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MARGINALIZED COMMUNITIES AND ACCESS TO JUSTICE

EDITED BY YASH GHAI AND JILL COTTRELL

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Preface

This volume is the result of a research project on access to justice (A2J) which was a component of the World Justice Project of the American Bar Association (ABA). The rule of law was the principal focus of the ABA Project, because it considered that "We live in a world with a rule of law deficit. This shortcoming undermines efforts to ensure basic human security, fight poverty, eradicate corruption, improve public health and enhance public education" – clearly among the most desired goals of people everywhere.

The concept of the rule of law, rooted in theories of democracy, constitutionalism, justice and development, covers a number of values, principles, institutions and procedures. The World Justice Project was aimed at leaders from different sectors of professional life, its multi-disciplinary character designed to increase the awareness among other professions of the principles and techniques of the rule of law. In addition, the ABA wanted the participation of scholars and for this purpose it invited Yash Ghai to organise a team of researchers to explore an aspect of the rule of law. Given the breadth of the subject, Ghai decided to focus on a specific and focussed topic, that of access of the marginalized communities to justice. First drafts of the papers were presented in Washington, DC in the first week of March 2008. In the light of comments on the papers, the authors revised them for presentation at the World Forum on Justice in Vienna on 4 July 2008. They were further revised and edited for publication in this volume.

The ABA also promoted another research project under the leadership of James Heckman, focusing on the theoretical aspects of the rule of law. Happily the papers prepared for that project are appearing as a companion volume to this book, under the title of *Global Perspectives on the Rule of Law*, and edited by James Heckman, Robert Nelson and Lee Cabatingan.

We would like to thank the ABA for its support of this project, particularly William Neukom, the President of the ABA, William Hubbard, Chair of the Commission on the World Justice Project, and Ms Claudia Dumas, Executive Director of the World Justice Project. Professor Robert Nelson of the

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Yash Ghai and Jill Cottrell

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Chapter 1

The rule of law and access to justice

Yash Ghai and Jill Cottrell

Introduction

For the Vienna World Justice Forum and its future work, the American Bar Association (ABA) developed a tentative definition of the rule of law (ROL) and elaborated criteria to determine the extent of its observance in a state. In its view, the ROL comprises four universal principles: (a) a system of self-government in which all persons, including the government, are accountable under the law; (b) a system based on fair, publicized, broadly understood and stable laws; (c) a robust and accessible process in which rights and responsibilities based in law are enforced impartially; and (d) diverse, competent, independent and ethical lawyers and judges (ABA 2008). These principles give the impression of a procedure-based ROL, but it is clear from their elaboration that the ABA's conception of the ROL includes important values. Among the values are the limitation of the powers of the state by a fundamental law, a democratic, participatory and transparent law-making process, clear and accessible laws and their faithful and fair administration, equal access to justice for all, and justice itself understood as including the protection of political, civil, economic, social and cultural rights.

In the ABA concept, the ROL is an unqualified good. Many others have expressed strong criticism of it. Its critics trace its origin in the development of the modern nation-state and the market economy; a system and supremacy of law is considered critical to both. Others see the ROL as the ideology and mechanism of class domination. The ROL is seen as technology for bureaucratic rule, promising much to the ordinary citizen but delivering little.

Many critics of the liberal state associate the ROL with it. Bhikhu Parekh, for example, describes various institutional and structural features of the modern state which in his view impose uniformity and ignore diversity. The organizing principle is state sovereignty, which justifies the centralization of power and displaces local and group sites of power. This sovereignty operates on a territorial basis, with hard boundaries. Rules for the exercise of this sovereignty are biased towards majoritarianism, stifling the voices of minorities. People relate to the state through the concept of citizenship, based

rigidly on equal rights and obligations of all persons, premised on loyalty to the state, and acknowledging no distinctions of culture or tradition. Citizens have rights but these are rights of individuals, based on an abstract and uniform view of the human person, without recognition of the difference made by gender, ethnicity, age, etc. The state operates through the medium of the law, but it is the law created by the state, rather than pre-existing bodies of customs or local law. The state favors the uniformity of structures and seeks to achieve the homogenization of culture and ideology, propagating them as universal values. The domain of the state is the public space, with an ever-shrinking area of private space, which alone allows some expression of cultural diversity (Bhikhu Parekh, 1997).[1]

Frequently commentators have seen a contradiction between the ROL and democracy (for recent perspectives, see José María Maravall and Adam Przeworski (eds) 2003). Democracy as the will of the people and their rulers, tended towards the expansion of state power, and was seen to threaten the rule of law. The notion of people's power implied restrictions on the jurisdiction of judges, so as not to subvert its sovereignty. The ROL began to be seen as a conservative ideology, blocking social and economic reform.

Various attempts have been made to bridge the gap between democracy and the ROL, particularly by the common acceptance of the centrality of human rights over the last several decades. The concept of the ROL has been broadened, from absolute fidelity to any law, to the notion of just law made through the democratic process. The ROL now also focuses on institutional arrangements of the state, including the separation of powers, and the franchise. The notion of democracy has itself become more substantive than procedural, emphasizing the rights of citizens and the protection of minorities. Some have incorporated notions of substantive justice in the ROL, invoking social, economic and cultural rights as an essential component. This broader concern first appeared in the Delhi Declaration on the Rule of Law in the 1950s (and is now extensively elaborated in the American Bar Association Index on the Rule of Law).

It was not the immediate concern of the project on access to justice (A2J) to engage directly with these controversies. Most contributors were aware of how the ROL can be used to establish class dominance and how its connections with the ideology of the nation state can marginalize particular sections of citizens. But they were also alert to the contradictions in the concept of the ROL that could be turned to the benefit of the marginalized. And those who have experienced or observed the terrible atrocities inflicted on innocent people can argue that the breakdown in the ROL facilitated the atrocities. The objective of the project was to look at an aspect of the ROL in detail, in order not only to understand its role and potential to bring about greater justice, but also to gain insights into the broader dimensions of the ROL.

Access to justice

For this purpose, the focus on access to justice was selected. Access to justice is central to the ROL. A critical and attractive feature of the ROL is the equality of all before the law. As part of this equality, all persons are entitled to the protection of their rights by state organs, particularly the judiciary, concerned with the enforcement of the law. As with the concept of the ROL, there is a narrow and a broad meaning of A2J. The narrow concept focuses on the courts and other institutions of administering justice, and with the process whereby a person presents her case for adjudication. The broader concept addresses, additionally, the process of law making, the contents of the law, the legitimacy of the courts, alternative modes of legal representation and dispute settlement. An intermediate concept would focus on dispute resolution, whether by official or unofficial mechanisms, but not include law making or content of the law (although adjudication often involves interpretation, and thus the broadening or narrowing of the law).

Access means approach, entry into; accessible includes the idea of being able to influence. So access to justice means more than being able to raise one's case in a court or other relevant institution of justice. Justice is defined as fairness; in the legal and political sphere; it usually means "exercise of authority in maintenance of rights". Fairness covers both the procedures of access and the substantive rules that determine the exercise of authority. Access to justice therefore means the ability to approach and influence decisions of those organs which exercise the authority of the state to make laws and to adjudicate on rights and obligations.

Defined in this way, A2J can be a very broad concept, covering the conduct of most organs of state and the processes of getting to the courts. Many current projects on the A2J define the concept to include the entire machinery of law making, law interpretation and application, and law enforcement. Thus it also covers the ways in which the law and its machinery are mobilized, and by whom or on whose behalf. Since justice is value laden, these projects focus on the content of the law and the ways in which it can be reformed to reflect the concerns of the groups in whose name the projects are undertaken – the poor, the disadvantaged and the marginalized. UNDP, a key international player in this field, states, "Access to justice entails much more than improving an individual's access to courts or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable" (UNDP 2004: 6). The World Bank, adopting a broad view of A2J, says that "Justice institutions play a key role in the distribution of power and rights. They also underpin the forms and functions of other institutions that deliver public services and regulate access to resources. Clear, equitable rules and processes can facilitate effective and peaceful transitional change, and can create the enabling conditions for a functioning social and economic net by

challenging inequitable practices" (2008: 1). The Asian Development Bank also uses a similarly broad view.

Another reason for the focus on A2J is that a great deal of reform activity sponsored by international and bilateral agencies, under the rubric of the ROL, has focused on it. Many financial and human resources have been expended, in an area which has become increasingly controversial (Carothers 2006 a and b, and other contributors to Carothers (ed.) 2006; and Rajagopal 2007). Some have said that despite the broad definition of law and justice, the focus of this internationally supported effort has been to create the conditions for the integration of the economies of developing countries into the international capitalist system through the market, to the great disadvantage of the people of these countries. They argue that another, related, concern is to increase the capacity of the state to maintain law and order, and to reduce challenges to it from groups and communities disaffected by international economic and political developments. The emphasis in these projects is therefore essentially technocratic.[2] Little has been done to ensure that the programs are "well designed, consistent and coherent" (Carothers 2006a: 10). He says that aid agencies prescribe rule-of-law programs to cure "a remarkably wide array of ailments in developing and post-communist countries, from corruption and surging crime to lagging foreign investment and growth" (Carothers 2006b: 17). He questions the connections between the ROL and democracy and economic development (18). Others say that all these efforts have failed; for example, McInerney points out in summarizing the state of the field, "Recent scholarship seems united in the belief that the promotion of the rule of law and good governance have, until now, failed to deliver either improved rule of law or improved governance" (McInerney 2005: 110). It is based on a misreading of the trajectory of economic and political development in the West (Carothers 2006b: 19), and the unwillingness to try to understand local laws, traditions, customary laws, etc. The problem is that most of the compliance with the law does not come from strengthening the judiciary or court systems. A focus on a specific aspect of these efforts, we considered, would help to provide some basis for evaluating this debate.

The scope of activities under the A2J projects

Two approaches can be detected in A2J projects (Golub a and b 2006). The first is what may be called the 'supply side', that is, the reform and strengthening of the machinery for the administration of justice and procedures for bringing disputes to courts. Typical activities are upgrading the skills of judges, improving their working conditions including remuneration, providing them with technology that can speed their work, building more and better court houses, digitalizing legislation and law reports, assistance to bar associations for better and continuing training of their members, assistance to law schools to improve standards of legal education and grants for research and

publications, and funds and technical assistance for law reform (often through law reform institutions), codification of law and better drafting. These measures enhance the capacity of the legal and judicial systems to cope with the demands that people make on them. To some extent this approach reflects, and seeks to respond to, the wide perception of 'mess' in legal systems – backlogs, corruption, expense, alienating and obfuscating procedures, physical inaccessibility.

The other approach, the 'demand' side, is the facilitation of the use of the courts, ombudspersons and other complaints mechanisms by the people. Typical activities are the use of local languages in courts, rules of procedure, including the standing to start legal proceedings, special rules for public interest litigation, waiving costs for arguable public interest and human rights issues, various forms of legal advice and representation (citizens advisory centres, legal aid administered by the state or the legal profession, *pro bono* services by the legal profession, state financed or managed public defender or public solicitors' offices), the role of paralegals, provision of popular legal information, human rights education, establishment of community or non-governmental organizations (NGOs) to raise public awareness of their rights and assist the people, particularly the poor and the disadvantaged, to get access to the courts and other complaints mechanisms. The more radical and political aspects of promoting 'demand' is said to involve the 'empowerment of the poor and the marginalized', so that they can overcome the sense of their own inferiority and the fear of the law and officials. Litigation is used in creative ways, not only to settle a particular dispute, but to promote a right or entitlement more generally, and even to instigate the process of law amendment or reform. The aim here is to overcome the obstacles to access posed by poverty, ignorance and fear. However sometimes the distinction between supply and demand may not be very clear. The supply may not be the real response to a problem but one conjured from western experience; equally 'supply' may take the form of repression, by restrictive jurisdiction of courts or the ignoring of indigenous laws (as in Cambodia).

Somewhere between the two approaches is the role of 'community justice' as opposed to justice provided through the state system. In Africa this takes the form of customary law and tribunals, in India people's courts like Lok Adalat, and in Latin America various associations especially among the indigenous peoples. 'Community justice' (a term which can cover quite diverse phenomena, including informal settlements, particularly by community elders, traditional or formal community tribunals, application of customary or religious laws, or even hybrid tribunals, drawing on traditional systems but expressed and modified through state mechanisms) is supported because it is deemed to reflect more closely the cultures and mores of the community concerned; it is informal and non-technical so that the poor and uneducated feel comfortable, is quick and easy to access, and the primary focus is mediation and resolution through forms of restitution. It thus enjoys considerable legitimacy – and takes

the load off the official system. Its critics say that these tribunals operate without any clear rules of procedure, local politics permeate them, rules are often discriminatory, especially against women and children, and at least in some communities, punishments can be harsh, even cruel. Little regard is paid to human rights. There is no consistency in judgments.

The recognition of normative orders, in addition to the formal system of the state, raises difficult conceptual issues from the perspectives of the rule of law (Ghai 2009). The existence of multiple normative orders has been examined by lawyers and sociologists under the rubric of legal pluralism. To some extent the relations between normative and legal orders are seen as a contestation over the nature and objectives of the state (or the 'nation state'). Multiplicity of legal orders can be regarded as victory of groups who are marginalized by the state (or rather the social forces that dominate the state). Arrangements under colonialism promoted legal pluralism, carefully orchestrated to serve the colonial project; it fell into disfavor after the end of colonialism, being seen as incompatible with nation building. The universalization of human rights, another post-Second World War project, was seriously challenged by the plurality of legal orders, particularly those based on ethnic affiliations. The revival, in some quarters, of legal pluralism, is therefore of particular academic interest, quite apart from its policy implications.

ABA project on A2J

If justice reforms are an aspect of the supply side of the ROL, the way they are manifested and elaborated depends largely on the demand side, on how numerous individuals and organizations mobilize the possibilities opened up by new laws and access to courts and other bodies charged with receiving and dealing with public complaints. The primary focus of our project is on the demand side. Here too one can see the influence of western organizations, for a great deal of activity is sponsored or funded by western agencies (as the studies on central and eastern Europe and Cambodia in this volume demonstrate). But for the most part the initiatives have come from local groups (sometimes supported by international NGOs). They provide the basis of community action, and thus community cohesion which gives a different coloration to social mobilization and litigation than normally we associate with the processes of the ROL. These initiatives are not merely the result of new possibilities. They follow, as Professor Susan Hirsch commented on chapters in the volume, decades of struggle for rights of various sorts, especially human rights and women's rights. Many of us are ambivalent about what claims to rights have offered in the long run, but it is hard to deny that the infrastructure of claiming in the legal arena has been heavily influenced by these earlier movements.

Having chosen access to justice (defined somewhat narrowly to focus on litigation and similar procedures), it was further decided that the emphasis

would be on the rights of communities or groups and the context of their struggles for justice. Reform efforts in this field, informed by traditional values and methods of the ROL, tend to be aimed at the concerns and needs of individuals. Yet, with the increasing focus on substantive justice, it is important to focus on the needs of communities which have been grossly marginalized. Their members, individually, have limited ability to mobilize or influence the legal system. Some of the rights they may be seeking to protect have a collective dimension, particularly in relation to land. There is greater recognition under national and international legal regimes of collective rights, and popular mobilization is increasingly based on identity politics. Strategies of group or collective litigation seem to hold greater promise of justice (but they have been attacked, including by liberal commentators who have a fear of 'group rights' in the modern democratic state).

The focus on strategies of group access to justice raises broader questions about the commitment of the state to law and human rights as the principal framework for policy and executive authority, the impetus to law reform through litigation, and the twin tensions of the empowerment and mobilization of the disadvantaged, on the one hand, and the management of legal suits by professionals on the other, and that between the immediate gains (mostly for the litigant) and the long-term gains of legal reform or the political agenda (for the community). Public interest litigation is one of the key methods to secure the rights of the disadvantaged. Litigation is largely about the implementation or enforcement of the law. Studies in this volume were to explore the difficulties of enforcing, and indeed the will to enforce, the law. These strategies may also raise critical questions about value of the engagement with the formal legal system and the move of the communities seeking redress to develop their own institutions and modes of redress. Several studies show the impetus towards informal or community forms of justice, and assess their relationship to state mechanisms, and their effectiveness. All these issues are fundamental to the ROL.

This volume is based on eight country studies, undertaken by some of the world's leading researchers in the field of law and justice. Consistent with the new understanding of the ROL as fundamentally concerned with human rights and social justice, all studies discuss the attempts of the weak and disadvantaged communities to seek the enforcement of their rights or redress for injuries. A brief summary of the studies is provided below. The concluding chapter, drawing on these studies, attempts to highlight the main findings and the insight they provide into access to justice and the ROL.

Land and justice post-apartheid: South Africa

A number of studies deal with the rights of the landless. Land is critical to the well-being of individuals and communities: as means of habitation, livelihood and economic production, social cohesion and community life. With the search

for and exploitation of natural resources and the new uses of land facilitated by national and global economic developments, land has become a major source of conflict in many countries. Geoff Budlender, who has played a critical role in the struggles for freedom in South Africa, explores the rights of farm dwellers in South Africa to housing guaranteed under the post-apartheid constitution. Farm dwellers were among the poorest and most marginalized groups in South Africans. They had few rights and virtually no access to justice in either the procedural or the substantive sense. After 1994, the new democratic government instituted major reforms aimed at improving the position of people in these circumstances, including an ambitious suite of new laws, and other measures aimed at increasing access to justice.

Geoff Budlender discusses reforms for the restoration of lands to Africans deprived of their titles and possession during the apartheid regime, and safeguards against eviction of those on land to which they cannot establish a title. With the end of apartheid, land reforms became a political imperative. The African National Congress government was committed both to social justice for those deprived of their property and to opportunities for advancement as well as the rule of law, which included socio-economic rights. Thus law, based on the rights approach, became the principal means of redistribution. Most of the remedial legislation was drafted by civil society actors who had been active in the cause of the disadvantaged communities, and appreciated the importance of both rights and judicial process (the latter assuming a special importance as assuring the white community that land would not be taken away arbitrarily). But they also recognized that access to courts might be problematic for these communities and built in provisions for legal assistance (although as it turned out, they were not sufficient). It is in this favorable context that Budlender considers the potential and constraints of change through law, and the appropriateness of different institutions and procedures.

Injustice in a lawless state: Cambodia

The approach in Cambodia may usefully be contrasted with that in South Africa. Ghai's paper examines the constitutional and legal protection of rights in land (particularly of indigenous peoples and other rural communities) and the reality of the exercise of those rights. He traces the development of land legislation after the ravages of the Khmer Rouge regime which destroyed all land records, expelled urban people to the countryside, and nationalized land. The current legislation provides a good framework for dealing with many economic, social and political problems connected to land. The strengthening of the institutions and practice of the ROL has been a constant concern of the international community. Dependent as Cambodia is on financial and technical assistance of the international community, the government has had to accept legislative reforms. However, unlike that of South Africa, the government in Cambodia has little commitment to constitutionalism and the ROL. Ghai