

**DFID Research Division – *Project Final Report***

When is Law a Force for Progressive Social Change?  
Comparisons across Rural Brazil and the Philippines

Principle Investigator: Peter P. Houtzager, Institute for Development Studies (IDS)

Collaborator, The Philippines: Jenny Franco, Institute for Popular Democracy (IPD)

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## I. Introduction

The goal of this study was to identify when the rural poor are able to use state law, through the judicial system, as an instrument for progressive social change – that is, change that expands their opportunities for security, wealth, and voice. The study sought to (i) identify factors that enhance the *legal capabilities* of the rural poor and (ii) the conditions under which rural poor are able to use the legal system to claim constitutionally guaranteed rights or institutionalise interpretations of legal rules favourable to their interests – that is, to ‘*make law.*’ The project therefore explored a set of issues that are central to access to justice and other judicial sector reforms, as well as to achieving human development more generally. The study paid particular attention to efforts by different segments of the poor to use law to gain access to land ownership and to challenge violations of civil liberties, including the right to organise. The study consisted of two years of fieldwork in eight rural municipalities of Brazil and the Philippines. The methodology employed was comparative and historical – the analyses uses a variety of data covering how the rural poor used the legal system over a twenty-year period, from 1980 to 2000, in different regions of the two countries.

The study explored four research questions. The first is descriptive. We know relatively little about who uses state law through the judicial system and through administrative courts in low and middle income countries. The data that is commonly analysed tends to be highly aggregated, often at the national level, and to focus on either the administrative infrastructure of the justice system or on overall civil and criminal case flows. We therefore wanted to create a more detailed map of who uses the legal system, using case information about the types of disputes that enter the courts in the fieldwork sites, as well as data from state or provincial levels. We sought to trace how these changed over the course of a twenty year period, 1980-2000. During this period both countries experienced democratic transitions, wrote new ‘citizen’ or ‘social-rights’ constitutions, and saw a dramatic increase in civil society activism – all factors that could plausibly contribute to enhancing the legal capabilities of the poor.

The second set of questions addressed what combinations of factors enhance the ability of the rural poor to use state law. Here we explored factors that existing studies suggest are significant, and which guide the design of many judicial reform projects. These include:

- 1) Favourable legal framework – constitutional provisions and legislation that extend new rights, or old rights to new social groups

- 2) Public legal aid and other government institutional mechanisms to facilitate access to the regular courts
- 3) Alternative dispute resolution or other institutional mechanisms that provide simplified and speedy procedures for resolving disputes
- 4) Civil society organisations, such as legal advocacy NGOs or law reform movements that provide low cost legal information or expertise, and other forms of support.
- 5) Existence of a ‘rights consciousness’ and a level of legal literacy

To these five factors we added two additional ones. One, the existence of a local political regime in which political rights are widely respected and elections are competitive; and the *disputing opportunity structure* people or groups face – that is, the availability of non-state authority systems to resolve disputes and seek justice, such as those provided by religious groups, customary law, cacique law, and revolutionary law of armed guerrilla groups (in the Philippines).

The third set of questions focused on the kind of access to justice provided by new or customary alternative dispute resolution institutions that have enjoyed a surge of international support in recent years. We focused on three quite different mechanisms: the Brazilian judiciary’s small claims court (Juizados Especial Civil, JEC), the state-annexed customary Barangay Justice System in the Philippines (katarungang pambarangay, KP), and the administrative court system of the Department of Agrarian Reform for land and land reform-related disputes, also in the Philippines and known as DARAB. We asked whether such reforms create incentive for rural poor to seek legal remedies, and what types of justice such institutional mechanisms offer.

The fourth, and last, set of questions related to the conditions under which rural poor are able to use the courts to claim legal rights and to produce and institutionalise interpretations of legislation or constitutional provisions that are favourable to their interests – that is, to make law from below. We explored five episodes of land conflicts involving implementation of national agrarian reform legislation to identify the political-legal dynamics that make it more likely that movements of peasants, the landless or agricultural workers are able to use the court system effectively.

### *Law and Legal Capabilities: An approach and some distinctions*

The notion of ‘law’ used in this project shapes much of the framing and design of the study and therefore requires a comment at the outset. There are two notions of ‘law’ prevalent in international development work. State-centred approaches to law, which are most common in law or judicial reform projects, understand law to be a set of legal rules that are binding on society and applied by formal state institutions such as the judiciary and enforcement agencies. In legal pluralist approaches, state law is seen as one of several set of rules and institutions that regulate social relations and through which conflict is resolved. Legal pluralists also argue that state law is a product of state elites and that its enforcement is primarily the role of state institutions, but they also argue that state-law competes with other forms of ‘non-state’ law in the regulation of social conduct. For a variety of reasons ‘non-state’ law can be, in particular social contexts, a preferable form of disputer resolution over that offered by state legal systems.

In this study state law is seen as a process in which state *and* society actors (including individuals) compete to establish the dominant interpretations of what constitutes compliance and enforcement of formal legal rules. While formal legal rules are created by political elites through legislation or administrative rules, these legal rules are not self-enforcing. Actors in both state and society have to construct interpretations that specify what kinds of actions are complying with these formal rules and what is acceptable enforcement. Contestation over these interpretations occurs both within judicial institutions and in other arenas, and involves public officials, civil society and corporate actors, and of course private citizens. The judiciary plays a central role in institutionalising interpretation of legal rules, because its rulings create binding precedents or jurisprudence. This state-society approach suggests that similar legal rules will over time provide the base for different law, as interpretations of the legal rules shifts in response to changes to the distribution of power amongst actors in society, shifts in societal values, and other factors.

Our research suggest that there are three basic distinctions that shape the answers to the questions posed above, and which by extension may influence the impact of policies that seek to enhance legal capabilities. The first distinction is in the nature of the conflict in which parties are involved. The justice concerns of the rural poor are broad and varied, but they can be defined as either centred on Restitution or Distribution. Restitution re-establishes a previous state – that is, rectifies a wrong or re-establish a broken social harmony – within families, or within residential, business, or other types of communities. Access to legal restitution does not contribute to poverty reduction in any direct way, though it certainly contributes to the quality

of life people enjoy and may have indirect poverty reduction effects, as small conflicts are kept from developing into larger and more disruptive ones. Distributive justice changes a previous state (and a balance of power in particular), such as access to land, gender equality, and can lift large numbers of people out of positions of subordination and exploitation. Legal claims of this nature tend to seek change in deep seated injustices and structural sources of human poverty.

The second distinction is between conflicts in which the parties are relative social equals or relative 'un'-equals. Disputes may involve parties who occupy similar or very different positions on systems of stratification (such as those based on gender, income or class, or ethnicity or linguistic group). Social inequality translates into *differential ability* to use the courts and often how the courts, the legal professional generally, and public officials view the disputing parties. This is particularly the case in countries with high levels of social inequality, such as in Brazil and the Philippines.

The third distinction is between conflicts in regions where the national state has a relatively strong presence and where it does not. Legal pluralists have taught us there are competing fields in which people can seek to resolve or manage the conflict. State law and judicial institutions are part of one such field. *When someone considers whether to use state law, they weigh the ease of access and the costs and benefits of using state law in relation those associated with using other normative fields.* A central task in understanding when people use state law and their relative efficacy in doing so is to identify how and why people shift between non-state and state law.

In rich countries access to justice reforms occur in a context of reasonably well-rooted and relatively effective state. This makes it more likely that processes within alternative dispute resolution institutions, for example, are consonant with (or at least not in direct contradiction of) state law. Hence people resolve disputes in what some legal sociologists call 'the shadow of state law,' even when not directly resorted to judicial or other justice sector institutions. But in many of the countries undertaking current judicial reforms state presence is weak and even prior to the introduction of alternative dispute resolution institutions, much dispute resolution did not take place in the shadow of state law. In low and middle-income countries the differences in the presence of the state in large urban centres and rural areas can be particularly large. This difference in the presence and reach of the state has profound implications for what kinds of access to justice reforms are effective for citizens and the poor in particular.

## **II. Method, Cases, and Data Collection Techniques**

The study is comparative and historical, tracing the relationship between different segments of the rural poor and the legal system over a twenty-year period (1980-2000) and across several regions of two countries. This methodology making it possible to explore the impact of different types of legal, political, and economic changes on the legal capabilities of the poor. The project, for example, examines the impact of recent agrarian reform legislation, the presence of social movements (the Movement of the Landless, MST) in Brazil and the National Coordination of Autonomous Local Rural People's Organisations (UNORKA) in the Philippines, the democratic transitions of 1985 and 1986 (respectively), and several institutional reforms of the judicial system.

We selected Brazil and the Philippines because both are countries with high levels of social inequality and grossly skewed income and land distribution. This inequality, we hypothesized, would influence the ability of both individuals and collect actors such as social movements to use the law, and how judicial and alternative dispute resolution mechanisms function. This case selection does point to an important limitation of the study's findings. They are relevant principally to countries that are (i) democratic and (ii) have high levels of social inequality. Some of the lessons, however, are applicable to other national contexts, but the effect of the democratic institutions and types and degrees of social hierarchy that occur in particular national or sub-national contexts need to be taken into account.

To explore the four sets of questions defined above, the project adopted a comparative strategy, at different levels of analysis. At the national level, Brazil and the Philippines have, on the one hand, strongly contrasting judicial institutions and legal traditions, and on the other both have experienced democratic transitions during the 1980s and produced new *citizen* constitutions and legislation that greatly expand social and diffuse rights. Furthermore, the two countries both implemented extensive access to justice reforms, but did so in different ways. In Brazil, a series of special courts were created during the 1990s, including the civil courts for small causes (small claims courts). In the Philippines, the reform took a very different direction: the customary Barangay councils, which were given the prerogative to mediate disputes in the late 1970s, and had their role expanded in the 1990s – lesser civil and criminal cases had to pass through the BJS before they could be heard in the formal trial courts. While the Brazilian reforms created a greater division of labour within the formal court system, the Philippine reform annexed customary law and its dispute resolution mechanisms. The Philippines also introduced an elaborate system of administrative tribunals managed by the Department for Agrarian Reform (DAR). The tribunals amounted to the executive branch

‘usurping’ a significant part of the judiciary’s jurisdiction, in a manner unthinkable in Brazil. These tribunals have exclusive jurisdiction over cases involving land conflict and the agrarian reform legislation. Judicial and administrative courts differ in the procedural rules and the training of the staff and these likely effects both the willingness of rural poor to use land related legal instruments and the concrete outcomes of litigation.

Within each country, fieldwork was undertaken in two regions that varied in the competitiveness of the local political regime and the ideological position of the judiciary, and hence the possibilities of rural poor finding allies inside and outside of the judiciary. And within each region two municipalities were selected. The criteria for selecting municipalities were variation in the presence of strong rural social movements and other civil society actors. In total fieldwork took place at eight locations: two municipalities in the Brazilian states of São Paulo and Rio Grande do Sul, and in two municipalities in the Philippine provinces of Quezon and Davao del Norte. Detailed descriptions of the regions and municipalities are given in the working papers that report research results in greater detail.

The conception of law that runs through the project – a product of the interaction of actors in state and society over the interpretation of legal rules, in the context of multiple legal orderings – requires a multidimensional data collection strategy. Fieldwork had to reveal law as a process of interactions between actors who occupy different positions in different fields, some of which have substantial overlap. It also had to capture change in the process of law over an extended period of time, and provide some means for identifying the causes that helped produce these changes. This is a tall order. The fieldwork outlined below does not meet this order but it comes as close as possible, given the constraints that studies of this nature face. These constraints include the availability of written records in rural areas, the high costs of cross-country comparative work, and the time frame of the study.

The fieldwork had four data collection components.

- 1) A survey of court cases in the eight municipalities that covered the 1980-2000 period. In Brazil this survey included the small claims courts but in the Philippines the weaknesses of record keeping did not allow a similar exercise for the barangay justice system. In the Philippines the survey did include land cases in administrative tribunals of DAR.

Brazil: 12,923 cases (civil and small claims court)

The Philippines: 6,721 cases (civil and administrative courts)

- 2) 80 focus groups – 10 in each municipality, of four to six hours of duration – with different sectors of the rural poor. Variation in participants included proximity of

residence to the municipality's administrative centre (where courts and other judicial institutions are located), religion, and gender. Focus groups discussed, among other issues, the types of conflicts that become legal contests, different pathways to the courts, as well as their disputing opportunity structure.

Brazil participants: 481 (57% women)

Philippines participants: 373 (34% women)

- 3) Structured interviews with local authorities who may play a role in settling disputes, such as local clergy, politicians, and of course judges. The interviews allowed us triangulate information produced by the focus groups about the disputing opportunity structure available, and the types of conflicts that are most common.
- 4) Case studies of conflict around implementation of agrarian reform legislation that became judicialised. We analyse five different episodes of land conflict that became judicialised, using interviews with protagonists on both sides of the conflict, legal professionals, as well as extensive court documents and newspaper accounts. In Brazil the case studies focused on conflicts involving the Movement of the Landless (MST) in São Paulo and in Rio Grande do Sul. In the Philippines the case studies looked at episodes of conflict around implementation of the agrarian reform law RA6657, and in which the NGO Peace Foundation played a prominent role.

### **III Trends in Access to the Judiciary, Brazil and the Philippines: 1980-2000**

The surveys of court cases sought to map which people have used the courts and around what types of conflicts. It also sought to trace how this has changed over in the 1980-2000 period. We conducted a census of all the civil and criminal cases in the local trial courts with jurisdiction over the eight municipalities. In each of the courts a sample of civil cases was drawn from this census to explore in more depth the characteristics of the litigants, the nature of the dispute, the final ruling and how long it took for cases too reach their judicial conclusion. Our primary focus was on civil cases, because these are initiated by individuals or collect actors, rather than by the state.<sup>1</sup> We also collected data on national and regional case flows. Hence we have case flow data at the national, regional or state level, and municipal level. Here we summarise briefly some of the principal findings. The study's working papers contain a more detailed analysis and further findings.

There has been a striking increase in the number of civil cases over the 20 year period examined in both countries, and in both urban *and* rural areas. In Brazil civil cases tripled,<sup>2</sup> and by 2000 there were 50 cases per thousand inhabitants. The project municipalities in São Paulo had an eight-fold increase in civil cases, well above the national average. In the Rio Grande do

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<sup>1</sup> Criminal cases are brought by public prosecutors representing the state against the defendant.



Sul municipalities the increase was less substantial – 2.3 times. Not only did the volume of civil cases grow dramatically in the four rural municipalities, but the diversity of the issues around which litigation occurred also grew substantially. Use of the courts therefore grew in both depth (numbers of litigants) and in breadth (range of social issues covered). Curiously, in all four municipalities the number of cases actually decreased during the 1980s, and then grew rapidly in the 1990s.

In the Philippines as a whole, civil cases grew faster than in Brazil – six fold during the 1980-2000 period. The rapid growth notwithstanding, the number of civil cases per thousand inhabitants in 2000 was only 3.<sup>3</sup> Case flow figures for the Philippine regions in which the four fieldwork municipalities are located suggest a picture comparable to that in Brazil – civil cases increased ten fold in South Tagalog and four fold in Southern Mindanao. The data therefore show the substantial growth in use of the legal system by people who live in rural areas, which in some municipalities outstripped the national average and in other others fell somewhat below that average.

If the overall increase in the number of cases by citizens is striking in both countries, and in the Philippines in particular, the disparities between Brazil and the Philippines in the absolute numbers of cases is also striking. Brazilians bring 17 times more cases than their Filipino counterparts (holding population size constant). In the regions where fieldwork took place the differences are even greater. In the state of São Paulo there were 108 cases per thousand inhabitants in 2000, and in Rio Grande do Sul 95 cases per thousand. In contrast, Southern Tagalog, the least developed of the four regions where the project undertook fieldwork, had only 1 case per thousand inhabitants in 2000. The Southern Mindanao region had 3 cases per thousand inhabitants, which is the same as the national average.

The two countries experienced their respective growth in cases at different historic moments. In the four Brazilian municipalities, there was an actual decline in cases during the 1980s cases, produced by a decrease in the number of cases brought by government, primarily against tax debtors. Cases brought by private parties remained stable or increased slightly during the decade. In the 1990s growth was rapid, driven by cases brought by private citizens, and in São Paulo by women in particular. In the Philippines the pattern is the opposite. Civil cases grew rapidly in the 1980s, after which growth slowed during the 1990s. Chart 1 shows,

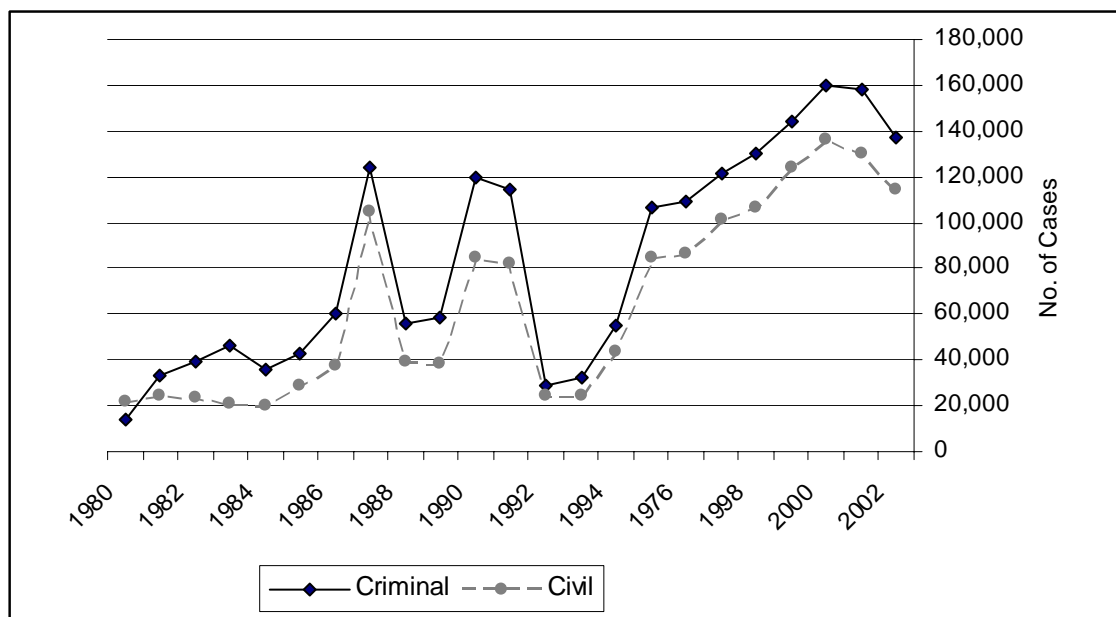
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<sup>2</sup> This figure includes on cases in the ‘common courts,’ and not those brought in special courts such as the small claims court or the labour courts. If cases in special courts are included the total numbers increase substantially.

<sup>3</sup> In contrast to Brazil, criminal cases have grown at a similar rate as civil cases and outnumber civil cases.

however, that in the Philippines the higher growth rates of the 1980s were accompanied by wild yearly fluctuations and that these stabilised during the 1990s. (Whether these fluctuations are ‘real’ or related to reporting deficiencies in the judicial system has not been possible to ascertain.) The regions in which the country’s fieldwork municipalities are located reflect this national pattern, with the number of civil cases in 1980s growing 3.6 and 3 times, and then experiencing somewhat slower growth in the 1990s.

Chart 1 Civil and Criminal Cases, The Philippines 1980-2002



Many factors undoubtedly contributed to the high growth rate in civil cases between 1980 and 2000. There are good reasons to believe, however, that this increase is related at least in part to the countries’ democratic transitions, which including enactment of new citizen constitutions, and to increases in the level of state presence – in terms of both public investment and consolidation of the administrative apparatus, and hence capacity to act – outside of the larger metropolitan areas. Separating the impact of the transitions from that of state presence is of course very difficult, not the least because both countries underwent democratic transitions in the mid-1980s (1985 in Brazil and 1986 in the Philippines) and we therefore lack variation on this particular independent variable.

There are several reasons why higher state presence may relate to increases in the volume and diversity of civil cases. Higher state presence (1) increases people’s access to information about rights and other legal-judicial information or administrative procedures; it (2) alters the disputing opportunity structure by eroding the power of other systems of authority

through which conflicts might be settled, hence making state law more attractive; and (3) in contexts of high inequality, higher state presence erodes local tyrannies or authoritarian enclaves that keep people from accessing state law.

First, the different timing of the expansion in case flow in the two countries suggests that the democratic transitions, while playing an important role, cannot *alone* explain greater use of state law. The democratic transition occurred at the same time in the two countries, in the mid to late 1980s, but while the Philippines saw a large increases in civil cases during the 1980s, this growth occurred in the 1990s in Brazil. The degree of state presence and capacity, however, varied greatly across the two decades in each country and in Brazil in particular.

In Brazil the 1980s saw a profound financial crisis of the state and a failure to tackle a deep recession and to change the country's development model. This policy paralysis culminated in hyperinflation at the end of the decade. In the 1990s and after 1994 election in particular, the country came to grips with its economic crisis and a series of state reforms were introduced to shift developmental models. In the Philippines the changes in state capacity were less pronounced, the presence of the central state increased in rural areas in the second half of the 1980s, particularly in regions where there was a threat of communist insurgency led by the National People's Army (NPA), and then appears to have become less institutionalised in the 1990s, though this varied across sectors of the state in important ways. The administrative and political capacity of the Department for Agrarian Reform, for example, in fact strengthened after 1992.

Second, within country variation also suggest that the degree of state presence and use of state law are linked. The contrasting case growth rates of the São Paulo and Davao municipalities versus those in Rio Grande do Sul and the Tagalog region reflect the considerable expansion of state presence that took place in the first pair. The two São Paulo municipalities have had growth rates in civil cases that are far above the national average – a nine increase over the volume in 1980 – while those in Rio Grande do Sul had growth below that average, at slightly under three times the volume of cases. Although São Paulo is a wealthy state by any standards, the two fieldwork municipalities are located in the far south-western region called the Pontal do Paranapanema, which is the least developed in the state and until the 1990s still had oligarchic landholding families that controlled local economic and political life. In 1990s the São Paulo *state* government intervened in the region a dramatic way, establishing a major presence to undertake agrarian reform projects and stimulate regional development. In the Rio Gande do Sul municipalities, the most significant increase in state presence occurred in

the 1970s under military rule, through the state agricultural extension service and Bank of Brazil in particular. This state presence declined during the 1980s financial crisis of the state, as it did in other rural areas, and recovered somewhat during the 1990s.

Third, the disparity in the aggregate number of cases brought in Brazil and the Philippines may provide further support for the argument that there is a relationship between state presence and the willingness or ability of citizens to use the courts to settle disputes and claim rights. The remarkably large gap in the number of cases per 1,000 persons between the two countries could reflect the fact that the Brazilian state, in both urban and rural areas, has far greater capacity for action and permeates social life in ways that it simply does not in the Philippines. That the Brazilian state has far greater capacity and presence than that of the Philippines is not in doubt. To establish a clear relationship between this and volume of civil cases would, however, require a statistical exercise with a larger number of countries that vary in both indicators of state presence or strength and of volume of civil cases. A combination of cross-sectional and panel data could shed significant light on the strength and nature of the relationship between use of law and state presence.

*Whose* access to justice has been increased over the past twenty years? Data for the four Brazilian municipalities are the most reliable. The notable feature of the expansion of the use of law is the dramatic increase in women who bring cases and, related, in the number of family law related cases. In São Paulo the number of women litigants grew almost ten-fold, while that of men four fold – that is, cases brought by women increased at twice the rate as that of men. In Rio Grande do Sul, the amount of growth in cases is far small for both men and women, but again women litigants grew at a higher rate than that male litigants (2.5 versus 1.9 fold). The growth of cases brought by companies and by government – mostly tax collection cases– also contributed to the overall increase in civil cases.

Our focus group work show that in 2003 women brought more cases than men in both São Paulo and Rio Grande do Sul. In the former, 36 percent of the women who participated in the focus groups had brought a case, versus 24 percent of men; in the latter the difference was 21 versus 18 percent. This is a quite a striking finding. Interestingly, the municipality that had the highest level of state intervention, Mirante do Paranapanema, also had the largest increase in women bringing cases. In the particular case of this municipality, the increase in the number of women using the legal system likely reflects the work undertaken by the São Paulo state government with community health agents, local health post workers, and social workers, all of whom were particularly concerned with gender issues.

The findings discussed so far are clearly noteworthy. Their interpretation, however, should factor in that there has been a gross underinvestment in the judicial system in both countries. Institutional growth and strengthening has not come close to accompanying the growth in use of the legal system. This is not the place to address the shortcomings of the respective judiciaries, but at least one comment should be made. The judiciaries in both countries face severe staffing problems, and in rural areas in particular. In both Brazil and the Philippines a substantial share of judgeships and public prosecutors positions are unfilled. In addition to a lack of numbers, judges in rural areas face significant difficulties obtaining access to new legislation and recent high court rulings. In our fieldwork, judges without exception complained about isolation from the profession and developments in the legal field. We also encountered judges who were applying legislation that had been superseded, in some cases by over a decade of new law.

#### **IV. Factors that Enhance Legal Capabilities**

People in rural Brazil use state law far more than their counterparts in the Philippines, and people in São Paulo more than in Rio Grande do Sul. There are at least three possible explanations for why this is the case. Each explanation implies a distinct set of policy to enhance use of state law. One is that the administration of the judicial system is at fault – it is more efficient and effective in Brazil than in the Philippines. This explanation assumes there is a demand for the state justice system, but poor administration of justice creates barriers to access and serves to repress demand. A second explanation, not necessary exclusive of the first, suggests that people prefer alternative forums for dispute resolution, such as customary law or new alternative dispute resolution, because these are speedier, more user friendly (i.e. less formal), and consistent with local norms. This explanation suggests that people face a dispute resolution opportunity structure and choose the forums that are more familiar or less costly (in whatever terms).

We suggest a third explanation, that the stark difference in use of state law in Brazil and the Philippines reflects at least in part the very different disputing opportunity structure each faces *and* the relative extent of the shadow of the state. Hence we agree that the disputing opportunity structure is a key part of the explanation. But the shape of this structure is influenced by the degree of state presence. In the case of the Philippines, not only do the rural poor have alternatives such as customary law, cacique law, religious authorities, and in some regions law provided by revolutionary movements (the NPA in the case of the Philippines), but

the extent to which the normative and substantive elements of state law casts a shadow over these, and influences their functioning, is far less than in Brazil. Non-state authorities often do not operate in the shadow of state law. One consequence is that in the Philippines people have less opportunity or incentive to use state law. In Brazil, authorities in non-state authority systems often resolve conflict in line with basic elements of state law – i.e. in its shadow.

The combination of focus groups and interviews with local authority figures, including judges and priests, reveal that in rural Brazil people have a number of different paths that lead to the court system and facilitate using state law. Particular in the São Paulo municipalities, where the state greatly expanded its role during the 1990s, rural poor had multiple paths to the courthouse. A variety of local non-state and state actors working in rural communities acted as a source of information about existing legislation and rights, court procedures, and availability of free legal aid. These included agricultural-extension workers, but local health-post workers and social workers employed by the municipal and state governments. They also included non-state actors, most importantly progressive clergy and Catholic lay workers, as well as leaders of rural worker unions. Social workers, community health agents, and progressive priests appear to have played a particularly important role in facilitating the access of women to the judiciary around family law issues – separation, divorce, custody, child support, and restraining orders in cases of domestic violence. Priests from the liberation theology tradition offered not only information about the possibilities of resorting to the courts, and how to access free legal services, but also provided a ‘moral authorisation’ to use state law. In municipalities where local clergy were conservative, such as in Rio Grande do Sul, the growth in the number of women litigants and family law cases was far smaller.

Once an individual decides to go ‘look for her rights’, free legal aid is available at the courthouses and in the offices of the Brazilian Order of Lawyers (OAB). Some private lawyers provide sliding-scale services. Court house staff can be a surprisingly valuable source of information on procedural, and sometimes substantive, law for the rural poor. This varies greatly across court houses however.

In the Philippines we found a very different picture. There are few pathways to the formal legal system. The different types of local authorities tend to block people from proceeding to the courts, rather than serving as pathways. Indeed, even state officials, as part of an official policy to reduce the number of cases coming into the courts, block access to the formal legal system. The one channel that led people to the formal justice institutions, and to the administrative land courts in particular, was provided by social movements which work with

peasants to secure access to land. Most types of conflict, however, are resolved through either the KP, cacique law, or influential political persons. In family law issues there is a strong trend towards seeking resolution outside of the village, but the local authorities that people consult, and women in particular – the parish priest, police chiefs, or municipality mayors – all discourage bringing family issues into court.

The stance of the judges, courthouse workers, and local police that discourages access to the judiciary is only comprehensible in the context of the Philippine Supreme Courts' reforms to address the 'explosion' of litigation. The Philippine judiciary is highly centralised and the Supreme Courts decision to address the increased case flow by keeping cases out of the courts, through a variety of alternative dispute resolution mechanisms, the most important of which (for the rural poor) is the KP (discussed in the next section), filtered down to the local trial courts. The barangay captain heads the KP court and is an important gate keeper to state law. Unfortunately, the barangay captain is also an important executive position in villages and a key political position. .

A second factor that blocks access to the judiciary, for better or for worse, is the stability of rural villages and the strength of their local institutions. Focus group work makes clear that in both the municipalities of Rio Grande do Sul and the Philippines, the stability of villages populations creates substantial group solidarity and pressure to resolve conflict between community members through local village mechanisms. In the case of Rio Grande do Sul, where the average residence in a village was 40 years, the old Italian and German immigrant communities rely heavily on elected community councils to resolve disputes between members of the some village. Such councils are usually composed of around 20 persons and have written statutes. Their origins reside in the work of the Catholic Church, mostly conservative clergy but in a few cases progressive, and they maintain strong links to the parish priest. Councils seek reconciliation but can also make rulings that include fines or community work. In cases involving outsiders, from other villages or outside of the municipality, or if a significant criminal offence has been committed, community members appeal directly to the police and the justice system. Many of such cases involve production-related disputes, such as purchase of agricultural inputs or commercialisation of product, that affect a group of families. The response is often collective – the village against the outside actor, whether commercial enterprise or government.

In the Philippines such internal village conflict is overwhelmingly settled by either the barangay justice system or other customary mechanisms. This holds true for even severe crimes

such as homicide and rape. The custom in which one family is compensated monetarily by the other for the losses incurred by crime, remains widespread in the fieldwork regions. Conflict with outsiders – that is, not villagers – is more likely to find its way to court but other forms of conflict resolution are also common, including those of cacique law or mediation by political leaders. In cases involving disputes between poor and local power holders, such as land owners, disputes generally *do not* become open conflicts, for the risks and costs to the less powerful party are too high.

## **V. Access to Justice Reforms: Small Claims Courts, the Barangay Justice System, and Administrative Courts**

Reforms that seek to enhance access to justice are of two kinds. There are reforms that seek to increase access to forms of legal restitution, and thereby to re-establish an existing set of social relations. Reforms that seek to enhance access to distributive justice aim to change a particular set of social relations. These two types of justice do not necessarily correspond to particular institutional arrangements – trial courts can provide both types of justice depending on the nature of the parties and litigation. What distinguishes the two types of reforms is more subtle. Reforms that attempt to enhance access to distributive justice take as a point of departure that the parties involved in a conflict are unequal, and reforms intervene in a manner to enhance the legal capabilities of the weaker party. In contrast, reforms that attempt to increase access to law for restitution assume parties are relative social equals. In this case, reforms have in recent years come to embrace non-state forms of dispute resolution, either customary or alternative dispute resolution mechanisms.

In either case, judicial reforms can address the often noted obstacles access to judicial institutions and use of available legal remedies. This includes (1) access to information and ability to define a grievance as a possible cause for legal action; (2) financial resources, to hire lawyers, documents ...using legal institutions can be very costly in themselves, but also entail opportunity costs, forfeiting income-generating activities; (3) institutional skill and alien language or concepts– the ability to understand and use the system; (4) distrust or community pressure to resolve disputes internally; and (5) slow pace of judicial procedures, which imposes significant opportunity costs (Anderson 2003).

The study examined justice sector reforms that sought to increase access to both types of justice. The small claims court system in Brazil, or Juizados Especial Civil (JEC), is a state judicial institution with simplified and expedited procedures that provides access to limited



forms of restitution. It attempts to balance informality and amicable settlement, with due process and procedural protections available in the regular courts. The barangay justice system, or katarungang pambarangay (KP), is a type of ‘state-annexed’ customary dispute resolution institution. On the one hand it is a local institution with strong roots in communities, on the other it formally falls under the authority of the Department of Interior and Local Government which is responsible for providing training to members of the KP system. By design, neither the JEC nor the KPs address cases that involve questions of distributive Justice.

The third reform the study examined was the administrative tribunal system managed by the Department for Agrarian Reform for settling conflicts related to implementation of the national agrarian reform law (RA6657).

### ***Small Claims Courts (Juizados Especial Civil, JEC) - Brazil***

The small claims courts (hence forth JEC, for Juizados Especial Civil) in Brazil originated as a sub-national experiment, in the southern state of Rio Grande do Sul, in 1982 and was ‘nationalised’ on a voluntary basis in 1984. That is, state judiciaries after 1984 had the option of creating small claims courts but were not obligated to do so. These specialised courts received constitutional status in the 1988 Constitution and became mandatory for state judiciaries. Implementing legislation was only passed in 1995, however.<sup>4</sup> The principal features of JEC reflect its emergence during the democratic transition and the judiciary’s concern with democratise access to justice, addressing a perceived ‘repressed demand for litigation,’ and the need to win back some of the legitimacy the judiciary lost under 21 years of military rule.

Two features of JEC are noteworthy. First, it is a part of the judiciary, housed within courts houses and not only functions in the shadow of the state, but is expected to extend that shadow to cover social groups who previously did not benefit from its protection. Among some of its architects there was an expectation that as people entered into contact with the judiciary through JEC they might learn more about their rights and gain trust in the judiciary as an institution, helping to revitalise it (Dinamarco 2000, 8). As a result, JEC makes a concerted effort to balance informal (and primarily oral) and efficient procedures with formal legal protections enjoyed in common courts. At least in principles there is a sense in which these courts balance simplicity-informality with due process of law. At least in principle, “liberty,

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<sup>4</sup> The Law of small claims courts (no. 7,244/84) and the Law of Special Courts (no. 9,099 of 26/09/1995), which created both the civil and the criminal special courts, the former being the small claims court.

equality of the parties, and the opportunity to refute the charges – the trilogy that has inspired modern [judicial] procedures and democratic compromise – are part of the process’ of the small claims courts (Dinamarco 2000, 24). It is also for this reason that, in contrast to the Philippines and many other countries that have adopted alternative dispute resolution mechanisms, they are voluntary – people can choose to enter with a case in either the small claims or regular court systems.<sup>5</sup>

Second, as is the case in many other national contexts, JEC hears small civil claims through a process that is free, informal, and with minimal procedural requirements, and that always seeks conciliation of the parties.<sup>6</sup> Most cases are settled in the first hearing, which is usually run by a mediator who may or may not have some formal legal training. A judge formalises any settlement after the hearing. If no settlement is reached a ‘judgement’ hearing is scheduled, this time presided by a lay judge. Usually the lay judge gives his ruling at the end of the judgement hearing.

The small claims courts have contributed significantly to the increased use of the judiciary in the first five years implementation (1995-2000). JEC cases in 2000 made up from 20% to 50% of all cases heard in the four fieldwork municipalities. Who used the small claims courts, and for what? An analysis of a *representative* sample of cases from this five year period reveals that it is overwhelmingly used to collect debts (over three-fourths of cases). Although it varies by municipality, women use the system less than men, from a low of approximately 12% of civil cases to a high of 30% of cases over the five year period, with men bringing 70 to 88% of the cases. This gender inequality is considerably higher than in the regular courts, where women bring between 27% to 35% of civil cases, while men bring roughly 40-45% of the cases (government and companies the remainder). Perhaps not surprisingly, over a quarter of the cases were brought by local store owners seeking to collect unpaid store credit. Small agricultural producers brought a significant number of cases – roughly 15% to 28% of the cases – but this is a small share relative to their weight in the population of each of the four municipalities.

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<sup>5</sup> This is not to say that the tension between judicial solutions that apply the legal rules vs. ‘equity’ or community harmony is absent. There is in fact an interesting debate among legal experts on whether the judge can rule by ‘equity’ or by ‘law,’ and whether the small claims courts should be made mandatory.

<sup>6</sup> There are also ‘Small Criminal Courts’ that handle cases in which the maximum sentence is one year. Here again, the emphasis always on reaching a settlement between the parties. The most common crimes heard in these courts are verbal and physical aggression (bar fights esp.), poor treatment, traffic infractions, leaving scene of traffic accident without aiding the victim, making threats or intimidating people, obscene acts, and disturbing the peace.

In sum, overwhelmingly the small claims courts are being used by a significant share of the population and, as one judge noted, has helped disputes from escalating into more serious conflicts. The access to justice it provides, however, is very limited. Most cases involve forms of debt collection. It is used mostly by people living in the municipalities' administrative centre, and particularly by store owners and providers of services, such as masons and carpenters. It also used by civil servants, homemakers, retirees, and small agricultural producers, but on a lesser scale.

Table 2 General features of JEC, Brazil

Features	Description
<b>Jurisdiction</b>	
<b>Geographic</b>	<ul style="list-style-type: none"> <li>The court jurisdiction, in rural areas usually overlaps with municipal border. Several municipalities with small populations may fall within a single jurisdiction however.</li> <li>40 minimum wages or less. (R\$200 x 40 = 8,000 or around £1,540 at the March 2005 exchange rate)</li> </ul>
<b>Causes</b>	<ul style="list-style-type: none"> <li>'simple', such as debt collection, malfunctioning products, misunderstanding between neighbours, traffic accidents without physical injuries</li> <li>Excluded causes include (i) family issues, such as child support, separation or divorce, cases involving children or adolescents, (ii) bankruptcy, and (iii) cases against the government</li> </ul>
<b>Standing</b> (who can bring cases)	<ul style="list-style-type: none"> <li>People 18 years and over and micro-enterprises, who live/operate in the jurisdiction</li> <li>A juridical person can, however, be a defendant.</li> <li>Bankrupt physical or juridical persons, government, and prisoners cannot be parties to a case</li> </ul>
<b>Legal representation</b>	<ul style="list-style-type: none"> <li>Optional for claims 20 minimum salaries or less; if one party has a lawyer the state has to provide a public defender to the other party</li> <li>Mandatory for cases over 20 minimum salaries</li> </ul>
<b>Procedures</b>	
<b>Evidence</b>	<ul style="list-style-type: none"> <li>Any kind of 'morally legitimate' evidence can be used to make ones case, even if its not specified in law</li> </ul>
<b>Appeals</b>	<ul style="list-style-type: none"> <li>Appeals have to be made within 10 days of the lay judge's rulings and will be heard by a body of three (regular) judges. Parties are required to have lawyers and the person who loses the case pays the court costs.</li> <li>The JEC have their own 'court of appeals' at the state level</li> </ul>
<b>Physical location</b>	<ul style="list-style-type: none"> <li>Court house, located in the administrative centre of the municipality.</li> </ul>

### ***Barangay Justice System (katarungang pambarangay (KP) - The Philippines***

The barangay justice system or *katarungang pambarangay* (KP) is a nationwide compulsory village mechanism for resolving disputes using informal means. It is based on the traditional value of social harmony (*pakikisama*) and customary practice of amicable settlement of disputes through informal mediation by village elders or headmen (*areglo*) (Pe and Tadiar 1984). It settles both civil and criminal cases. Over the years the kinds of cases subject to the

system has expanded and today all disputes involving offences punishable either by less than one year imprisonment or less than a PhP 5,000.00 fine (£48, at March 2005 exchange rate) fall under the jurisdiction of the *Llupon Ttagapamayapa*, the village ‘peace-making’ council led by the *barangay* captain that is responsible for operation of the *KP katarungang pambarangay* law.

The customary institution was annexed by the state in 1978 under Presidential Decree (PD 1508), at the height of the Marcos dictatorship. It was given an expanded role under the Local Government Code of 1991. Amid public dissatisfaction with the judiciary, the push to develop the system came from reports of a flood of cases getting stuck in regular courts with little chance of timely resolution. In adopting the new system nationwide, the government aimed to decongest the courts, standardize and make official indigenous *areglo* practices, and preempt use of non-state regulatory orders. It was to be a state-sponsored alternative to both the judiciary and other non-state fields of law (Silliman 1985). Since the early 1990s it has increasingly been promoted as a faster and cheaper way for poor people to obtain justice, as well as an effective way to reduce the case load in the regular courts. The *katarungang pambarangay* is compulsory for certain kinds of cases; all means of obtaining an amicable settlement must be officially certified as having been exhausted using the prescribed steps before a person could legally go to court.

Table 3 General Features of the KP System

Features	Description
<p><b>Jurisdiction</b></p> <ul style="list-style-type: none"> <li>i. Territory</li> <li>ii. Disputes</li> <li>iii. Litigants</li> <li>iv. How initiated</li> <li>v. Optional or compulsory</li> </ul>	<ul style="list-style-type: none"> <li>i. Barangay</li> <li>ii. All kinds of disputes except: those involving government party, government official or employee performance, criminal worth less than P5,000 (₱48) or one year in jail, no private offended party, real property in different municipality/city, those deemed off limits by Department of Justice. (All other kinds of disputes can be filed directly in the regular courts; but all agrarian disputes must pass through BARC first)</li> <li>iii. (Non)resident "natural" (physical, private) persons on their own behalf.</li> <li>iv. Only parties in interest initiate.</li> <li>v. Compulsory first step before bringing a case to regular court.</li> </ul>
<p><b>Structure</b></p> <ul style="list-style-type: none"> <li>i. Organization</li> <li>ii. Structure</li> <li>iii. Supervision</li> <li>iv. Budget</li> <li>v. Adjudicators</li> <li>vi. How become adjudicator</li> </ul>	<ul style="list-style-type: none"> <li>i. Lupon (10-20 persons plus BC, at least 18 years old, appointed by BC), from which the Pangkat (3-person conciliation panel set by parties or BC) is drawn as needed.</li> <li>ii. National law (PD 1508; RA 7160).</li> <li>iii. Department of Interior and Local Government (DILG), assisted by other agencies and LGUs. But judges review certificates of failure to conciliate to make sure correct procedures followed.</li> <li>iv. No separate budget since integral part of regular barangay operations</li> <li>v. BC, Lupon, and Pangkat</li> <li>vi. Appointment by BC</li> </ul>
<p><b>Procedure</b></p> <ul style="list-style-type: none"> <li>i. Steps</li> <li>ii. Time frame</li> <li>iii. Appeal</li> <li>iv. Enforcement</li> </ul>	<ul style="list-style-type: none"> <li>i. Offended party brings complaint to BC where respondent resides; BC summons the 2 parties for mediation/conciliation; can have separate conferences with parties; if fails first time, must then go to Pangkat; if successful, written agreement signed by both parties; if not, can try arbitration with same players but different procedures (prior written agreement made binding them to whatever decision rendered; evidentiary hearings, investigation, decision, formal receipt of decision); if conciliation and also arbitration fails, only then can dispute go to regular court upon issuance of certificate ("that no conciliation or settlement was reached") by Lupon Secretary to complainant (copy furnished to courts); but BC can also issue certificate to bar judicial action (when deemed that respondent willingly failed to appear for hearings).</li> <li>ii. 15-15-15 days maximum</li> <li>iii. Can go to court only if have attested certificate of failure to conciliate in hand.</li> <li>iv. BJS has no official responsibility for enforcing a breached compromise agreement, though it can be of help in an unofficial capacity. It is the court's responsibility to enforce (thru motion of hearing first, then motion of execution of barangay settlement if nothing happens).</li> </ul>

Note: BC=Barangay Captain.

Table 4 shows that, according to the Department of Interior and Local Government, the growth in KP cases has been only slightly less rapid than that in the regular trial courts. Between 1980 and 2000 the number of cases grew five fold in the country as a whole. The quality of record keeping at the barangay level, however, is highly variable and in the fieldwork areas we did not encounter reliable records of the number or types of cases heard by the local KP.

Table 4 KP Cases Filed and Actions, The Philippines (1980-2000)

Type of Cases	1980	1985	1990	1995	2000
<b>Criminal Cases Filed</b>	13,563	42,996	119,833	106,411	159,768
<b>Civil Cases Filed</b>	21,421	28,650	85,096	84,983	135,905
<b>Total Cases Filed</b>	39,645	81,613	233,474	221,748	353,121
<b>Cases Forwarded to Trial Courts</b>	1,987	4,649	17,491	14,132	22,157

Source: Bureau of Local Government Supervision, DILG

The forty focus group discussion in the Philippines may provide a more accurate picture of the role KP plays. The KP system appears to have become well established, accepted, and well used in the handling of disputes among rural poor villagers themselves, in all of the villages visited, regardless of geographic location, associational ties, presence of rights advocacy NGOs, degree of elite political competition, or availability of other alternative orders. The most common disputes, according to the focus groups, were alcohol-related fight, theft, jealous intrigue, loose animals, and boundary disputes. In each municipality there were also instances of serious crimes coming before the KP, including homicide and rape (which by law should not pass through the KP). The one area that focus group participants consistently stated was excluded from the KP were family disputes, which tend to be taken up with authorities outside of the village, such as parish priests.

The focus groups suggest that most KP cases involved relative social equals. This would suggest that KP does not reinforce local authoritarian relations or locally tyrannies. There are two important caveats however. First, KPs in practice do here cases which by law are under the jurisdiction of the trial courts, including violent crime. Second, although they tend not to hear family related cases, there are indications of gender discrimination in how the KPs function. Ascertaining the levels of gender discrimination is difficult but the issue was enough of a recurrent theme in focus group and other discussion to merit mention here.

### ***Administrative courts for land (DARAB) – The Philippines***

The Philippines has one of the most progressive legal frameworks for agrarian reform in the world. The task of interpreting the rights in the constitution and enacting legislation – the Comprehensive Agrarian Reform Law, RA 6657 – has been largely removed from judicial authorities and given to executive authorities. A large administrative bureaucracy exists to convert potential property rights into actual rights, by identifying landholdings and beneficiaries, awarding titles and, at times, ‘installing’ beneficiaries on awarded land. Under current agrarian reform law, nearly six million hectares of land has been redistributed to more than two million peasant households since 1988, representing nearly half of the total

agricultural lands and two-fifths of the total agricultural households in the country (Borras, 2004: 9). The quasi-judicial tribunal system administered (DARAB) by the Department for Agrarian Reform has played an important role in this process of redistribution and has significantly expand access of rural poor to land rights

The decision to remove agrarian matters from the jurisdiction of the trial courts and place them in a new DAR-run tribunal system reflects a concern with both the amount of case take in the time trial courts, and landowners' ability to influence the final outcomes of these cases. On the one hand, (i) judges are often landowners themselves (and thus more sympathetic to a fellow landowner than an 'upstart' tenant or farmworker) or they are part of the extensive elite patronage networks that play a role in judicial appointments to begin with and, on the other, (ii) judges are more likely to apply the liberal notion of property rights in the civil code, rather than the social function of property and social rights ideas contained in the Constitution and in agrarian reform legislation. In practice jurisdictional lines in relation to agrarian reform and agrarian reform-related disputes remain unsettled, reflecting in part the underlying source of institutional discontinuity and legal tension is the co-existence of two contending bases of legal interpretation, the 1950 Civil Code on the one hand, and the 1987 Constitution and 1988 Agrarian Reform Law on the other. The two sets of legal rules was produced at different historical times and under different social-political circumstances. The 1950 Civil Code takes evidence of title (e.g., absolute deed of sale, tax records, etc.) as the legal basis for land ownership, whereas the 1988 agrarian reform law takes personal cultivatorship as the legal basis for land ownership. And while the 1987 Constitution defines property in terms of its social function, there is no such concept of land under the Civil Code. Rural poor claimants seeking land reform are obliged to mobilize state law administratively through the DAR or the quasi-judicial DARAB structure. DARAB decisions can be appealed at the Court of Appeals. If the case is taken to the Court of Appeals and decided against, the petitioner can either file a motion for reconsideration or he or she may appeal a Court of Appeals decision directly to the Supreme Court.

Data from the June 1998 Transition Report of then outgoing DAR Secretary Ernesto Garilao reveals just how much the 1988 law and the department's quasi-judicial machinery has become a site of substantial legal activity. Between 1988 and 1992 the number of cases filed with the DARAB reached 15,302; the total for the July 1992 to 1997 period rose to 117,487 cases. That is, in the first period the average number of cases a year ran at 3,825, and in the second period at 23,497 cases – a 16 fold increase. Cases between 1988 and 1997 have likely

involved the livelihoods of well over half-a-million rural poor, depending on what average household size one uses.

The system does have significant shortcomings. As in the case of trial courts, there are not enough DARAB permanent members to hear cases, dissemination of DARAB rulings is unsystematic, the autonomy of provincial adjudicators' vis-à-vis landowners is variable and a cause for concern. There are serious problems in the recruitment of qualified and competent adjudicators at the provincial level.

Nonetheless, when compared with the functioning of the regular trial courts in the Philippines, and the challenges agrarian reform beneficiaries in Brazil face in the regular courts (more on this in the next section), the DARAB system appears as a reform that has led to significant improvements in access to distributive justice for the rural poor. In the context of extremely high inequality and relative weak state presence overall, DARAB offers an interesting model for the poor to claim a particular set of constitutionally guaranteed rights.

## **VI. Claiming Rights and Making Law**

In Brazil and the Philippines, as in other countries with relatively recent democratic transitions, a new generation of constitutions have incorporated a range of social rights. These include rights relating to access to land under social function clauses, and to human rights such as housing, health and education. The final component of the study consisted of a small number of detailed case studies of episodes of land conflict that entered the judiciary. The case studies allowed us to explore how actors use the courts to claim rights and how they compete with other actors, including government and landowners, to construct interpretations of substantive law. Finally, it helped to identify why some interpretations prevail over others and become 'institutionalised' through court rulings. These case studies were not defined by a particular legal case, but rather by an episode of contestation (over time) that had the judicial system as at least one of its arenas. In each episode we traced a sequence of legal cases (civil and criminal) in tandem with contestation in other, non-judicial fields (direct contestation on the streets, through the media, or legislative bodies or state agencies).

The Brazilian Constitution of 1988 and the Philippine Constitution of 1987 both make property rights contingent on land fulfilling its social function and, along with implementing legislation, create a set of legal rights and commitments around which a variety of social movements have mobilised. In both countries the legal architecture that determines rural poor people's legal land rights is vastly different from what it was in the early 1980s. This is



particularly so in the Philippines, where constitutional and juridical changes greatly expanded tenants' and farm workers' legal rights to own the land they till. The wider scope of state law means that more rural poor people are now recognized as potential legal owners of a specific piece of land. Republic Act No. 6657, otherwise known as the Comprehensive Agrarian Reform Law of 1988, covers all private and public farmland, regardless of tenurial arrangements or productivity conditions and created a coherent and long-term agrarian reform programme that has provided land to over two million peasants. Furthermore, Executive Order 229 of July 1987 divested Regional Trial Courts of their general jurisdiction over agrarian reform matters, which was transferred to the Department of Agrarian Reform and its Adjudication Board (DARAB).

In the case of Brazil, no coherent agrarian programme was created during the 1990s, nor was jurisdiction over land conflict shifted into a specialized set of administrative courts. The social function of property, however, was placed among fundamental rights (article 5) in the 1988 Constitution, and Article 186 of that document defines in broad terms what constitutes the social function of agricultural land. According to Article 186 the State only recognized property rights in land that is used in an economically rational manner – that is, meets basic productivity criteria; complies with environmental and labour laws; and is exploited to the benefit of both owner and employee.

This is not the place to detail each of the five cases or the legal issues involved but instead we provide a brief summary of each. The two Brazilian cases focused on conflict over implementation of land reform involving the Movement of the Landless (MST). The São Paulo case study focused on the Pontal do Paranapanema region, a triangular piece of land in the poor south-west corner of the state, where the MST's land occupations pushed its landless families into direct conflict with one of the region's oldest landholding families. The ensuing court cases played a central role in altering legality of large swaths of land in the region, by pushing the state government to reestablish public possession of property that had been illegally occupied by large landowner, and to redistribute these to landless families; by producing an important procedural innovation that made it possible to accelerate the pace of judicial processes to suit better the needs of both the landless families and that of elected officials; and by altering interpretations of legal rules that helped decriminalise the movement and legal its collective action strategy. The Pontal do Paranapanema, is the only region in Brazil that analysts agree is experiencing true agrarian reform, benefiting directly over 7,000 households (perhaps as many as 30,000 people).

The second case is Fazenda Primavera in the state of Rio Grande do Sul. The farm, run by a productive and modern company that produced vegetable oils, was occupied by 600 landless families in 1998. Although the company had leased the land legally, the state supreme court ruled that the property rights specified in the civil code had to be interpreted through the lens of the constitution, and that (i) the conflict revolved around competing constitutional principles – property rights versus the right to a dignified life of the 600 families, which includes the right to shelter, clothing and refuge; that (ii) the company had not used the land according to its social function when it had failed to pay employees pension contribution (and thereby accumulating a large debt with the government), and finally (iii) that the case had wider social repercussions that needed to be taken into account – that is, the state had a public interest in maintaining social order in the region and forceful removal of the families could produce a social explosion in the region. The judges were centrally concerned with the collective nature of the occupation, its occurrence in a social context of substantial privation, and the failure of the government to address the profound social problems the families faced.

In the Philippines the first case study was of an episode involving SAMACA (*Samahan ng mga Magsasaka sa Catulin* or Farmers' Association in Catulin), in the municipality of Buenavista, Quezon Province. SAMACA is a landholding-based peasant association that had failed in several attempts to initiate land reform proceedings the 174-hectare estate in which its forty-five tenant households live and work. It was up against a prominent member of the regional land-based authoritarian elite. Around 1996 community organizers from the national non-governmental organization called PEACE Foundation were hired by the Bondoc Development Project (BDP), a joint Philippine-German government regional integrated development project, to organize tenants on the estate. Its organisers and SAMACA undertook paralegal training on agrarian reform and developed an intensive, semi-clandestine agrarian reform rights education drive in order to prepare all forty-five tenant households (and fifty-six individual beneficiaries) inside the property. The tenants' then formed a municipal-level peasant organization, the Buenavista Bondoc Peninsula Farmers' Alliance, out of four landholding-based organizations of tenants poised to claim land rights under RA 6657. The main legal issue raised was whether or not the estate's land was agricultural and thus covered by RA 6657. The landowner claimed that his estate was an untenanted cattle ranch and reforestation area, and therefore exempted from RA6657 coverage.

The second case involves the Free Association of Farmers in Sitio Libas (*Malayang Samahan ng mga Magsasaka sa Sitio Libas* or MSMSL) in the Municipality of San Narciso,

Quezon Province. This dispute involved another member of Bondoc's regional landed elite and thirty-five tenant households, over a 130-hectare landholding. Tenants petitioned for agrarian reform coverage of the property and two legal issues emerged in the ensuing dispute: (i) the tenants challenged the ownership claim of the landholder, which was manifested in his demand that the peasants make share payments; and (ii) land classification, whether the contested property is officially classified as inalienable public land such as public forest or timberland zone, alienable and disposable public land that simply has not yet been titled but may be, or private land with proper evidences of ownership. The answer to the land classification question would determine which set of agrarian reform legal rules and procedures under the 1988 law would apply and, related, whether or not the landholder or elite claimant to the land would be eligible to claim and receive 'just compensation' from the government for land redistributed.

Unlike in Catulin, the rural poor claimants in this case were embedded in a more extensive set of authoritarian relations, marked by a more settled presence of the underground guerrilla movement, alongside the landholder's private armed force. These two groups, reportedly in alliance with each other, sought to prevent the tenants from claiming the land through state law and then to punish them when they did so, undermining their physical control of the land even as their legal claim gained strength. At the same time, state military and local police presence was (and still is) strongly counterinsurgency-oriented and highly suspicious of any autonomous social movement and nongovernmental organization activity in the 1990s, and so proved to be of little help in guaranteeing the tenants' effective access to basic human rights, against the predations of either the guerrillas or the landholder's goons. In the absence of central state effort to safeguard human rights, the tenants suffered violent retaliatory attacks resulting in loss of life and physical dislocation, revealing the need for an even more comprehensive and integrated effort to gain central state recognition in order to mobilize the fullest force of state law in defence of those rights.

The third Philippine case involves WADECOR Employees Agrarian Reform Beneficiaries Association Incorporated (WEARBAI), located in the municipality of Carmen, Davao del Norte. This episode involves an unusually complicated agrarian dispute between a prominent member of the regional land-based elite, who headed the Worldwide Agricultural Development Corporation (WADECOR), and retrenched and active farm workers in a 1,024-hectare commercial banana farm. In 1998 a segment of retrenched and active farmworkers joined to form WEARBAI for making their land rights claim in WADECOR under RA 6657. Three intertwined legal issues arose in the case: farmworkers' basic civil rights, including the

right to freedom of association, who had rights to claim the land under RA 6657, and legal jurisdiction over agrarian-related disputes (as three different juridical bodies were drawn into the fray by the two main contending parties). By mid-1997, a critical segment of the retrenched workers believed that the retrenchments were part of a systematic plan to undermine their access to land rights accorded them under RA 6657. By their own calculations, about two-fifths of the region's banana farm workforce – an estimated 20,000 workers – were retrenched during in two years (1988-98). With community organizers from a local nongovernmental organization called the Mindanao Farmworkers' Development Center (MFDC), an affiliate of PEACE Foundation, they began to organize other retrenched workers throughout region's commercial farm belt.

### *Findings from the Case Studies*

The case studies point to a three types of general findings. First, the cases leave little doubt that constitutional guarantees and legislation matter greatly for movements of the poor. In the Philippines in particular, national constitutional changes, and institutional changes in the justice system, created unprecedented opportunities for landless rural poor to claim ownership rights on land they tilled as tenants and farm-workers, even in the most politically contentious landholdings.

Many interviewees in both countries mentioned the importance of the more favourable legal framework that emerged in the both countries during the 1990s. Constitutional rights and enacting legislation offered both important legal/juridical tools that were used in particular cases and as symbolic or political tools that made it easier for movements to influence public opinion and attract allies, as well as to avoid repression. The cases also confirmed what many other sociological studies of law have noted – that whether and how laws are enforced is contingent on a range of factors and varies over time. Social movements and other collective actors play an important role in shaping what is considered compliance and can be a key factor producing enforcement of legislation.

This is particularly the case with legislation that is contentious or has distributional implications. Agrarian reform legislation is an inherently highly contentious, because it contains numerous progressive promises and provisions, while those who have power under the existing setting refuse to relinquish it even when so legally determined. Making the progressive elements of state agrarian reform law societally authoritative has thus been neither automatic nor easy, precisely because it's meaning and purpose has remained contested. To return to our

earlier metaphor, in effect there is contest over what the shadow of the law should look like, and how far it should extend.

A different set of findings relate to when social movements of the poor are able to claim rights through judicial institutions and make their interpretations of those rights the predominantly accepted ones. The processes involved are obviously complex and each case had a number of important specificities. Nonetheless, there are a number of general findings that come through the case studies. At the level of the agency of movements of the poor, what it or its supporters can effectively do, there are five findings:

- 1) Claiming rights and winning interpretative disputes against more powerful adversaries in the courts, including in administrative courts, requires the capacity to engage in sustained litigation. In all episodes multiple court cases developed and ran for extended periods of time.
- 2) Some degree of local organisation is essential, in order to sustain litigation, but also to represent affected people, accumulate needed resources, and negotiate with allies and legal experts. Organisation is also important to the ability to *resist* legal and extra-legal anti-reform initiatives and possible repression of state and societal elites. Claiming highly contested rights, such as that for access to land, is therefore a collective enterprise, not an individual one.
- 3) Such organisations of the rural poor need access to specialised legal knowledge over time – they must be able to concentrate the talents of diverse juridical actors on defending the organisation's claims
- 4) Developing this ability requires integrating legal action into broader political mobilization, politicizing struggles in order to influence public opinion and secure access to legal expertise
- 5) Finally, the Brazilian cases show that campaigns to disseminate favourable court rulings and interpretations of existing legislation can be highly effective in changing the conventional wisdom of justice sector professionals, including judges in rural areas.

The final type of finding is at a structural level and therefore beyond the control of actors such as movements of the poor. It is clear that the particular historic moment in Brazil and the Philippines, marked profoundly by the recent transition from democracy and the new constellation of organisations and actors that emerged in the transition, played a critical role in the ability of movements of the rural poor to mobilise politically and attract allies, and of these allies to help influence judicial proceedings. What these historical conditions were in each country varied, the transition to democracy played a vital role in both. In both countries the transitions were driven and accompanied by a great expansion in the number of civil organisations dedicated to progressive social transformation, including agrarian reform, and in

the case of Brazil a political party committed to this end, the Workers' Party (PT). Again in Brazil, a new generation of judges 'for democracy' emerged in the 1990s interested in constitutionalising law and making the law an instrument for addressing gross inequality and extending citizenship rights to poorer sectors of society. This gave movements sympathizers or even potential allies within in a judiciary that has historically been one of the most conservative parts of the state. In the Philippines, the threat of the NPA and the well organised alliances of new civil society actors concerned with agrarian issues helped produce path breaking agrarian reform legislation and the creation of the DARAB system.

This last finding – that local historic factors played a significant role in shaping movement's capacity to engage with judiciaries shows that contingent nature of movements' ability to engage with judiciaries and that in, different contexts, their ability to do so, and what strategies may work, will vary considerably. This does not suggest, however, that no other set of historical circumstances are favourable to movements. Far from it. It does suggest, however, that we need to pay careful attention to the larger historical processes that are in motion when undertaking reforms and to identify which actors in these processes may be in a position to leverage reforms into real social change.

## **VII. Lessons for Policy**

The study sought to identify factors that enhance the *legal capabilities* of the rural poor and when rural poor are able to claim rights and make law by institutionalising their interpretations of legal rules. The single most important finding of the study is that use of the legal system, through the courts, has increased greatly over the twenty-years spanning 1980-2000. The substantial increase in access to the judiciary has occurred without specific 'legal or judicial reform initiatives,' but rather occurred before these were enacted and came in response to longer-term processes such as democratisation and strengthening of the state's presence in rural areas. The one exception is it the Brazilian small claims courts (JEC), which have led to a substantial increase in access and use of formal state law, albeit to settle a relatively narrow set of disputes.

The findings do not point to a single set of policy prescriptions that can enhance legal capabilities – individual or collective – but they do identify three important analytic distinctions that should be taken into account when making policy for legal or judicial sector reform. The findings suggest that policies that seek to enhance capability of the rural poor to use law should clearly distinguish between the type of justice to which they are seeking to provide access –

restitution or distributive. They should also distinguish between involvement in disputes between parties that are relative social equals or relative 'un'-equals, and in particular what types of dispute resolution mechanisms are appropriate for high and for low inequality settings. And finally, the distinction between working in regions with relatively high or low state presence is critically important. The same set of reforms that in regions with high state presence may enhance access to justice, in areas of low state presence may reinforce local tyrannies or erode citizenship in other ways.

There is broad agreement in the literature that for customary and alternative dispute resolution institutions to function effectively and in a just manner, the parties to a dispute must be relative social equals. This has highly significant policy implications. Fora for speedy conflict resolution *should clearly not reinforce local tyrannies or local norms incompatible with basic notions of citizenship*. A central consideration in deciding which types of fora to implement in access to justice reforms must be whether they support, or even extend, state law and basic notions of citizenship, in effect spreading the shadow of the law. Nonetheless, in practice both types of institutions are being encouraged in judicial reform programmes in contexts that violate this basic principle. Rural Philippines, for example, has extreme levels of social inequality yet the government, through the Supreme Court and Ministry of the Interior, and funded in part by USAID, has in recent years championed the KP as a solution to court congestion and access to justice.

While the JEC in Brazil is voluntary and has the benefit of drawing people into the sphere of state-law and into the judiciary, potentially enhancing their citizenship and extending the shadow of state law, the KP system does exactly the opposite. The KP is compulsory and is used to block people's access to the judicial system. Rather than enhancing citizenship and extending the shadow of state law, it erodes these. On the other hand, JEC covers a quite limited range of disputes and is used by a more limited array of people than KP, which appears to serve villagers well for simple village level disputes that involve social equals.

The KP highlights a paradox. In areas where the state has a relatively strong presence, and is able to cast its shadow over other forms of dispute resolution, as in Brazil, the introduction of alternative dispute resolution will not erode citizenship rights and may in fact serve as a pathway to accessing those rights. If, on the other hand, the state has only a weak presence, the need for formal courts is particularly great because the 'shadow of law' will not shape proceedings within alternative dispute resolution channels, and these will not act as potential channels to accessing rights. In such cases the difficulty and cost of creating

institutions of state law is of course greater, but it is needed all the more. Again, this is particularly the case in regions that have high degrees of social inequality.

Removing from the judiciary the resolution of conflicts that involve substantial distributional issues and impact significantly on the poor, as was done with DARAB in the Philippines, offers an interesting alternative to JEC and KP. DARAB offers access to a form of justice that has the potential to substantially reduce poverty by providing a dedicated institutional arrangement, with a staff trained and promoted on the basis of implementation national legislation, through which rural poor can access a particular set of rights.

The case studies of rights claims and making law reveal that pro-poor legislation has concrete benefits to the poor when these organise and use the judicial system. They also reveal that rights-advocacy organisations play a vital role in enabling movements of the poor to use the judiciary and to protect themselves from legal persecution by landowners and the state. In order to build support among other social groups, and within the legal profession, such movements need to embed their legal activities with a larger political-legal mobilization strategy.



## **Dissemination of Project Findings**

### Presentations

Peter Houtzager, “When the Poor Make Law: Comparisons across Brazil & the Philippines,” IDS, 19 February 2002.

Peter Houtzager, “When the Poor Make Law: Comparisons across Brazil & the Philippines,” Warwick Law School 9 March 2002.

Jenny Franco and Peter Houtzager, Workshop with community leaders, Davao Norte, The Philippines, 30 March 2003.

Jenny Franco and Peter Houtzager, Workshop with community leaders, Bondoc Peninsula, The Philippines, 2 April 2003.

Peter Houtzager, “Access to and Use of State Law,” Association for Law and Administration in Developing and Transitional Countries (Aladin), Leiden University, The Netherlands, 8 December 2004.

Peter Houtzager, “The State of *Law and Development*,” Keynote speech, Annual Conference of the Dutch and Flemish Law and Society Association, Leiden University, The Netherlands, 9 December 2004.

### Final Workshop

“Fundamental Rights in the Balance: New Ideas on the Rights to Land, Housing and Property,” International Workshop – 16 to 18, October, 2003, Institute of Development Studies (IDS), University of Sussex, Brighton, UK.

The two day workshop brought together an international group of judges, lawyers, and (legal and socio-legal scholars. Participants included high courts judges – that is, from a court of appeals or the state or federal Supreme Court – from Brazil (3), India (1), The Philippines (1), and South Africa (1). Representatives of legal empowerment NGOs from most of these countries also attended. DFID was represented by Julian Quan. (See annex 3 for a list of participants.)

### **Publications**

Project publications include several IDS Working Papers in the Law, Democracy and Development Series, a book chapter, a journal article (under review), and a book manuscript

outline. The papers can be downloaded from the project webpage, at

<http://www.ids.ac.uk/ids/law/index.html>.

Franco, Jennifer C. “Balimbing Justice: The Many Languages of Law in the Rural Philippines.” In R. Tupas (ed.) *Globalization and Language*. Quezon City: University of the Philippines Press, 2005, forthcoming.

Franco, Jennifer C. “On Just Grounds: The New Struggle for Land and Democracy in Bondoc Peninsula.” In J. Franco and S. Borrás (eds.) *On Just Grounds: Struggling for Agrarian Justice and Exercising Citizenship Rights in the Rural Philippines*. Quezon City: Institute for Popular Democracy and Amsterdam: Transnational Institute.

Houtzager, Peter and Jenny Franco. “More Justice for the Poor? Experiments in Judicial Reform in Brazil and the Philippines.” IDS Working Paper in the Law, Democracy and Development Series, forthcoming.

Franco, Jenny. “Making Property Rights Accessible: Social Movements and Legal Innovation in the Philippines.” IDS Working Paper in the Law, Democracy and Development Series, forthcoming.

Houtzager, Peter. “Social Movements and Juridical Modalities of Legal Change: The Movement of the Landless (MST) in Brazil.” IDS Working Paper in the Law, Democracy and Development Series, forthcoming.

Houtzager, Peter. “Movement of the Landless (MST) and Legal Change in Brazil.” In Boaventura de Souza Santos and César A. Rodríguez-Garavito, eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge: Cambridge University Press, 2005.

Houtzager, Peter. “Social Function of Property, Movement of the Landless (MST), and the Judicial Field in Brazil.” Paper presented at “Fundamental Rights in the Balance: New Ideas on the Rights to Land, Housing and Property,” International Workshop – 16 to 18, October, 2003, Institute of Development Studies (IDS), University of Sussex, Brighton, UK.

Houtzager, Peter and Jenny Franco. “When the Poor Make Law: Comparisons across Brazil and the Philippines – A Project Summary.” Paper, Institute of Development Studies, 19 February 2003.

Franco, Jennifer, and Saturnino Borrás Jr., Benhur Bobis, Danilo Carranza, Gema Escobido. “Overview of Legal and Judicial System in the Philippine: IDS Making Law Project.” Paper, Manila, The Philippines, 28 January 2002.

## **Annex 1**

### **CONCEIVING LAW**

The kinds of questions and hypotheses a study sets out to explore, and how it proposes to explore these, of course depends on the overall theoretical apparatus that is employed and how particular concepts are defined and measured. What follows is a crude exposition of three approaches to conceiving law, including that being developed in this study. Following this, the paper explains the comparative methodology of the project and the data collection strategy.

The dominant conception of law has two complementary sides. Policy makers at the commanding heights of state and international organisations see law, broadly speaking, in instrumental terms; while legal professionals and experts generally view law through the lenses of legal positivism.

Modernising elites of the right and left during most of the 20<sup>th</sup> century saw law as an instrument through which to pursue large-scale transformative projects. For state elites, law was a rationally constructed instrument “to restructure, plan or encourage enterprise on a massive scale, to promote peaceful revolution in social relations (for example, through anti-discrimination law) and to shape attitudes and beliefs in a manner far more ambitious than could have been attempted in early periods of social development” (Cotterrell 1992: 44). The “rule of law” is indeed one of the central characteristics of the modern state. The correctly designed set of rules, interpreted and applied correctly by agents of the state, including the judiciary, should produce the desired outcomes – modern societies. When outcomes fail to meet expectations the blame has been placed on subversion of the law by different groups of actors, or on the poor design of the rules themselves. The state-centric and instrumental view of law has been questioned less often.

Legal experts and scholars have similarly conceived of law as a set of rules created and applied by the state (through the legislative process, court rulings etc.). Legal positivism, the dominant framework underlying professional legal training, is premised on the notion that creating the rules is the domain of politics and state elites and identifying the rules of law that apply to particular circumstances is that of the legal profession. For the legal profession as a whole, the law is a “given,” an objective fact located in the state.

Legal instrumentalism and positivism retain their hold on the imagination of policy makers and legal experts today, for at least three obvious reasons. First, much legislation and judicial rule making does appear to be of a purposeful nature – that is, reasonable efforts at

engineering social order or change. The questions of what kind of order, and change to the benefit of whom, we should set aside for now. Second, in particular social contexts it appears to work – there is substantial research that demonstrates how new legislation enacted to alter the behaviour of people has indeed done just that. Minimum wage legislation, seat belt and anti-smoking laws, and so on appear to vindicate at least part of the dominant view. Law can be an instrument of social engineering. Third, what are the alternatives available to large political-bureaucratic agents – that is, without state created and enforced legal rules, how do societies that are organised within nation-states produce social order and change on a large scale?

We know, however, that how legal rules and institutions operate “varies considerably across geographic and social space – that is, across national territory and systems of social stratification such as gender, class, and ethnicity. Similar legal rules and institutions have dramatically different consequences for differentially socially situated groups.”<sup>7</sup> The problem with legal instrumentalism and positivism is in part the belief in the autonomy of legal structures and their direct effects on the behaviour of actors. Too much causal weight is assigned to formal legal rules and the institutions that enforce them. These alone cannot explain the great variation in legal outcomes that we find empirically. Acknowledging this has important implications for judicial reform initiatives and access to justice programs.

The second conception of law is society-centred. Legal pluralism falls in this category, as do some of the policy initiatives that attempt to strengthen customary (non-state) courts and dispute resolution traditions. Approaches that are based on this view observe that meaningful regulation of people’s interactions often does not occur through official or state law, but through alternative unofficial regulatory orders, such as customary and/or religious rules and institutions. In order to grant these other forms of regulation equal conceptual and political legitimacy, legal pluralists insist that they must be recognised and publicly named ‘law.’ Leaving aside whether we should label all regulatory systems law, the idea that societies have multiple and sometimes competing regulatory orders, of which state law is only one, might help explain why similar legal rules and institutions produce diverse outcomes across and within countries.

When people consider whether to use “state law” they weigh the costs and benefits in relation to their involvement in other regulatory orders. This implies that a central task of those

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<sup>7</sup> Peter P. Houtzager, “We Make the Law and the Law Makes Us: Some Ideas on a Law in Development Research Agenda,” in Richard Crook and Peter P. Houtzager, eds., *Making Law Matter: Rules, Rights and Security in the Lives of the Poor*, IDS Bulletin 32, no.1 (2001), 8-18, on 8.

involved in understanding when rural poor use law, and their efficacy when doing so, must be able to explain how and why people shift between non-state regulator orders and state law.

Unfortunately there is relatively little work exploring the intersection between regulatory orders from the perspective of the ‘users.’ Legal pluralists have tended to focus on understanding “how people dispute” – or how they dispute in “many rooms” as Galanter put it – and not on the causal factors that push or encourage people to use different orders.<sup>8</sup> For this and other reasons legal pluralism is a theoretically incomplete framework for the task at hand.

The third view of law is the one developed in this and other studies that abandon the state/non-state dichotomy and focus on law as a process that is set in motion by the interaction of state and societal actors. In this view ‘state’-law emerges out of interactions between actors in society and the state over the setting, interpreting, and complying with authoritative rules.<sup>9</sup> This process is set in motion when actors (state and societal), with differential legal capacities and access to resources, attempt to create, use, and comply with legal rules as they negotiate relations with each other. Central to this view is the idea that legal rules (legislation, government regulations, court rulings, etc.) are neither self-enforcing nor self-interpreting. To become authoritative legal rules, they require that actors interpret and invoke them.

Although it is important that we examine how this process unfolds in other regulatory orders, the primary focus of this study is on the process we commonly call state-law, but which can more accurately be labelled state-society law or ‘societally authoritative law.’ This kind of law has gained central importance in the popular struggles to gain access to land and land ownership and to defend civil liberties of the rural poor. The invocation of societally authoritative law has affected the very nature of the struggle for land rights and civil liberties. And for good reason. The legitimacy this form of law can accord social struggles, and the ability it gives to the rural poor to call in state actors as third parties, can help to restrain violence and lower the costs of claim-making. When the legitimising cloak of state law is invoked successfully by the rural poor, it can aid in their escape from the tyranny of local despots, even if only temporarily, by putting the latter on the defensive and giving the former access to potential allies beyond the local level. State law also has strategic value in the sense

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<sup>8</sup> See Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law,” *Journal of Legal Pluralism* 19 (1981), 1-47.

<sup>9</sup> This view shares a number of features with that proposed in Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2<sup>nd</sup> edition, Butterworths 2002). Other works that have an affinity with the approach developed in this project include Bryant Garth and Yves Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, 1998);

that it has the potential to universalise principles underpinning specific rural poor claim-making activities, creating positive ‘spill-over’ effects for similar struggles elsewhere.

To understand why some groups of people are better able to use and make state law than others, and to identify the conditions under which subordinated groups acquire ‘legal capacity,’ we borrow some of Pierre Bourdieu’s theoretical apparatus. Bourdieu offers a sophisticated yet elegantly simple way to think about how actors – individuals or organised groups – negotiate relations with each other in different arenas of activity.<sup>10</sup> We can think of people or groups as being active in different arenas, such as the judicial or religious arenas (or the boxing arena for that matter). In these arenas different forms of power operate – for example, knowledge of legal or religious texts, or a certain type of physical prowess. The ability to deploy arena-specific power influences the outcome of the encounters between actors. Hence the ability to follow up a left jab with a right hook might win one a boxing match and earn a livelihood, but it will certainly not produce a positive outcome in the court room. Similarly, knowledge of the fine legal details that enable one to dismiss a case on procedural grounds, such as missing filing dates, will not serve one well when the encounter occurs within the church.

Bourdieu refers to these arenas as “fields of action,” the actors who negotiate relations in the fields are “agents,” and the power that enables one agent to influence the behaviour of another as “currency.” The study adopts the field metaphor but replace the economic ones with Actors and Power (the ability to alter the behaviour of others in a desired direction). As we know from our own experience, all actors function in multiple fields.<sup>11</sup> Empirically, it is possible to identify the boundaries of a field by changes in the utility of different types of power. It is in fact out of the interaction between actors deploying particular forms of power that fields emerge.

Fields share a couple of features. One, interactions between actors often occur through field-specific institutions. These institutions both empower and constrain action. Institutions are not, as the new institutional economics suggests, rules per se. And, they are not simply bundles of particular kinds of rules that we call organisations. They are social practices that are reproduced over time so that they acquire a degree of ‘solidity’ for people, allowing them to

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Lauren Edelman, Christopher Uggen, and Howard S. Erlanger, “The endogeneity of legal regulation: Grievance procedures as rational myth,” *American Journal of Sociology* 105 (2) (1999) 406-54.

<sup>10</sup> See Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” translated by Richard Terdiman, *Hastings Law Journal* 38 (July 1987): 814-53; and Pierre Bourdieu and Loïc Wacquant, *An Invitation to Reflexive Sociology* (Chicago, 1992).

<sup>11</sup> This conception shares a number of features with that of Sally F. Moore (1973), “Law and social change: the semi-autonomous social field as an appropriate object of study,” *Law and Society Review* 7, 719-746.

adjust expectations and plan future actions (Stinchcombe 1997: 391).<sup>12</sup> Hence institutions are rules that are reproduced by the actions of multiple actors with diverse motivations.

Two, field-specific institutions support field-specific forms of stratification. The pecking order in state bureaucratic fields, for example, is carefully and clearly defined, even if movement between levels of stratification often seems mysterious. The same is true for the Catholic Church with its centuries old hierarchy, as well the boxing profession. The bases of stratification in a field are a historical product and do not necessarily overlap with control over different quantities of field-specific currency. They might be based in part on the position within certain institutions, strategic position within a particular network, and so on. Field-specific stratification does not imply that more socially-diffuse forms of stratification such as gender, class, and race, are inoperative. Much as class and race stratification often reinforce each other, field-specific stratification may build on or reinforce these diffuse forms of social hierarchy.

The combination of unique bases of power, institutions, and forms of stratification give fields a particular logic and coherence of their own, and therefore a degree of autonomy from each other. This helps explain why actors who are highly successful in one field may fail in another terribly another, or why institutions that look similar can contribute to very different outcomes in different contexts.

The juridical field is central to the process of law and, therefore, central to this study. It is a field that, along with others, is constitutive of the modern state but, seemingly paradoxically, not coterminous with it. It is reproduced by the actions of state agencies and judges, but also by lawyers, law firms, professional associations, law reform non-governmental organisations etc. In the two countries where the study is being undertaken, the juridical field is one of several fields of action where people seek to resolve conflict, and obtain redress and protection from authorities. These fields are connected to each other in context specific and multiple ways that cannot be specified a priori. Based on initial research, however, some of the most important fields can be named: the religious field with the Catholic Church at its centre;

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<sup>12</sup> Rules can be said to have become institutions when the power and resources that were necessary to create them are no longer central to their reproduction. And hence the actor(s) originally responsible for their creation lose control over them and reproduction becomes diffuse, driven by the actions of multiple actors with diverse motivations who *use* rules and organisations as “spaces” or “resources” to achieve their goals. This definition captures the intuitive sense of the term that pervades conversation of the specialist and non-specialists alike – institutions persist over time and therefore have a degree of solidity and predictability. There is not much analytic gain in lumping together legal and other rules that go largely unobserved (such as much constitutional law in much of the world) with those that actually structure important parts of social life. Similarly, placing organisations such as internet start-up companies in the same category “institution” as the Catholic Church is not meaningful.

the community field where social relations are marked by relative equality and, in the Philippines, the Barangay council plays an important regulatory role; patrimonial field in which regional power holders are especially influential and the municipal government is a key institution; a movement field that has emerged around the MST in Brazil and UNORKA in agrarian reform areas; and a techno-bureaucratic field constituted by in particular by members of state land and other public bureaucracies.

In the language of the approach outlined above, this study seeks to uncover what leads actors of the rural poor to choose the juridical field over the other fields, what enables them to be successful in that field, and when do they succeed in making their interpretation of a legal rule authoritative (the one different actors begin to reproduce).

This approach suggests two new hypotheses. Let's examine these by way of an example. Two parties are engaged in a conflict over land. They may seek to engage with each other in one or several fields. Diagram 1 depicts the options in a part of São Paulo, Brazil. The fields are represented as parallel ovals because we have good reason to believe that the fields exist but are not sure how they "touch" and impinge on each other's logic. In Diagram 1 there are few fields that intersect other fields in a perpendicular manner. These represent actors who detain enough field-specific power and intimate knowledge of the logic of each field (a kind of informational power) that they are effective players in both. These actors in effect help bridge between fields. The brokers discussed in the literature on clientelism are an example. The brokers bridge relations between local patrimonial field and other fields, particularly those in which the state is a constitutive part.<sup>13</sup>

The land conflict example suggests that (i) the rural poor are more likely to use and make law where there are actors who help bridge between the patrimonial/community field and the juridical field. And that (ii) the ability to bridge fields is in and-of-itself a source of power, which expands the possibilities of action in both fields.

In the Philippines and Brazil it appears that the government land departments, some sectors of the Catholic Church, and different types of NGOs and social movements have played such bridging roles, albeit in distinct ways. Our research hypothesis is that areas in that multiple actors brokering between fields, subordinated groups of people are more likely to use the judiciary.

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<sup>13</sup> An example from a different social realm: the civil servants who knows both how to deploy technical expertise, knowledge of organisational procedures, and obtain hierarchical positionality to be effective within a bureaucracy, and can deploy knowledge of contemporary scholarly work and social scientific concepts to transact effectively with academics in an social science department.



## Annex 2

Table Summary of the Applied Focus Group Discussion Method

Sequence of Discussion	Description	Process Goal	Procedure
<b>1. Opening</b>	Introductions; Review purpose of visit; Explain how activity to proceed; Answer initial 'bottom line' questions.	'Level off', 'clear the air' and basically get implicit 'permission' to proceed.	Team Facilitator assumes role; Team Leader explains overall project and fields questions.
<b>2. Barangay Mapping</b>	Map the <i>barangay's</i> main physical and demographic features.	Warm-up socially; Begin focusing cognitively; Get concrete picture of community at outset.	Team supplies materials and leaves the group to organize itself to accomplish the drawing, followed by presentation of results.
<b>3. Econ-Soc-Pol Background</b>	Sketch the basic economic, social-historical, and political dimensions of the <i>barangay</i> .	Establish conducive terms of participation and interaction.	Team works through a series of standard predetermined questions.
<b>4. Organizational Life</b>	Profile the organization's purpose, structure, and life course, including 'successes', 'failures' and nature of linkage to larger pol-legal system.		----- ditto -----
<b>5. Common Disputes Part I</b>	Identify and analyze most common disputes between ordinary rural poor people in the <i>barangay</i> .		Use metacards to construct a list of common disputes; work through the list, clarifying the nature of each dispute, dissecting how normally handled and where processed.
<b>6. Common Disputes Part II</b>	Identify and analyze most common disputes between ordinary rural poor people in the <i>barangay</i> and 'influential' and/or 'wealthy' persons.		----- ditto -----
<b>7. Rights and Justice</b>	Reflect on meaning and sources, using specific civil liberties and political rights as discussion vehicle.		Probe participants on what 'rights' and 'justice' mean to them, where these 'come from', and how specific rights/freedoms are actualized (or not) in their experience.
<b>8. Survey Questionnaire</b>	Participants complete individual survey questionnaire with technical assistance from team.		Facilitator guides participants through questionnaire step-by-step; other team members rove to assist anyone having trouble completing the form.
<b>9. Closing</b>	Gather participants' reflections about how the focus group session went; discuss follow-up workshop activity; express appreciation.	'Clear the air' and bring formal closure to the activity, while committing the team to a follow-up workshop.	Facilitator culls the group for any comments or criticisms about the activity; Team Leader reiterates next steps and thanks the group.

### Annex 3

## **Fundamental Rights in the Balance** **New Ideas on the Rights to Land, Housing and Property**

International Workshop – 16 to 18, October, 2003: *Institute of Development Studies (IDS)*

### **Participants**

Jacques T. Alfonsin	Retired Attorney General of the state of Rio Grande do Sul, member of the National Network of Popular Lawyers (RENAP), Brazil
Minister Ruy Rosado de Aguiar Jr.	Retired Justice of the Superior Court (Tribunal Superior de Justiça), Brazil
Ronald Herring	Professor, Cornell University, USA
Peter P. Houtzager	Fellow, Institute of Development Studies, University of Sussex, UK
Justice Pius Langa	Deputy Chief Justice, Constitutional Court, South Africa
Zander Navarro	Professor, Federal University of Rio Grande do Sul, Brazil
Hon. Eugênio Facchini Neto	Judge, Corregedoria of the state of Rio Grande do Sul, Brazil
Mauro Almeida Noletto	Law School, University of Brasilia, accompanying Min. <a href="#">José Paulo Sepúlveda Pertence</a>
Celestine Nyamu	Fellow, Institute of Development Studies, University of Sussex, UK
Patrick McAuslan	Professor, Birbeck College, UK
Ambreena Manji	Professor, Warwick Law School, UK
Hon. Felixberto T. Olalia, Jr.	Judge, Branch 8 Regional Trial Court, The Philippines
Robin Palmer	Land Policy Adviser, Land Rights Project – Oxfam, UK
Raul Pangalangan	Professor, University of the Philippines Law School, The Philippines
Minister José Paulo Sepúlveda Pertence	Justice of the Supreme Court (Supremo Tribunal de Justiça), Brazil
Jean du Plessis	Deputy Director, Centre on Housing Rights and Evictions (COHRE), Switzerland
Julian Quan	Land Policy Adviser, Department for International Development (DFID), UK
Balakrishnan Rajagopal	Professor, Massachusetts Institute of Technology (MIT), U.S.
Jason Christopher Rayos Co	Coordinator Urban Poor Programme, Saligan, The Philippines
Justice Rajinder Sachar	Retired Chief Justice Delhi High Court & former UN Special Rapporteur on the Right to Housing, India
Boaventura de Sousa Santos	Professor, Coimbra & University of Wisconsin, Madison, Portugal
Neeru Vaid	Advocate, Delhi, India

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