BOOK REVIEWS

TOWARDS A POLITICAL ECONOMY OF LAW IN UNDERDEVELOPED COUNTRIES

Research Advisory Committee on Law and Development of the International Legal Centre, *Report on Law and Development: The Future of Law and Development Research*, International Legal Centre, New York and The Scandinavian Institute of African Studies, Uppsala, 1974 pp. 91.

What should be the role of legal research in 'underdeveloped' 'less developed' 'developing' or 'third world' countries?[1]

A broad question such as this often raises heated debates among legal scholars working in underdeveloped countries. It is an important question for Papua New Guinea especially after the establishment of the Law Reform Comm ssion. It therefore needs discussion if legal scholars here are not to flounder in the morass of pedestrian concerns in similar fashion to their Western counterparts.

In 1972 The International Legal Centre of New York, which is a United States foundation-financed body, requested a committee of law teachers and social scientists to study the progress and problems of research on "law and development".[2] This review is an attempt to evaluate the contribution of the Report of the Committee to the answer to our question of "What role for legal research?"

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1 The terms 'underdeveloped', 'developing', 'less developed' or 'third world' are often used inter-changeably. None is really adequate, but my own preference is for 'underdeveloped' because it points to a lack of development, whether this has resulted from the efforts of an 'overdeveloped' country or otherwise. The Report which is being reviewed here uses the terms 'Less Developed Countries (LDC's), and 'More Developed Countries (MDC's)'.

2 It is important to note at the outset that the Committee was weighted in favour of U.S. scholars. The composition was, United States 8, other Western Developed Countries 2, Socialist Eastern Europe 1, Under-developed Countries 6. Of course, this does not necessarily determine a classification based on ideology.

There are two aspects to the Report. One consists of a geographical survey of legal research, and the other consists of a theoretical evaluation of legal research together with recommendations as to the future of law and development research.

The survey (chapter IV) contains much useful information on the state of legal research in developing countries. A distinction is made between 'doctrinal research' and 'law and development research'. The Report (p.19) defines doctrinal research as the more traditional form of research concerned with the elaboration of doctrine through study of laws, regulations, rulings and cases. The doctrinal researcher in this country will, for example, be concerned with writing on the law relating to negotiable instruments in Papua New Guinea, through an examination of the decisions in a series of cases in the Supreme Court, the High Court of Australia or in the House of Lords. It is customary these days to add a few suggestions for 'law reform'. In the opinion of the committee (p.19), the main problem with doctrinal research is that "it does not tell us much about the law's role in society, especially in a period of planned or spontaneous change".

On the other hand, law and development research is (p.19) "research which sets itself explicitly the goal of examining relationships between law and change or the role of law in the context of a particular society". In the Papua New Guinea context research into "Legal Blocks to Popular Development"[3] or into the kind of concerns raised in the papers delivered at last year's student seminar on Lawyers and the Eight Point Plan is clearly law and development research. Research into an area of substantive law such as the law of succession, with a view to 'decolonising' it or adapting to the needs of Papua New Guinea society, is also law and development research.

One basic conclusion of the Committee is that while both doctrinal and law and development research has value, lawyers in underdeveloped countries have tended to concentrate, like their Western counterparts, on the former at the expense of the latter sort of research. Apart from institutions such as the Centre for the Study of Law and Society in New Delhi, very

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3 P. Fitzpatrick and L. Blaxter, "Legal Blocks to Popular Development" (1974) 1 *Yagl-Ambu* 303.

little non-doctrinal work is being done by local scholars in Africa, Asia or Latin America, partly because of lack of funds and people.

The dominant law and development research force has come in the past from the former colonial powers such as the United Kingdom and France, and more recently from the United States. Yet, even in the United States there are factors militating against law and development research. The Committee finds that (p.40) such research "will not guarantee a scholar a place in any US Law School" and "a deep interest.....might even be a *barrier* to professional advancement". The situation in the socialist countries of Eastern Europe is different (p.42) as "law is regarded to be ultimately a product of socio-economic relations". However the scholars of Eastern Europe have concentrated on research in their own countries and not the underdeveloped countries.

The most important conclusion to be drawn from the Report's survey is that law and development research has in the past been dominated, in terms of personnel, aims and method by the needs of the western metropolitan countries. The Committee itself considers (p.31) that this was the case in the colonial times when "the needs of the colonial power" were paramount. However, it seems to the present writer from an analysis of the Report and of the dominant research trends that the same may be said of the new post-colonial era.[4]

Thus we have already noted that scholars from the United States and other Western countries have dominated recent law and development research. Most of the research was based on the assumption that the law and the legal system must be *'modernised'* along western lines if *'development'* was to be achieved. One justification for this was found in Max Weber's thesis that the development of the 'rational' legal systems of the west were necessary conditions

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4 D.M. Trubek, "Toward a Social Theory of Law: An Essay on the Study of Law and Development" (1972) 82 Yale LJ is a review of the research on the subject. M.Rheinstein, "Problems of Law in the New Nations of Africa" in C. Geertz (ed.), *Old Societies and New States: The Quest for Modernity in Asia and Africa* (1963) 220 and M. Galanter, "The Modernization of Law" in M. Weiner (ed.), *Modernization: The Dynamics of Growth* (1966) 153 give some idea of the research and attitudes on the subject.

for the development of western capitalism.[5] The researchers being both ethnocentric and ideologically biased assumed that both western law and capitalism must go together for the development of the underdeveloped countries.

The second justification was the belief that 'modern' law was a necessary 'instrument' by which the country's development strategies were to be achieved. This view saw the state, for which the law is a chief instrument, imposing changes on the people through legislation. Little consideration was given to the possibility that it might be the structure of the state itself and its oppression of the people which might form the real block to development, or that the people, their culture and their politics might be very relevant to genuine development, and that the institutions of 'modern' law may be incompatible with these.

Armed with these basic assumptions, the researcher would then apply what the Report calls (p.29) "canons of positive social science research". This research method assumes that society can be studied scientifically in the same way as the natural sciences through an examination of 'facts' or 'variables'. As a result of this examination generalisations can be produced. Unfortunately, the method ignores that what are considered 'facts', or 'relevant facts', or 'interpretation of facts' may differ from person to person. The differences are caused by the differences in ideology of the so-called scientists[6] as can be seen, in the case of law and development research, from the very questionable ideological assumptions on which much of the research was based.

These biases in the research led to an ignoring of issues which one would consider vital to the understanding of the relationship between law, society and development, such as:-

(a) what has been the impact of colonialism and neo-colonialism on development and on law?

(b) how do the people see the law?

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5 M. Weber, *Economy and Society* (1968 transl. ed. by Roth and Wittich).

6 See G. Myrdal, *Objectivity in Social Research* (1969).

(c) To what extent do the people need to be freed from, in particular, colonial laws?

(d) what alternative strategies are there to development - in what ways is the law relevant to these?

(e) what is the real relationship between the law, the state and the people in an underdeveloped country?[7]

Instead of this the western law and development researchers have been largely involved in concerns such as reform of legal education[8], legal system[9], laws relating to the development of a capitalist market economy[10] and laws relating to land tenure[11] all to fit in with western capitalist models. Seen in this light mainstream law and development research was little more than a legal version of neo-colonial developmentalism which was being purveyed by western development theories. These theories were based on the assumption that the only path to development was through the infusion of western capitalist ideology, institutions and investment in the underdeveloped countries.

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7 Often, research in these areas has come from other quarters than those professing concern with law and development. See eg. M. Strathern, "Official and Unofficial Courts; Legal Assumptions and Expectations in a Highlands Community", (1972) *New Guinea Research Bulletin* No. 47.

8 *e.g.* Steiner, "Legal Education and Socio-Economic Change: Brazilian Perspectives" (1971) 19 Am J Comp L 39; J. Murphy, "Legal Education in a Developing Nation: The Korea Experience" (1967) 1 *Korea Law Study Series* 54-60.

9 The classic example in relation to Papua New Guinea is D.P. Derham, *Report on the System for the Administration of Justice in the Territory of Papua New Guinea* (1960); for Ethiopia see R. David, "A Civil Code for Ethiopia: Considerations on the Codification of The Civil Law in African Countries" (1963) 37 *Tul L Rev* 187.

10 *e.g.* D. Trubek, "Law, Planning and the Development of the Brazilian Capital Market" (1971) No. 3 *Yale Law School Studies in Law and Modernization.*

11 *e.g.* Rheinstein, *op. cit.*

These theories have suffered great blows in recent years from scholars such as Andre Gunder Frank.[12]

The Report reflects some of the theoretical uncertainty which has seeped into the law and development field as a result of these blows. Very little consensus is left on any of the major theoretical issues.

Thus, the Report accepts (p.15) that development "is not a unilinear evolutionary process in which poor nations necessarily repeat the historical experiences of the wealthier ones", but may include both attempts to achieve material benefits of the wealthier societies as well as attempts to enrich and deepen" their own cultural traditions or to seek "new and original paths for the realisation of a better life". No agreement could be reached about the relationship between law and development (p.16). In addition to the traditional view of law as an 'instrument' for 'modernising' society through law reform, or, as 'modern law', representing the ideal of the preservation of the rule of law - the possibility is accepted that law itself may be an *obstacle* to development, and the legal system itself might operate as a block to genuine revolutionary transformation of society. Again, in the discussion of theory and methodology (pp.50-56) the main issue was whether everybody ought to follow the positivist social science development studies method. While some members of the committee supported this, others were opposed particularly on the ground that the method "has been built on rather questionable generalisations from the experience of western industrialisation."

The Committee appears to have recognised the dominant position of western scholars in existing resource allocation and research, and recommend that their future role should be marginal both in work and policy decisions (p.59).

The Report then proceeds to make broad recommendations (chapter VI) for the allocation of money, which it accepts is fairly scarce. The basic goals are to expand law and development research, to create broader recognition of the

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12 A.G. Frank, *Sociology of Development and Underdevelopment of Sociology* (1971); W. Rodney, *How Europe Underdeveloped Africa* (1973). Even McNamara, President of the World Bank, an institution which has been a major channel for "selling" Western development theory to underdeveloped countries has recently been, at least in his official pronouncements, forced to admit its drawbacks. See R. McNamara, *One Hundred Countries, Two Billion People: The Dimensions of Development* (1973).

	2003 Recurrent Budget Estimates	PAP promot emfn	V.2,Pt.2 29,722
38.	Diagnostic and Statistical Manual Of Mental Disorders (Third Edition)	Z616.89075 AME	13,434 mfn
39.	Statistical YearBook for Asia and The Pacific 1994	Z315 UNI	17,135 13,474 mfn 19,885

value of such research, and the basic principle in the strategy for implementing these goals is that while greater encouragement is to be given to institutions in the underdeveloped countries, any strategy should never get in the way of support "for good scholars doing good work, whoever they are, wherever they work and whatever they are interested in" (p.73). Specific recommendations include, more funds for research, priority for institutionalised research centres in the underdeveloped countries, making research available to wider audiences through publishing, workshops where scholars can communicate with one another and the encouragement of the International Legal Centre (which commissioned the Report) as a central co-ordinator and stimulator of law and development research.

The Report represents a serious attempt to provide a broad liberal umbrella within which research of both the old instrumental western positivist variety and the new revolutionary variety can take place. Unfortunately, this broad umbrella might give legitimacy to the kind of research which David Trubek, a leading member of the Committee, himself recognised in an article, which is a genuine example of self criticism, as being of a dubious nature.[13]

The research was carried out by Trubek and Steiner in Brazil.[14] Both were motivated by the need to establish a flourishing capital market (or stock exchange) for the proper working of the Brazilian capitalist system. Trubek suggested that to achieve this law reform was needed which would provide for a stronger system of private property rights and an independent legal profession based on private practice. Steiner's research recommended reforms in legal education which would result in the production of the right sort of lawyers.

It is apparent that the researchers were both ethnocentric and ideologically biased in favour of a particular kind of development. In addition, they ignored that they were working for an authoritarian military dictatorship which was only

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13 Trubek (1972), *op. cit.*

14 Trubek (1971), *op. cit.*; Steiner (1971), *op. cit.*

in the non-'liberal' bits of their liberal capitalism. As a result, as Trubek himself admits:

> But for all their (the researchers) lofty ambitions, these hopes, assumptions, and efforts were soon dashed... Market growth seems to have had little effect on legal life..,those legal changes which have occurred have not hindered the government's efforts to dismantle the liberal aspects of Brazil's legal order... in the final analysis, liberally motivated efforts to assist educational reform may have actually aided the consolidation of the authoritarian regime.[15]

It is obvious from Trubek's article that inspite of his own convictions, the objective result of his research was to help a reactionery regime. Again, objectively this has been true of much law and development research until now. Can the recommendations of the Report change this state of affairs? While genuine and sincere efforts are made in the Report to move away from the existing United States dominated tendencies toward research, it appears in the breadth of its recommendations to give legitimacy to research in the 'law and development' field, whatever its nature or purpose. This issue is in fact raised by Sawyerr, a Ghanaian member of the Committee, in a supplementary statement to the Report (p.82).

Many social scientists are now dissatisfied with being mere "technocrats" and are asking themselves questions such as "research for whom?" and "what kind of research?"[16] These issues are extremely important in Papua New Guinea today, with the move towards independence. In the past, the country's development policy has been dominated by western development theories. Developments in the law have not been much different. The Derham Report attempted to impose the so-called 'modern' system of law in this country.[17] Yet, with the establishment of the Law Reform Commission, there is a possibility of a re-

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15 Trubek (1972), *op. cit.* at 47.

16 C. Wright-Mills, *The Sociological Imagination* (1959); Paul Baran, "The Commitment of the Intellectual" in his *Longer View* (1969).

17 D.P. Derham, *op. cit.*; see also International Commission of Jurists, *The Rule of Law in an Emerging Society* (1970).

examination of the colonial legal system. What should then be the task of the law researcher?

It has been argued in relation to another underdeveloped country.

> A lawyer-intellectual has to analyse the legal forms to reveal the real substance - the exploitative economic and social and political dominant/dominated relationships that underlie much of law. Failing this critical role, the lawyer is likely to become "an intellect worker"; a technocrat in the service of ruling classes.[18]

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18 I. Shivji, "From the analysis of forms to the exposition of substance: The tasks of a lawyer-intellectual" (1972) 142 *Eastern Africa Law Review* 1 at 7,