

IDS Working Paper 178

Access to justice and legal process: making legal institutions responsive to poor people in LDCs

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February 2003

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Summary

This paper examines some of the principal factors that deny poor people access to justice and suggests a number of legal reform strategies. The legal system offers an arena in which people can hold political leaders and public officials to account, protect themselves from exploitation by those with more power, and resolve conflicts that are individual or collective. Access to justice is therefore not only central to the realisation of constitutionally guaranteed rights, but also to the broader goals of development and poverty reduction. The ability to access and use legal institutions, however, is distributed unevenly in most societies. The poor in LDCs in particular have little access and are infrequent users of the legal system. They often live in various forms of illegality – in housing or in work, in the use of electricity, etc. – and encounter the legal system primarily in criminal prosecutions. Making legal institutions accessible and responsive to poor people is one of the major challenges that confront law and judicial reform initiatives.

Although the legal system is composed of numerous institutions, this paper focuses in particular on the judiciary. It begins with a comment on how different forms of illegality or lawlessness contribute to the creation and reproduction of poverty. After a review of the judiciary's accountability functions, it proceeds to examine the institutional obstacles to legal accountability by the poor and the anti-poor bias of many legal institutions. The paper's focus then turns to civil society and examines a number of economic and social factors that keep the poor from obtaining access to judicial systems. The next section explores how democratisation and the incorporation of human rights concepts into national law have (or have not) enhanced access to justice. The conclusion suggests a number of policy reforms and strategies that state and civil society groups can deploy to increase the responsiveness of judicial systems to the poor.

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1 Introduction

The legal system offers an arena in which people can hold political leaders and public officials to account, protect themselves from exploitation by those with more power, and resolve conflicts that are individual or collective. Access to justice is therefore not only central to the realisation of constitutionally guaranteed rights, but also to the broader goals of development and poverty reduction. The ability to access and use legal institutions, however, is distributed unevenly in most societies. The poor in LDCs in particular have little access and are infrequent users of the legal system. They often live in various forms of illegality – in housing or in work, in the use of electricity, etc. – and encounter the legal system primarily in criminal prosecutions. Making legal institutions accessible and responsive to poor people is one of the major challenges that confront law and judicial reform initiatives.

This paper examines some of principal factors that deny poor people access to justice and suggests a number of legal reform strategies. Although the legal system is composed of numerous institutions, the paper focuses in particular on the judiciary. It is one of the principal institution through which ordinary people can assert legal control over political and administrative action and over the behaviour of those with greater power in the market and in the community. The judiciary is peculiar in that it is essentially a reactive institution – in most cases, legal proceedings are initiated by parties outside of the judiciary itself. Who is able to access and use the courts sets the agenda for the judges, and hence what kind of accountability role they play. If most litigants are affluent and use legal remedies to sort business or property disputes, as happens in many national contexts, then this will be reflected in the docket of the courts and indeed in the overall development of the legal system (legal services offered by lawyers, jurisprudence etc.). The denial of access to justice to particular social groups therefore has profound implications for society as a whole.

The paper begins with a comment on how different forms of illegality or “lawlessness” contribute to the creation and reproduction of poverty. After a review of the judiciary’s accountability functions, it proceeds to examine the institutional obstacles to legal accountability by the poor and the anti-poor bias of many legal institutions. The paper’s focus then turns to civil society and examines a number of economic and social factors that keep the poor from obtaining access to judicial systems. The next section explores how democratisation and the incorporation of human rights concepts into national law have (or have not) enhanced access to justice. The conclusion suggests a number of policy reforms and strategies that state and civil society groups can deploy to increase the responsiveness of judicial systems to the poor.

2 Lawlessness and poverty

It is now common ground among development theorists that unchecked abuses of political power can undermine growth.¹ There is also renewed support for the nineteenth century proposition² that the rule of law is an essential precondition for a prosperous economy organised on market principles.³ The rule of law, it is argued, not only ensures life and personal security, it also provides a stable framework of rights and obligations which can help to reduce political risk to investors and to cut down transaction costs. A legal system that protects property rights and enforces contractual obligations also fosters the development of markets in land, labour, and capital, thereby enhancing economic efficiency. The 1997 *World Development Report* (World Bank 1997: 41) concluded that markets cannot exist without effective property rights, and that effective property rights depend upon fulfilling three conditions:

- a) 'protection from theft, violence, and other acts of predation';
- b) 'protection from arbitrary government actions – ranging from unpredictable, ad hoc regulations and taxes to outright corruption – that disrupt business activity';
- c) 'a reasonably fair and predictable judiciary'.

The *Report* describes the absence of these conditions as “the lawlessness syndrome” and highlights the negative effects that the syndrome has for business. Lawlessness raises costs, discourages risk-taking, and depresses the velocity of economic transactions.

While the importance of legal institutions to business and investment has received considerable attention in the literature, there has been little systematic exploration of the role that the rule of law plays in ameliorating poverty.⁴ This is somewhat surprising since the poor are most at risk from the abuse of political power, and are least able to protect themselves against the injury and economic loss consequent upon such abuse. In countries all over the world, the poor are more likely to be victims of police violence than the rich. So too they are more likely to be ignored or mistreated by bureaucrats, are most vulnerable to being left destitute by petty corruption, and are least likely to have the skills and resources necessary to

¹ World Bank (1997: chaps 1 and 6).

² The general idea that good governance, including good kingship, was necessary for prosperity can be found in ancient and medieval thinkers from most societies, including Narada and Kautilya in India, Aristotle in Europe, Meng-Tzu in China, and so on. Among the social theorists, the importance of law to economic growth was emphasised most strongly by Max Weber, who advanced the proposition that 'Industrial capital must be able to count on the continuity, trustworthiness and objectivity of the legal order, and on the rational predictable function of legal and administrative agencies' (Weber 1922/1968: 1095).

³ See, for example Carothers (1998), Messick (1999), Pistor and Wellons (1998), Sherwood, Shephard and de Souza (1994), Shihata (1991: chap 6; 1995: chaps 1 and 3; 1997) and Webb (1996). The hypothesis that the rule of law promotes economic growth has not been easy to confirm in empirical studies, and is probably too simplistic in its characterisation of the causal relationships involved (Pistor and Wellons 1998). There is also support for the view that the rule of law may be important for certain types of growth in particular circumstances, but is not a necessary condition for all types of market-based growth (Weiss and Hobson 1995).

⁴ Hence in a survey of the experience of judicial reform, we are told that that main purpose of an effective judiciary is to make legal systems more “market friendly” (Messick 1999: 118). An exception to the trend is the publication *Governance: The World Bank's Experience* which notes that the legal system also affects the lives of the poor, and has a role to play in poverty alleviation through preventing discrimination, protecting the socially weak and distributing opportunities in society (World Bank 1994).

“work” the state machinery. These factors are not just symptoms of poverty: they are part of its cause and a most fundamental aspect of its manifestation. While poverty has traditionally been regarded as a phenomenon best understood in terms of income and productivity, it has more recently been recognised that poverty is a multi-dimensional problem, extending beyond low income to include physical vulnerability and powerlessness within existing political and social structures (Bernstein 1992). This view is corroborated by anthropological studies of impoverished communities that highlight the prominence of lawlessness in the daily experience of poverty.⁵ At the same time, the growing number of neo-institutional analyses suggests that political and legal rules do have a direct impact upon social practices and economic outcomes.⁶ In short, institutions matter for poverty.

What are the ways in which lawlessness contributes to poverty? Much depends on the interaction of various social relations, but several key factors can be identified:

- Following the work of Amartya Sen and others, it is now clear that unchecked abuses of political power can contribute directly to hunger and famine (Sen 1981; 1994). In particular, political restrictions on the press and freedom of expression create conditions that discourage global action in response to famine or other major threats to human life such as HIV epidemics.
- Unchecked violence by police, prison officers, and other public officials is a problem in most regions of the world,⁷ and has its greatest impact upon the poor. Official violence can lead to death, injury, permanent disability, and mental illness.⁸ These consequences frequently deprive poor households of essential income, and increase costs, and exacerbate indebtedness.
- In countries where corruption occurs among officials, the poor are regularly forced to pay a premium for public goods and basic services – such as access to water, education, health care, medicines, travel on public transport, and official information. It is not uncommon that impoverished individuals are unable to pay and are therefore denied access to the public good in question.
- In countries where extreme human rights abuses prevail – including mass arrests, disappearances, unchecked martial law, and paramilitary units with license to abduct, torture, and kill – a culture of fear can develop which not only discourages productive activity, but also leads the poor to devote a part of their income to pay bribes, purchase weapons, and make other unproductive expenditure on self-protection.

⁵ See, for example, Gaventa (1980), Khare (1998), Scott (1985: esp. 274–8), Scheper-Hughes (1992: esp. chap 6).

⁶ In addition to the now canonical North (1990), other examples include Weaver and Rockman (1993), Rodgers (1994), Rodgers, Foti, and Lauridsen (1996). It is notable that even Hirschman (1994: 346), who is cautious about the links between political institutions and aggregate economic growth, admits the direct relevance of political institutions to poverty as demonstrated by Sen (1994) in respect of famine.

⁷ See for example Human Rights Watch (1999).

⁸ Mental illness is one of the largest causes of lost productivity and human morbidity in developing countries, and appears to be exacerbated by violence and political disempowerment (Desjarlais, Eisenberg, Good, and Kleinman 1995: chap 6).

- Less brutal but nevertheless overbearing regimes can resort to ‘the steady pressure of everyday repression backed by occasional arrests, warnings, diligent police work, legal restrictions, and . . . preventive detention’⁹ which create a culture of fear and encourage the poor to devote time and energy to evading the police. Moreover, a culture of fear prevents the poor from asserting their legal rights to public goods.
- The poor are more likely to be subjected to arbitrary treatment, intimidation and humiliation by government officials. For the poor, this pattern discourages use of government services, absorbs otherwise productive time, and may contribute to depression and other forms of mental illness.
- The poor are at greater risk of losing their property to either public or private theft. It is not unknown for government officials to arbitrarily seize part of the harvest for personal use, to confiscate goods from urban street merchants, or have land registered in their own names during the course of land reform initiatives.
- Development projects that are identified and approved according to undemocratic processes are often designed in ways that leave the poor outside the calculus of benefits, or worse, may cause direct injury to the poor through displacement or disruption of income.
- Living in situations of persistent insecurity, the poor are prone to short-term economic decision-making and lack the necessary level of trust to accumulate, invest, or take risks in business.¹⁰

The precise impact of lawlessness takes many different forms, and it is often the overlapping effects of several factors at once creates the greatest impact.

There is no government in the world that boasts of treating the poor in these abusive ways. While political abuse is sometimes justified, *sotto voce*, as a “necessary” form of political control, it is rarely endorsed in public debate, and legal systems are unanimous in purporting to protect citizens from the abuse of political power. So violence, theft, corruption, and anti-poor exercises of discretion usually occur in violation of formal intent, if not necessarily in violation of existing legal rules and accustomed practice. The question thus becomes one of how to enforce rules written to protect the poor from abuse. In this task, the judicial system is essential.

⁹ Scott (1985: 274), describing life in a village in Kedah, Malaysia.

¹⁰ There is much emphasis in the literature on the need to foster risk-taking among businesses and investors. But it may be equally important to promote risk-taking among the poor. The celebrated conservatism of the peasantry – described by Tawney and Scott, among others – and its attendant low productivity probably stems as much from a fear of violence and expropriation of proceeds as much as cultural predilections.

Box 3.1 Lawlessness contributes to poverty – examples

- At a hospital in Babati district in Tanzania, a new delivery of essential medical supplies purchased with foreign currency disappears from the public dispensary within hours but is available for purchase at a doctor's home that evening. The poor do not receive the free medical care promised by the government, but those with the right connections who are able to pay are able to secure pharmaceuticals in abundance.
- In Muzaffarpur, Bihar, a man found innocent at a criminal trial is illegally imprisoned without explanation. He is held in Bihar's notoriously harsh prison conditions for nine years before the government enquires into his condition, but he is still not released for another five years. When he is finally freed after 14 years of wrongful imprisonment, the Bihar government is unable to come up with an explanation for his detention, although his innocence is in no doubt. During his time in jail he has not only suffered irreparable injury to his physical and mental health, he has also lost wages from fourteen of the most productive years of his life.
- In Johannesburg, South Africa, rates of theft and violent crime are some of the highest in the world. Wealthy residents are able to employ sophisticated alarms, security guards, and other forms of private policing to protect their property and persons, while the poor are stuck in poorly-built homes sometimes without even simple locks, and are left vulnerable to theft, assault, and other violent crimes.
- A man who is too old to work is left without assets or income after his son is murdered. In order to gain access to his son's estate, he requires a "succession certificate" from the civil court of first instance in Lahore, Pakistan – over 160 kilometres to the south of his village. The cost of the train journey and the bribe demanded by the clerk of the court send him deeper into debt, but after five separate trips to the court over as many months, he has still not been given the stamped piece of paper to which he is legally entitled. Each trip to court send him further into debt, but the clerk refuses to produce the certificate while the authorities in his home village refuse to give him access to his son's assets until the certificate is produced.
- Government-promoted oil development in the Oriente region of Ecuador has disrupted the lives of the Huaorani people who have lived in the area for centuries. The oil operations have driven away wildlife, disrupted food supplies, polluted drinking and bathing water, and introduced new diseases. Both oil company security men and police have been involved in killing members of the free clans of Huaorani living in the forest. In these circumstances, malnutrition and disease have increased among the Huaorani. While most of these activities clearly plainly amount to violations of the right to life as well as other rights guaranteed under the 1983 Ecuador Constitution, there are no effective means of redress before the Tribunal of Constitutional Guarantees.

3 The role of the judicial system

There is a temptation, particularly in common law societies, to equate the judiciary with the entire legal system, and to look to judges to serve as the primary guardians of probity and fairness. Yet the judiciary is but a part of the entire legal system, and both the scope of its powers and its political role vary considerably from jurisdiction to jurisdiction. In some circumstances judges are seen essentially as low-level bureaucrats exercising minor administrative powers. In other political systems judges are entrusted

with the task of resolving some of society's most profound political and moral dilemmas, including for example the legality of the death penalty, whether an election is to be annulled, and how health care should be rationed in circumstances of scarcity. Apart from the important differences between civil law and common law conceptions of the judicial role, differences arise from the political context in which judges are embedded. For these reasons, there can be no one-size-fits-all analysis of the role of judges in ameliorating poverty.

With these cautionary comments in mind, it is nevertheless possible to identify a common (if not wholly universal) theme in the relations between judges and the executive branch of government. It is generally agreed that it is not only the role of judges to settle disputes and to enforce clear legal rules, but also to supervise the way in which government power is exercised. While this "rule-of-law" function should not be assumed as a universal – and certain courts, such as those in the People's Republic of China, are clearly constructed on a different model (Baker 1996; Dicks 1995) – it does represent an important strand of political thinking in most LDCs. There is considerable debate regarding the correct meaning of the rule-of-law,¹¹ so about all that can be said is that there exists a cluster of concepts – including rule-of-law, rule-by-law, *rechtsstaat*, and constitutionalism – which all get at the idea that the legal system has a role in constraining and channelling government action.

Following Schedler's (1999a: 14–17) analysis, the process of ensuring political accountability can be seen to involve at least two components: answerability and enforcement. The first, *answerability*, is the requirement placed upon public officials to make information available about their activities and to give valid reasons for their actions. The second component of accountability, *enforcement*, is the ability to impose sanctions on political leaders and other public officials who have acted illegally or otherwise violated their public duties. Enforcement also requires the ability to give an authoritative pronouncement on which actions are legal and which are illegal. In sum, the main aim of accountability is 'the project of subjecting power not only to the rule of law but also to the rule of reason' (1999a: 15).

In theory, the judiciary is perfectly suited to exercise accountability functions. The idea that the judiciary should act as a check upon excesses of legislative and executive power is a fundamental component of the doctrine of the separation of powers – a doctrine most closely associated with the political philosophy of Montesquieu and the US Constitution – but which has been adopted either explicitly or implicitly in a majority of the world's constitutional regimes.¹² The power of judges to exercise control over the other branches of government varies from country to country, but most powers can be fit into either of two categories: the judicial review of legislation, and the judicial review of administrative action.

The judicial review of legislation empowers the judges of the higher courts to review either legislation or proposed legislation to test it for conformity with the constitution. Most importantly, the

¹¹ Aspects of the debate may be found in Clark (1999).

¹² An intellectual and political history of the separation of powers doctrine is provided by Vile (1998), while evidence of its global dissemination may be found in Beer (1992), Franklin and Baun (1995), and Shivji (1991a).

acts of parliament or the legislative branch can be checked for conformity with any fundamental rights in the constitution.

In most legal systems of the world, matters of economic policy and development goals are matters to be settled by political processes. Within the broad constitutional framework it is left to the legislature and executive to set priorities on topics such as health policy, infrastructure development, and agricultural subsidies. So too specific development projects – such as the construction of hospitals and dams – are normally left to the executive branch operating within a legislative budget. Although development planning may be subject to legal controls such as zoning laws and environmental regulations, in most countries the details of development planning have been left to executive discretion. Yet unchecked political discretion allows officials to indulge in nepotism or seek illicit favours interested parties. It also allows officials to take decisions in ways that are inconsistent, uneconomic, or arbitrary. For these reasons, there is a global trend toward subjecting development decisions to judicial scrutiny (see Box 3.2).

The second major technique used by the courts to control the actions of public figures is judicial review of administrative action. Once a court has been petitioned to exercise judicial review over executive acts, it can usually ask for information, monitor developments, demand explanations, and inquire into the validity or authority for the acts. Most legal systems also empower the higher courts to rule that a particular action was unlawful, and to order a public official to do something that he or she should have done. It is also possible in some cases for the court to award money damages to the person who has suffered personal injury or economic loss due to government acts. The extent to which various legal systems allow courts to fulfil such functions, both in theory and in practice, varies a great deal. Thus the legal rules which regulate the powers of the court are particularly important to accountability.

While courts can provide a powerful tool for accountability, it is one of their key characteristics that they are essentially reactive, and are driven by social forces. That is, in most cases, the court will only commence proceedings, receive evidence, and give judgement once a litigant has petitioned it.¹³ Thus the pattern of litigation which may be observed in any court is constituted by the intersection of two factors: first, the legal rights and procedural gateways which are created in law and second, the complaints and petitions brought mainly by private individuals and businesses.¹⁴ The first factor is essentially institutional, while social conflict and market forces drive the second factor. In the main, it is litigants and their lawyers who determine which disputes will reach the courts, when and how often courts will be petitioned, and how intensively conflicts will be pursued. 'If the State provides the institution of the judiciary, clothes it with power, appoints judges and provides back up support and resources, it is the private market economy that provides life and blood to the institution' (Dhavan 1986: 13). Thus we arrive at an irony, for while the courts are organs par excellence of the state, and often symbolise the beneficent neutrality of blind justice, they are designed to be operated by social and market forces, and thus inevitably reflect the agenda of those forces in their decisions.

¹³ The party before the court may be an officer of the state, as in a criminal prosecution. There is a very small number of cases in which judges have initiated cases of their own volition after reading a newspaper article or otherwise coming across information on which a judgement could be founded.

¹⁴ I am grateful to Rajeev Dhavan for this analysis, which is presented more fully in Dhavan (1986).

Box 3.2 Judicial supervision of development – the national level

Judges can play a role in supervising the development process and holding officials accountable for delivering genuine improvements.

Holding development accountable. In most countries it is possible for individuals – and in some cases organisations – to challenge the design or implementation of a development project if they may be directly harmed by it. For example, in the state of Puebla in Mexico, several agrarian communities (known as *ejidos*) were given notice that their farmland was to be expropriated on the grounds of “public utility”. The state announced vague plans to build public housing on the land, but it soon emerged that deals were being struck to transfer the land to private developers and that the compensation to be paid was 1/15th of the prevailing market rate. The *ejidos* challenged the plans in court, contending that the plans did not meet the test of “public utility” as required under Article 93 of the Agrarian Law. The case was later settled out of court, with an agreement giving the *ejidos* increased compensation and greater involvement in the land development process. Perhaps more importantly, the deals with the private developers were rescinded, and the state was compelled to complete the public housing that it had originally promised. Although the *ejidos* faced many technical obstacles in the court, the case illustrates the way in which people can rely on formal legal rules and judicial supervision to curb anti-poor executive action.

Fulfilling policy promises. It is common for politicians to make public promises about development goals – including health, education, and infrastructure. Such promises may be included in legislation, but there is normally no means by which the poor can ensure that development promises are kept. At best, the government may be voted out in periodic elections, but there is often little reason to expect that the performance of the next government will be much better.

A novel approach developed in India relies on public interest litigation to monitor the implementation of development policies through the courts. A key feature of the litigation is that it has made the Directive Principles of State Policy in the Indian Constitution a set of standards against which prevailing development programmes may be tested, and in some cases enforced as fundamental rights. This approach is unusual because courts in other countries usually treat similar constitutional provisions as unenforceable. In India, it has allowed the courts to make the state answerable for its programme failures:

- In the state of Himachal Pradesh, the residents of an isolated mountain community were promised a road to give them access to markets and services. The road was only partially constructed when the budget ran out due to corruption and mismanagement. The residents went to the courts to demand that their promised road be completed, and while the Supreme Court stopped short of issuing a direct order for the road to be built, it strongly encouraged the state government to review the situation.
- The 1950 Constitution stipulated that the state should provide “free and compulsory education” within ten years of its commencement. After nearly four decades had passed, India still had an adult literacy rate of only 44%, including only 29% of women. The Supreme Court was petitioned and declared the right to free education to the age of 14 a fundamental right that could be enforced by the courts wherever it is denied.
- In the 1984 Rajiv Gandhi announced the creation of the “Ganga Action Plan” to clean up the polluted Ganges River. Despite extensive publicity for the programme, little action was taken and polluting industries were left to operate without new restrictions. In several public interest litigation cases, a sole applicant – M.C. Mehta – successfully petitioned the Supreme Court to close down polluting tanneries, impose pollution controls on other industries, and recognise an enforceable fundamental right to environmental protection.
- Although the Constitution lays down the objective that there should be “equal pay for equal work”, the pay for many government posts in India is premised on implicit discrimination according to caste, sex, and social status. In 1982 the Supreme Court read the “equal pay for equal work” provision into the right to enforceable right to equality. Since then, it has issued orders to eliminate discriminatory pay policies in dozens of cases.

The consequence of this analysis is that judicial institutions cannot be understood in isolation from their use by society. The point is clarified if we think of the judicial system as a supplier of a set of goods and services. The services include dispute resolution, the legal control of political action, and the provision of authoritative interpretations of the law. The goods provided by judges include reasoned opinions supporting their decisions, and where appropriate documents conveying injunctions, orders, and other types of legal remedy. But judges cannot supply these goods and services unless there are customers, that is litigants, expressing a demand for them. Just as an accountant cannot complete a set of annual financial statements without a client's figures to work from, so too a judge cannot settle a dispute without litigants in contention. Nor can the judge exercise control over the executive branch without a petitioner demanding that such control should be applied. In other words, the character of justice depends on civil society demands as well as judicial supply of justice services.

This is not to suggest that the supply of judicial services – or, more broadly, the supply of justice – can be reduced to neo-classical supply and demand curves. The interactions are not mediated mainly by price signals, and there is a political dimension to the process that cannot be reduced to an economic logic. Yet the metaphor may assist in analysing patterns of courtroom use. Most litigation in developing as well as developed countries involves either business or the propertied classes as litigants. Criminal matters aside, the voluntary use of courts to resolve conflicts either with the state or other private parties tends to reflect the main sectors of economic activity. In Ghana, for example, a major source of litigation relates to property disputes and customary law associated with cocoa production (Luckham 1987). In India, litigation patterns broadly reflect the concerns of the three economically dominant classes – agrarian landholders, the urban salaried groups, and industrialists (Sudarshan 1985). It follows that the supply of legal services by both lawyers and judges tends to reflect the preferences and needs of their most common users – mainly propertied or salaried classes. As long as this pattern is sustained, there will be very little pressure generated from users to reform the law or reshape legal procedures in a way that will benefit the poor.

The poor rarely appear in court except as defendants in criminal prosecutions. This is not surprising if the judicial function is conceived of as a supplier of services in a market driven by demand. The poor possess a limited capacity to express effective demand for any good or service, and there is no reason why justice should be any different. The actual costs of engaging a lawyer, the opportunity cost of time spent in court, and the general level of skill and education required to litigate effectively all serve as deterrents.

This demand constraint is a direct result of poverty, and has important implications for the analysis of justice in LDCs. Supply and demand for justice are products of institutional factors on the one hand and civil society pressures on the other. These two aspects will be taken in turn in the sections that follow.

4 Institutional obstacles to legal accountability

If judicial institutions are ideally suited to the tasks of accountability, then *why are the judicial (and legal) systems in poor countries not more effective at constraining the behaviour of political leaders and people who occupy positions of state authority?* The answer to this question turns on at least three factors – the nature of constitutionalism, the need for legal reform, and the uncertain independence of the judiciary. There are also a number of factors that affect the ability to poor people to make use of the legal remedies available, but these will be discussed in the next section.

4.1 The political contingency of constitutionalism

If a constitution is a “power map”¹⁵ which defines the rules of the political game, then constitutionalism is the agreement to play the game more or less by those rules.¹⁶ While most countries have written constitutions, and the majority of constitutions contain legal provisions placing limits on the exercise of government power, the actual operation of those constitutional rules depends ultimately upon politics. There are more than a few constitutions in the world which contain rules and rights which have very little to do with the actual exercise of government power. Many commentators have arrived at the conclusion that a particular constitution has failed to regulate the exercise of power and protect fundamental rights, while others have commented on this failure as a widespread and persistent phenomenon.¹⁷ While such constitutional failures are an important factor in any attempt to constrain political power through a constitutional rule of law, the consequences of such failures are rather more complicated, and in this context three points bear mention.

First, just because the constitution and legal institutions are the subject of political controversy, it does not mean that the constitutional order is necessarily under threat or in decline. That legal institutions are embroiled in political turmoil may point precisely to their central relevance to prevailing economic and political debates.¹⁸ Thus in India the conflicts between the executive and the judiciary – expressed in debates about land reform, secularism, women’s rights, and positive discrimination – have given rise to intense political struggles, and even violence. Yet as Dhavan (1992) has pointed out the competition between political constitutionalism and juridical constitutionalism do share a common premise – they agree on the central importance of the constitution to any vision of governance.

Second, there is no reason to expect that the constitutional law-state will necessarily emerge as the dominant political form. As Lev (1978: 68) has noted of Indonesia, ‘the role that law, as institution and as political myth, may play depends in large part on the results of political conflict’. In this perspective, constitutional evolution is a political outcome as much as constitutional decay, and each depends upon the degree of political support which different visions of governance are able to muster. Thus in

¹⁵ The phrase derives from Duchanek (1973).

¹⁶ Lev (1993) uses the term “constitutionalism” to mean that ‘the political process, with or without a written constitution, is more or less oriented to public rules and institutions intended to define and contain the exercise of political authority. At the core of constitutionalism is legal process’.

¹⁷ See for example Ghai (1986).

¹⁸ This point is made most acutely by Lev (1972), but see also Geertz (1983: 278).

Indonesia and Malaysia both authoritarian and constitutionalist visions of the political future are in active play. That is, there are broadly authoritarian political groupings seeking to reduce the role of constitutional and legal accountability in the conduct of day-to-day politics, as well as groups explicitly devoted to curbing abuses of state power through an enhanced profile for constitutional law. In Malaysia defenders of the rule of law have fought a rearguard action, at least since 1988, to preserve the constitutional independence of the judiciary and to preserve the rule of law from abuse by a strong executive branch (Lev 1993; Harding 1996; Khoo Boo Teik 1999).¹⁹ In Indonesia, on the other hand, a coalition of students, private lawyers and other urban professionals, began to lobby as early as 1970 for a *negara hukum*, or law-state, including greater judicial independence and judicial review of legislation (Lev 1978; Bourchier 1999). This coalition of forces helped to secure a new set of Administrative Courts that began operation in 1991 and opened up a channel for government officials to be brought to book by ordinary citizens. In 1994 the Jakarta Administrative Court upheld a challenge against the Information Minister's decision to close down a popular magazine, and a new optimism about accountability through law gained momentum (Bourchier 1999), ultimately contributing to the political downfall of Suharto in 1998. Thus in both Indonesia and Malaysia, forms of legal accountability became the explicit object of political campaigns supported by what Lev refers to as "law-movements" (see Box 4.1).

Third, a political attack upon a particular set of constitutional mechanisms may reflect a fundamental mis-match between the set of institutions outlined in the constitution and the prevailing political conditions which the institutions are designed to serve. The former African colonies of the France and the UK, for example, acquired new constitutional orders at independence, which were based on liberal models and designed to contain the power of the executive. A common characteristic of these constitutions is that an unrepresentative political elite in conjunction generally drafted them with technical legal advisers from either UK or France. Thus the Francophone constitutions were mainly based on the French Constitution of 1958 (Romdhane 1991: 219–20) and the Anglophone constitutions imposed a modified Westminster system which included the text of the 1950 European Convention on Human Rights in slightly modified form. The text of the 1950 Convention reflected the concerns and politics of the European states involved in its drafting,²⁰ and while it may have represented something like international "best practice" at the time it was first incorporated into Nigeria's constitutional order in 1958, there is nothing to suggest that it reflected the balance of political forces in Nigeria at the time.

As Okoth-Ogendo (1991) has pointed out, the constitutional power maps which were bestowed on the eve of independence were fundamentally at odds with the patterns of political power which had been consolidated during the colonial period. Whereas colonial rule had centralised power and involved the state in most aspects of economic life, the new constitutions were based on checks and balances designed

¹⁹ The combination of the 1995 election majority which shored up the coalition government, and the public acquiescence in the trial of Ibrahim Anwar in 1998–9 suggest that the battle has been largely lost. Khoo Boo Teik (1999: 222) has concluded that the judiciary is now a 'fragile bastion' rather than a 'co-equal branch of government capable of providing checks on executive prerogative and power'.

²⁰ See for example, Marston (1993).

Box 4.1 Law-movements

Constitutionalism and the rule of law depend upon sustained political support. Law-movements, or political groupings explicitly lobbying for the legal control of state power, can play an important role in determining constitutional outcomes. Lev (1978: 39) notes that law-movements 'develop among groups that are disadvantaged by existing patterns of political, economic, and social regulation and have begun to regard old authoritative relationships in the state as morally bankrupt'. Such movements tend to be largely middle-class in composition, and often include doctors, journalists, academics, and other professionals, although trade unions may also be important.

Lawyers are essential to law-movements for their familiarity with legal vocabulary and as conveyors of legal ideology. Lawyers also have a direct economic interest in the independence of the judiciary since their livelihood depends upon a legal system that can administer rules in a predictable way. The presence of a large and prosperous private Bar in colonial India may help to explain the resilience of its constitutional order compared with countries such as Burma, which had few lawyers at independence, or the Anglophone countries of East Africa which did not even have a law school until 1960.

Law-movements are most successful when the demands for individual rights, judicial autonomy, and institutional controls over political authority are expressed in a moral language grounded in the history and culture of the society. Western Europe's historical law-movements, for example, drew heavily on the idea of natural rights. In India, Gandhi's call for curbing colonial police power was expressed in terms resonating with *ahimsa*, or non-violence. Just as the doctrines of Roman Catholicism have fed the "liberation theology" movement pressing for human rights and state accountability in Latin America, so the notion of "justice according to Islam" has been combined with calls for human rights protection as the basis for a public interest litigation movement in Pakistan. More recently in South Africa demands to eliminate apartheid-era criminal punishments and for greater legal accountability to the poor have been expressed in terms of *ubuntu*.

to limit power and exclude the state from dirigiste controls. Moreover, the new constitutions were generally organised around bills of rights while the colonial legal regimes had not protected rights, nor prepared judges, lawyers, or politicians to abide by bills of rights. In these circumstances, the constitutions of sub-Saharan Africa were widely re-shaped to reflect the political traditions that they had inherited, and to give more accurate expression to the forms of political organisation that had become dominant at independence. Thus Africa in the 1970s witnessed a re-centralisation of political power, derogations from Bills of Rights, and the rise of one-party states and military regimes. At a legal level, these changes could be introduced in a number of ways, including: setting aside the Constitution (e.g. Nigeria), establishing one-party systems (e.g. Zimbabwe), suspending the fundamental rights provisions under a state of emergency (e.g. Zambia), making the executive immune from legal accountability (e.g. Kenya) or conferring life tenure on the president (Malawi and Tunisia). These developments were associated with the concentration of executive power, and a diminished role for the judiciary in checking state power. While deeply prejudicial to human rights and the welfare of the poor, it is possible, as Shivji (1991b) has nearly argued that the process of indigenizing the constitutional regimes of sub-Saharan Africa was a necessary pre-condition for the ultimate emergence of authentic democratic movements in civil society.

What is certainly clear from the above is that the consequences of a constitutional order for the poor is irreducibly a question of politics, and will probably depend to a large extent, on the character of middle

class support for constitutionalism. It also depends on the capacity of institutions such as the judiciary to deliver the services needed to support constitutionalism as a political form.

4.2 Threats to judicial independence

Classical separation of powers theory taught that if the judiciary is to exercise an effective check on the abuses of the executive branch, then it must be independent of the government. The point is essentially sound for liberal constitutionalism, and has been one of re-emphasised in respect of democratisation in developing countries. Precise definitions of judicial independence are elusive,²¹ but the term is normally taken to involve the following:

- *Impartiality.* the judge makes decisions based upon a dispassionate application of law to the facts rather than bias in favour of one party
- *Political insularity.* the judge is not subject to removal from office or threats for reaching decisions unpopular with government
- *Institutional autonomy.* the judiciary is largely self-governing, is not subject to political cuts to its budget, and is free from administrative interference
- *Legal authority.* the judiciary possesses genuine powers to determine questions of law and fact in all cases, including those involving the executive branch
- *Legitimacy.* the judicial branch is recognised by the constitution, other political branches, and civil society as a separate entity with the legitimate purpose of upholding the rule of law
- *Probity.* the judge is immune to bribes, favours, and other forms of influence which might affect impartiality

Judicial independence, including at least most of the components listed above, is a necessary condition for the judiciary to exercise effective control over the abuse of political power. Unfortunately, judicial independence is often lacking in LDCs, and judges are particularly vulnerable to political pressure from the executive branch. The topic of judicial reform and judicial institution building has received considerable attention in recent years, and there is much that can be said about judicial training, case-management, information technology, and so on.²² But in addition to these technical aspects, judicial independence turns crucially on what are irreducibly political factors.

It has been widely noted that an independent judiciary requires popular support.²³ But it is important to know what kind of support, from which groups, and in which circumstances. Here again, Lev's concept of the law-movement may shed some light on the matter. One of the main threats to judicial independence is the attack upon working conditions. A judge who has fallen from political favour may be sidelined for promotion, posted to unattractive courts, or find that the benefits of a car and household

²¹ Much of the relevant literature is summarised in Larkins (1996).

²² See for example Dakolias (1996).

²³ For example, Widner (1999).

staff have been withdrawn. In a number of cases in India, Pakistan, Bangladesh, and Malaysia, blatant political attacks upon the judiciary have been challenged by groups of law-movements. Public demonstrations in support of the judiciary have drawn attention to the matter while lawyers have been involved in bringing a series of public interest cases that have challenged the legality of frequent judicial transfers.

4.3 The need for legal reform

Even where there is a strong support for constitutionalism and an independent judiciary, there is a need for laws that are suited to the needs of the poor both in form and content. One of the main reasons that the legal system is not better adapted to protecting the poor from political abuse is that the substantive laws applied by the courts are out-of-date, or still carry the stamp of colonial authoritarian rule. Many LDCs are far behind their law reform programmes, or have had law reforms proposed but lack either the political will or parliamentary time to implement the reforms.

Colonial laws

Many post-colonial states still rely upon the basic legal architecture that was constructed to support colonial rule. Often not only basic matters of criminal and civil procedure are retained unamended, also often the statutes governing the most fundamental aspects of economy and society, including penal codes, company acts, planning legislation, contract acts, and so on. Many of these statutes were designed to centralise power in the colonial executive, and create neither vehicles for accountability nor basic citizen rights which prevail elsewhere. Moreover, colonial legislation frequently created strong police powers and limitations on civil rights such as preventive detention and limitations on freedom of assembly which continue to operate.

Legal dualism

It is a consequence of the continued survival of colonial legislation that statutes are often inconsistent with constitutional guarantees of basic human rights. In India, for example, the statutory power of a magistrate to issue an order to prevent a public assembly²⁴ still operates even though it appears to be a blatant violation of the constitutional right to freedom of assembly. Similarly in Jamaica and many other Caribbean states the constitution was drafted to protect existing (colonial) laws from judicial scrutiny under the fundamental rights provision of the constitution. Constitutional rights were made inapplicable to colonial criminal statutes in particular, to prevent the interference of constitutional rights with “law and order”. The same pattern may be seen in Tunisia where statutes curbing the right to travel, freedom of association, and freedom of the press existed for decades alongside the Constitutional guarantees of those very rights. In these cases, and many others, the legal system seems to show a kind of split personality with liberal constitutional provisions and authoritarian statutes existing within the same legal field.

²⁴ Code of Criminal Procedure, sec. 144.

Outdated dirigiste rules

A further legacy of colonial rule, and of planned economies or state capitalism in more recent years, is the large number of state controls and punitive sanctions found in myriad pieces of legislation. These rules give both bureaucrats and police wide powers, but in most cases they have not been removed from the statute books even after extended programmes of economic liberalisation.

Inadequate rules for accountability

It was a further feature of most colonial legal systems that they involved regulation through top-down rules and the application of criminal sanctions rather than systems of consultation with the regulated.²⁵ India's environmental law, for example, still relies heavily upon criminal sanctions rather than regulatory consultation, and provides very few channels for public participation in the planning or environmental regulation process (Anderson 1996). And where systems of accountability are created, they do not always endowed with sufficient legal powers to achieve their ends. The Mexican National Human Rights Commission, for example, is clearly charged with holding government accountable for human rights abuses, yet it possesses no prosecutorial powers and its findings are regarded as non-binding.

Procedural reforms

A substantive right on paper is of no use unless it is harnessed to an effective procedural remedy which allows the litigant to actually bring the case before the court in good time and without excessive cost. Legal gateways are important determinants of what kind of justice can be achieved. Many procedural rules which are in place in LDCs are out-dated or inflexible, often originating in the last century and have not been updated to reflect changes in the legal system, or to take account of the new constitutional order under which they operate. Legal procedures not only determine whether the poor can get access to legal remedies, and how quickly and effective such remedies will be, they can also influence the way that a particular dispute is construed by the law, and the kinds of outcomes which are possible.

How legal procedures influence the way disputes are constructed and the final outcomes can be seen in the litigation following the Bhopal gas leak in 1984. A leak of methylisocyanate gas from a pesticide factory owned by Union Carbide (India) Limited killed more than 2,800 people immediately and exposed an estimated 520,000 people to the gas. The first major procedural question is whether the case would be heard in the courts of the United States, where the parent company, Union Carbide, is located, or whether it would be heard in India where the survivors lived. Although the Indian government advanced legal arguments that the case should be decided in New York, these were rejected by the US courts, and the case was sent back to India. This procedural decision had a substantive outcome, since it determined that the case should be decided under Indian law rather than US law.

²⁵ To take one example, the regulation of air pollution in Calcutta during the early 20th century involved regular consultation with European factory owners while Indian factory owners were much more likely to be subjected to fines and penalties without warning (Anderson 1996c).

Box 4.2 Anti-poor bias of the law – Indian examples

One of the main reasons why the poor are not able to use the legal system to prevent further impoverishment is that the law is not framed in their favour. Many statutes dating in particular from the colonial period are designed mainly to protect property, gather power in the hands of the administrators, and put down social unrest. Some examples follow:

- The Court Fees Act 1870 was designed in part to discourage litigation. It requires any person filing a suit for money damages to pay in advance a non-refundable court fee amounting to 7–11% of the amount of damages sought. The effect of the Act is to debar the poor from tort litigation – the main avenue for recovering compensation for injury or loss.
- The Land Acquisition Act gives the state extensive powers to expropriate property. The Act provides for minimal compensation, and is regularly used in India to take land from farmers for use in housing. The land is commonly purchased at cheap rates and then sold through private brokers who earn massive profits. Squatters, landless labourers, and others formerly dependent on the land for their livelihood are not given any compensation.
- The Code of Criminal Procedure provides that an individual accused of a criminal offence may be released on bail after providing sufficient security. But the price of a bond is normally beyond the financial capacity of the poor, while the wealthy are able to buy their way out of jail with ease. At the heart of the inequity is a system which requires rich and poor alike to post similar bonds, thus a rich individual can secure bail after paying a tiny fraction of annual disposable income whereas a poor individual would need to surrender an entire year's income to secure the same release.

5 Access to justice

Even where the courts are constitutionally protected, the judiciary independent, and the laws drafted in fairness to the poor, the legal system will be of little benefit to the poor unless they are able to use the legal levers that it makes available. While “access to justice” has attracted considerable support, and has featured in recent legal reforms in the UK and elsewhere, it has not featured prominently in the good governance agenda in developing countries.

Repeated studies of access to justice have shown that two factors predominate in determining whether people are able to use available legal remedies.²⁶ The first, and by far the most important, is access to financial resources. Hiring lawyers and using legal institutions can be very costly in themselves, but also entail opportunity costs, which for the poor usually means time away from income-generating activities. The second factor usually identified is institutional skill – the ability to understand and use the system. Other factors arising particularly in developing countries are discussed below.

5.1 Reluctance to use the law

It is commonly noted that in many cultures there is a reluctance, particularly among the poor, to become entangled with the courts. This is sometimes attributed to the strong social stigma attached to any encounter with the law, no matter how innocent. Thus litigation may be seen as making trouble while a

²⁶ See for example Galanter (1974), Cappelletti and Garth (1978).

brush with the police can be interpreted by the local community as guilty until proven innocent. While these cultural factors are undoubtedly important, a closer analysis reveals that for the poor, the decision to avoid contact with the legal system is less a symptom of parochial traditionalism than it is a rational response to the opportunities and risks which the legal system presents. As Hill (1996: esp. 252–72) has recently emphasised in a study of seventeenth century England, where the content and application of the law is stacked against the poor, it is not surprising that the poor regard the law as their enemy.

Box 5.1 Naming, blaming, claiming, winning, enforcing

How do grievances become court cases? Even if an individual is subject to violence, deprivation of property, or administrative abuse by an official of the state, she or he may be disinclined to make a complaint to the courts. Building on the early work of Felstiner, Abel and Sarat (1981), it is possible to construct a heuristic schema of the stages of litigation, highlighting the barriers to using courts effectively. With the interests of the poor against political abuse in mind, the stages are as follows:

Grievance: the perception of an act or omission on the part of an official that causes injury or loss to an individual or group. Examples could include: police extortion and violence toward the residents of an urban informal settlement, a decision to allow urban growth into farming areas in violation of planning laws, and a demand for sexual favours in return for a government loan, and the existence of unchecked industrial water pollution into an urban slum.

Naming: this is the first step on the path to litigation. It involves the process of identifying the grievance in an explicit way as a possible cause for action. While this sounds straightforward, it may be the biggest barrier. In the environmental field, for example, many grievances are often half-conscious and vaguely formulated. A general discontent about the density of automobile traffic in the countryside is not a basis for action, but opposition to a particular motorway undergoing a planning application process can be. Here the content and conduct of environmental planning laws may play an important role: in attending a public meeting on the roadway, one may find that pre-articulate consciousness has been brought into the open, and that the language of the law identifies issues more clearly.

Blaming: once an issue has been clearly named, then the question is whether the person is able to identify a particular culprit or authority which bears responsibility for the concern in question. This second stage is blaming. Again, the applicable law may provide an important guide if the duties of both private actors and government departments are clearly delineated. Although legal literacy may be helpful at this stage, the blame can be expressed in moral rather than legal terms.

Claiming: if a problem has been named and blame attributed to either a private entity or a government official, then the stage of staking a formal legal claim becomes possible. The transformation of a grievance from blame to claim presents the most formidable challenges because it entails formal involvement with the legal system. At this point the grievance must be construed in a legal vocabulary, normally with the aid of a lawyer. The barriers of time and cost feature prominently.

Winning: once a claim is lodged, the litigation in many countries can take years. The cost of lawyer's fees and the opportunity costs for the litigant can be prohibitive for middle class people, and simply impossible to meet for the poor. The independence of the judiciary and the fairness of legal procedures can also be fatal at this stage, even if the case is well-founded.

Enforcing: even when a courtroom victory has been secured, it may not be enforceable. The High Court of Bangalore, for example, had 11,500 contempt of court proceedings before it in 1996 – most relating to the failure of government officers to enforce court orders.

Living in illegality

In circumstances of rapid urbanisation and inadequate urban housing, the poor usually build their homes either on illegally occupied land or in violation of local planning regulations. In Alexandria in Egypt, for example, it is estimated that 68 per cent of the housing stock is built informally, either in squatter settlements or in violation of zoning regulations.²⁷ Thus new migrants to the city begin their urban lives as outlaws, and remain vulnerable to police intervention (or exploitation or bribe taking) for the duration of their stay. And just as accommodation is often in violation of the law, so too is most economic activity in the informal sector. In Zambia, a survey of the legislation applicable to urban economic life found that most self-employment among the urban poor – including vegetable sellers, builders, tailors, and traders – was outlawed under colonial legislation (Mulwila and Mushota 1981). Because both accommodation and employment often take place on roads, abandoned lots, and other forms of public land, the urban poor are also vulnerable to the laws prohibiting “public nuisance” or vagrancy. In common law countries, the offence of public nuisance can result in a conviction on the basis of little evidence, and gives the police wide latitude to use their discretion in arresting or harassing the poor.²⁸ In rural areas, similar laws often restrict access to common property resources such the use of rivers for washing and access to forest resources that are essential to the daily lives of those living on the economic margin. In these ways and others, the poor are forced by their economic circumstances to violate the laws. Living in a permanent condition of illegality, they are not likely to draw attention to the fact by voluntarily seeking out contact with the legal system.

Mistrust of the law

It is not uncommon for the poor to be wary of the official legal system. An essential component of this wariness is a lack of respect founded on the experience of illegality. The view is commonly expressed among the urban poor that ‘there must be something wrong with a law or code if it is broken daily by so many people as they go about their daily lives’ (Hardoy and Satterthwaite 1989: 31). The view that the law does not serve the real needs of the poor, but serves some other set of interests or ideals is difficult to refute in such circumstances. For the most part, the poor ‘see the law as a tool which the wealthy and well-connected can use against them’ (Hardoy and Satterthwaite 1989: 16, drawing on McAuslan 1987).

Alien idioms of the law

To the poor, the official law is often expressed in a foreign language. This is true in two senses. First, it is often literally true – English is the official language of the law in India, Kenya, and the Solomon Islands, even though only a small proportion of the population can speak English in these jurisdictions. Similarly, the language of the law is French in Niger and Portuguese in Mozambique. That the law is transacted in a

²⁷ ‘The Legal and Illegal City’ in Hardoy and Satterthwaite (1989: 25–26), citing a 1987 survey.

²⁸ In colonial Bengal, public nuisance prosecutions accounted for up to 46 per cent of all criminal convictions, and appear to have been used most intensively against low-caste and migrant groups (Anderson 1992). The same legal principles and basic systems of police organisation are in place in present-day Bangladesh and West Bengal.

foreign language, and often a language associated with the injustice of colonial rule, is doubly alienating for those who have no access to it. The second sense in which the law is foreign is that its most fundamental concepts, including notions of identity and causation, are commonly at odds with the frame of reference used by local communities.²⁹

Formalities and powerlessness

Formality of language and precision of ritual are two of the devices by which legal systems are cloaked in legitimacy. Like medical training, legal training introduces the student to a new vocabulary that can be used to describe the ordinary world in new terms. This use of formal language seldom aids either analysis or clarity, although it may play an important role in allowing the legal profession to charge high fees and claim a monopoly of competence in the law.³⁰

5.2 Access to legal information and legal literacy

In some countries, the lack of a comprehensive and timely system for publishing laws has important consequences for the rule of law. Where the absence of private-sector law publishing is compounded by outdated and poor-quality official publication, knowledge of the law can depend largely upon personal contacts and proximity to the capital city, even for lawyers and judges. Where even judges cannot get access to current legal materials, it is unrealistic to expect lawyers or their clients to have an understanding of their applicable legal rights. Many developing countries lack the academic resources to produce legal textbooks – which play an important role in distilling, explaining, and commenting upon official law – even for judges. So it is not uncommon for judges in some Commonwealth countries to rely upon textbooks commenting upon English law even though the substance of the rules may be very different.

5.3 Inadequate legal representation

In most legal systems, private citizens are not even allowed to appear in court to present their own case – a monopoly of competence is bestowed on the legal profession. Legal rules thus require litigants to use lawyers, but lawyers are often in short supply. An extreme example is Chad, where roughly 100 judges and only seven practising lawyers serve six million people (Webb 1996: 50). In such circumstances, it is not surprising to see lawyers develop practices focusing on lucrative commercial or government work rather than representing the poor against abusive state powers.

5.4 Justice delayed is justice denied

It has been emphasised for robust private-sector development, businesses require courts to provide an efficient service – that is, where ‘cases are heard promptly, decisions are broadly predictable, and likely to be enforced’ (Webb 1996: 60). These requirements are not restricted to business; the poor need the same

²⁹ The tension between official law and popular concepts of justice has been widely described. See for example, Anderson and Guha (1998), Geertz (1983), Khare (1972), Burman and Harrell-Bond (1979).

³⁰ See generally Ghai, Luckham and Snyder (1987: 649–724).

thing of the courts, only more urgently. While businesses litigate matters which tend to affect levels of profit and loss, the poor tend to reach court in cases where they are at risk of destitution – both because their margins for error are smaller and because the most fundamental components of livelihood are at stake.

In such circumstances, delay can be deadly. Unfortunately, most court systems in developing countries are very slow. A 1986 study of tort litigation in the state of Maharashtra, for example, showed that the time between the filing suit and receiving final judgement was 17.4 years on average. But reforms to speed up court processes are possible. In Singapore, reforms of the Supreme Court in the early 1990s reduced the backlog of cases by 90 per cent in under two years, and reduced the average waiting period before hearing from five years to four months (Webb 1996: 60).

6 Impact of democratisation and human rights

The good governance agenda tends to link democracy, respect for human rights, and responsive judicial processes as inter-locking and mutually supporting phenomena. However, virtual circles need to be demonstrated rather than simply assumed, so it is important to ask: *Does democratisation significantly affect the capacity of the poor to use the judicial process for purposes of protection and redress?* It may be useful to break down this general question into two ancillary questions – first, *has democratisation been associated with notable improvement in the responsiveness of the judicial system?* And second, *has democratisation been associated with greater access to legal gateways for the poor?* These questions immediately run afoul of the problem of defining democratisation, and therefore democracy. According to certain broad definitions, democracy includes the separation of powers, judicial independence, and effective access to justice – some of the main preconditions for the poor to use judicial processes for protection and redress. On such a broad definition, the dependent and independent variables are conflated, and the question loses analytical utility. If, however, we assume with most of the literature that democratisation consists mainly in competitive elections of political leaders, and that it also embraces notions of political equality and majority rule, then it may be possible to pose the question more sensibly. The question can be approached in three ways: exploring logical causal links, seeking systematic evidence from empirical studies, and reasoning from anecdotal evidence.

First, it can be argued that there are logical connections between democratisation and judicial responsiveness to the poor on the one hand, and the ability of the poor to use judicial institutions on the other hand. Anti-democratic and authoritarian governments that feature a strong executive are not likely to tolerate an independent judicial branch that might fetter executive power. Perhaps more importantly, a repressive government that does not respond to political pressure is unlikely to create the conditions in which law-movements will thrive. That said, there is no logical reason to suggest that elections *per se* must be conducive to a more responsive judiciary and greater access to justice.

A second approach is to rely upon empirical studies that have sought to quantify democracy and access to justice over time. While a number of studies have sought correlations between democracy and

human rights, there do not appear to be any empirical studies of democracy and access to justice. I was not able to find any cross-jurisdictional studies of judicial behaviour³¹ or court use that related to levels of democratisation. The studies of democracy and personal integrity rights may be suggestive, however. In the three main studies which examine security rights (the right to life, freedom from torture, and personal liberty were studied in common), it was found that democracy is a fairly strong predictor of personal integrity abuses in that greater democracy correlates with decreased incidence of abuses (Henderson 1991; Poe and Tate 1994; and Milner, Poe and Leblang 1999). Yet the most carefully conducted study found that the negative correlation between electoral democracy and personal security abuses was significantly stronger among OECD states (-0.4297) than among non-OECD states (-0.2227) (Milner, Poe and Leblang 1999: 428–9).³² It should be noted that number of researchers have cautioned against the methodological difficulties inherent in such studies, and that the relationship between democracy and basic human rights may not be linear (Fein 1995), and may involve complex social and economic factors which inevitably require qualitative description as well as statistical analysis (Arat 1991).

Turning to the third approach, it is possible to glean some insight from anecdotal studies of democratisation and access to judicial remedy. South Africa, which is an interesting example of a state which had a strong ideological adherence to the rule of law during the apartheid era, but the rule of law was not enough since the laws which were applied were explicitly discriminatory. During this period, the courts played a distinct but limited role in controlling the excesses of the executive. With democratisation the end of apartheid policies, the existing formal rule of law has been grafted onto a genuine commitment to racial equality and new constitutional rights. New judges were appointed, including a new Constitutional Court with a strong commitment to racial equality, human rights and pro-poor policies. Although levels of criminal violence remain very high, there is strong evidence suggesting that police violence has declined, and the decisions of the courts are distinctly more responsive to criticisms of state authority and the needs of the poor. A second example is the state of South Korea, where the democratisation of recent years has been associated with a new brand of judicial review. The courts have played a particularly important role in the area of labour rights, affirming freedom of association and the rights of workers to protection from police violence.

Has the incorporation of human rights concepts into law increased the responsiveness of the judicial system? There is a logical connection between the use of human rights categories and enhanced ability of litigants and the courts to constrain abuses by officials and political leaders. As many authors have documented, the starting premise of civil rights is the classical liberal idea that the individual must be protected from excessive of state power. For example, the right to personal liberty, enforced in many countries through the writ of *habeas corpus*, is mainly used precisely in those circumstances where the executive is detaining an individual without legal justification. *Habeas corpus* proceedings are usually quick

³¹ A small number of studies have attempted to quantify judicial independence, but they are not correlated with democracy, and in any case present serious methodological problems (see Larkins 1996).

³² The same study found a much stronger correlation (0.4609) between democracy and the fulfilment of basic needs as measured through the Physical Quality of Life Index.

and relatively inexpensive (although still beyond the grasp of the poor unless legal aid is available or a lawyer agrees to act in a *pro bono* capacity) – simply allowing a court to order the executive to produce the prisoner before the court and give a sound justification for his or her detention. Such actions have been highly effective in jurisdictions as diverse as Zimbabwe, Argentina, and the Solomon Islands. In India during the 1975–76 Emergency, Mrs Gandhi attempted to suspend the right to habeas corpus, but the Supreme Court refused to suspend it and an important protection against political abuse was preserved.

It is clear that for human rights to be protected, and to be effective in constraining state action, it is not sufficient that they be bestowed from above by the state. Even with a sympathetic judiciary, human and constitutional rights will only be “parchment barriers” unless litigants in real conflicts actively invoke them. In other words, rights also need to be seized from below by active individuals and groups in civil society. Some analysts have used the term “rights revolutions” to refer to patterns of governance in which constitutional or human rights become an important vehicle for political struggle on the part of groups seeking more egalitarian outcomes. The only comparative study of rights revolutions (Epp 1996) concludes that such revolutions only occur when there is an active and well-resourced movement in civil society seeking to use rights for pro-poor ends.

The vocabulary of rights can also be a powerful tool at the political level. It is arguably the case that the language of rights is particularly good at crystallising popular understanding and mobilising political movements. Rights are thus not only standards in the sense of measurable calibrations of political behaviour, they are also standards in the sense that a standard-bearer would carry a flag into battle. That is, a rights argument can provide a focus for political action, providing a language to give voice to the grievances of the poor, but also cloaking the claims of the poor in a state-legitimated vocabulary (cf. Houtzager 2001 on the relationship between land reform legislation and political mobilisation of the poor).

This can also create linkages between litigation strategies and other campaigning strategies. For example, environmental campaigns in various countries have seized on the idea of the human right to a clean, healthy and protected environment as a campaigning tool. The campaign for environmental rights has two components: a legal component pursued through constitutional reform and litigation, and a political component pursued through demonstrations, media campaigns, and environmental education. The two movements – legal and political – reinforce each other and contribute to more effective strategies for change.

7 Conclusion: some reforms and strategies

How can judicial processes be used more effectively to provide protection and redress against abuse of power by political leaders, market actors, and community notables? There are a number of sound legal reforms that state agencies and civil society groups can pursue. The judiciary is an essentially reactive institution, responding to the demands of litigants and changes in legislation occur in response to political demands. Hence the suggestions below are aimed at groups in both the state and civil society. The reforms can be grouped in three broad categories: (1) eliminating laws with a distinctly anti-poor component, (2) reforming legal procedures to create greater access for individuals and NGOs acting in the public interest, and (3) reduce legal technicalities and simplify legal language.

While it may not be possible to generate either academic or political consensus on which reform policies are pro-poor, it is a relatively straightforward task to identify ones that are clearly anti-poor. This is true of many statutes, which clearly have anti-poor content or implications (see Box 4.2). Yet few governments (or donors) devote the skill and resources required to identify anti-poor laws and to develop proposals for their revision. The point is essential, and is an easy place to start. There is an analogy to be drawn with environmental protection: the World Bank emphasised that a top priority for the environment is to eliminate those state activities (such as pro-pollution subsidies) which are causing environmental harm (World Bank 1992). After these are eliminated, one may proceed to the more difficult task of developing policies to protect the environment (such as Pigouvian taxes). A similar argument can be made concerning legal reforms: first eliminate those laws which are clearly anti-poor, and then go on to develop laws that may be pro-poor (but also may be subject to more political debate).

There are numerous and diverse types of reforms of legal procedures that would create greater access to legal remedies. Where the interests of particular groups are at stake, reforms that facilitate public interest and class action litigation can contribute. More generally, liberalised laws of standing, legal literacy, using international standards in national courts, judicial training and support, and support for law-movements all have positive effects on access.

Finally, civil society can be incorporated into the enforcement process of judicial decisions. Reputation is a powerful tool for accountability. Reputation is a form of “symbolic capital”³³ that has real economic value as an asset, and which is not only useful to secure cheap loans and political favours, but is often an essential precondition for securing public position. It is therefore possible to mobilise systems that put pressure on reputation. The media and NGOs, for example, can be mobilised to monitor the implementation or enforcement of judicial decisions.

The legal reforms and strategies discussed above can provide a point of departure for state and society-led efforts to enhance the ability of the poor to access the justice system. It is access to justice that will enable the poor to claim constitutionally guaranteed rights and to move out of a context in which diverse forms of illegality that contribute to the reproduction of poverty defined in its broadest terms.

³³ The term is derived from Bourdieu (1977: 177–81), who notes that peasants can rely on accumulations of honour and prestige to secure loans or food during economic hardship.

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Bibliographic Note

Box 3.1: Lawlessness contributes to poverty

The examples in Box 3.1 are derived as follows: Tanzania (Doriye 1992: 99–100), Bihar (*Rudul Sah v State of Bihar* AIR 1983 SC 1086), Johannesburg (personal communication, Essop Patel), Lahore (personal communication, Afzal Mufti), Ecuador (Fabra 1996).

Box 3.2: Judicial supervision of development – the national level

For a comparative analysis of discretion in development projects see Booth (1996). The *ejidos* example is taken from Jones (1998). On India's enforcement of the Directive Principles of State Policy, see *Himachal Pradesh v Umed Ram* AIR 1986 SC 847 [roads], *Unni Krishnan v Andhra Pradesh* (1993) 1 SCC 645 [right to education], *M.C. Mehta v Union of India* AIR 1988 SC 1037, *M.C. Mehta v Union of India* AIR 1988 SC 1115 [Ganga pollution], and *Randhir v Union of India* AIR 1982 SC 879 [equal pay].

Box 4.1: Law-movements

On law-movements generally, see Lev (1978, but also 1992, 1993).

On the history of legal education in Africa, see Shivji (1987) and Ghai (1987). Weber (1922/1968), Tigar and Levy (1978), and Berman (1983) describe the role of natural law theories in European law-movements in different ways. References for other topics include: liberation theology (Boff 1986), the role of Islamic ideology in Pakistan's public interest litigation (Lau 1996; *Benazir Bhutto v The Federation of Pakistan, Akbar Ali v The State*), and *ubuntu* in South Africa (*State v Makwanyane*, Mokgoro 1999).

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Akbar Ali v The State 1991 SCMR 2114

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