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STATE-MANAGED DEVELOPMENT:

A LEGAL CRITIQUE

by

James C.N. Paul
Clarence J. Dias

State-managed programs to bring essential resources and other benefits to rural people are creatures of law as well as political economy and ideology. Different kinds of law can be used to organize administration and direct it toward prescribed objects, to create different kinds of institutions and to allocate powers and roles to actors within them. Similarly, different bodies of law can be used to prescribe processes for making decisions which dispose the agency's powers; and other bodies of law may be used to establish systems of review and regulation in order to hold actors accountable and to identify measures needed to reform existing structures.

Analysis of these elements can often reveal how existing regimes of law create or contribute to pathologies which regularly afflict state-managed programs - pathologies which in turn contribute to a political economy of impoverishment, exploitation and exclusion in rural areas. Conversely, this analysis may help to show how law may be differently used in order to promote self-reliant participation and more equitable allocation of resources, values which are now emphasized by new international norms proclaimed over the last decade or so.

The 1979, FAO-sponsored World Conference on Agrarian Reform and Rural Development adopted this declaration:

Participation of the people in the institutions and systems which govern their lives is a basic human right and also essential for realignment of political power in favour of disadvantaged groups and for social and economic development. Rural development strategies can realize their full potential only through the motivation, active involvement and organization at the grass-roots level of rural people with special emphasis on the least advantaged strata, in conceptualizing and designing policies and programmes and in creating administrative, social and economic institutions including cooperative and other voluntary forms of organization for implementing and evaluating them.¹

Other World Conferences, addressing other sectors of development-- habitat, health and employment--have adopted similar resolutions.² But converting these international norms into practice will require changes in legal structures as well as changes in power structures. Here we attempt to analyze some tasks of legal change by critiquing ways in which law is presently used to structure state-managed rural development, and by suggesting ways to make these frameworks more responsive to the values of alternative development.

I. A Critique of the Legal Regimes of State-Managed Development

Understandably, one finds few general critiques of the amorphous mass of laws which govern the design and administration of different sectors of rural development in third world countries. The task seems forbidding because "rural development" encompasses diverse objectives as well as different kinds and levels of activity; e.g., macro and micro planning; regulating people and inspiring them; managing local facilities and national corporations. Various types of law may be used to structure a program: organic and subsidiary legislation; manuals and directives; unwritten customs of bureaucracies which assume the status of law through usage; general principles of public law drawn from the constitution, international commitments and court-made doctrines of administrative law; legislation of general application such as enactments governing public employment. It may seem difficult to make meaningful general observations about the use of these different kinds of legal materials in the structuring of the variegated activities which comprise "rural development." Nevertheless, some general hypotheses are offered here.

Despite new international norms calling for self-reliant participation, state-managed rural development continues to reflect continuities from colonial law and administration.³ Law is still used to monopolize state control over most of those resources and activities which make development possible for the rural poor. The processes of designing programs are dominated by experts and technocrats, and characterized by ex parte decision making. Management and supervision of programs is exercised by hierarchies of officials whose outlook is professional and elitist--tendencies which are reinforced by rules governing recruitment, tenure and advancement in public employment. These officials often enjoy broad discretionary powers which are seldom regulated closely by law; conversely, ordinary people are seldom endowed with rights enabling them to influence official decisions. Similarly, there exist few accessible institutions with adequate powers to provide independent review and regulation of the operations of rural development agencies--particularly their impact on the poor and disadvantaged. The absence of review contributes to continuing failures to make changes within programs in order to make them more responsive to local needs or grievances. Cumulatively, these pathologies

in law legitimize practices which lead to underallocation of essential resources to the rural poor; to their continued political exclusion from sectors where participation is most important, if it is valued at all; to discouragement or repression of new, popular, self-reliant economic or political initiatives.

Of course these propositions must be tested by reference to particular cases--and modified as the complexities of this subject are better understood. They are set out here because they appear to characterize so many case studies, including those in this volume, and because they indicate that neglect of the jurisprudence of rural development is a serious omission. A framework for developing legal critiques of particular programs is suggested below, along with some further observations. The focus is on the way law is used (and not used) to prescribe general legal principles governing the:

1. design and enactment of programs, i. e., the processes of planning programs and promulgating rules to enable them to go forward;
2. characteristics of institutions to carry out programs;
3. selection and control of actors who exercise important powers allocated to institutions;
4. articulation of powers delegated to institutions and actors;
5. prescription of processes followed to exercise these powers; and
6. establishment of structures for review of those decisions and for securing accountability of actors and institutions and reform of programs.

1. Design and enactment. Our focus here is on legal principles governing processes which lead to enactment of development programs: the investigation of needs, planning and drafting organic legislation, and subsidiary rules or legal commands expressed in other forms. Since these decisions determine ends and means of programs, and since ends and means are interdependent, participation at this stage by those whose interests are immediately affected, obviously becomes important.

Of course many different kinds of high-level decisions may affect the ultimate content of laws prescribing particular programs (e.g., pronouncements of official ideology; macro planning; prioritization). So one obvious

vehicle for participation is the "political system." But in most countries the institutions and processes which make up this "system" provide little opportunity for "bottom-up" influence by the rural poor, particularly in spheres of government traditionally perceived as having to do with "administration." The design of programs, as well as implementation, has regularly been assumed to be a matter for planners and other experts, accountable to political executives.

Parties in "competitive" political systems are usually formed and dominated by urban elites with access to money and organizational resources. In one-party systems they tend to be parastatal institutions dominated by political executives. In either event they are seldom structured so as to become vehicles for grass-roots participation in the design or redesign of development programs. Similarly, one cannot assume that parliaments provide vehicles for effective participation. The rural poor, as a class, are seldom found in legislative chambers. Moreover, parliaments, like courts, are essentially "reactive" institutions; their powers must be invoked in a systematic, organized way by those groups who would seek to use them effectively. Like courts they are also complex institutions requiring skill and knowledge, physical and social accessibility, intermediaries and organizations for effective participation. These capacities are notably lacking in impoverished rural communities. But they usually can be found in the more dominant classes in society: high-ranking public officials; larger-scale landowners; entrepreneurs in agribusiness and other groups with commercial interests in agrarian economies. Striking indications of the political power of these groups in parliaments can be seen from a number of case studies of the enactment of land reform legislation.⁴ Of course rural people may enjoy a chance to voice their frustrations in general elections. But elections are dominated by parties, and they seldom turn on the kinds of issues which concern us here.

In many countries, programs are enacted by executive decree with no consideration by the legislature, because, under existing constitutional arrangements or by virtue of the broad terms of existing enabling legislation, the executive already has the power to make the necessary rules. Indeed, it is probable that many development programs are undertaken without much if any initial attention to the need for laws to legitimize official actions already initiated. As several reports in this volume suggest, enabling rules are often regarded as a bothersome detail by planners and managers who want to get on with their projects. They perceive--or are told by experts--of developmental needs to be addressed, and thereafter they persuade political executives to act upon these findings. The identification of "problems" and the ends and means of a responsive program are determinations made within governmental offices without consultation before the process has moved to the point of initiating action. The experts

who engage in these tasks are usually employed by and accountable to agencies which often have vested interests in the definition and solution of the problems to be resolved --and in maintaining the role of experts. Examples of this are portrayed in this volume: the imposition of urban land use controls in Africa; the imposition of regimes of water management in Sri Lanka and the Philippines; the countrywide imposition of village-based, state-regulated cooperatives in Niger. All of these programs proceeded with no meaningful interaction with people whose basic needs for land, water, credit and other essential resources inevitably were clearly affected by the projects prescribed. Countless other accounts of programs reflect these syndromes.⁵

As shown by the reports in this volume, the exclusion of rural people from these processes can produce many unfortunate results. Exclusion tends to reinforce the impulse of agencies to replicate existing approaches of "administering" to the poor rather than "empowering" them. Exclusion allows governments to perpetuate those less visible institutions which are empowered to appropriate surplus from the rural poor: parastatals which may determine terms of rural-urban trade, agencies which impose levies on crops. When professionals promulgate programs unilaterally, the outcome is regularly flawed by failures to relate the institutions and activities created to the needs and perceptions of people, for example, failures to relate programs to provide credit and inputs to farming cycles; failures to create cooperatives which are understood and accepted by those who are brought into them; failures to create community acceptance--and thus effective sanctions--to support regulations designed to prevent serious health hazards.⁶ Disengagement of people from the process of making laws regularly leads to their disengagement from the steps taken to implement them.⁷ A further result may be the continuing estrangement of the rural poor from their government.⁸

The problems of translating the "basic human right" to participate in design into a bundle of enforceable, legal rights are obviously complex. In what ways can law be used to provide meaningful "rights" of participation in the formulation of national plans for different kinds of agrarian programs, or in negotiations between a ministry and an international agency (or a TNC) looking towards establishment of an agribusiness or the erection of a dam? In what ways can affected groups influence redesign of an existing program concerned with management of water resources, credit or government lands? Rights to participate may depend, in part, on recognition of a wide variety of legal obligations and entitlements: requirements that legislative proposals be publicized with opportunities for public discussion in accessible forums; establishment of public commissions representative of the poor to review programs; recognizing the standing of popular organizations to be heard in ministries and other executive

agencies where key policies are made; providing rights of access to the media.⁹ These kinds of laws, if taken seriously, may pose threats to authoritarian regimes and established bureaucracies. Moreover, promises of participation--legal or otherwise--will do little to help the very people who are supposed to be empowered unless they enjoy rights to participate through organizations. The formation of grass-roots' groups is a first step in this process.

2. Institutions. Our focus here is on control and accountability within and between different kinds of organizations which manage programs. The belief that the state must control these institutions is deeply rooted. In part this reflects the entrenchment of colonial models. In part it reflects distrust of the capacities of rural people to control the operations of these agencies at local levels. Political economy considerations also loom large. Control of institutions entails control of patronage, agrarian production and allocative decisions which often carry significant implications to those in power. Thus it is not surprising that programs which provide resources directly to rural communities, or which regulate activities of rural producers, are usually subject to the control of political executives of the central government.¹⁰

Programs which are intended to provide services essentially through human resources--activities such as health care, education or agricultural extension--are usually organized through professionalized bureaus within ministries. Those which provide credit, inputs, and facilities for storage and marketing of crops may be organized through some combination of a system of cooperatives licensed and regulated by a bureaucracy and state corporations managed by professionals employed by the state and accountable to political executives.¹¹ Local institutions created to mobilize villagers and peasants to contribute money or work to build local roads or other facilities, or to share in other tasks (e.g., village or district "development councils" and other similar groups) are organized under laws which vest powers of direction (and sometimes coercion) in local officials.¹² Law enforcement agencies are another component in this panoply of state institutions. Their importance is often neglected in development literature. The police and the courts enforce penal-type regulations promulgated by ministerial institutions (e.g., regulations prescribing proper modes and schedules of agricultural production or proscribing environmental or health hazards); similarly they enforce collection of taxes and other levies. Other laws (such as the licensing of meetings) may be used to maintain the power of local officials to control political activities and frustrate mobilization of the rural poor.

Experience certainly shows that there is no one institutional form which is necessarily suitable for a particular function. On the contrary,

new institutional arrangements are attempted with sufficient frequency to suggest--despite the usual absence of publicity surrounding reorganizations--that the problem of institutionalization is both important and quite difficult to solve. Jurisdictions are frequently transferred from one ministry to another--and often enough to new ministries.¹³ "Decentralization" is now frequently prescribed for diverse ends: to bring government closer to people and make it more responsive to them; to achieve greater "efficiencies" and "coordination" in decision making. But, as reports in this volume show,¹⁴ decentralization by itself does not produce participation unless there are genuine devolutions of state powers. An account of Tanzanian experience suggests some of the reasons:

In 1972, government operations were decentralized, vastly increasing the numbers of civil servants in the districts and regions. But budgetary and policy control remained at the center. Civil servants remained employees of the center, and because they were hired, fired, transferred, promoted, and paid by the center, they were, not surprisingly, more responsive to signals from above than from the villages. There was no one in the bureaucracy whose job it was to listen to and act as advocate for villagers, nor was there much, if any, reward in the system for such behavior.¹⁵

The paradigm of state-managed development administration assumes the necessity of some form of governmental control over institutions which allocate resources or regulate behavior deemed important for development purposes. But thoughtful critiques of development administration tell us that when the state manages a development program, much of the energy of those charged with implementation is inevitably diverted to maintenance of the institutions created rather than to innovative initiatives to satisfy the needs of intended beneficiaries: lacking the incentives of the market, or the need to satisfy a demanding electorate, maintenance of power becomes a dominant if implicit institutional value; release of power in order to encourage self-reliant community activities is rightly perceived as a threat.¹⁶ While the social costs of this syndrome are now widely recognized, the creation of alternative, institutions still seems to be a novel, sometimes heretical, subject.

If rights of participation are valued ways must be found to include representatives of people who need to be empowered among decision-making bodies, or, alternatively, to use popular grass-roots organizations as institutions to administer programs by allocating powers and resources directly to them--as in the "inductive" approach to water management in Gal Oya, or in the model for primary health care

suggested by Oscar Gish. Of course, devolution of power from state to non-state institutions creates new, unfamiliar issues --which we discuss in a later chapter.¹⁷ But if participation is valued there is a need at the outset to challenge the pervasive assumption that institutions of rural development must be controlled by state actors.

3. Actors. The focus here is on individuals within institutions who are empowered to make allocative decisions or enforce regulatory powers, at both macro and micro levels: in what ways do existing bodies of law prescribe norms of selection, orientation and individual accountability which reflect values of participation?

Recruitment of these employees is often dependent on satisfaction of formal educational requirements, particularly recruitment to higher levels where university degrees are prescribed, thus tending to limit entry to those able to enjoy these benefits. The resulting stratification within agencies means that higher-level officials are likely to be both unfamiliar with and socially distant from problems of the field and the people who must address them.¹⁸ But professionalization is often apparent in rules governing entry and deployment into "lower" civil service jobs which furnish important human resources to rural people: e.g., providers of health, agricultural and police services within rural areas. Their recruitment and training is governed by rules prescribed by senior professionals within their institution, and their accountability runs to those persons --extending vertically to professional superiors rather than horizontally, into communities which the agency is supposed to serve.¹⁹ Indeed, laws governing public employment generally insulate officials deemed to be exercising professional tasks from personal accountability to the public by creating immunities from civil liability which are not enjoyed by comparable actors in the private sector. An extension agent who gives plainly negligent advice or who callously refuses to attend to the ailing cow of a poverty-stricken family cannot easily be made to pay tort damages. Tax collectors or policemen who abuse their authority can invoke doctrines of privilege to persuade judges to dismiss charges against them.²⁰

Relationships between officials and the rural poor may also be affected by laws which empower governments to maintain pay scales and "perqs" of office which --particularly in regard to higher positions --tend to set officials far apart in social as well as economic terms from the communities they are supposed to serve, and indeed enable officials to become part of the affluent power elite within communities. It is a matter of some interest --and importance --that government commissions set up to investigate pathologies in the civil service (commissions made up of professional public servants) so often recommend salary increases as the solution to

the problems found. The causes and consequences of this phenomenon have been examined in several interesting studies.²¹ All of these factors may help to maintain long-standing customs, imbued with the sanctity of law, which endow "public servants" with the kind of social status which requires respect and deference; they become important considerations in societies where stratification is already closely related to political power.

Indeed, in examining particular sectors of "rural development," it is often important to understand the political linkages--at both local and higher levels--between public officials and the more wealthy and powerful classes or groups who have an interest in the program. While civil service laws were historically intended to isolate and protect government employees from political influence, that premise may need critical review in third world settings. As noted, eligibility rules for higher office limit access to those who usually come from more affluent families, or who aspire to affluence as a result of higher education. Higher public office is often a means of commanding resources, patronage and other sources of largesse of great value to large-scale farmers, leaders of cooperatives and other wealthier people in rural communities. Often, too, the salary and perks provided with higher office are enough to enable state actors to become "progressive" farmers, landlords or investors in agribusiness. In this way, and through other social connections (such as family linkages), civil servants become part of the ruling elite, and the regime of law establishing civil services may reinforce these tendencies by stratifying access to positions that count and insulating the occupants of such positions.

If participation is valued, legal principles governing state employment should emphasize the importance of holding actors personally accountable for harms they inflict through intention or disregard of known standards governing exercise of discretion. Indeed, as state institutions begin to work at local levels with community organizations (as in the health care and water-management systems described in reports in this volume), then state actors who provide specialized services to community groups should be treated, in legal terms, as servants of those groups--just as the Sarilakas and Gal Oya organizers were made responsible to the community served. Underlying legal principles governing recruitment should emphasize the continuing need to reach within impoverished communities to find and train people to staff development programs--something analogous to "affirmative action" programs favoring recruitment of women or other historically disadvantaged groups.

4. Powers. Reports in this volume portray the diversity of tasks delegated to officials at local levels: some are empowered by delegation to manage and provide physical resources (e.g., land, water) or human

resources (health care); some are authorized to interpret and enforce regulatory rules (e.g., governing use of water or land) or penal legislation protecting rights of plantation workers or tenants; some are required to license and supervise cooperatives or other local business organizations. While these diverse tasks entail exercise of different kinds of judgment, it is often important, in analyzing different programs, to examine whether and how law is used to direct different kinds of discretion towards desired objectives.

For example, it is notorious in some countries that the delegations of some kinds of "regulatory" discretion--e.g., to grant licenses, or register property or births--carry built-in opportunities for state actors to charge unprescribed fees for the exercise of discretion or expeditious action. Other kinds of delegated discretion carry other kinds of inevitable risks. Officials who allocate scarce resources--e.g., land--inevitably have to choose who will receive and who will be denied. If this discretion is left unguided, outside pressures will fill the vacuum. The delegatee, in making up his mind whether an applicant is worthy, is likely to be moved by those who can gain his attention and present convincing arguments, and this situation is usually prejudicial to those who lack intermediaries.

While these kinds of foreseeable problems can be addressed by subsidiary rules and directives, the prevailing tendency is to delegate powers in open-ended terms. The myth of the "neutral," "rational-legal" bureaucrat continues to guide lawmakers. For various reasons officials in central offices may be uncertain, ill informed and yet unwilling to develop further guidelines through collegial decision making with actors in the field. The tendency is to pass responsibility down without articulating standards of accountability, while still retaining powers to intervene. Thus, health officers, extension agents, cooperative inspectors, police and other officials in the field are essentially left free to determine how general rules or directions will be applied. But they must still satisfy what they perceive to be the expectations of their superiors and that can often best be done by satisfying dominant groups within the local community.²²

These kinds of conclusions are suggested in some of the reports offered here. They are also nicely documented in a recent, rewarding legal analysis of the problems of implementing agrarian legislation in India:

Laws are drafted by the legal department. . . . The responsibility for implementing them is then passed down without any attempt to explain the rationale of these laws to the petty officials who can make or mar them. This was the experience in Akkalkua. This was also the author's reaction in Davoor and Shahada. The

officials, even to the level of the tehsildars are interested in identifying themselves with the traders, manufacturers and big farmers. Not surprisingly, they are not enthusiastic about implementing laws which have an adverse effect on their friends.²³

Unregulated discretion can be used to legitimize practices which produce inaction, inertia, or be used to condone decisions which are inconsistent with other decisions made in like cases, or to condone practices which can lead to corruption. However, powers can be delegated in terms of the ends and means of the kind of development sought -- in ways which create rights for intended beneficiaries as well as privileges for power wielders. As every lawyer knows, the way powers are articulated directs attention not only to what powers are bestowed but also for whose benefit they are to be exercised, and how -- with whose participation. In theory, the way these kinds of goals and norms are set out as legal commands can affect:

- (a) the duty of delegates to articulate (through processes requiring a flow of information to, and consultation with, affected interests) more particular standards governing the exercise of discretionary powers;
- (b) the capacity of intended beneficiaries to invoke law to demand a more equitable treatment and the entitlements (if any) enjoyed by affected people and groups in allocational decision making;
- (c) the criteria by which the "effectiveness" of implementation of a state program can be measured;
- (d) the criteria used to establish a meaningful system of accountability for administration; and
- (e) the articulation of the relationship between political-economic aspirations of a program and the means of realizing them.

These kinds of guides and standards can be systematically developed and tailored to the needs of specific programs through subsidiary rules and

directives; and general laws can require that this be done as part of the administrative process.

5. Process. Procedures governing decision taking can be a powerful constraint on otherwise unregulated discretion. The process followed to enact regulatory rules, determine entitlements to resources, organize cooperatives, compel behavior or impose sanctions can affect outcomes in many ways --by compelling examination of factual or normative assumptions, by providing information and understanding among those affected, by instilling confidence in and acceptance of decisions taken. In fact the processes used for decision making are usually left to the discretion of official actors. The officers of banks may be left free to establish eligibility rules and phasing of loans without knowledge of facts which may affect how the rules they establish will impact on different farming communities; the officers of an agency empowered to set commodity prices may fix rates without consulting producers who may be demonstrably exploited by the result; regulations to promote desired farming practices may be imposed without communication with affected persons and hence under a misapprehension of highly relevant facts. Just as the law frequently fails to specify terms of access to decision makers, so it is frequently silent when it comes to prescribing duties to provide information. Yet the importance of information--and the consequences of lack of it--is a widely reported phenomenon in the literature of rural development. Knowledge of credit programs, of technologies, of rudimentary health hazards and precaution--knowledge geared to basic needs--is all too frequently lacking. The Sarilakas report (among others) suggests another important category: knowledge of one's legal rights. Where people lack information about the existence of programs ostensibly created to aid them, the program itself may fail to achieve its avowed objectives --in part because law-enforcing authorities remain ignorant of violations, or are unprepared to press the matter when there is no pressure to do so. As the 1978 Indian development plan noted,²⁴ the organized efforts of intended beneficiaries may often be the only way they can realize benefits they are supposed to enjoy, and, as the Sarilakas report shows, those efforts can only be forthcoming when people understand their entitlements.

In theory, general principles of law --expanding the concepts of "natural justice" or "due process" --can be developed to require various forms of informing, and consultation with, those directly affected --and often adversely --by agency action. The form and scope of opportunities to be heard may vary --depending on weighing the burdens imposed by consultation on program implementation against the burdens which impending rules or decisions may impose on individuals and groups. Of course provision of opportunities to be heard are of little value if the procedures to pursue these opportunities are complex and time-consuming. As Reginald

Green points out, procedures are rarely value free: they may provide the appearance of due process but in fact impose handicaps on the uneducated and produce other pathologies in administration. From the perspective of alternative development, due process procedures must be analyzed in terms of their value to the poor as a means of facilitating participation.

6. Review and Regulation. Case studies regularly show that state-managed rural administration generates grievances among intended beneficiaries. Accounts of the deployment of agricultural extension services show how relatively few "progressive" farmers are able to co-opt and benefit from this assistance--and the links it provides to government--at the cost of neglect of the poor. Similarly, the frequent outcome of the administration of cooperative laws is the creation of structures which are dominated by local elites and officials and used to control farming behavior of small holders, and often enough used for self-dealing purposes. Accounts of enforcement of tax and penal laws show how they are frequently used as instruments of coercion to repress dissidence. The Gal Oya report portrays another difficulty which frequently confronts peasant communities: the failure of different agencies to coordinate provision of technical advice, credit and inputs, so that these benefits can be realized at the time in the farming cycle when they are needed. The Sarilakas report also portrays familiar phenomena: the nonenforcement of laws designed to protect workers, debtors, tenants, women and others historically disadvantaged from exploitative practices.

The grievances generated by these outcomes may be widely shared, deeply felt; but they often remain relatively invisible to outside observers, in part because information on entitlements is withheld and because explicitly lawful means for seeking review and redress are uncertain and inaccessible and because other forms of protest are treated as unlawful. Thus failures to provide accessible structures with adequate power to review and regulate administration reinforces tendencies towards pathologies already described.

In theory, of course, a variety of opportunities for review can be made available. Mechanisms for administrative review could be built into the body of law structuring cooperatives, extension services and so on. But usually there is an absence of law on this subject. Complainants may be told to take their grievances to some higher official, or to write a letter. After a long delay they may be told the matter is under study. No law compels a prompt, reasoned response. None is forthcoming.²⁵ Similarly, auditing procedures (e.g., of cooperative transactions) are often notoriously lax. One reason why this is so is because the poor have no access to the accounts of state and parastatal bodies--and inadequate resources to review them.²⁶

The courts may seem (to lawyers at least) to provide another forum. But of course there are many constraints: ignorance, fear and suspicion of the function of government courts; lack of access or intermediaries; lack of "standing" to present a "justiciable" claim, or a "class" action; lack of jurisdiction; the understandable reluctance or inability of judges to review discretionary actions; immunities of officials; lack of suitable remedies -- e.g., powers to put agencies under injunctions compelling affirmative changes in structure or policy. Whether administrative law could or should be reformed to enable courts to exercise broader roles of review and regulation is a question discussed below.²⁷ In recognition of some of the difficulties, many governments have created ombudsman agencies to provide more accessible alternative or supplementary institutions. But, like courts, these agencies can only review and respond to individual complaints, not systemic problems; they lack broad remedial powers and "clout" to compel structural changes in development programs.

From time to time, needs to provide for more adequate review and regulation are recognized. Allegations of abuse of powers, incompetence, systemic breakdowns and dissatisfaction with the "bureaucratic style" are brought forward -- sometimes by frustrated leaders of governments. Special commissions are appointed (though they rarely are representative of the victims of the situations exposed) and various remedies proposed -- e.g., creation of ombudsmen offices, codes of ethics, tightening fiscal controls, "decentralization." Usually, however, these studies define and approach the problems from the perspectives of etatist paradigms of development administration: the need for discipline and rectitude in existing structures. Seldom is the problem of review and regulation cast in terms which emphasize opportunities for victims of maladministration and under-allocation to present demands for systemic and structural changes -- to seek remedies which strike at root causes of dissatisfaction through creation of alternative structures. Seldom are the people most affected given any real power in the system of review. Perhaps this is because investigative and "law reform" commissions are dominated by political executives, technocrats and eminent lawyers who are relatively insensitive to the problems and perspectives of the rural poor.²⁸

In the absence of other alternatives, the political system may offer the most likely avenue of protest. But, as we have already seen, there are constraints: the rural poor lack resources, organization and intermediaries to press their demands on government, and local administration in rural areas is usually quite hostile to sui generis attempts of people to mobilize and take collective action to press grievances, outside of the activities permitted within parties. Nevertheless, in view of the absence of other avenues, and in view of the need for basic structural changes, it seems clear that mobilization, organization and collective action are

essential. For it is doubtful that systemic changes, entailing redistribution of power can--or will--be forthcoming solely as a result of reforms developed from within governments.

II. Changing the Legal Regime of State-Managed Development

There is now widespread disillusionment with prevailing forms of state-managed development. "Participation" and "accountability" have become conventional prescriptions, and the questions more often debated relate to the meaning and importance to be ascribed to these objectives and to ways of accommodating them with perceived needs for professional and state controls. Two approaches are contrasted here.

The "reformist" approach is so labeled because the purpose is not so much to challenge the basic premises of state management as it is to make official institutions more responsive to human needs' goals and more accountable to rule of law norms. A variety of reforms have been attempted or discussed; it is not possible to catalogue them here, but a summary of three kinds of reformist approaches may illustrate some recent tendencies and problems.

One set of reforms focuses on the redesign of institutions (to secure decentralization, autonomy, consolidation of functions and collaborative participation) and the reorientation of actors (to promote consultation). One model for this is a district agricultural development agency--a corporate-type institution--which would possess a number of "integrated" powers (e.g., planning, provision of services and inputs, marketing and transport) to produce a package of benefits.²⁹ The institution might be controlled by a directorate (which might include local representation), or it might be supervised solely by a manager who would in turn deal with each of the relevant ministries and other central organs providing resources to the field. Devolution would include block grants and broad authority over all functions allocated to the agency. Local participation--in planning as well as administration--might be secured through (state created) village or ward development committees. Field staff would be retrained to learn techniques of participation.

Devolution may indeed bring control over resources nearer to the rural poor, but it does not, per se, bring it within their grasp; nor does it alter existing stratifications of power within communities. Nor, experience suggests, does it necessarily alter other administrative practices leading to underallocation or corrupt dealings with the disadvantaged. Many district development corporations in Tanzania appear to have been mismanaged, and pressure to produce revenues coupled with power of monopolization have led to programs of little value, indeed sometimes

harmful, to the interests of the poor.³⁰ Several papers in this volume go further in suggesting why devolution, by itself, does not meet the needs of marginal cultivators, tenants and other agricultural workers for self-reliance and empowerment.³¹

Another set of reforms looks towards imposition of tighter discipline over government actors. These include promulgation of codes of conduct, new procedures for establishing criminal liability for abuse of power or corruption coupled with more draconian sanctions, and establishment of new ombudsman institutions for investigating grievances. Thus local officials may be prohibited from engaging in private conduct which creates vested interests in existing forms of rural administration or in existing social structure: landlordism, moneylending or employment of farm labor may be proscribed. Officials may be charged with broadly-defined crimes of corruption where their manifest affluence clearly exceeds their salary; the burden of proof is shifted to the defendant to prove the source of his wealth.

Again, these measures, by themselves, seem neither to have changed power relations nor cured many pathologies which help to maintain poverty.³² Ombudsman institutions may indeed provide some measure of relief for some kinds of grievances--if (and it is often a big if) these agencies are visible, readily accessible, independent and relatively efficient in handling their jurisdiction. But as already noted these institutions are reactive rather than proactive. Their jurisdiction does not enable them to strike at the root causes of recurrent problems nor to redesign inefficient programs.³³

Another reformist approach centers around active use of administrative law (as that subject is traditionally understood by lawyers). A number of recent decisions by the Indian Supreme Court may illustrate some of the possibilities open to lawyers, working in behalf of the rural poor, to use the courts to challenge aspects of rural administration.

In one case³⁴ the court granted "standing" to employees who alleged that the impending sale of various plants of a government corporation not only violated their constitutional rights, but that the procedures followed violated various other provisions of law designed to secure rectitude in these kinds of transactions. The court held that all of these contentions could be raised by the petitioners (and proceeded to examine the merits of various alleged defects in the sale proceedings). In allowing the petitioners to secure judicial scrutiny of both the "decision to sell and the sale proceedings," in sweeping aside the "standing" objections of the Attorney

General, the court declared that it would take a "broader view" of standing to challenge the corporate decisions. These enterprises are "owned by the people and those who run them are accountable to the people." Parliamentary control was found to be too "diffuse and ineffective" to preclude the need for judicial review in order to provide some forum to secure the interests of accountability. The terms on which standing was granted here are broad enough to encompass other affected groups --such as consumers who may be disadvantaged by a corporate decision, or farmers disadvantaged by eligibility rules. By implication this doctrine might allow courts to review many realms of rural administration affecting people particularly dependent on an agency for goods or services. The concurring opinion of Justices Iyer and Bhagwati noted that the court's "fascinating [doctrine of] expansionism is of strategic importance viewed in the perspective of Third World jurisprudence." They went on to justify "expansion" in terms of the "social audit function" of courts and the need for "participative public justice."³⁵

This liberalization of access to the courts has been combined with liberalization of the scope of review in several cases. In one of considerable interest the court applied doctrines of promissory estoppel to the dealings between a private company and a ministry.³⁶ Claims of immunity based on notions of the need for official discretion in awarding benefits and the need for protection from harassment were all swept aside. Again the court recognized that it was dealing with rules of "considerable importance" to "public law," with doctrines capable of "vast possibilities of growth."

In a third case the court held that a licensing agency was bound by its published eligibility rules and could not change them "arbitrarily."³⁷ Again a wide scope for judicial review was quite consciously opened. The court depicted government as a vast enterprise dispensing new forms of "largesse" --services, licenses and other benefits. The argument that these dispensations are "privileges" not "rights" was swept aside. The crucial point was that "discretion" to dispense "largesse" must always be governed by norms and these can never be arbitrary,³⁸ and the courts are open to determine "arbitrariness," and where a transaction appears prima facie to reflect favoritism or special treatment the burden appears to shift to the government to justify its legality.

It is of course uncertain whether judges in other countries can be persuaded to follow this new "access jurisprudence" geared to an avowedly "activist" judicial review of programs of resource allocation. Moreover, there are significant limitations on the capacity of courts --even "activist" ones --to reform the legal frameworks of administration. Principles may appear to be won --but little may happen as a result.³⁹ People must be

mobilized (and helped by support groups) to use new legal rules, and the judicial process cannot by itself produce these resources.

Indeed nearly all of the reforms which address the pathologies of state-managed development administration depend in the first instance on the existence of self-managed organizations of the rural poor. Only through organization (and support from other groups) can they hope to secure: participation in the processes of design, access to and accountability from local officials, proper audits of public bodies, invocation of the remedial powers of the courts, access to the legislature or to investigative commissions.

The "Alternative" Approach is so labeled because the premise of state control is directly challenged. The contention is that state monopolization of power over institutions which plan and manage development programs--monopolization of the power to make law governing their creation and management--regularly leads to the kinds of pathologies and biases portrayed in the case studies reported here and in so many other accounts of rural administration. Even more important, the premise of state monopolization is an inherent contradiction of the values which make people-centered development meaningful. Accordingly, the first task is to help people to form their own organizations, and to help these groups play a much more pervasive, dynamic role in the design and administration of development. Another step is to bring the processes of design and lawmaking back to the communities affected. Another step is to use "non-state" structures to carry on activities which people can carry on themselves through organizations of their own design. As some papers in this volume show, it is indeed possible to organize local health care programs through participatory institutions created by and accountable to the community itself. Water resource programs can be managed, at least for many crucial purposes, by groups created and governed by those who depend on the water for their livelihood.⁴⁰ Group enterprises can be created by people themselves, using "law" developed by adapting traditions and norms of community cooperation to new circumstances.⁴¹ Of course specially-trained human resources are needed by rural people to make some kinds of "development" possible--health care providers, extension agents, persons versed with rudimentary knowledge of accounting and others. But it does not follow that these specialists must be provided through structures which make them only accountable to state bureaucracies rather than those who most need their services. Reports in this volume show how health workers, organizers and other personnel can be provided directly to participatory, community groups which manage these services, and the employment relationship can be restructured to provide for accountability to the community.⁴² This change of control over institutions and actors can lead directly to processes for determining powers and guidelines for

making allocational or regulatory decisions which are participatory, and hence better understood and usually more acceptable. Further, these arrangements provide more meaningful opportunities for presentation of grievances; and a greater likelihood of review and regulation which will be geared to community needs.

Strategies and methods to develop "non-state" structures and enable them to take over tasks of administration which the community itself can handle are discussed in the concluding chapter. It should be apparent, however, that there is not always a clear line between "reformist" and "alternative" approaches towards change. The mobilization of rural groups can be reinforced by efforts to impose a human-needs-oriented "rule of law" on rural administration, or to create new locally-managed institutions for agricultural development. Both approaches call for the creation of new kinds of social resources--including legal resources--which communities must enjoy if capacities for mobilization and organization are to be developed. That subject, too, is deferred to our final chapter.

* * * * *

Most of the papers in this volume are reports analyzing experiences of particular programs or sectors of development. Those which follow (in this section) are descriptions and critiques of state-managed programs; others (in the next section) contrast state-managed programs with "non-state," "people-managed" "alternatives." Cumulatively, the papers depict efforts to organize a wide range of development activities: urban land use controls, redistribution and "consolidation" of land holdings, cooperatives, indigenous businesses, water resources, health care. Thus, there is, here, an interesting body of source materials to develop critiques of conventional approaches to development administration.

Several papers depict tendencies which typify the processes of designing and enacting state programs. For example, the historical phenomenon of imposing new structures, unilaterally on rural communities--of creating intervening state institutions which monopolize control of access to resources--is illustrated in Coldham's account of the imposition of land tribunals in Kenya and Munkner's account of the imposition of state-regulated cooperatives in the Ivory Coast and Niger. The power of elites to shape land reforms (of a socialist government) is treated in Samaraweera's analysis of the design of programs in Sri Lanka in the '70s. The role of experts (notably expatriates) in designing programs is portrayed vividly in the reports of McAuslan (on the imposition of urban planning and land use

controls in several African countries) and Uphoff (on attempts to impose a hierarchy of state-prescribed, water-management committees on the rice farmers served by the large Gal Oya irrigation project in Sri Lanka). Gish discusses the consequences of "top down," ex parte planning of local health care programs by medical experts of international and national health agencies.

Characteristics of state institutions which manage development programs, and of actors in them--their autonomy, lack of accountability, antipathy to participation and their links to other powerful groups and classes--are brought out in a number of papers. Ghai describes the evolution of new centers of bureaucratic power following a "decentralization" scheme in Papua New Guinea which was supposed to bring government closer to people. Anderson discusses governmental manipulation of community development institutions in the Philippines, and the alliances between local officialdoms and the affluent in rural communities. Uphoff describes the autocratic characteristics of the Irrigation Department of the Ministry of Agriculture which administered the Gal Oya project, and the effects of this "style" on "equity" and "efficiency" in water allocation. Gish discusses the tendencies of ministries of health to reproduce highly professionalized modes of delivering services which preclude or discourage community participation both in the work of health care, and in planning and managing local programs.

The problems of articulating delegations of discretionary powers are interestingly developed in McAuslan's discussion of the difficulties of encouraging building regulations which would encourage rather than frustrate innovative construction of housing for the urban poor in African settings. Similar problems are suggested in Ghai's discussion of powers delegated to a bureaucracy in Papua New Guinea which was charged with the task of licensing "indigenous business groups," thereby bestowing valuable privileges of legal personality on these groups. The tendency to delegate powers in terms which create new realms of authority for state actors rather than new rights for intended beneficiaries is discussed in Uphoff's description of draft legislation mandating formation of water-user groups in Gal Oya.

Several of the papers discuss the absence of meaningful structures for review and regulation, and the implications of this omission for people who are dependent upon public and private actors who control resources. The lack of access of the Sarilakas sugar workers to courts left them at the mercy of employers who flagrantly abused statutory obligations designed to protect worker interests in the employment relationship. McAuslan describes the impotence of the urban poor when it comes to contesting plainly ultra vires actions of planning bodies--and the social costs of that situation.

As McAuslan suggests, traditional administrative law reforms--e.g., attempts to provide access and opportunities for affected people to be heard--are, by themselves, unlikely to cure many pathologies. As the Sarilakas group argues, Basic Human Needs strategies of development call for basic changes in power relations affecting the design, administration and regulation of programs. These changes call for new concepts--and rights--of participation. Strategies to pursue those objectives are addressed in the concluding section of this volume.

FOOTNOTES

1. Food and Agriculture Organization, World Conference on Agrarian Reform and Rural Development, Programme of Action (1979).
2. For discussion of this phenomenon see S. Marks, "Emerging Human Rights: A New Generation for the '80s," Rutgers Law Review 33:436 (1980).
3. See U. Baxi, The Crisis of the Indian Legal System (1982) (especially chapter 2). These continuities are portrayed in several of the papers in this volume, e.g., Ghai's discussion of bureaucracy in PNG and Uphoff's description of the Gal Oya "IO."
4. In this connection Samaraweera's account of the impetus for and constraints on Sri Lankan land reform is instructive. See also, e.g., Inayatullah (ed.), Land Reform: Some Asian Experiences (1980). (Contains a number of country studies. See especially Blondie Po's account of Philippines' experience. Also Inayatullah's "Concluding Review.")
5. See, e.g., D.C. Korten and F.B. Alfonso, Bureaucracy and the Poor: Closing the Gap (1981), especially chapter 12 by David Korten summarizing experience of various country and project reports.
6. Ibid. See IDS Bulletin 10:2 (1979) edited by Robert Chambers, entitled Rural Development: Whose Knowledge Counts?
7. See, e.g., the discussion in Uphoff's account of planning water-management programs. This point is also developed in Vasudha Dhagamwar's "Problems of Implementing Agrarian Legislation in India," Journal of the Indian Law Institute 23:228 (1981).

8. Sources cited, notes 5, 6, 7 supra.
9. Cf. Neelan Tiruchelvam's proposal for a "National Poverty Law Centre" which would assert these rights at the national level in behalf of rural communities in "The Legal Needs of the Poor: Towards an Alternative Model of Group Advocacy" in International Commission of Jurists, Development, Human Rights and the Rule of Law (1981).
10. See, e.g., G. Lamb, Peasant Politics: Conflict and Development in Murunga (1974); G. Hyden, "Government and Cooperatives" in G. Hyden, K. Jackson and J. Okumu, Development Administration in Kenya (1970); M. Bratton, The Local Politics of Rural Development: Peasant and Party-State in Zambia (1980) (Chapter 1).
11. See, e.g., U. Lele, The Design of Rural Development: Lessons from Africa (1975) on the problems of "integrating" these activities. R. Chambers, Managing Rural Development (1974); Hunter et al (eds.), Policy and Practice in Rural Development (1976).
12. See, e.g., Bratton, op. cit., note 10 (study of Village and Ward Development Committees in Zambia).
- 12a. See U. Baxi, note 3 (Chapter 4).
13. See sources cited note 11; Hyden et al., note 10.
14. Notably that of Yash Ghai on Papua New Guinea experience. One workshop which generated papers for this volume had the benefit of an excellent overview paper by Diana Conyers, "Decentralisation for Regional Development: a Comparative Study of Tanzania, Zambia and Papua New Guinea" (1980).
15. L. Fortman, "Pitfalls in Implementing Participation: An African Example," RDPR 1:1:9 (1979). See for an interesting critique by an architect of decentralization, J.H.J. Maeda, "Creating National Structures for People-Centered Agrarian Development" in Koretn and Alfonso; op. cit., note 5. See also Conyers, supra, note 14.
16. See B.B. Schaffer, "The Deadlock in Development Administration" in C. Leys (ed.), Politics and Change in Developing Countries (1969).
17. See Paul and Dias, "Alternative Development: a Legal Prospectus," infra. For another interesting discussion of these problems, see F. Korten, "Community Participation: a Management Perspective on Obstacles and Options" in Korten and Alfonso, op. cit., note 5.

18. See B.B. Schaffer, "Administrative Legacies and Links in the Post-Colonial State: Preparation, Training and Administrative Reform," Development and Change 6:13 (1974).
19. See the discussion of this problem in Uphoff's paper. For illustrations see, e.g., R.F. Weber, G.B. Kerr, H.B. Smith, J.M. Seymour, Senegal: the Sine Saloum Health Case Project (Project Impact Evaluation No. 9) (USAID 1980); D.K. Leonard, Reaching Peasant Farmers in Kenya (1977).
20. The examples are suggested by episodes reported in the sources cited in note 19 and Dhagamwar, note 7. Chapter 1 in Baxi, op. cit., note 3, develops the theme that existing administrative law helps to establish state actors as an "immunized," privileged class. See also Baxi's "Introduction" to I.P. Massey's Administrative Law (1980).
21. See, e.g., Schaffer, note 18; P. Collins, Administration for Development in Nigeria (1980) (reviewing the Udoji commission's report). See also P. Bennell, "The Colonial Legacy of Salary structures in Anglophonic Africa," IMAS 20:1:127 (1982).
22. Cf. F. Korten, note 17.
23. Dhagamwar, note 7.
24. See the quotation in Chapter 2, supra.
25. On delay and evasion as an important strategy of bureaucracies, condoned by law, see Baxi, note
26. Secrecy in maintaining accounts of cooperatives and other agencies which deal directly with the rural poor is often a major concern of the poor. See F. Korten, note 17, Maeda, note 15.
27. See also U. Baxi, "Introduction" to I.P. Massey's Administrative Law (1980).
28. See note 21. Compare Tiruchelvam, note 9; Baxi, supra.
29. See, e.g., G. Hunter, "Linking Levels of Planning and Action for Participatory Rural Development," RDPR 1:3:5 (1980). Cf. F. Korten, note 17.
30. H.P.B. Moshi, "Financial Performance of Public Corporations: a Case of District Development Corporations," Utafiti 5:1:1.u (1980).

31. See, e.g., those by Ghai and Coldham. See also Korten, note 17.
32. Cf. Moshi, Note 30.
33. Cf. R.L. Martin, "The Ombudsman in Zambia," Journal of Modern African Studies 15:239 (1977).
34. Fertilizer Corporation Kamagar Union v. Union of India, A.I.R. 1981, S.C. 344.
35. Ibid. at 351.
36. M.P. Sugar Mills Co. v. State of Uttar Pradesh et al., A.I.R. 1979, S.C. 621.
37. Ramana Dayaram Shetty v. International Airport Authority, A.I.R. 1979, S.C. 1628.
38. The court seems to have drawn extensively from Charles Reich's "especially stimulating article," "The New Property," 73 Yale Law Journal 733 [1964]." A.I.R. 1979, S.C. at 1637.
39. See V. Dhagamwar, "Public Interest Litigation in Tenancy Matters: The Case of Akkalkua" (paper presented to the Law and Society Association meeting at Toronto, June 1982). The author, working as a "legal activist" for poor farmers provides a number of illustrations where court victories were, or would be, of little value unless backed up by a "SAG" (Social Action Group) working for, and with, local groups. Cf. Baxi, note 27.
40. See, e.g., the papers by Gish, Uphoff and Anderson. See also F. B. Alfonso, "Assisting Farmer Controlled Development of Community Irrigation Systems" in Korten and Alfonso, note 5.
41. The Upper Volta village groups described by Hans Munkner are a good illustration of this process.
42. See, e.g., the descriptions of the recruitment and accountability of the "legal facilitators" in the Sarilakas report, and the "I.O.s" in Uphoff's Gal Oya report. See also Maeda, note 15, reporting on government plans to "second" extension and other service providers directly to Ujamaa villages.