition. State law, by explicit recognition of customary law, acknowledges that the latter already exists as law outside of, and prior to state law. The state thus abandons the claim mentioned earlier and acknowledges that it does not have a monopoly of the legal world.

A further factor adding to the complexity of the African legal world appears as a prominent theme of research and theory concerned with recognition. It is found that the norms which the state legal system declares to be 'recognised' and seeks to enforce as customary law are often different from the norms followed by those who observe customary law in their social conduct. This has been remarked upon and analysed elsewhere (Woodman 1969, 1985, 1988). It may be noted that the divergence between lawyers' customary law and people's customary law is not primarily a result of judicial misperceptions, although these have certainly occurred; nor does it result to a great extent from state decisions to over-rule particular customary norms on policy grounds. It is primarily a result of the transformation that is inevitable when a body of norms which has been observed as part of the social order and enforced outside and independently of any modern state institutions is then adopted and enforced by the courts and other institutions of a state.

To accept that lawyers' customary law does not coincide with any other body of norms does not require acceptance of the extreme view that all customary law is 'invented' (cf. Chanock 1985). Anthropological and other research show that in many African social fields bodies of customary law are observed. They may well have undergone considerable change in the past century or so as a result of increasing international contact. They may have been affected by the proximity of state law and its institutions. But they are not the creation of the state, neither do they, as a matter of historical fact, trace their origins to colonisation.

The claim advanced here is not merely that the word 'law' should be applied to some non-state normative orders. That claim might be answered by

arguing that it is worthwhile to use terminology that distinguishes between the normative orders of states and other normative orders. Or it could be said that it is preferable to adhere to the traditional terminology which, it is sometimes alleged (although, I believe, mistakenly), uses the term 'law' only for the state's normative order.

The claim is that there is no clear distinction in fact between the social phenomena referred to as state laws and other social normative orders. This claim stands in opposition to the admittedly common assumption that the state's normative order has such distinctive characteristics that a terminological distinction must be drawn if words are to correspond to our usual understanding (Moore 1973; Tamanaha 1993). On the contrary, I argue that state laws have no distinctive characteristics that are not frequently displayed by non-state laws, including, it is suggested, close involvement with state institutions. Indeed, I would deny the existence of clear boundaries around state law that might justify a distinction between specific norms belonging to a system of state law and other specific norms that did not. This claim will be set out and demonstrated at length elsewhere. Here I would appeal to the observation that, in description and analysis of African societies, it is very common to refer to customary *law* when the object in question is not, or is not necessarily an element in state law.[1]

This argument is not directed to a minor or exceptional phenomenon. The admission of the state that it does not make all law, and the knowledge of people's customary law engendered by research and everyday experience, lead to the conclusion that there is a great deal of law which is not state law. The claim of legal centralism that 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions' (Griffiths 1986:3), although often accepted by lawyers, is erroneous.

For the present purpose I adopt the term 'law' to refer to any set of observed social norms. This includes the norms constituting the law of the state (since these are usually observed by some of the personnel of state institutions), including lawyers' customary law, but it includes also the bodies of norms observed and enforced in practice outside the courts and other institutions of the state.

This does not imply that any body of norms remains static. On the contrary, according to much observation there appear to be unceasing processes of change in all legal orders. (Moore's concept of the semi-autonomous social field was in part an attempt to incorporate a recognition of this fact of change into the theory of legal anthropology: Moore 1973.) To conceptualise a body of norms as existing unchanged for a substantial time may seem to be a convenient device to aid the processes of study and analysis, but it oversimplifies. When the truism that all bodies of norms in the legal world are in states of change is combined with the proposition that the legal world includes many bodies of social norms in addition to those of the state, the study of law as a social phenomenon in any particular situation is considerably complicated. Thus the choices open to classes of actors, such as disputants and third parties in disputing processes or parties to land trans-actions, change over time, even for those actors who conduct their relations exclusively in terms of one body of norms, such as a particular state law or a particular customary law. For example, when a landholder permits another person to occupy land for a limited time, the terms of the grant may be determined by a customary law. This law may specify at a certain period that land may be granted for the cultivation of seasonal foodstuffs in return for periodic prestations by the grantee to the grantor to signify gratitude. But when in a later period new commercial uses of land become possible, there may be added to these terms other customary law possibilities, such as a sharecropping arrangement for growing cash crops. Change such as this, which is internal to one law, is not the entire story. When different bodies of law coexist, actors may have the opportunity to choose between them. The available choices may also change, becoming broader or narrower. It may, for example, become accepted that land may be granted on the terms of a common-law tenancy in certain circumstances. But it may become accepted that a common-law tenancy is the only appropriate arrangement in some circumstances.

For the purpose of understanding change, it may be helpful to use the distinguishing notions of externally induced change and self-generated

change. However, it seems rarely possible to classify in these terms particular instances, such as those in the terms of landholding. It is likely that in all social fields, everywhere, change is stimulated by external contact, although it usually occurs only through some degree of internal initiative. This suggestion is relevant to the assessment of programmes for development that are externally designed and driven.

2 The Significance of the Rule of Law for Development

The preceding reflections on the manifestations of law as a social fact may be related to the field of law and development. Here we are concerned not with theoretical analysis but with social action. The field of study of law and development seeks to answer the question whether, and if so, how law can induce or facilitate development in low- and middle-income countries (LMIs). Development is today taken to mean much more than an increase in Gross Domestic Product. Some of the factors that have been suggested to be features of, or in some way relevant to, development need consider-ation, and it may be helpful to consider the rule of law and rights.

2.1 The rule of law

The rule of law is nearly always counted a laudable ideal. It is also routinely asserted that it means more than simple adherence to legal rules. It is thought to entail some requirement that a substantial range of human activity be regulated by general prescriptions; and it is claimed that the need for generality is incompatible with extensive discrimination. However, it is also generally agreed that the rule of law should not be confused with other ideals such as that of democracy.

The acceptance of a wide notion of law not limited to state law, as advocated in the first section, requires a further adjustment to the debates about the rule of law. Much of the current discussion of the ideal focuses exclusively on state law. Consequently, it is concerned with impediments to the universal observance of state law. On the view put here, the rule of law cannot be limited to the rule of state law. If the law of a state is largely disregarded because subjects consider it to be an alien element enjoining them to flout their own sense of right, but general rules expressed in a customary law are largely observed, the conditions for the rule of law would appear to be present. Thus, in respect of many African countries where state law is largely a foreign, implanted law, but customary law an effective factor of local social cohesion, any additional empowerment of the state may result in a diminution in the totality of the rule of law.

Where only state law is seen as true law, discussion of the rule of law can become debate about the ways in which state law can be made effective. There is undoubted value in studying ways of ensuring that powerful groups, and especially state governments, can be subjected to the control of rules. But the notion of the rule of law cannot be limited to ensuring that governments obey the rules. The notion also supports the demand that ordinary subjects obey the rules: and when these rules are made by the powerful, the ideal of the rule of law can become a tool of totalitarian regimes.

We should consider just why we think the rule of law is a worthy ideal. I doubt that it is because we think that the state, through its law, should be omnipotent. If support for the rule of law entails the elevation of the state as an ideal in itself, many of us would not wish for it. On the other hand, we have a notion that it is desirable for government, groups and individuals to conduct themselves according to pre-determined, clear, known, accepted rules. As Aristotle put it:

> He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of a beast.

The rule of law is both an ideal in itself and the means whereby the individual may be enabled to flourish through the guarantee of a stable social environment in which the conduct of others is relatively predictable.

But if this is so we must recognise that the rule of law may be more nearly achieved in Africa by assisting people to follow their customary laws, which are clearer, better known and more acceptable to them, than a remote and mysterious state law. It is worth noticing also that the notion of the rule of law is well established in African customary laws. In particular,

the evidence about the different forms of chieftaincy in the continent suggests that chiefs are identified by customary law, their authority is conferred by customary law, and their powers are defined and limited by customary law. The rule of law applies to chieftaincy. This could be overlooked in the current debates about chieftaincy, where there is a tendency, even in discussion which purports to be legal, to emphasise the political forces which sometimes diminish and sometimes can be exploited by chiefs to secure their political ends (van Rouveroy, van Nieuwaal and Ray 1996; van Rouveroy van Nieuwaal and van Dijk 1999).

2.2 The notion of 'rights'

Today the effectiveness of rights is widely characterised as an ideal. Even common law countries have constitutions which confer or recognise fundamental rights; even the UK has enacted a Human Rights Act. This is not a suitable place to question in depth such an overwhelming trend in contemporary legal thought, but a few comments must be made. Laws generally impose obligations, both to do and to refrain from doing. When an obligation is imposed upon one person for the benefit of another, and certain other conditions are present, that other is said to have a right. But it appears that the concept of a right in modern law is more than the expression of an obligation from a different perspective. The common idea is contained in the metaphor of the trump card. Rights are trumps in the sense that, unlike other advantages individuals may have, they cannot legally be overridden by general social utility (Dworkin 1977).

It might be argued that the well-being of individuals and their protection from oppression could be secured at least as effectively by elaborating and enforcing the standards of proper conduct by governments and other powerful bodies as by inventing rights on a slender philosophical foundation and encouraging individuals to assert them.

Perhaps a more significant objection in the present context arises from the observation that systems of customary law, in Africa as elsewhere, seem often not to give prominence to, and perhaps not even to include the concept of rights in the sense used by the proponents of human rights. Thus a group or individual charged with the administration of communal land is invariably expected to observe certain standards of reasonableness in allocating its use among members, but it is not common to find a member asserting a right to a portion of communal land. If the community head fails to observe the appropriate standards, the expectation is less that the individual right-holder will take action as that the members generally will hold the head to proper standards, or remove him or her from the exercise of land allocation functions. Again, customary law seems to speak little of rights of inheritance but much of the factors which should be taken into account when the property of a deceased is distributed. In the West the rise of rights seems irresistible. But this may be a culturally specific concept. It may be a questionable strategy for Western powers to press the notion upon African states.

2.3 The state and development

When thinking about development takes seriously the fields of legal activity outside the realm of the state, problems are encountered in the existing literature that are even more fundamental than those already noted. Almost every set of development proposals and even general discussions of development assume that the type of activity that potentially can assist development is action by or within the institutions of the state. This is clearly the case with almost all discussion from external points of view (such as those at the workshop where this article was originally presented as a paper). It is the case with all discussion by professional lawyers, whether indigenous or foreign. Their training leads them, if concerned with social change, always to think only of change that may be produced through state law. The increasing reliance on NGOs in aid and development programmes does not alter this, since NGOs in general rely on governments to secure the conditions necessary for them to operate and to provide some or all of the resources they need. In consequence there is very little consideration of the possibilities of producing development through customary law. Frequently customary law is seen as opposed to state law, through which development will occur. Customary law is thus classed as a potential impediment to progress, which the state

may have to remove. At best, customary law can and should simply be ignored.

Since little thought has been given to ways in which customary law may produce or hasten development, it is difficult to assess its potential. However, there may be factors that will open possibilities of realising this potential. An object and a method of many development programmes today is to empower people generally to control events in their localities. While the initial stages of local empowerment may require some changes in state law, it is to be expected that development may subsequently occur through action taken outside the sphere of the state. Again, the current excitement about the notion of globalisation could perhaps also be helpful in so far as it emphasises the current and future potential of external influence on LMIs, which by-pass the state. It may not be helpful in so far as it is expressed in terms of potential state intervention.

3 Implications for Research with the Objective of Development

Some preliminary and general suggestions may be put on the basis of these arguments.

First, studies limited to the modes of operation and impact of state law alone are likely to be of limited value. But it is not enough to recognise the truism that the study of the formal sources of state law, of the black-letter rules, is unlikely to assist development. Socio-legal research is also unlikely to be instrumentally successful if it is restricted to state law.

For example, in the field of land law it is clearly not sufficient to demonstrate that case law shows the ultimate title to land in a state or part of a state to be vested in customary communities, and that statute law subjects these communities' exercise of their powers to control by a state Lands Commission. It is no doubt necessary also to investigate how the communities and the Lands Commission choose in practice to exercise their respective powers. But this is not enough. We need also to investigate the practised customary law with regard to land use. We might well find a good deal of local variation in this customary law. The practised law may not always accord powers to the customary community that can appropriately be translated into the notion of an ultimate title. When it does, it may also include norms governing the ways in which the powers of the community are to be exercised. It may be found, for example, that an allocation of land to a member of the community or to a stranger is subject to the fulfilment of certain conditions. These conditions may be understood popularly in a standardised form, but may include also a requirement that disputes arising between a community leader and the potential allottee must be subjected to a customary procedure. (Some support for this and other arguments alluding to land law in this article may be found in Woodman 1996.)

Thus extensive research into practised customary law is necessary.

The second suggestion arises from factors just touched upon. The population that observes a particular customary law is usually a fraction of the population of a state. Anthropological research often shows that a small set of interrelated norms, such as those regulating the relationship between the parties to a pledge of land, observed in one locality may differ from those observed for an almost identical category of transactions in a community a few kilometres distant. To put the point in crude but not inaccurate terms, it could be said that, if a customary legal order is defined as the totality of customary norms which are observed by a population, it is unusual to find a customary law for which the population amounts to as many as a thousand.

This clearly has implications for research into customary law and development. Research findings may reliably support conclusions as to the current state of legal relations and as to means of promoting development, for a particular local community. The extrapolation of such conclusions to other communities is unsafe. Conclusions about an entire state are almost certain to be erroneous, unless they relate to one of those rare activities that are substantially regulated in practice by state law alone. For example, conclusions about the bureaucratic procedures of a state institution, such as the documentation drawn up by a Lands Commission in giving statutory consent to a type of transaction, may be correct for the entire state. A proposal to reduce the length of the documentation procedure without changing its effect may be of benefit to persons involved in the transactions. But even this will not be true of all transactions of this

type, but only for those in which the statutorily required consent is in fact sought.

Thus research into practised customary law in many small localities is necessary.

Third, if development is to be achieved, it will be necessary to look for ways of producing social change that do not rely on the effectiveness of state law and institutions. Research may sometimes suggest that, in a particular locality, action by state institutions may stimulate development. This is perhaps likely if the state has or obtains (possibly from external providers) resources that are massive in comparison with those available in the locality, and is ready to expend them there. Such instances are likely to be rare. We have developed little understanding of how outsiders may assist to produce development other than through the instrumentality of the state.

Finally it may be suggested that an increased use of carefully considered comparative study might be beneficial. Anthropological discussion has much to offer as to the possibilities of employing comparative methods while avoiding ethnocentrism (Benda-Beckmann 1984; Geertz 1983). The implementation of highly localised research may make this easier, since there is more likely to be room for such comparative study between small fields in close proximity.

Notes

1. It may be suggested in passing that the autopoetic theories of law developing in some European theories today (e.g. Teubner 1993) are not helpful to socio-legal analysis. Indeed, to see legal norms as elements in legal systems, with the implications of bounded, self-consistent bodies of norms with clear hierarchies, may be unrealistic. It would beg fewer of these questions if we referred not to legal systems but to 'laws' and bodies of norms.

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