

THE IMPACT OF LAW ON THE DEVELOPING ECONOMIES

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It is with full awareness of my limitations as a student of economic development that I present this paper in honor of Dr. Luis Recaséns-Siches, whose breadth and depth of scholarship are far beyond what I hope over to attain. But indeed it is the breadth of his scholarship, and his concern for all things which have a bearing on law, that have encouraged me in this endeavor, for I feel that, however inadequate may be my examination of certain major problems relating to law and developing countries, the topic is one which might well interest him. It is this which gives me confidence to embark on the following discussion.

First let me differentiate between the role of law and the impact of law in developing economies. The role of law is similar to that of law in any country — the maintenance of order, the furthering, through the judicial process, of changes in institutions deliberately agreed upon by the legislative branch of government, and, most vitally, the promotion of just and equitable relations among the people and between them and their government. The impact of law, on the other hand, may fall far short of these goals, and I suppose usually does in all countries. What concerns me here, then, is the impact of law, the degree to which legislation and the judicial process actually affect economic development. To limit the discussion so that it may fit within the confines of the present paper, I shall consider only government efforts to promote economic development, setting aside, though by no means disparaging, the role of individuals and groups in this process.

On first considering this issue, one is struck by the opportunities that appear to be available to government in promoting economic development. In the first place, it can be safely stated that almost without exception governments of these countries have mandates from their peoples to press forward with economic development as rapidly as possible. Of course when one passes from such a generalization to more precise considerations it is obvious that the issue of how fast or in what general circumstances development shall take place is not at all clear — that questions such as those concerned with the

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role of public enterprise versus private initiative, the use of compulsion, the advance of one economic sector in preference to another, are surrounded by huge areas of uncertainty and conflict. Nevertheless the governments of developing countries have what many of the governments of the present industrial countries lacked in their earlier phases of industrialization —general support of the view that government has a “right” to intervene, indeed is expected to intervene, in the process of economic growth in order to direct and accelerate it.

In another respect also the governments of developing countries are in a more favorable position than those of industrial countries when the latter were in a comparable stage of growth. These modern governments, vis-à-vis their economies, are stronger, more capable of the sustained effort required to promote development. They have, or soon will acquire, civil servants, technical specialists like engineers, economists, lawyers, far superior to what were available in the past. They have better opportunities to borrow abroad, and often as the result of harsh experience are more knowledgeable of the risks of seeking foreign financial aid. Granted that in the past they have almost all fallen victim to one or another form of economic imperialism, they can in the future expect to attract foreign business on terms far more favorable to themselves than in the past. They are, it is true, still crippled by inadequate sources of revenue, precisely because their economies are undeveloped, but their position in this regard is in general better than in the past, and as development takes place they will be able to capture in taxes an increasing share of production. In short, the governments of developing countries, in comparison to many governments of industrial countries during their early phases of industrialization, are in a relatively strong position for undertaking economic development.

The major instruments for implementing the mandate to develop are economic plans, including tax policies, supported by an enforcement apparatus which consists of the court system and a body of statute law, often combined with a rather new constitution. Here again we see that these governments are in a favorable position, for developing countries during the last generation have either rewritten or revamped their constitutions for the express purpose of protecting a greatly increased range of “human” rights, which to a large degree is consonant with development goals. For example we find many constitutions explicitly give labor the right to organize. In contrast, in an industrial country like the United States the legitimacy of labor organizations was for a hundred years and more under consistent and formidable attack, first through the ancient conspiracy doctrine, and later from unflinching hostility of employers and their political supporters; all this opposition was rationalized by the widely held belief in the beneficence of competition and the “sacredness” of contracts and property rights. For 130 years or more unions maintained an insecure foothold in the United States. Only the social and economic convulsions of the Great Depression awoke the country

to the need of giving labor the right to organized existence. Today organized labor in the United States is not only accepted but is indeed deeply embedded in society. Yet it is interesting that in the United States membership in a unions is lawful, while in many developing countries it is a constitutional right.

The constitutions of developing countries specify and protect many other economic and social rights, and government has for this reason undeniable grounds for intervening in the economy in order to encourage the exercise of these rights. In addition, for many reasons, mostly historical, government has as large or larger a share in economic life than is common in industrial countries: government owns large parts of the transportation and communication systems — telephone and telegraph, railroads and airplanes, radio and television, electricity. Most significant in contemporary affairs is government ownership of oil and other mineral resources. It is clear that government in the developing country is a major economic actor.

Finally, the specific political system of a country may cause more power to devolve on government. Communist, socialist, monarchial or other highly centralized systems, which are quite common in developing countries, place more power to act in the economy in the hands of government than do conventional republican governments. In short, there are many reasons to consider the governments of developing countries as the prime movers and shapers of their respective economies. Therefore it might be concluded that the impact of law on developing economies is largely a reenforcing process — that government sets targets and plans, moves resources about to achieve its goals, passes laws to insure public compliance, and if there is any resistance, turns to the courts for enforcement. Of course such a conclusion is as far from reality as were the conditions of existence that Alice experienced when she stepped through the looking glass.

What lies at the root of the difference between this ideal picture and reality is the fact that the development process, while accepted *in general*, is in its details frequently totally unacceptable to individuals or groups who have the political power to checkmate the planners and who violate the laws with impunity. Nor should this surprise us. Development inevitably involves profound changes in the relationships existing among groups and individuals; absolutely and relatively some people will benefit from it and others will suffer. Those who suffer, or who expect to suffer, will do their best to block development at all stages and with all means in their power. Thus development becomes of all issues the most highly politicized. A plan for economic development may pass from the drawing boards of the planners through the cabinet to the legislature and be welcomed on all sides; yet opposition is sure to surface, although at first it may take the form of lobbying. If the plan survives the legislature, it may still prove ineffective. If applied at a distance from the capital, as in the case of a land reform law, localism may neutralize it. Noncompliance may persist because courts

refuse to convict. In the last resort opponents may foment political dissent, even revolution.

This process is not unique to developing countries. Something like it exists in all countries. It is not the attack per se, but the intensity of attack, which is of significance in the case of developing countries, and most particularly the lack of sufficient independence of the three branches of government, and the likelihood with discussion and compromise will be broken off and the ultimate threat of revolution or counter-revolution, or even the calling in of foreign countries will be resorted to. This ultimate threat, which brings an end to normal political processes, must be ever present in the minds of government officials charged with carrying out development plans.

In short, the implementation of a development plan may expose a government to extreme risks. To pass laws on support of the plan may only lead to a weakening of government's prestige, since it may be impossible to enforce such laws. And to call on courts to support government may be useless when courts themselves have little independence.

This is a depressing conclusion. And yet I would hold that law has considerable impact on economic development, in certain areas, and that it may be expected to extend its influence more widely in the immediate future, and in time farther yet. Specifically, law has at the present time great impact in the relations between developing countries and foreign countries. In the area of constitutionality we can soon expect to see much progress; and in a third area, that of integrating traditional groups and isolated minorities into a modern democratic society, while progress is slow, it is clear that law can undertake important social and economic reforms. We will consider each of these areas in turn.

1. The Impact of Law in International Affairs

It is strange but true that a developing country which cannot as yet deal with internal challenges to its authority may nevertheless give a good account of itself in the international field. Perhaps this is because international matters by their very nature become the subject of world attention, and public opinion may lend support to a developing country. A major triumph was Mexico's expulsion of foreign oil companies from her land, not by force but by law. The law of particular importance in this case was that found by reaching back into the distant past to seek the roots of sovereignty in feudal Spanish society. There land was held of the king, not owned outright by his feudal subjects. The modern Mexican government, lineal descendant of the Spanish king, proclaimed that its land had not been alienated. It was a blow to the foreign companies, but in the long run educational to them as well as vastly supportive of efforts by other developing countries to reacquire control of their mineral lands, or to take over railroads

and other facilities. The recent assertion of economic independence by the Middle East oil producers is in direct line from the Mexican action, though three decades have intervened. In each successful case of repatriation of resources law has achieved what force, given the relative size of the countries involved, could not have achieved.

2. *The Constitutional Test*

If law has aided economic development in connection with the international economic affairs of developing countries, why does it appear less successful at home? In fact it has had domestic successes as well, but the crucial contests are yet to be won. The explanation for the less spectacular operation of law in the domestic sphere lies in the internal political structure. Law cannot be effective so long as citizens fail to respect the underlying principles of government. In any country those whose interests are threatened by an economic policy will work to neutralize that policy, yet it may still survive through the aid of the courts. But this presupposes an independent court system, not always a realistic assumption. Courts cannot remain independent for long unless other agencies of government, executive and legislative, do their best to keep them so. And in developing countries it has been all too often the case that the executive branch in particular has damaged the integrity of the courts. I hasten to add that this is not peculiar to developing countries; Franklin Roosevelt, one of the greatest of American presidents, threatened to "pack" the Supreme Court, and while he did not carry out his threat, the court suddenly became much more amenable, finding at last his reform legislation constitutional. Like Roosevelt, governments in developing countries have sometimes threatened the courts in efforts to jam through reform, but however good the intention, the threat to the courts' integrity means that they cannot offer support to government programs that meets with the full respect of the public.

Independence of the courts, then, determines the impact they will have on domestic policy, and this means independence from all unwarranted pressures, not only those exerted by government. What is needed to end such actions is a widespread acceptance of the sovereignty of government in general, and recognition that the policies of a given government should be challenged in two ways only, at the polls and through resort to the constitutional test. But until the powerful groups within a country are convinced that it is more to their interest to challenge government policy in these ways than through the ultimate threat of revolution, courts cannot achieve sufficient independence to play an optimum role in development.

For those countries which have chosen communism or socialism, the question of constitutional behavior appears to be irrelevant. In these countries government is not only the major economic actor, but almost the only actor. Opposition to government economic policy is unthinkable. And yet I suspect

that even in such cases, to maintain the consensus which is important even where open dissent is not present, the basic requirements of integrity of the courts and constitutional behavior of the government will be the same.

3. Integration and Modernization of Society

A vast area demanding the attention of the courts embraces the traditional sphere of life in developing countries. Economic development, after all, is only the means to achieving the end of better living conditions for a much larger proportion—at best, the overwhelming majority—of the population. But for thousands of people a better life cannot be achieved in the face of forces, mostly social in nature, which hold them in the grip of a traditional despised status. The courts, in defining these victims of social forces as human beings of equal worth with all others, can enormously aid development process, as well as performing their primary function of augmenting justice among men.

Traditional patterns of living in developing countries have included traits which, by modern standards, are most undesirable. For example, the general denigration of women, the continuance of outcaste status in India, and the persistence almost everywhere of rigid class structure are coped with ineffectively through statutes or education. There is a common root to such problems—they all hark back to traditional ways of living when they represented acceptable if not desirable conduct and attitudes. In other words, old standards of morality are being challenged by new; what once was tolerable, or even desirable, is now intolerable. It is my impression that it is the courts which can most quickly and effectively deal with this confrontation of traditional and modern standards; only with the passage of time will education and new ways of living obliterate these conflicts. Indeed, courts have always dealt with such matters, fusing traditional values with newer values, adjusting customary law to newer statute law. Now, with rapid economic development and social change the need for such action by the courts is intensified. People are finding new opportunities, but also suffering loss of status, occupation and sense of belonging. Often it is economic change itself which turns an old moderate injustice into harsh oppression. In India, for example, the viciousness of certain small farmers toward their laborers reflects the farmers' helplessness in the face of new market forces which they cannot control. Another tendency is that which, as modernization proceeds, completely transforms a traditional institution. A tribal leader who formerly assigned tribal land to members of the tribe, may end up owning the land; workers entering factory employment with no house room or food with which to sustain dependent family members may contribute to the collapse of the extended family and completely alter this vital institution.

In other words we must expect that economic development will generate profound social change, and as well profound change in value systems.

In industrial countries this occurred slowly, over decades, but in developing countries one must expect more rapid, therefore more painful change. And this seems to me the point at which law, primarily judicial interpretation, can make one of its greatest contributions. For the courts, among all formal organizations, are those best suited to weigh modern law against customary and religious law, the needs of the individual against his obligations to the family, the desirability of change against that of continuity. The courts alone can not only adjudicate but also adjust and reconcile. Without such intervention I fear that economic development, though successful by material standards, will be incredibly costly in terms of the larger human values.

Conclusion

What policy implications can we gather from the preceding discussion? How can law —statute law together with judicial interpretation— best support the development effort? In the first place, in what appears to be the area of most immediately soluble problems, developing countries should strengthen their proficiency in international law. They must be prepared to exert their rights in such matter as definition of territorial waters, control of foreign business, depletion of natural resources, and the like. On all counts, specially for promoting development, government should be first in upholding the integrity of the courts, the controlling nature of free elections, and the supremacy of the constitution. Perhaps most important for the long run, the courts should be specifically charged with mediating between traditional and modern standards of value and behavior.

What does this mean in regard to the preparation of politicians and administrators, of lawyers and judges, to undertake such tasks? Politicians and administrators must learn to walk a narrow line between “activism” which may precipitate revolution or counter-revolution and lethargic if correct behavior, between responsiveness to the needs of special groups and loyalty to developmental goals. There is need for many lawyers and judges specialized in international and constitutional law. But most particularly there is need for lawyers and judges who, while thoroughly trained in modern legal procedures and practise, will also take the time to submerge themselves in the old laws and customs, the traditional standards of ethical behavior, so that, through balancing the old against the new, they can help the population to find its way by the least tortuous and rocky paths to modern economic and social life.