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LAW AND DEVELOPMENT:
THE INTERFACE BETWEEN POLICY AND IMPLEMENTATION

ROBERT B. SEIDMAN *

The manifold torments of the Third World press themselves upon all of us for solution. Poverty, disease, oppression, early death: this is the fate of most of mankind. Today all the world plucks at the sleeves of the academy, asking, What do you know? What are you good for?¹ Any answer must include a statement of the discipline's response to the troubles that beset the less-developed countries. How lawyers respond ought to define the domain of the study of law and development.

Lawyers, however, march to a discordant beat. They have suggested at least three different definitions of the domain of study of law and development: conflict amelioration, law and society studies, and problem solving.

1. Conflict amelioration. The dominant western jurisprudential and sociological tradition perceives conflict amelioration as the law's primordial function.² Law is an

*Professor of Law, Boston University. The following article was originally published in the Journal of Modern African Studies, Volume 13, Number 4 (1975), and is reprinted with the permission of the Cambridge University Press.

1. R. LYND, KNOWLEDGE FOR WHAT? 7 (1945).
2. C.J. FRIEDICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 102-19 (1968).

'integrative' mechanism.³

The function of the law is the orderly resolution of disputes. As this implies, 'the law' (the clearest model of which I shall take to be the court system) is brought into operation after there has been a conflict. The court's task is to render a decision that will prevent the conflict - and all potential conflicts like it - from disrupting productive cooperation.⁴

This tradition celebrates the law as a great wall against Hobbesian anarchy.

Some modern writers on law in the less-developed countries have assumed that its function there will be same as that which they think it performs in the metropolis. The role of law is:

to create a milieu in which social and cultural diversities are harmonized, values essential to societal and governmental purposes are unified (and others left alone), and tensions resolved. . . to maintain stability within a climate of desired, necessary and inevitable change.⁵

The Third World's imperative is social transformation: painful, tension-ridden, conflict-plagued, but inescapable. The reduction of tension and conflict in that passage too easily becomes a device for delaying social change, thus bolstering the status quo. Conflict amelioration as a domain of study responds to the uncertainties of power, not the pain of poverty.

2. Law and society studies. Other lawyer-academics have responded not to the cries of the Third World, but the more muted whimpers of the U.S. academic community. These scholars have defined the domain of study as 'the general

3. T. Parsons, The Law and Social Control, in Law and Sociology 56, 58 (W. M. Evans ed. 1962).

4. H.C. Bredemeire, Law as an Integrative Mechanism, in id. at 73-4.

5. Prochl, Review of William Harvey, Law and Social Change in Ghana (1966), 42 INDIANA L. J. 277, 291 (1967).

connections between law, culture and development.'⁶ 'Comparative research and cross-cultural generalization', writes David Trubeck, 'will play a major role' in developing 'a social theory of law', demanded by an age in which 'law's solutions to social problems fail to satisfy'.⁷ These theorists explicitly warn against trying to understand law in conditions of development as a phenomenon different from law and social change generally. They begin with a variable, derived from their academic discipline -- 'universalistic rules' or 'the legal culture' or 'the autonomous legal system'. The law-ways of the Third World are then studied not in order to ameliorate the torment of the less-developed countries, but as an exotic laboratory in which to test the chosen variable.

3. Problem-solving. Another method of selecting the domain of study requires those undertaking research to consider initially not the difficulties faced by academics, but by real people. In real life, investigations do not begin with a variable. They begin with the troubles that plague people: poverty, pain, suffering, conflict, power.

The pervasive problems of the poor countries are poverty and oppression. How are lawyers and the law engaged with these troubles? To answer that question is to define our domain of study. I examine first the function of law in development and, secondly, the role of lawyers in that process.

THE FUNCTION OF LAW IN DEVELOPMENT

Modern social science conceives that each society is defined by the repetitive interactions of its members. Nigeria differs from the United States because its peoples interact with each other in different patterns -- they behave differently. By the same token, social change can be

6. Friedman, Legal Culture and Social Development, 4 L. & SOC'Y REV. 29-30 (1969).

7. Trubek, Toward a Social Theory of Law: An Essay on the Study of law and development, 82 YALE L. J. 1 (1972).

defined as an alteration of kind and intensity in the repetitive patterns of behaviour of the members of the society. Development is a form of social change.

Repetitive patterns of human behaviour are defined by norms, supported by sanctions, expressing how the various roles in society are expected to be played. A few of these norms are promulgated, communicated, or sanctioned by state officials. I shall use the word 'law' very broadly to mean all or any part of the normative system in which the state has a finger. It includes the processes by which rules are promulgated, communicated, or sanctioned by persons acting at least under the colour of official capacity, as well as the rules themselves.

Law enters into the processes of development in two ways. First, the burden of trying purposely to induce social change today usually falls upon the state. No other institution ordinarily has sufficient capacity, resources, or legitimacy to undertake so formidable a task. Typically, the state does this by changing the rules defining repetitive patterns of behaviour, and by directing its officials to act in new ways with respect to sanctions.

Demands for development therefore appear in the guise of demands for new legislation concerning land tenure, marketing boards, planning machinery, electoral politics, educational institutions, monetary systems, taxation. The International Congress of Jurists in 1959 recognised these functions in its modified definition of 'The Rule of Law': this concept

should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, political, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.

This function of law is thrust upon the governors by circumstance. The patterns of behaviour that define society are in

8. INTERNATIONAL COMMISSION OF JURISTS, THE ROLE OF LAW IN A FREE SOCIETY. A REPORT OF THE INTERNATIONAL CONGRESS OF JURISTS NEW DELHI, INDIA, JANUARY, 1959, at 3 (1959).

constant flux. Society ever changes. However little a government changes its law, vast upheavals inevitably erupt: wars, revolutions, famines, education, the introduction of cash crops, industrialization, foreign or domestic investment. The romantic vision of a never-changing tropical society -- poor, to be sure, but in the unhurried idyll of its days blessedly free of future shock -- is a lie.

Since societies change even within the constraints imposed by their legal order, a decision to try to induce new patterns of behaviour by altering the law is not, as is frequently thought, a decision to introduce change in an otherwise static world. Rather, it is an attempt to deflect existing processes of change into channels thought to be more desirable. To do nothing about existing law is to accept the new configurations which social processes themselves induce. Law-makers cannot avoid that decision.

Besides being an instrument for channelling social change, law enters into the processes of development in another, perhaps even more fundamental way. That it is mainly the nation-state which today has thrust upon it the initiative to determine the course of social change -- rather than the Church, family, or village -- reflects the great transformation from kin-oriented, agricultural subsistence communities into exchange societies with a high degree of specialisation. Here the shoemaker must know not only that others will supply him with leather, but that some will keep a monetary system going, while others will create and maintain the markets in which he can purchase food, and in which he can sell his product. '[Modernization requires a] wide range of new specialized roles [that] can succeed only if the persons who occupy them mesh their activities with each other. This requires a high degree of coordination.'⁹

9. F.W. Riggs, Modernization and Political Problems: Some Developmental Prerequisites, in W.A. BELINE & G.O. TOTTEN, IN DEVELOPING NATIONS: QUEST FOR A MODEL 67 (1970).

Hence the long-term trend in Western Europe was 'toward the perfection of systems of obligations and their transformation from a network of individual relationships into obligations to the community'.¹⁰ Law is the most available instrument to state, create, enforce, and co-ordinate these obligations.

Despite its importance, however, it is a common dirge the world around that too frequently law fails to induce the prescribed behaviour. Development programmes remain on paper, plans die in parturition policies remain unimplemented. Gunnar Myrdal has denoted the consequences of what he calls 'soft development':

a general lack of social discipline in underdeveloped countries, signified by many weaknesses: deficiencies in their legislation and, in particular, in law observance and enforcement; lack of obedience to rules and directives handed down to public officials on various levels; frequent collusion of these officials with powerful persons or groups of persons whose conduct they should regulate; and, at bottom, a general inclination of people in all strata to resist public controls and their implementation. Also within the concept of the soft state is corruption, a phenomenon which seems to be generally¹¹ on the increase in underdeveloped countries.

Explanations properly precede solutions. Unless we can discover the causes of social phenomena, attempts at solutions are likely to fail. One of the obvious reasons for soft development is that law as an instrument of social change has its own limits. To attempt to use the law as a tool in aid of development without understanding its parameters is to ensure failure. The airplane designer ignores the law of gravity at his peril. So also does the policy-maker who sets the ends of social action without regard to the limits inherent in the

10. G. MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS* 896 (1968).

11. Myrdal, *The Soft State in Underdeveloped Countries*, 15 U.C.L.A. L. J. 1118, 1118-20 (1968).

means available. Means determine ends, just as much as ends determine means.

THE ROLES AT THE INTERFACE OF MEANS AND ENDS

It is sometimes argued that all this is no concern of lawyers. The content of law is determined by policy-makers -- politicians, cabinets, revolutionary councils. Lawyers, it is maintained (frequently by lawyers), while of course involved in the drafting of rules relating to development, are mere scribes, technicians who translate programmes devised by others into the obscurantist language of the law. By the same token, it is argued that the policy-makers have nothing to do with the law itself -- that is the responsibility of the lawyers, civil servants, bureaucrats, and other technicians concerned with the detailed drafting and implementing of rules.

So do we all: when asked what we do, we respond with only an idealized part of what we are supposed to do. 'It is as if a policeman were to describe his role by saying that he catches criminals; as if a businessman were to say, he makes soap; . . . a priest . . . [that] he celebrates mass; . . . a congressman [that] he passes laws.'¹² So to separate 'technical' from 'policy' roles insulates technicians and policy-makers both from the full moral consequences of their actions, and from responsibility for their effectiveness. On the one hand, '[to] limit judgment solely to "autonomous" technical criteria is in effect not only to permit but to require men to be moral cretins in their technical roles.'¹³ On the other hand, to formulate 'policy' unanchored to implementation assumes that the ends adopted will justify any means -- a proposition no less morally cretinous.

In every government, there are some actors whose roles

12. A.W. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 25 (1970).

13. Id. at 13.

place them at interface between ends and means, between policy formulation and implementation. Very frequently, this interface is where policies are transformed into law, for it is at that point that the generalities are given programmatic content. That interface is a broad one, comprising many actors: those who draft the legislation, structure options, raise queries, and submit or review drafts, as well as those who finally decide 'yea' or 'nay' on particular formulations. Titles vary: permanent secretary, ministerial counsel, consultant, civil servant, parliamentary draftsman, solicitor general, and so on.

In every country that I know of, some of the roles at the interface will be occupied by law-trained professionals. Their positions place them at the very cortex of decision-making. Unless these lawyers, and the other actors at the interface, are explicitly aware of both the policy implications of their contributions to the decision-making process, and the inherent limits upon the law which is their inevitable means, too frequently the ultimate outcome is defensible neither pragmatically nor morally.

A CASE-STUDY OF THE FORMULATION OF LEGISLATION

The history of the formulation of Tanzania's Range Management and Development Act exemplifies the policy-making component of the various roles concerned with the details of legislation. That Act is the basis for a programme to introduce an entirely new way of life to the pastoral Masai, who drift with their herds across vast arid plains in northern Tanzania. It purports to convert them from a nomadic existence, organized in clan and family, using cattles as the basis of subsistence and status, into sedentary co-operative villages producing cattle for the cash market. That programme was born not out of solicitude for the Maṣai and their place in a developing society, but out of a concern for conservation. The present revolutionary thrust of the statute came about mainly during the drafting stage.

The progressive exhaustion of the Masai ranges was a subject of concern during the colonial period. The Ministry of Agriculture in independent Tanzania continued its interest. As is usually the case -- at least in anglophone Africa -- the initiative for a new legislative attack upon the problem came not from the Cabinet, in constitutional myth the policymaker, but from officials within the Ministry. A memorandum stated the objectives of the proposed new programme: a phased plan covering the control of stock movements and members, the prevention of further indiscriminate and unprofitable land use, and the development of a selected area of Masailand.¹⁴ The means to achieve these ends were to be (i) the division of the district into zones, based so far as possible on traditional Masai social patterns; (ii) the declaration of a maximum number of stock that might use each zone; (iii) the branding of all stock with at least a zonal identification mark; and (iv) the prohibition of cultivation without official permission.

Legislation was suggested to create a competent Authority charged with the definition of the various areas, the branding of stock in appropriate numbers for each zone, and the enforcement of the statute. This would establish an appropriate system of land tenure in designated 'development areas', control waste supplies, and the siting of buildings, roads, and other works. All Masailand was to be covered by zoning; intensive development would take place in these designated areas. An inter-ministerial co-ordinating committee was appointed to pursue the matter.

Following the usual procedure, the memorandum was submitted to the Law Officers:

This is necessary to ensure, first, that the proposed legislation is in line with Government policy; second whether the new activity can be undertaken administratively, without requiring new legislation; and last, to determine whether it is mere tidying up of existing legislation, or involves a change in

14. TANZANIA: MINISTRY OF AGRICULTURE MEMORANDUM (FEB. 2, 1963).

policy.¹⁵

Self-evidently, for a law office to review a proposal to determine if it is 'in line with Government policy' requires him to interpret that policy. Only occasionally is policy a clear determinate fact. It is usually more or less vague. In a marginal case, the decision that a particular programme is or is not subsumed within an existing policy, is itself necessarily a policy determination.

In Tanzania, the Law Officers raised only two questions: whether the legislation would permit the growing of food crops (it would), and whether the proposed restraints on the movement of cattle accorded with ministerial policy (it did). Even as early as 1962, the then Government of Tanganyika -- or at least Prime Minister Nyerere -- had spoken out strongly against class stratification,¹⁶ and it is notable that the Law Officers did not mention any issues concerning such a socialist policy. The matter was then raised at a meeting of the Legislation Committee of the Cabinet, which asked for a paper 'stating the policy which the Bill is to implement' to be considered by the Cabinet.¹⁷

In the meantime, however, ministerial thinking about the proposed legislation was undergoing re-examination. In the first place, the American Government had earlier agreed to supply technical assistance, and a U.S.A.I.D. mission had developed a method of measuring the number of animals using a range, equating one bull with two heifers or five goats, and so on. The suggestion was briefly made at the end of the report that the Masai be organized into 'Ranching Associations Ltd.', as a device for creating units with whom the Government

15. ZAMBIA: CABINET OFFICE CIRCULAR NO. 72 OF 1969.

16. Nyerere, Ujamaa -- The Basis of African Socialism, reprinted in UJAMAA: ESSAYS ON SOCIALISM I (1969).

17. TANZANIA: MINISTRY OF AGRICULTURE MEMORANDUM (MAY 16, 1963).

could deal, and in whom title to land could be vested.¹⁸ This was the earliest mention of the formation of radically new institutions for Masai society. Secondly, a memorandum circulated within the Ministry of Agriculture sought to shift the central emphasis of the legislation from conservation to making greater economic use of the rangelands. An essential objective was now to form new ranching organizations, probably cooperative in form, based upon the existing Masai traditional unit, the enkutoto or extended family grouping.

The minutes requiring the Cabinet paper had stated that it was to concern itself 'with principles, not legislative details', and this was at last prepared, on these lines, after a whole year had slipped by. It returned to the earlier definition of the problem, as being primarily to do with overstocking and poor animal husbandry. The Cabinet was not presented with the broader issues concerning the incorporation of the Masai in the money economy. The ranching associations were proposed only as handy recipient of title to portions of the range, so that the cattle of their members could be restricted. What these new organizations would be like was hardly mentioned: if a majority of heads of families in a proposed range wished to join an association, one would be formed 'which all the heads of families would be eligible to join subject to their limiting their herds to an appropriate proportion of the assessed capacity.'¹⁹

Nothing was said in the Cabinet paper specifically about the form of the ranching associations, nor about the formula for reducing the size of the herds. These decisions, however, were critical because there were gross inequities in Masai society: indeed, the family herd varied from 2,000 or more to a handful. The new 'Ranching Associations, Ltd.' might allow

18. THE FALLON REPORT (U.S.A.I.D. MISSION TO KENYA), 25 May 1963. See also PARLIAMENTARY DEBATES OF NATIONAL ASSEMBLY OF REPUBLIC OF TANGANYIKA AND ZANZIBAR, 9 SEPTEMBER 1964, at 33, 43-6 & 74.

19. TANZANIA: CABINET PAPER NO. 65 OF 1964. Author's emphasis.

traditional practices to be continued with the existing wide disparities in cattle-holding. On the other hand, they might become instruments moving Masai society towards producer cooperatives which held cattle in common, with growing equality among their members, and increasingly involved in the money economy. Were the associations to be mere paper forms, a convenient receptacle for legal title to land? Or were they to be genuine produce co-operatives? Were the limitations on grazing to be apportioned so as to continue, or to reduce, the existing stratification in Masai society?

The decisions on these issues were made while the Bill was being drafted. The procedure at this state, common in anglophone Africa, resembles British practice only in crudest outline. In Britain, each department has its own solicitor whose task is to reduce departmental policy into detailed instructions for parliamentary counsel. This is ordinarily scrutinized by the administrators of the relevant department before being sent on to the draftsmen. The Treasury Centre for Administrative Studies in London even has a training programme, not for lawyers but for young administrators in the process of preparation for a bill.²⁰ In Africa, this detailed departmental consideration of the instructions is usually missing. Instead, in Tanzania the very general Cabinet paper went forward directly to the parliamentary draftsman.

The draft Bill that emerged in Tanzania embodied decisions concerning the form of the ranching associations, and the method of reducing the number of cattle. It reserved to the Minister the power, through subsidiary legislation, to stipulate the form of the constitutions and by-laws of the associations. By so doing, it ensured that those decisions would be made in the future by ministry officials. By stipulating that cattle would be reduced pro rata, it elected to continue existing Masai stratification, and to reinforce

20. Kean, Drafting a Bill in Britain, 5 HARV. J. LEGIS. 253, 255-58 (1968).

individual ownership of cattle.²¹

These decisions were made in the course of the drafting process -- not by politicians or 'policy-makers', but by 'mere technicians', concerned with 'legislative details'. It is these discretionary choices, however, which in fact defined the central thrust of the programmes under the Act. In the 1972 Development Plan, it was proposed to establish some 72 of these ranching associations, thus profoundly and probably irrevocably modifying the nature of Masai society. If the statute be implemented, these changes will follow a course plainly at odds with Tanzania's egalitarian and socialist orientation.

* * * * *

John Dewey makes a distinction between the 'end' of policy, and what he calls the 'end-in-view'. If I want to build a house, that is the 'end'. The actual plans that emerge constitute the 'end-in-view'. Until plans are made, it is impossible to state what I mean by the word 'house' save in the most general terms. In the same way, it was impossible for anyone to say what Tanzanian policy concerning the Masai was until the detailed legislation and rules emerged which concretely defined that policy.

It is immaterial whether the lawyers made these decisions on their own, or in conjunction with ministry officials. The lawyers' specific contribution to any bill, of course, varies with circumstance. Bills that are critical to the elite no doubt receive far greater scrutiny by politicians than do bills which do not hit them so closely. Zambia's Leadership Code, which cuts very close to the elite bone, has gone through four successive amendments on details.²² The greater the time pressures, the greater the temptation to the draftsman to bypass higher authorities. The more complex the legal

21. Range Management and Development: Draft Bill (1964), Section 24(5).

22. Zambia Statutory Instruments, Nos. 249 and 288 of 1973, and Nos. 47 and 108 of 1974.

issues involved, and the more the bill is drafted in legal jargon, the greater the power of the draftsman over the final decision.

The title of the roles at the interface are unimportant. The detailing of specific rules is a complex process, in which many participate in varying ways. Until these details are formulated, however, it is impossible to specify the actual content of the "policy". Their formulation is part and parcel of the policy-making process. For lawyer or civil servant to insist upon a sharp division between 'policy' and 'law' is to ensure that nobody raises those crucial questions which are indispensable if the end-in-view is to be both effective and consistent with broader perspectives.

Sometimes this task at the interface of broad policy and detailed implementation is called 'problem-solving'. The phrase raises uncomfortable visions of mindless pragmatism, the sum of whose 'solutions' is often the most difficult problem of them all. To 'solve' a problem in such a way as to magnify rather than to alleviate troubles is plainly no solution at all. 'Problem-solving' must include some methodology to avoid that sort of confusion.

Lawyers, to some degree, have always played a problem-solving role in society. In more developed communities, it sometimes appears that their principal technique in 'solving' emergent social problems is to operate an on-going, relatively stable system of law. In conditions of underdevelopment, the lawyer frequently is more clearly engaged with the process of creating a new set of rules.

The contemporary lawyer . . . in the developing nations must become an active and responsible participant in development plans.

An ever-increasing . . . part of the work of the lawyer is neither litigation nor the resolution of disputes. It lies in the scope and formulation of policies, in the exercise of legal powers constructively establishing or altering the relations between private legal parties inter se, between public authorities and private parties, between governments and foreign investors, and the like . . . In all

these questions, the lawyer must play an important, often decisive part. It is he who must draft the necessary legislation, or the complex international agreements; it is he who will usually be the principal or one of the principal representatives of his country in international trade negotiations . . . It would be as artificial as it would be wasteful of the still desperately scarce trained manpower resources of developing countries to believe that the lawyer should or could confine himself to strictly legal issues.²³

These tasks are not sought out by lawyers or by the civil servants with whom they work. They are thrust upon them by the necessities of developing detailed programmes for action. Their successful accomplishment requires careful analysis of the uses and limits of governmental power to influence the direction and intensity of social change, and the formulation of policy within those limits. That problem has been but little studied:

The view that government is an integral part of the social structure, but may have the capacity of altering it significantly, is not in the mainstream of social theory. The opposite view is more common: that the formal government and its actions are epiphenomena, the product of forces arising from the social and economic structure of society.²⁴

'Mainstream' social science lags behind. Every government today perceives its function to be in part one of influencing ongoing processes of change into desirable directions. The study of 'soft' development ought to lead to knowledge likely to make that function more effective. At the same time, its study should lead as well to a consideration of the uses to which state power ought to be put -- that is, into the nature and meaning of development, and the interests it does and should serve. That is our domain of study.

23. Friedman, The Role of the Law and the Function of the Lawyer in Developing Countries, in VAND. L. REV. 181, 186-88 (1963); See also Nyart, The Role of Law in Economic Development, _____ SUDAN L. J. & REP. 394, 404-10 (1962).

24. Bendix, What is Modernization?, in BELING & TOTTEN, supra note 9, at 10.