

Developmental Legal Aid in Rural ASEAN: Problems and Prospects

(Jose W. Diokno, Lecture delivered at the Seminar on Human Rights and Development in the Rural Areas of Southeast Asia Region, sponsored by the International Commission of Jurists and the Consumer Association of Penang, held from November 30 to December 4, 1981, at Penang, Malaysia)

Why discuss the problems and prospects of legal aid for the rural poor in ASEAN?¹

I

The poor of rural ASEAN—and in a sense the poor are rural ASEAN—need food and water, medicines and sanitation, clothes and houses, education and information. ASEAN governments are hard put to meet these needs: despite government efforts, unemployment and underemployment, poverty and inequality, hunger, disease and illiteracy remain rampant in the region.² Why should scarce resources be diverted from meeting these needs to provide legal aid?

The answer is that the basic needs of the rural poor are more than merely physical. The rural poor hunger besides for justice, for respect for their dignity, and for control over their lives. Listen to Salud Algabre, a tenant farmer's wife, a mother of five, explain why she took part in an abortive uprising in 1935 in Southern Luzon in the Philippines:³

- Q. When did you begin to consider the government as unjust to the people?—A. 1930.
- Q. Why?—A. Because of the abuses against the people. The needs of the labourers were ignored. The leaders paid no attention to the people.

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¹ I have limited this paper to ASEAN countries, first, because the participants in the Seminar come from these five countries, and second, because I have no data on legal aid in socialist countries of Southeast Asia.

² See, for example, Chia Siou Yue, "Economic Development," in Keonil S. Sandhee et. al. Southeast Asian Affairs, 1978, Singapore: Heinemann Educational Books (Asia) Ltd., for the Institute of Southeast Asian Studies, 1978, p. 18.

³ David R. Sturtevant, Popular Uprisings in the Philippines 1840-1940, Ithaca: Cornell University Press, 1976, pp. 290-291. Emphasis added.

Q. As tenants were you abused?—A. When we worked the land, we were cheated. The terms on the estate were 50-50. If the tenants harvested 1,000 tons, 500 were to go to the propietario and 500 to the farmers. But we never got the agreed 50 per cent. We would get a mere 25 per cent, sometimes even less.

Q. Did you share out the 25 per cent?—A. We divided it among ourselves. But even then it amounted to less. They got all the disbursements back. All the expenses in planting were borne by us, even the land tax. We were very poor.

Q. Then the basic problem was one of the poverty or having enough to live?—A. Having enough, but without abuses.

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Q. It was poverty, then, and abuses which caused your discontent?—A. No. It was more. There was a root cause behind everything. Nothing could solve our problem except independence, as the United States had promised. Freedom was the solution. x x x There was no other answer to the abuses and the poverty. With independence the leaders would cease to be powerful. Instead, it would be the people who were powerful. The people would have their freedom. We would have our own lands; they would no longer be the monopoly of the proprietarios and of the government officials. As it was, we had nothing.

Hear the tenant farmers who took part in another peasant revolt twenty years later in Central Luzon:⁴

Even if we got nothing, that's not important. What's important is that we had to fight back. And we fought so well that the big people and the government will never forget us again.

x x x

We showed then [the landlords and the government] we weren't slaves. We didn't lie down like whimpering dogs when they started to whip us. We stood up to them and fought for what was rightfully ours.

x x x

⁴ Benedict J. Kerkvliet, The Huk Rebellion: A Study of Peasant Revolt in the Philippines, Berkeley: University of California Press, 1977, p. 269. Emphasis added.

No strike, no demonstration, no rebellion fails. Protest against injustice always succeeds.

To the extent that legal aid can help the rural poor gain justice and greater control over their lives, it does meet a basic need.

II

But is legal aid relevant to human rights and to development?

No one doubts that legal aid is relevant to legal rights. But not all human rights are legal rights. Some are, in fact, denied by law, for example, the workers' right to strike.⁵ Since legal aid must operate within the law, how can it enforce human rights that are denied by the law itself? Does it make sense to talk about gaining justice for the poor if the justice that is gained is not worth having?⁶

Besides, are human rights themselves relevant to development? Of course, no ASEAN government openly repudiates human rights. But judging from their acts and policies, all are disposed at some time or another to sacrifice some human rights in the name of development. For example: all ASEAN governments are committed to development, but none has ratified or adhered to the International Covenant on Civil and Political Rights and its Optional Protocol or to Protocol II of the Geneva Convention. And all ASEAN governments are authoritarian in varying degrees. How useful is it then to discuss legal aid in rural ASEAN?

III

These questions cannot be ignored. Like doubts about the power of non-violence to overcome tyranny, misgivings about the value of legal aid to human rights and to development have some basis.

This is particularly true of legal aid of the traditional type: the rendering of free legal services to the poor in their private disputes like child support, tenancy sharing, usury, defending common crimes, and the like. These services are not, of course, to be scoffed at. For the abandoned mother, the tenant cheated of his share of the crop, the man, woman or child wrongly charged with crime, legal aid can spell the difference between life and death, freedom and slavery. But where the law itself violates human rights traditional legal aid can do little.

⁵ International Covenant on Economic, Social and Cultural Rights, Art. 9, par. 1(d).

⁶ Austin Sarat, "Book Review," in Harvard Law Review, Vol. 94, No. 8 (June, 1981), p. 1919.

The state may be generous in recognizing rights, but it is seldom generous in providing effective remedies. ... As long as legal aid limits its concern to private disputes, few problems arise; but as the vindication of the rights of the poor becomes inevitably more aggressive and requires a challenge to government policy, the operational costs to the state may come to outweigh the legitimizing benefits. The state's response may then be to eliminate such offending activities or to rein in those attorneys who have gone too far. ...⁷

Moreover, traditional legal aid is actor not structure oriented. It assumes that the law is just and that injustice results from human greed and weakness that violate the law. This assumption does not imply that legal aid lawyers are blind to violations of human rights caused by unjust social structures: better than most citizens, they know that the law itself is often unjust; but as legal aid lawyers, they see their function simply as upholding the law, not changing the law or society, a task they view as properly the function of the legislator. Since development is social change, often radical and rapid, traditional legal aid is of limited value to development.

To ensure accelerated development two general conditions are necessary: first, far-reaching internal changes of a social, political and institutional character in the developing countries, and second, significant changes in the world economic order.⁸

Traditional legal aid is, in fact, the lawyer's way of giving alms to the poor. Like alms, which provide temporary relief to the poor but do not touch the social structures that keep the poor poor, traditional legal aid redresses particular instances of injustice but does not fundamentally change the structures that generate and sustain injustice. And like alms, traditional legal aid carries with it the germ of dependence that can prevent those it serves from evolving into self-reliant, inner directed, creative and responsible persons who think for themselves and act on their own initiative. Unless this danger is guarded against, traditional legal aid can retard, rather than promote development: for above all else, development is human development.

These weaknesses also afflict the current "access-to-justice" movement into which traditional legal aid is evolving. The movement's thrust is laudable: to create new, informal, inexpensive and faster ways of resolving legal conflicts. But this applies primarily to private disputes, not to public disputes that question state policy or threaten social structures. The movement involves a procedural rather than substantive approach to the problems of the poor, an

⁷ Austin Sarat, *ibid*, note 6, p. 1917.

⁸ Wassily Leontieff, Anne P. Carter and Peter A. Petri, The Future of the World Economy: A United Nations Study, New York: Oxford University Press, 1977, p. 11.

approach that implies that social structures are fundamentally sound and require only some improvement, not radical change. That may well be true of developed countries; by definition, it is not true of developing nations. And even in developed countries, the fear has been expressed that:

... the movement will succeed only in securing those reforms which will increase the legitimacy of the current system, and fail to secure those that will make it really change.⁹

IV

So development requires a different type of legal aid, one that will not supplant traditional legal aid but supplement it, concentrating on public rather than private issues, intent on changing instead of merely upholding existing law and social structures, particularly the distribution of power within society. As Adnan Buyung Nasution, director of the Lembaga Bantuan Hukum (Institute of Legal Aid) of Indonesia well put it:

... legal aid at the moment requires reorientation: legal aid has so far only been directed at the manifest needs of the poor while largely ignoring their latent needs, which in fact often are of more fundamental importance. ...

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The most important problem that emerges is obviously the unequal control over political and economic resources, together with a monolithic political and economic structure. If this structure is left unchanged, it is useless to talk about a more equal distribution of the fruits of development; about democracy; and about basic human rights. Whatever its outcome, development will remain remote to the poor who are alienated from decision-making process, the implementation of the policies, and the distribution of the benefits of development.

What can legal aid do to bring about change? This is perhaps the most fundamental question that has to be answered at this stage.¹⁰

⁹ Trubek, "Public Advocacy: Administrative Government and the Representation of Diffuse Interests," in Mauro Cappelletti and Bryant Garth, eds., *Access to Justice*, Vol. III: Emerging Issues and Perspectives, Amsterdam: Sijthoff and Noordhoff, 1979, p. 493, quoted in Austin Sarat, *ibid* note 6, p. 1923.

¹⁰ Legal Aid and Development: A Reconsideration, paper submitted to the Seminar on Human Rights and Development Cooperation, called by the Nederlandse Organisatie voor Internationale Ontwikkelingsamenwerking [NOVIB], held at Noorfdwijkerhout, Netherlands, December 1980.

This new type of legal aid is needed because development is more than just feeding, clothing, curing, teaching and housing people. Many prisons do as much. Development is above all the people deciding what food, clothes, medical care, education and housing they need and how to provide them.

The right of the people to make these decisions is explicitly recognized in Articles 1 and 7 of the Charter of Economic Rights and Duties of States:¹¹

Article 1

Every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever. [emphasis added]

Article 7

Every state has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development. ... [emphasis added]

This right includes whatever is necessary for its effective exercise. This means that people have the right at least:

- To enjoy the fundamental freedoms set out in the Universal Declaration of Human Rights and its implementing covenants, because without these freedoms, the people could not make informed choice of economic, political, social and cultural systems;
- To change the existing structures of, and the distribution of power in, their societies, because these effectively prevent the people from fully sharing in the process and benefits of development.

All ASEAN governments voted for the Charter and are therefore bound, in law, to recognize these rights, no matter how often, in practice, they may violate them.

¹¹ UN General Assembly Resolution 3281 (XXIX, December 12, 1974, adopted by a roll call vote of 120 ayes, 6 nays and 10 abstentions.

Moreover, since the existing social structures and distribution of power in ASEAN countries are economic and social consequences of colonialism, neo-colonialism and foreign domination, ASEAN governments are also legally bound to change them. Article 16, paragraph 1 of the Charter is explicit:

Article 16

1. It is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. ... [emphasis added]

In ASEAN countries and, indeed, in all developing countries, then, a new type of legal aid would rest on firm legal ground: the right of the people to development.

V

Efforts to practice this new type of legal aid, which for want of a better name I shall call developmental legal aid, have begun in ASEAN countries.¹² Lawyers who have been imprisoned or had practiced traditional legal aid became convinced that, under conditions obtaining in their country, something more was needed. If the rights of the poor and the oppressed were to be vindicated, and just and humane development achieved, the job of developmental legal aid had to be done. But no one else would do it. So in a sense the practice of developmental legal aid was “forced” on them.

They do not of course, consider developmental legal aid as panacea, nor view themselves as saviours or messiahs.¹³ They know they are merely groping towards a more relevant and effective way of using law and helping people use law to attain the people’s aspirations. They are aware that, as lawyers, they must act within the law, a law that imposes severe limits on what they can do and how they can do it. And, although they know, as Radbruch put it, that “law cannot originate in law alone... There is an original creation of law, a first generation of law out of factuality, law making by law breaking, new legal

¹² Typical are the efforts, among others, of the Lembaga Bantuan Hukum (LBH and Institute of Legal Aid) of Indonesia and the Free Legal Assistance Group [FLAG] of the Philippines.

¹³ Adnan Buyung Nasution, *ibid* note 10. See also two other papers on legal aid and development submitted to the same seminar: one by Eduardo Umana of the Corporacion Colectivo de Abogados (Lawyers’ Collective Corporation), Bogota, Columbia, Legal Help in Conscientization Process, the other by Jose W. Diokno of the Free Legal Assistance Group [FLAG], Manila, Philippines, Legal Aid and Development.

ground on congealed revolutionary lava,"¹⁴ as citizens they are dismayed by the tremendous disparity between the armed strength of organized government and the unarmed weakness of unorganized people, and as lawyers they recoil instinctively from the bloodshed and destruction that violent revolution would cause even if it succeeded.

To resolve this dilemma, developmental legal aid lawyers have evolved a two part strategy. One part is to confront the regime with the detrimental effects on people of its policies and programs, with the inconsistencies between its policies and actions, on the one hand, and the aims and principles it professes or standards that are internationally accepted, on the other, and in appropriate cases, even with its own illegitimacy.

This strategy is based on two beliefs:

- That men in government, no matter how oppressive they may appear to be, are not all evil; like all men, including legal aid lawyers themselves and the poor whom they serve, they are a mixture of good and bad, so that appeals to the conscience are not predestined to fail.
- That governments seek the respect of other governments and military and economic aid from industrialized states, to obtain which they must maintain an international appearance of legitimacy and respectability, and this need can be exploited to dispose governments to accept change.

The tactics developmental legal aid lawyers use to implement this strategy cover a wide range. In some cases, they simply urge an interpretation of existing law different from official interpretation in order to favor the rights of the poor. In others, they challenge policies citing constitutional provisions, public utterances of government or international formulations of human rights. In still others, they challenge government itself for usurping or impairing the sovereignty of the people. In all cases, they take pains to document the effects of the policy or act in question on the persons or social group it affects in order to show that these effects are so detrimental or so blatantly unfair that they shock the conscience.

Practitioners of legal aid do not expect this strategy to cause the regime to abdicate, change its authoritarian nature, or abandon its policies—although should it do so, so much the better. Their expectations are lower: first, to make the regime begin to doubt its own legitimacy and thus blunt the cutting edge that unchallenged belief in its righteousness could give it; and second, to open the eyes of the people and of supporters of the regime, domestic and foreign, to its

¹⁴ Gustav Radbruch, "Legal Philosophy," in Kurt Wilk, trans., The Legal Philosophies of Lask, Radbruch and Dabin, Cambridge, Mass.: Harvard University Press, 1950, p. 125.

illegitimacy and to the injustice it perpetrates or tolerates, and thus erode what support it enjoys.

VI

The second part of the strategy is to help the poor, as members of communities or social sectors, become aware of the causes of their situation and organize and mobilize themselves to overcome these causes.

This strategy rests on these beliefs:

- That the power of governments ultimately rests on the submissiveness— “your very force is nothing but my fear”¹⁵—and can be neutralized by developing the sense of self-respect in people that denies submission, the self-respect that “is the basic power ingredient behind the great Asian revolutions of our time associated with the names of Gandhi and Mao—the poor man’s power, Asian power, human power.”¹⁶
- That just as law can and has been used, misused and abused to institutionalize poverty and privilege, exploitation and inequality, it can also be used properly to establish social justice and equity, participation and autonomy. To accomplish this, however, law must be generated by the people themselves; the role of developmental legal aid is purely supportive. The poor and the oppressed must rely their own efforts, not on lawyers, to forge a better society. But their efforts must be organized to be effective, not only because of the strengths of numbers, but also because the poor have been alienated from each other as much as from the elite, they bare subject to the same temptations and suffer from the same frailties as all men, and have to learn to work together since, in the end, they will attain development only by that self liberation that generates social liberation.

The tactics used to implement this strategy are:

- To inform people of their legal rights;
- To show how these rights are often inadequate or inadequately enforced;
- To search with them for the causes of the inadequacies; and
- Together to devise legal and social solutions.

This process produces a heightened awareness in both the poor and the lawyers that is the beginning of development. But that beginning will be abortive unless

¹⁵ Gustav Radbruch, *ibid* note 13, p. 115.

¹⁶ John Galtung, *The True Worlds: A Transnational Perspective*, New York: The Free Press, McMillan Publishing Co., Inc., 1980, p. 83.

awareness is converted into action. So the process is supplemented by steps designed:

- To encourage the poor to organize and mobilize themselves, such as by explaining the advantages of organized effort, citing examples, and informing them of the legal requirements and pitfalls of organizing;
- To urge them to cooperate with other groups similarly situated, specially when the similarities are not immediately apparent, as in the case of tribal groups and urban squatters; and
- To motivate them to invent and use metalegal tactics—non-violent group actions that transcend normal judicial and administrative procedures yet remain faithful to the basis of law in that they seek the common good—to supplement and strengthen standard legal tactics to change law and society.

Practitioners of developmental legal aid do not expect this strategy to succeed in all cases. But they do expect that, more often than not, the strategy will help overcome the sense of impotence—the most serious obstacle to development—that centuries of oppression have instilled in the poor, and re-place it with a sense of power that will release the creativity and the drive imminent in them ads in every man. And that is in itself development.

VII

Developmental legal aid groups face the same problems that traditional legal aid groups do—and more. Like traditional legal aid, they suffer from:

- Lack of time, manpower and resources.
- Difficulties of communicating with the poor they serve.

And more than traditional legal aid groups, they face threats of reprisals from authoritarian governments. Some legal aid lawyers have in fact mysteriously disappeared, been jailed or physically assaulted.

Developmental legal aid groups have tried to solve these problems in a variety of ways.

To save time, they have, for example:

- Limited themselves to handling public disputes, cases that affect large numbers of people or reflect social issues, referring private disputes to traditional legal aid practitioners.
- Enlisted the expertise of academics and social workers to supply data and insights into the sociological and psychological dimensions of the legal problems they deal with, and to carry out pilot surveys or samples where data are not available.
- Produced primers which explain both what the law is and what it should be on rights to land and on rights of oppressed sectors like small farmers and landless agricultural workers, fishermen, urban poor, tribal minorities, industrial workers, students and political prisoners. These primers were drafted by lawyers who have had experience with problems of each sector. The drafts were submitted to representatives of the sector concerned, who were asked to criticize both language and content, to point out which portions were not clear, which portions were not relevant, and what problems were not adequately covered. Then workshops were held, attended by these representatives and by the lawyers-authors, in which the criticisms were threshed out. Only after the drafts had been revised to meet the criticisms, were they issued.

To overcome the manpower problem, developmental legal aid groups have:

- Enlisted the help of organizations they work with to keep their eyes open for and recommend lawyers who display awareness of the problems of the poor and can be recruited for legal aid work;
- Trained paralegals or "barefoot lawyers" in the basic concepts of law, legal procedure, tactics and counter tactics, and in the skills needed to do routine, repetitive, or preliminary jobs and carry out simple investigations, such as interviewing witnesses and taking down their statements, getting copies of public records, preserving physical evidence, filling out standard government forms, etc. Paralegals are chosen from among promising students of law and social sciences who agree to do field work with poor communities between school terms; are recommended by civic organizations working with them; and trade union members recommended by their unions. Paralegal training has produced several benefits. Lawyers have had more time to devote to the creative aspects of their job: counseling, negotiating, drafting, advocacy. Some law students were motivated by their experience as paralegals to join legal aid groups after admission to the bar. And paralegals have equipped the communities they live in with a knowledge of how law works and how to use law to assert or defend their rights.

There will never be enough funds for developmental legal aid groups. Government certainly will not fund them; and in any case, developmental legal aid groups are jealous of their independence and carefully guard against control by government or any other individual or group. So they have tried to stretch the meager funds they have in the following ways:

- Lawyers charge no fees for their time and services, and shoulder the cost of their transportation and the overhead expenses incurred in legal aid cases. Only when lawyers devote more time than they can afford to legal aid are they given modest honoraria from legal aid funds.
- Whenever they can afford to, legal aid clients shoulder all out-of-pocket expenses for filing fees, gathering evidence, transportation to hearings, and the like. Only the portions of these expenses that clients cannot afford are paid from the funds.
- Seminar expenses are borne by the organizations who request paralegal training. Often space is free, and the participants bring their own food.

These policies require lawyers to devote only part of their time to developmental legal aid. This has obvious disadvantages. However, the disadvantages are offset by the fact that their paying practice keeps lawyers' skills honed, avoids the tedium of over-specialized practice, and maintains their reputation and respectability at the bar and with the elite community. It also provides an assurance that the time and skill they devote to developmental legal aid are products of firm commitment, not self-interest.

With respect to the danger of reprisal, developmental legal aid groups have adopted such tactics as the following:

- Only lawyers who enjoy spotless reputations in their community are recruited; many are, in fact, leaders of bar associations; their reputation and standing restrain government from committing blatant acts of reprisal and, at the same time, add to the persuasiveness of their legal aid advocacy.
- Lawyers work in close cooperation with organizations who enjoy so great a prestige or so large a following that government hesitates to take action against them.
- Lawyers take pains to keep their relations with developmental legal aid clients on a strict lawyer-client basis and to give government no factual

grounds to level charges of subversion or other wrong-doing against them.

Still threats of arrest, detention, physical injury and death are always present. Developmental legal aid lawyers and their families have to learn to live with these threats.

Much more, of course, remains to be done. But a beginning has been made. Despite costs and risks, the number of lawyers involved in developmental legal aid had multiplied. This alone gives hope that their work has some value and that it will continue and become more effective as they and the poor learn from their failures and successes.

VIII

Developmental legal aid seeks to use law to redistribute power and change social structures – in effect, to wage revolution by law. Can it succeed?

Practitioners of legal aid hope that it will, but in truth they do not know, and cannot know until it has been fairly tested. There is much to be said for revolution by arms, as there is much to be said for revolution by law. Power does flow, as Mao Tze Tung said, “from the barrel of a gun,” a saying authoritarian governments live by and sometimes even quote. But power also flows from the strength of will and of spirit, as Gandhi proved and as students of war from Sun Tzu¹⁷ to Beaufre¹⁸ confirm. Napoleon himself, the great master of war, said: “There are only two things in the world, the sword and the spirit. In the long run it is always the spirit that will conquer the world.”¹⁹ To which, of course, the proponents of arms will reply, with Keynes, that “in the long run we shall all be dead.” The debate goes on, with inconclusive results.

What is conclusive is that any revolution, whether by law or arms or both, may fail; but every revolution must involve law. Law rests on force or the threat of force – yes, but only ultimately. Governments do use force and the threat to use force always lurks beneath the surface – true; but if governments were to rely solely on force to maintain themselves in power, they would sooner or later collapse. This is why governments enact law: because, as Rousseau said, “Even the strongest is not strong enough unless he transforms his power into law and obedience into duty.”²⁰

So the struggle to develop, to forge a better society, must involve a struggle over law. In that struggle, the poor and the oppressed can use law to liberate themselves as the oppressors use law to oppress them. In the event, law may prove not to be a sufficient weapon, but it is nonetheless a weapon not to be ignored. For the use of law enhances man in a way that the use of arms does not. Should his revolution succeed, whether by law alone or by arms also, he will be the better prepared to build a more just, more human and more humane society over the ruins of the old. Should his revolution fail, he will still retain his knowledge of how to use law to discomfit the powerful. And he may find solace in the lesson Filipino peasants have time and again uttered, “No uprising fails. Each one is a step in the right direction.”²¹

¹⁷ Sun Tzu, *The Art of War*, Samuel B. Griffith, trans., London: Oxford University Press, 1963, p. 38, 63-71.

¹⁸ Gen. D’Arme’e Andre Beaufre, *An Introduction to Strategy*, Maj. Gen. R. IJ Bany, trans., London: Faber and Faber, 1965, p. 138, and *Strategy of Action*, *ibid*, 966, pp. 113-114, 131.

¹⁹ Quoted in Gustav Radbruch, *ibid* note 14, p. 115, footnote 4.

²⁰ Quoted in Gustav Radbruch, *ibid* note 14, p. 115.

²¹ Salud Algabre in David R. Sturtevant, *ibid* note 3, p. 296.