THE RULE OF LAW ENTERPRISE – TOWARDS A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMICS

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CSGR Working Paper No. 164/05

May 2005

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ABSTRACT

For nearly two decades, international organisations and bilateral donors agencies have been involved in the promotion and implementation of legal and judicial reform projects in developing and transition countries. This paper refers to this process as the rule of law enterprise (RLE). It identifies the ambiguities and misconceptions of the RLE and asks why there has been so little interaction between those involved in the implementation of legal and judicial reform and academics with knowledge and experience on this topic. After identifying the theoretical and practical obstacles to a fruitful dialogue the paper concludes that such a dialogue could take place, provided that academics – political scientists and lawyers – and practitioners adjust their respective approaches.

KEYWORDS: governance, rule of law, judicial reform, law and development, rights

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INTRODUCTION

In recent years the World Bank and regional development banks (Asian Development Bank, the Inter-American Development Bank and the European Bank for Reconstruction and Development), along with bilateral donor agencies and international agencies such as the European Union and the United Nations Development Programme (UNDP), have become involved in the promotion and implementation of legal and judicial reform projects in developing and transition countries. This paper refers to this process as the rule of law enterprise (RLE) and refers generally to its promoters as international financial institutions (IFIs).

> Today the RLE occupies a prominent place on the development agenda. The IFIs regard the rule of law as indispensable for achieving good government and ensuring the protection of international human rights. Initially, some governments in developing countries were reluctant to embrace it. However, their attitude has changed. Tough conditionalities attached to international loans and generous bilateral aid packages soon persuaded them that improvements in the rule of law were indeed a top development priority. Moreover, as the framework of international economic regulation matured, governments became increasingly aware that, unless they adapted their legal systems to the demands of globalization, their position within the world economy would deteriorate. As a consequence, today virtually every government in developing and transition countries is involved in one or more internationally sponsored projects designed to strengthen their legal systems and institutions. Participation in rule of law projects, especially those designed to combat political corruption, gives governments a much-coveted aura of respectability among international agencies and bilateral donors.

The prominence of rule of law projects is a new departure in the area of development cooperation. Until recently the World Bank, as well as other multilateral banks, had no interest in it. They regarded the rule of law either as an unproblematic technical tool that could be safely ignored or as a controversial political artefact that should be kept away from contaminating development projects. Today, however, they regard law as a magic wand that promises to resolve virtually every conceivable economic and social problem. Despite the prominent place that law plays in current development thinking, legal academics and political scientists with knowledge of and experience in developing countries have played virtually no role in the RLE. Instead, the RLE appears to have been intellectually nurtured almost exclusively by economists of a neo-liberal persuasion. The

exclusion from the RLE of legal academics is not altogether surprising. After all legal, academics with expertise in development are often hostile towards market-based approaches, are generally excessively critical, rarely agree with each other and their work is often plagued by incomprehensible jargon. The exclusion of experts on political development is not surprising either, since, until recently, these scholars did not regard law as having any relevance to the development process.

There is, of course, no shortage of legal and political commentary on the RLE. Yet, this literature is either excessively negative or, if constructive somewhat narrow. Radical critics regard the RLE as part of a wider scheme associated with the much-maligned policies of structural adjustment and the so-called Washington consensus (Fitzpatrick 2001: 212-215, Santos 2002: 335-352, Tshuma 2000). There is truth in this view. The process of economic globalization undoubtedly provided the impulse for the RLE and the World Bank and the International Monetary Fund have played a major role in steering this process. This critique, however, is largely negative, as it offers no clear indication as to how law and legal institutions can be made to contribute to social and economic development. Absent from this critique is any attempt to reflect on the practical lessons that emerge from the implementation of the RLE. Observers with a practical interest in the RLE have produced useful studies and commentaries. So far, however, their work has either been partial and incomplete (Carrothers 2003, Chodosh 2002, Dezalay and Garth 2002, Faundez 1997, Faundez 2001, Garth 2002, Golub 2003, Hammergren 2002, Jensen 2003, Upham 2002, Nagle 2000) or not critical enough (Biebesheimer and Payne 2001, Dakolias 1995).

A dialogue between RLE practitioners and academics with experience in development is urgently needed. Despite its many shortcomings, the RLE is an attempt to respond to developments associated with the process of economic globalization, the spread of democracy and the enhanced authority of international human rights. As such, the RLE is part of a larger process that is redefining the relationship between states and citizens, the nature and function of governments and the pattern of integration of states within regional and global institutions. Since we all have a stake in this process, the RLE ought to be taken seriously. Unfortunately, there is little evidence that a dialogue between RLE practitioners and academics with expertise in developing countries is forthcoming. Moreover, because RLE practitioners and its academic critics refuse fully to confront the political implications of legal and judicial reform, it is unlikely that a dialogue, were it to take place, would yield a fruitful outcome. Indeed, as this paper argues, both RLE practitioners and its academic counterparts are trapped in a conceptual framework that blurs their understanding of law and social change. The objective of this paper is thus to identify the obstacles to a dialogue and to suggest how such a dialogue could be promoted. The first section briefly traces the evolution of the RLE, identifies some its major

problems and explains why RLE practitioners are reluctant to engage in a dialogue with academics. The second section examines the response of academic lawyers and political scientists to legal and judicial reform and argues that, on the whole, they have little to offer as neither their approach nor their methodology significantly departs from that employed by RLE practitioners. But the prospects of a fruitful dialogue are not altogether bleak, as evidenced by the recent work of Guillermo O'Donnell, a leading specialist in political development and Latin American politics. Thus, the third section of this paper critically examines O'Donnell's views on the rule of law and democracy and concludes that, despite some problems, they provide a useful starting point for initiating a fruitful dialogue between RLE practitioners and academics with experience in political development.

I

RLE: AMBIGUITIES AND MISCONCEPTIONS

Incessant Growth

During its relatively short life, the RLE has undergone an astonishing transformation. Initially, the World Bank was concerned with the drafting of laws in economic and commercial law areas and with the reform of courts. It was conceived as a technical enterprise that could be implemented without paying close attention to underlying political and economic factors. The reform process concentrated mainly on improving efficiency by updating and modernising the infrastructure of courts, introducing modern systems of case management and court administration and providing training for judges and court personnel.

It soon became obvious that this approach had serious shortcomings. As attempts to reform courts presupposed that courts were independent, RLE practitioners had to look beyond the judicial context to issues of constitutional engineering and institutions generally. The wider focus on institutions led to the introduction of the notion of governance. A perusal of the World Development Report, published annually by the World Bank, shows that between 1997 and 2002/3 the number of items identified as important components of governance has grown at a rapid pace. Thus, while in 1997 the WDR identified 45 items relevant to 'good governance', in 1999 the number of items had increased to 66 and in 2002/3 to 116 (Grindle 2002). Since virtually every aspect of governance has a legal dimension, the expansion of the governance agenda brought about a corresponding expansion of the RLE agenda. Thus, today the scope of the RLE agenda is as broad – and vague - as the governance agenda. Indeed, it is difficult to think of a legal topic excluded from the RLE. While the work of the World Bank continues to revolve largely around judicial reform, other international organizations and bilateral donors have ventured into areas such as criminal law, access to justice, policing, administrative law and informal justice systems (UNDP 1997).

The expansion of the agenda of the RLE has not, however, improved the quality of the

delivery of their projects, nor has it made life easier for practitioners involved in the design, implementation and delivery of these projects. The ever-expanding agenda of the RLE raises innumerable practical problems. Where should the reform process start? How should priorities be identified? What is the correct sequencing of policies in the reform process? What should be the balance between loans and technical assistance? Should all projects aim at 'comprehensive' reform or should the objectives of the reform process be more limited? These are difficult questions, and, in order properly to address them, it is necessary to have a clear understanding of the strategy underlying the RLE. Questions about strategy, however, are the Achilles' heel of the RLE.

The Strategy

Initially, the strategic objectives of the RLE were clear. As set out in some of the key World Bank documents, the RLE was designed to establish legal frameworks friendly to market reforms (World Bank 1992, World Bank 1995). Accordingly, the formula proposed was simple: general laws that were properly drafted and fairly enforced would yield instant economic benefits. The simplicity of this formula is perhaps the reason why, in the early days of the RLE, its practitioners saw no need to enter into a dialogue with academics with experience of legal reform in developing countries. Moreover the simplicity of the proposed formula also led to unrealistic expectations and to intense optimism that observers with experience in developing countries probably regarded as both arrogant and naïve.

The continuous expansion of the RLE prompted senior World Bank officials to re-consider its strategy. As part of this process, the Bank organised a major international conference in Washington in 2000 (Van Puymbroeck 2001). The aim was to open up a dialogue with academics, politicians and representatives of NGOs to take stock of the lessons learned during the preceding decade and to consider the possibility of formulating a strategy more suited to the expanded RLE agenda. The much-awaited strategy did not, however, materialise. Instead, the Bank issued a document that largely restates the old 'market friendly' approach (World Bank 2003). Thus, although the RLE has expanded beyond recognition, its conceptual foundations have remained the same. It is debatable whether the narrow conceptual framework of the RLE will be capable of

containing its large and ever-expanding agenda.

Muddling Through

> It is unlikely that practitioners will lose sleep over the tension identified above between the RLE's conceptual framework and its broad agenda. Yet, whether or not they are interested in theory, the expansion of the RLE is creating unexpected problems. Indeed, officials involved in designing and implementing RLE projects are becoming increasingly aware that there are no 'quick fixes' in the area of legal and judicial reform (Hammergren 2003). Moreover, recipient countries also have mixed feelings about the enterprise. Some complain that the agencies are far too intrusive and prescriptive, while others (often the same officials) claim that international agencies do not offer adequate technical support (Angell and Faundez 2005). Promoters of the RLE enterprise have responded by making small adjustment to their projects, but, so far, they have not significantly changed their approach or revised their methodology.

Given the sudden expansion of the RLE, it is not surprising that officials responsible for the implementation of these programmes find the process difficult and frustrating. They soon become aware that legal systems do not exist in isolation and realise that tinkering with one of its components brings about unexpected responses and resistance from other parts of the system. They also soon realise that legal systems are part of wider mechanisms of political and economic domination, and, that vested interests cannot be ignored or wished away. These are mammoth problems. Officials in the operations departments of international organizations, bilateral donor agencies and NGOs cannot be expected to resolve them. Under these conditions, the patience and dedication of these officials, as well as their often-excellent achievements, are remarkable (Biebesheimer and Payne 2001).

In practical terms, the response to the problems identified above has been to press ahead in the hope that practice and experience will yield the right answer. This pragmatic response has the advantage that it is seemingly flexible. Indeed, in recent years, RLE practitioners have become increasingly willing publicly to admit that not all is well with legal and judicial reform. Thus the phrase 'lessons learned' is often found in official publications on the RLE (World Bank 2004: 12-14). But what is described as lessons learned is so general that it is unclear whether this acknowledgement can make any difference. Thus, among the lessons that supposedly have been learned are the following: that the process of legal and institutional reform is slow and that one size does not fit all.

It is difficult to believe that Bank officials were not aware, prior to launching the RLE, that there are no quick fixes in the area of institutional reform. It is also difficult to believe that promoters of the RLE genuinely believed that one size fits all. It must be conceded, however, that the current response that perhaps one size does *not* fit all is attractive as it suggests that RLE practitioners are indeed learning lessons and that, in future, legal and judicial reform projects will be carefully tailored to fit the needs of recipient countries. There is, however, little evidence that those in charge of the design and implementation of rule of law projects have been given the time and resources to do so. In any event, the problem is not whether one size fits all. Indeed, in some areas of legal practice, it could well be that one size does fit a variety of different contexts. The process of legal harmonisation, which under the aegis of globalization has acquired new impetus, is pervasive. Thus, in areas such as environmental regulation, competition policy or central banking, it does seem that one size fits all. Moreover, the growth of the human rights movement has extended the process of harmonization to areas of the law that are not directly related to the management of the economy. Thus, the issue is not whether one size fits all, but about understanding the impact of institutional and legal reform on legal and political systems. Unless this impact is adequately considered, the phrase 'lessons learned' is simply another way of saying 'we will muddle through' and hope for the best. This approach undoubtedly has some appeal among common law lawyers (Feeley and Rubin 1998). I wonder, however, how governments would respond if they became aware that RLE projects, some of which they purchase at considerable expense, are not technically safe or reliable.

The Vanishing Development Objective

While RLE practitioners muddle through in the expectation that experience will help them find answers to the problems of implementation, the strategic question as to why they are involved in legal and institutional reform does not go away. This question is not raised by the anti globalization movement, but by mainstream economists, multilateral bank evaluation offices and government agencies. While in this area it is difficult to disentangle genuine intellectual and policy disagreements from bureaucratic turf wars, there is, undoubtedly, a current of opinion within multilateral

development banks that is beginning to question whether the RLE has any bearing on concrete development objectives (Meltzer Commission Report 2000, United States General Accounting Office 2001, World Bank 2002, Lerrick 2002). Accordingly, economists at some of these institutions are beginning to demand hard evidence that improvements in the legal system have a measurable impact on the process of economic growth. Since the evidence is not forthcoming, the tension between development economists and RLE practitioners is not likely to subside (Messick 1999).

It is ironic that some economists are now beginning to express frustration and disenchantment with the RLE. After all, the launching pad of the RLE was an economic theory that proclaimed the centrality of the market in social relations and called for a shift from old-fashioned development projects (dams, bridges and roads) to institutional infrastructure (law and good governance). Perhaps the concern of development economists reflects a deeper anxiety about the state of the sub-field of development economics (Ranis 2004). Apart from the pressure from economists, leading experts on law and economics also view the RLE with a certain amount of scepticism. Thus, for example, Richard Posner – one of the main exponents of the law and economic movement - has questioned whether comprehensive legal reform is necessary to bring about efficient economic outcomes (Posner 1998). Other academic observers have also expressed scepticism as to whether improvements in the law will necessarily yield better economic outcomes (Davis and Trebilcock 2001, Cross 2002). The various Asian economic miracles (tigers and dragons) are a reminder that perhaps the RLE, as presently conceived and implemented, is not likely to achieve either improved economic outcomes or improvements in the quality of governance (Pistor and Wellons 1999).

RLE practitioners can, of course, respond to this criticism. They can point out that their projects are relevant to economic development because law pervades every aspect of social life. But such a response merely underscores the ambiguity of the RLE.

Regime Change or Tinkering

As RLE practitioners continue to 'muddle through', external observers have good reasons to be puzzled. Indeed, from an external perspective, the RLE appears to oscillate between the seemingly innocuous goal of improving the physical and technological infrastructure of courts and the more ambitious task of carrying out a complete overhaul of legal systems – a task that comes dangerously close to the controversial notion of regime change (Faundez 2003). If the RLE merely seeks improvement in the design and delivery of legal services - such as, for example, simplifying tax laws, updating regulatory frameworks or improving the management of courts – it may be regarded as a technical operation that can be safely entrusted to lawyers and public administration specialists. If, on the other hand, the RLE seeks a more profound transformation of legal systems – as was the case in some of the former socialist countries and in developing countries affected by civil strife (East Timor, Rwanda, Guatemala) - then the technical aspects of law recede as political factors relating to regimes and constitutional arrangements acquire greater prominence.

> Perhaps promoters of the RLE believe that, by using the word 'governance', they can circumvent the ambiguity noted above. The choice of the word, governance, however, is odd since its meaning is imprecise. The Concise Oxford Dictionary defines governance, as "the act or manner of governing". So the word governance is helpful precisely because it is ambiguous. It helps to raise the profile of modest projects of legal reform while it conceals the complexity and intrusiveness of projects that seek more profound legal change. Since all RLE projects can be described as projects seeking 'improvements in governance' they all acquire a technical aura that is often not justified.

The political nature of much of the activity that falls under the umbrella of the RLE cannot, however, be easily ignored. The use of the word governance to describe these activities does not have the expected sanitising effects, nor does it remove the complexity, or the political implications, of many aspects of the process of legal and political reform. Moreover, as anyone

familiar with law knows, even innocuous changes to the legal system often have unanticipated social and political consequences.

A Methodological Shortcut

RLE practitioners, undoubtedly, are fully aware of the political implications of their activities. Yet, there are legal reasons that explain their reluctance to confront them. The old international financial institutions (World Bank and IMF), as well as the United Nations, are constrained by their charters from venturing into political areas. The post-war settlement that left the world divided into two opposing camps brought about respect for state sovereignty and, as a corollary, the prohibition to intervene in the internal affairs of states. While the principle of non-intervention was not widely respected, it did influence the way international economic organizations defined their mission. In order to reassure its members that involvement in matters concerning economic development was not political, the constitutional charters of the World Bank and its affiliates defined their mission as purely technical. Accordingly, concerns about law and legal institutions did not fall within the scope of their jurisdiction. This constitutional constraint explains why the World Bank has been unwilling to update its RLE strategy. If the new strategy were faithfully to reflect the whole gamut of activities that currently fall within the RLE, it would inevitably be dismissed on the ground that it is not 'market friendly'. It would also be challenged as inconsistent with the Bank's mission of promoting economic development.

This constraint has influenced the way RLE practitioners approach their work. They see it as primarily technical and exclusively legal. In terms of legal theory, I would characterise their response as a curious blend of legal formalism and legal instrumentalism. While legal formalism reassures RLE practitioners that legal systems are self-contained and can be changed without the contamination of politics; legal instrumentalism reassures them that once formal law is in place well trained judges and dynamic commercial lawyers will move the legal edifice in the right direction. Although this response is misguided, I fully understand why RLE practitioners embrace it. After all, officials working for IFIs have a job to do, and the tools in the lawyers' kit promise to deliver the desired results. These tools, however, are virtually all drawn from rules and legal institutions found in the legal systems of OECD

countries, especially the USA. In practice, however, their misguided belief in the virtues of legal formalism and in the capacity of lawyers and judges to bring about social change has transformed the imported rules and institutions into universal benchmarks. The blend of legal formalism and instrumentalism is a convenient methodological shortcut as it enables RLE practitioners to offer legal advice without having to go through the tedious, difficult and often unrewarding task of understanding the societies they purport to help. The World Bank, bilateral donors and even some NGOs working in the area of human rights welcome this methodological shortcut as it ensures the delivery of legal products that are standardised and familiar. In this way, 'due process', 'judicial review' and 'constitutionalism' acquire an aura that detaches them from their historical origins and transforms them into moral and political imperatives that are used to measure and evaluate the quality of governance and the efficiency of legal systems. Insofar as RLE practitioners continue to regard law as a merely technical artefact they have little to gain from entering into a dialogue with academics. Such a dialogue will either yield technical legal information they already know or raise political issues that they would rather avoid. Under these circumstances, a fruitful dialogue between RLE practitioners and academics is highly unlikely.

II

LAW AND POLITICAL DEVELOPMENT

Fear of Politics

Development agencies are not alone in their reluctance to confront the political implications of RLE. Academic lawyers with interest in the area of development have the same aversion towards politics. Indeed, fear of politics was one of the factors that brought about the demise of the US-based law and development movement of the 1960s and early 1970s (Gardner 1980). Inspired by the success of the civil rights movement in the United States, the distinguished academics who launched the law and development movement set out to improve the efficiency of legal systems in developing countries, in particular the mechanisms that facilitate the exercise of rights. Their expectation was that a modern and effective legal system would bring about political benefits and

greater social justice to the worst-off sections of the population. But law and development practitioners soon discovered that in the political and social terrain of countries as diverse as Brazil, Ghana, Colombia and Sri Lanka, legal reform would either be futile or, worse, would contribute towards consolidating and deepening the privileges of the ruling elites. Since law and development practitioners were unwilling to transform themselves into political scientists, they declared that the movement was terminally ill (Trubek and Galanter 1974, Trubek 2003, Merryman 1977). Its death was confirmed when funds from the US-Government dried up and prominent American foundations turned their attention to other urgent issues.

It is interesting to note, that while members of the law and development movement were expressing unease with the political dimension of legal change, more theoretically minded colleagues within their educational establishments were beginning to develop a critique of liberal legalism. This group eventually established the critical legal studies movement. Their work, though inspired by Roberto Unger's devastating critique of liberalism, concentrated almost exclusively on debunking the myths of the process of adjudication (Unger 1983). Their critique of adjudication naturally went hand in hand with a critique of rights. Their analysis led them to conclude that the promise of certainty and predictability implicit in liberal legalism was hollow. Law, seen largely as the outcome of the process of adjudication, was characterised as essentially indeterminate. 'Law is politics' is the phrase that - perhaps with some exaggeration - identifies the message underlying the Critical Legal Studies Movement (McCormick 1999).

Members of the Critical Legal Studies Movement did not have the intellectual inhibitions that characterised the law and development movement. Instead of scouting around for help from other disciplines, they developed their own theoretical position (Kennedy 1997). Yet, both the law and development movement and critical legal theorists share the same fear and distrust of politics. The law and development movement abandoned the field because they could not find a theory that offered a clear explanation about the link between legal and political processes. Critical legal theorists, for their part, 'trashed' liberal legalism because they regarded the process of adjudication as political, or as an area in which reason is displaced by arbitrary choice. Either way, they both reflect the deep-seated fear and scepticism that academic lawyers feel towards politics and political analysis.

Bringing Political Scientists Back In

If practitioners and academic lawyers are reluctant to explore the political implications of the RLE, it is only natural to seek enlightenment from political scientists. But this is not an area where most political scientists have expertise. Indeed, until recently, political scientists had no interest in law and legal institutions. Their focus of analysis was mainly on the political behaviour of groups and individuals, and they regarded the study of institutions as unscientific on the ground that it was either purely descriptive or excessively normative. As a consequence, the study of constitutionalism or the rule of law did not fall within their brief.

The disregard for law and legal institutions was also reflected in the approach of political scientists and economists working in the area of development studies. The development paradigm that prevailed during the 1960s and 1970s was based on the assumption that economic growth followed a pre-determined route, and each stage along the way was associated with a specific level of institutional development (Rostow 1960). This stage-by-stage approach to economic growth was complemented by Lipset's celebrated theory on the prerequisites of democracy (Lipset 1959). According to this theory, most developing countries were unlikely in the near future to meet the requirements of a democratic polity – understood as liberal democracy. Since the rule of law is regarded as a distinctive feature of advanced liberal democracies, it is not surprising that law and legal institutions were of no concern to scholars working in the field of political development. Indeed, their concern was mainly with stability and the containment of political mobilisation (Bermeo 1997). Thus, specialists in political development would not have favoured the extension of rights to subordinate groups, as this would have been seen as a threat to political stability (Huntington 1968, Huntington and Nelson 1976).

The collapse of the Soviet Union and the recent wave of democratization brought about renewed interest in the study of institutions. Scholars specialising in the study of democratic transitions could not fail to notice that law and legal institutions played a role in the establishment and consolidation of democratic regimes. They have thus begun to turn their attention towards RLE topics such as judicial independence, constitutionalism, systems of legal accountability and access to justice. This shift of focus by political scientists has generated substantial research output, some of which is extremely useful and insightful (Bill Chavez 2004, Eckstein and Wickham-Crowley 2003). On the whole, however, there is little evidence of a theoretical breakthrough. According to Guillermo O'Donnell, there are two reasons that explain the difficulties political scientist face when they attempt to engage with issues relating to the RLE. First, political scientists are not trained to observe the highly disaggregated qualitative data generated by the study of institutions. And secondly, political scientists do not have the required legal knowledge to understand how institutions work. O'Donnell is not optimistic about the prospects for overcoming these obstacles. In his view, "[I]n settings where career and promotion patterns place a prize on working on mainstream topics

and approaches, the transdisciplinary skills required by these phenomena and, at least for the time being, the difficulties in translating findings into solid and comparable data sets are a discouraging factor for this type of research" (O'Donnell 1999, 333-4). Perhaps this assessment is too bleak, but it does suggest that bringing political scientists into the RLE will not instantly resolve the ambiguities and misconceptions that have plagued this process from its inception nearly two decades ago.

There are, however, reasons, to be sceptic. The recent wave of democratization appears to be having a negative, unintended, effect on the study of politics in developing countries. This effect appears to stem from an interesting process of theoretical and methodological convergence: political scientists who study democracy in developing countries are using the same theories and methods of colleagues studying similar processes in well-established democracies. This convergence, prompted and nurtured by the pervasive influence of neoclassical economics on all the social sciences, has brought about a decline in area studies since specialisation in one region of the world, or a small group of countries, is no longer seen as cost effective. As Barbara Geddes in her excellent survey of the sub-field explains, scholars who concentrate exclusively in one area are hindered in theory testing because they know nothing, or very little, about countries in other regions (Geddes 2002). Conversely, it is now possible to become an expert on democratization in developing countries without having specialist knowledge of their history or political institutions.

The theoretical and methodological convergence noted by Geddes in the study of democratic processes is also evident in studies by political scientists on topics that relate to the RLE. Indeed, many of these scholars approach the study of legal systems in developing countries as if it were no different from that in developed countries. They thus tend to regard legal institutions in developed countries as models of best practice that have to be emulated by developing countries. As a consequence, these studies sidestep the complexity of the role of law in political processes and end up replicating the formalistic and instrumental approach of RLE practitioners. Absent from these studies is any concern about whether all or even any of the legal institutions they urge new democracies to embrace are appropriate. Thus, for example, a recent study on the impediments to judicial reform in Latin America opens up with the following statement:

> The rule of law is necessary for the political stabilization of liberal

> democracy. Only through the establishment of an enforceable, binding and predictable rule of law can countries in Latin America adopt the political rules required for the development of a strong competitive democracy. An independent judiciary is one of the core institutions necessary for the principle of separation of powers…Typically, judiciaries in Latin America are weak, over-politicised and heavily dependent on and subordinate to the executive branch. They often fail to act as effective mechanisms of political checks and controls (Buscaglia and Domingo 1997).

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The authors of this study then go on to show how Latin American judiciaries and legal systems fail to meet the requirements prescribed at the outset. Although academically interesting, it is doubtful whether such a study significantly enhances our intellectual and practical understanding of judiciaries. While the study is excellent in that it identifies the shortcomings of judiciaries in regard to international benchmarks, it does not ask why this is so. Indeed, the state of Latin American judiciaries, as depicted by the authors, is so calamitous that it would seem that any attempt at reform would be futile.

III

A DEMOCRATIC RULE OF LAW

Rediscovering Law

It is disappointing that political scientists who have embarked on the study of legal and judicial reform fail to reflect upon the wider theoretical implications of their work. A notable exception to this trend is Guillermo O'Donnell. After writing extensively on transitions to democracy, he has turned his attention to issues relating to the rule of law. Although his views on this topic are tentative, they are worth considering as they raise important issues that his colleagues have overlooked. In the interest of brevity I shall focus mainly on the argument that O'Donnell presents in two recent publications, "Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion"(O'Donnell 1999, hereafter Polyarchies) and "Why the Rule of Law

Matters"(O'Donnell 2004, hereafter Rule of Law). I will not consider his wider ideas about politics and economics, nor will I consider his valuable contribution to the study of democratic transitions. As a consequence, what follows is incomplete schematic and provisional. I trust, however, that it fairly represents his views on this topic.

The question that concerns O'Donnell is as difficult as it is important. It relates to the tension between political equality and the pervasive social and economic inequalities that prevail in most developing countries. How, asks O'Donnell, can new democracies in Latin America and other developing countries escape the destabilising effects of this tension? His answer is disarmingly simple: the new democratic regimes must take seriously the rule of law.

The suggestion that new democracies should take the rule of law seriously is, on the surface, persuasive. Indeed, the legal system and legal institutions of most developing countries are often weak and corrupt. Latin American countries, for example, have perfectly drafted constitutions and comprehensive legal codes that are technically adequate and cover virtually every conceivable eventuality. But since many do not fully, or fairly, enforce their constitutions or legal codes, the argument that law ought to be taken seriously seems compelling. Yet, the force of this argument depends on whether its premise is valid: that until now law in Latin America has been a decorative device devoid of social and economic content.

A close scrutiny of the evolution of legal and political systems in Latin America suggests that law has been a lot more than a decorative artefact While many of the rights enshrined in the constitution or legal codes are not enforced or applied fairly to all citizens, they are not dead letter or a mere formality. Legal rules define who participates in the political process, justify and legitimise the treatment of workers and, most importantly, provide a predictable framework to structure commercial transactions both locally and internationally. Legal systems play a crucial role in shaping social and political processes. The rules of the legal system, however, are not always universally and fairly applied. The law may be fair to members of the political and commercial elites, but tough and unforgiving towards those excluded from this circle. Legal systems, though imperfect, are not empty vessels detached from politics waiting to be filled with content. This analysis also applies to legal systems in other regions (Channock 1989, Dev 1965, Mamdani 1990**).**

O'Donnell is, of course, aware of the many shortcomings of legal systems in developing countries and regards these shortcomings as an impediment to the progress of democracy. His assessment of the performance of the new democracies in Latin America is gloomy and depressingly familiar (Polyarchies 312-313). In most of these countries the state bureaucracy does not respect the citizens, discrimination against women and minorities is rampant, ordinary people do not have

access to the judiciary and general lawlessness, especially in large cities, is the norm. This bleak diagnosis suggests that the unstable social and economic conditions prevailing in Latin American threatens to undermine democracy, thus raising the possibility of a return to populism or authoritarianism. According to O'Donnell, this outcome can be avoided if countries observe the rule of law. His suggestion is a major departure from the approach taken by political development specialists of the 1960s and early 1970s. Instead of regarding the rule of law as the outcome of successful policies of economic development, O'Donnell sees the rule of law as the means to sustaining democratic regimes and resolving social and economic inequalities.

Reviving Legal Formalism

> O'Donnell's notion of the rule of law is based on a list of formal attributes identified by Joseph Raz in an article appropriately entitled 'The Rule of Law and its Virtue' (Raz 1977). Raz identifies eight attributes associated with the rule of law: laws must be prospective, stable and general; the judiciary must be independent, principles of natural justice (due process) must be observed, courts should have review powers, they should be easily accessible and prosecutors should not have excessive discretion. Raz's list is not original and he does not present it as such. Most legal theorists would have no difficulties embracing it. Yet, I suspect that scholars who, from different perspectives, have studied the role of law in society would regard O'Donnell's embrace of this formalistic conception of the rule of law as somewhat disappointing. After all, the shortcomings of purely formal approaches to the study of law have been amply demonstrated in the work of scholars from widely different perspectives, including social theorists (Habermas 1996, Unger 1976), historians (Benton 2002, Tilly 1998), legal anthropologists (Geertz 1983, Mamdani 1996, Merry 2000, Nader 1990) and legal academics (Chanock 1985, Trubek 1972). The work of this diverse group of scholars shows that law is deeply embedded in social practices and that formalistic conceptions of the rule of law are not reliable guides to understanding the relationship between legal and political processes.

O'Donnell does not, of course, believe that compliance with the rule of law will instantly stabilise democracy and contribute towards resolving the tension between political equality and socio-economic inequality. Indeed, he acknowledges that rule by law (or mere legalism) often leads to deepen the tension identified above. Instead, what he suggests is that the rule of law is an indispensable component of democracy and, as such, what he proposes is not revival of formalism but greater awareness that democracy and the rule of law are complementary. Thus, the virtues attached to the rule of law are also virtues of the democratic process. He thus calls for the establishment of a genuinely democratic rule of law. According to him, a democratic rule of law has

three characteristics: "1) It upholds the political rights, freedoms and guarantees of a democratic regime; 2) it upholds the civil rights of the whole population; and 3) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts" (Rule of Law 36).

> The notion of a democratic rule of law is more overtly political than Raz's list of rule of law virtues, yet it is still formalistic. Indeed, it does not go beyond the traditional notion of constitutionalism as limited government (Sartori 1962). As such, it does not tell us how law can provide a platform to bring about both a reduction of socio-economic inequalities and a strengthening of political democracy. In order to understand O'Donnell's faith in the rule of law, it is necessary to bear in mind that he makes an important distinction between the nature of a country's political regime and the nature of its state. A democratic political regime (one where public authorities are selected by free and competitive elections) may obtain within a state that is far from democratic. This is indeed his complaint about the state of democracy in most Latin American countries today. He is thus critical of political scientists who focus exclusively on the nature of political regimes to determine whether a country is democratic. He correctly points out that, in order to determine whether a state is democratic, it is necessary to look closely at the way the legal system works. The legal system, according to O'Donnell, is an intermediate level that stands between the political regime and the socio-economic foundations of state and society. Understanding how this intermediate level works is also important because, according to O'Donnell, legal systems and institutions have a major impact upon the way traditional political institutions, such as parties, parliaments and congresses, work or fail to work (Polyarchy 315). But understanding the nature and impact of legal systems is not only of academic interest. It has practical importance because compliance with its precepts can bridge the gap between political equality and socio-economic inequality, thus contributing towards consolidating the quality of democracy.

O'Donnell thus calls upon political scientists to examine closely the way legal systems work and proposes a research agenda that is as comprehensive as that advocated by RLE practitioners. The research agenda is designed to answer questions that for many years have plagued lawyers and academics who study the role of law and society. Here follows a sample: Does the legal system extend homogeneously across the territory of the state? Does it apply uniformly across social classes? Does it contain effective mechanisms of accountability? Does it dispense justice fairly and with equal consideration and respect? Do the poor have effective access to justice? (Rule of Law 44.)

If political scientists and other social scientists were seriously to carry out O'Donnell's

research agenda, they would greatly contribute to enlightening RLE practitioners. Yet, however valuable O'Donnell's research agenda may be, it does not tell us how compliance with the rule of law can achieve the social and economic transformations required to strengthen and enhance the quality of democracy.

Rights and Political Regimes

> O'Donnell's confidence in the rule of law stems from his conception about rights. He notes that in old democracies or as he calls them elsewhere, "the originating countries" (O'Donnell 2001), political rights were extended to citizens only after civil rights had been extensively recognised. Moreover, in those same countries, the recognition of social rights occurred at a much later stage (Polyarchies 309). By contrast, today, new democracies in developing countries recognise the political equality of citizens, even though civil and social rights are not widely respected. But these democracies do, however, formally recognise that civil rights of a universal character attach to individuals irrespective of their social position. According to O'Donnell these formal rights ought not to be lightly dismissed since "when conquered and exercised, they provide a valuable foundation for struggling for more specific and substantive rights" (Polyarchies, 323). He underscores the political importance of the rights of legal subject by pointing out that the close relationship between legal rights and the political rights of citizens: "the formal rights and obligations attached by polyarchy to political citizenship are a subset of the rights and obligations attached to a legal person" (Polyarchies, 308). By this he means that the exercise of political rights by citizens presupposes that they already enjoy rights such as the right of association and free speech, which are also civil rights. He thus refers to the rights enjoyed by members of these new polyarchies as rights of civil citizenship.

O'Donnell's argument about the intimate relationship between political and civil rights is important, but, unfortunately, somewhat nebulous. It would have been helpful had he expanded his theoretical and historical analysis on this point. In any event, there is little doubt that O'Donnell, while acknowledging the importance of formal rights, does not regard rights as empty shells. He regards rights as the product of social and political struggles. Law, under his conception, is not a mere technique for ordering social relations, but "a dynamic condensation of power relations" (Polyarchies 323). The question that arises, however, is whether and how this dynamic historical conception about the evolution of rights relates to his conception of democracy. It is at this point that O'Donnell's theoretical analysis becomes problematic.

O'Donnell endorses a minimalist view of democracy. A country is democratic if it holds regular

competitive elections, citizens enjoy freedom of expression, including a free press, and can join and create organizations, including political parties (Polyarchies 394). He explicitly rejects a broader or substantive view of democracy on the ground that it often leads to or conceals populist or authoritarian objectives. Indeed, he attributes the legacy of dictatorship in Latin America during the 1960s and 1970s precisely to these unrealistic conceptions about the nature of democracy. Thus not surprisingly, elsewhere, he describes his conception of democracy as 'realistic (O'Donnell 2001).

How does O'Donnell's dynamic and historical conception of rights relate to its 'realistic' conception of democracy? Since O'Donnell's conception of democracy closely resembles that of Joseph Schumpeter's, we can assume that this is a democracy in which the scope of politics is limited and hence, political participation is largely confined to the ballot box (Schumpeter 1943: 269-283). Citizens are not encouraged to make use of political channels to demand social and economic change as this would pollute and destabilise the political regime. If this is so, then how can the tension that O'Donnell rightly identifies between political equality, on the one hand, and social and economic inequality on the other, be resolved? One possible answer is that individuals in their capacity as legal subjects (not as citizens) ought to pursue improvements in their social and economic status through the deployment of rights in the private sphere – that is, the market. Under this conception, the rule of law, acting as a neutral framework that is not committed to substantive outcomes, provides the tools (formal rights and a strong judiciary) that enable the political system to divert economic and social demands of its citizens away from political channels and into the more tranquil framework of private law and the courts. This view about the operation of the rule of law complements and reinforces a conception of democracy that severely restricts the scope of political participation. Neither Huntington nor Hayek would disagree with it. Huntington would endorse it because it responds to his concern about the excesses of political participation (Huntington 1968). Hayek would endorse it because he did not believe governments should seek to achieve social justice since any such attempt would interfere with efficient market outcomes, lead to an inordinate increase of state power and end up by undermining democracy (Hayek 1976).

Given that O' Donnell regards the struggle over the extension of rights as a dynamic historical struggle, it is unlikely that he would endorse the implications resulting from the view that the transformation of formal – civil and social – rights can take place solely, or mainly, through the courts. But, if the struggle to transform formal rights into substantive rights is acknowledged as political, it is difficult to see how it can be reconciled with his formal and procedural conception about democracy. The demands for the full extension of civil and social rights to citizens

presuppose an increase in political participation and greater public concern for substantive equality. As such, it would have a destabilising effect on the political regime and would probably soon give way to the populist or authoritarian tendencies that O'Donnell's restricted view of democracy seeks to avoid. Thus, it seems that O'Donnell's democratic rule of law is not formal, but substantive. But this substantive conception of the rule of law cannot be easily contained within the framework of a democracy that is procedural and severely restricts the scope of politics.

O'Donnell's reflections on the rule of law are important and stimulating. He is undoubtedly right in pointing out that the quality of democracy and its long-term sustainability cannot adequately be assessed without taking into account the operation of the legal system. Yet, his claim that new democracies can overcome the disintegrating consequences of socio-economic inequalities through the rule of law is unpersuasive. Indeed, although law is not merely politics by other means, law is not an intermediary level wholly external to the political regime. If the political regime restricts the scope of the political agenda – as is the case today in many new democracies in developing countries – socio-economic inequalities will persist. They will not be significantly reduced merely through the exercise of rights through courts, since courts are not designed to perform this task. Moreover, any attempt seriously to seek redistribution policies through courts, apart from futile, would politicise the judiciary and distort the process of adjudication, as litigation would become the exercise of politics by another means. If, on the other hand, citizens seek the extension of rights through political channels they will expand the scope of politics and will require the political regime to abandon its claim to neutrality and take the side of those who are economically and marginally deprived. The route towards greater socio-economic equality is messy, contested and involves inescapable value choices. In any event, whether the extension of rights is pursued through the courts or through normal political channels, the political regime cannot be insulated from its consequences. Legal and political processes are so closely intertwined that neither can be properly understood without understanding the other.

CONCLUSION

As this paper has shown, the obstacles for a fruitful dialogue between RLE practitioners and academics are formidable. Yet, these obstacles can be overcome provided that the parties

concerned adjust their respective approaches. If RLE practitioners are serious about improving economic outcomes and enhancing human rights, they should take into account the political factors that have a bearing on their programmes. If lawyers want to make a contribution to the RLE, they will have to accept that, although law does not always deliver certainty and predictability, it does play a major role in shaping and changing political institutions. If political scientists extend their study of democracy from political regimes into the operation of legal systems, they will be in a position to offer valuable information and theoretical insights into the difficult process of legal and institutional reform.

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