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## **Human Rights, Legal Services and Development: Theory and Practice**

**Hans-Jürgen Brandt**

### **1. Introduction**

The complex relationship between law and development in so-called Third World countries and societies has received little treatment in the literature published in West Germany. Scientific studies on this topic have appeared primarily in the United States in the form of a discussion or critique of the "law and development movement"<sup>1</sup> that began in the 1960s, or the "legal development assistance programs" which North American institutions carried out with counterpart organizations in Latin America and Africa.

West German literature has, on the other hand, paid ample attention to human rights problems in developing countries. Numerous theoretical studies have been published on human rights, constitutional guarantees and systems designed to provide international protection for human rights.

International organizations like Amnesty International, the International Commission of Jurists, and the International League of Human Rights have published numerous reports on human rights violations throughout the world, with both political parties and Third World action groups frequently joining in protests against regimes which commit such violations. However, these worthy activities are nevertheless by their very nature reactive and defensive. Their chances of success are slim. Numerous governments, like that of President Belaunde in Peru (1980-1985), have appeared unimpressed by international protest against human rights violations. Instead, they have attempted to discredit the organizations and investigatory committees concerned as non-objective or politically biased, describing their findings as false or as hostile propaganda.

<sup>1</sup>) Gardner, James A.: Legal Imperialism, American Lawyers and Foreign Aid in Latin America, Wisconsin 1980, p. 6.



In practice, international protests, agreements under international law and the institutions concerned with safeguarding international human rights have proved to be relatively blunt instruments in the defence of human rights and the rule of law. This raises the question of how respect for the human rights and the rule of law can be promoted actively at a national level in developing countries and how international cooperation can contribute towards this end.

Promoting human rights is an important objective in West German development policy. In accordance with resolutions adopted unanimously by the German parliament on March 5, 1982, and January 19, 1984, international cooperation should further observance of human rights and promote both social justice and the mobilisation and active participation of the population in the development process. The resolution passed on January 19, 1984, specifies that the West German government should concern itself more with the concrete results of development policy and provide evidence that the money spent has in fact helped to safeguard human rights and has promoted democratic institutions in the Third World.

This paper uses the term "human rights" in the broad sense as defined in the Declaration of Human Rights and the covenants of the United Nations on "Civil and Political Rights" on the one hand and "Economic and Social Rights" on the other. Accordingly, human rights embrace not just the right to life, prohibition of torture, freedom of conscience and religion, freedom of opinion, freedom to hold meetings and form coalitions and so on, but also the right to an appropriate standard of living, the right to social security, the right to an education, etc.

Legal service projects can greatly enhance respect for human rights and the rule of law. Legal aid or "legal services" have been defined "as a rational and effective method to protect individual freedom, expand citizen participation in decision-making, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life"<sup>2</sup>.

2) Trubek, David M. / Gallanter, Marc: Law and Society, *Scholars in Self-Estrangement: Some reflections on the crisis in law and development studies in the United States*, in: *Wisconsin Law Review*, Vol. 1974 (1975) pp. 1062, 1063.

Legal services include more than just legal advice and the legal defence of individuals. Legal services projects aim rather to introduce or strengthen self-help processes through education and special training programs for members and leaders of grass-roots organizations, cooperatives, associations etc. These self-help schemes should help individuals and groups to fight for or make better use of their individual and collective rights (including civil, political, economic and social rights).

Given the complexity of the subject matter, the different legal systems and problems in individual countries, as well as the controversies over the role of law and legal service programs in the development of countries of the "Third World", this paper can only attempt to single out certain aspects. At the risk of making partly unreliable generalizations, it will try to provide a survey of previous strategies and experience.

Because of its close links with liberal thought, the main concern of which is the universal validity of human and citizens' rights, the Friedrich Naumann Foundation has in recent years supported a series of legal service projects. The possibility of extending this aspect of international cooperation is currently under discussion within the Foundation.

## 2. On the role of law and legal services projects in development

Theorists and practitioners of development policy and aid often subscribe to a certain kind of legal nihilism which leads to fundamental doubts about the kind of project we shall describe. At first sight the reluctance displayed in dealing with the complex questions relating to "law and development" seem justified: Almost all development theories and strategies assume the primacy of economics. The theories of modernization of the first United Nations development decade focused primarily on economic growth and the increase of Gross Domestic Product. Here one recalls the development models which were strongly influenced by Walt Rostow's theory of the "stages of economic growth", according to which strengthening of the modern sector of the economy ("big push" would lead to a "take-off" towards self-sustained economic growth and an improvement in the incomes of the poor by way of a "trickle-down" effect)<sup>3</sup>. Such theories of modernization gave little attention to the role of human rights and the constitutional state in development. It was assumed



that growth would automatically bring with it a development of the social, political and legal system. In this respect conservative and Marxist strategies converge — though obviously from a different starting-point and with different aims: In Marxist teaching the underlying theory — which is, however, also contested in Marxist circles — is that social change is achieved only via economic relations and not through “reflections” of those relations, such as law.

A mere glance at World Bank per capita income statistics for both market economy oriented and socialist developing countries on the one hand and Amnesty International reports on human rights violations on the other shows, however, that it is difficult to establish any significant causal link between growth, economic structure and respect for human rights.

The failure of the growth-oriented theories of modernization has also led to a change in development strategies. The eradication of mass poverty and underdevelopment is today envisaged as a product of “integrated development” and “satisfaction of basic needs”. Material improvements (a guaranteed income, board and lodging, clothing, etc.) remain central to the concept of development. But non-material basic needs have been incorporated as well, such as participation, self-reliance and cultural identity.<sup>4</sup> On the one hand it is quite clear that the basic needs concept also caters for human rights which are included in the 1966 Covenant of Economic, Social and Cultural Rights, such as the right to an appropriate standard for living (sufficient food, clothing, a place to live). Civil and political human rights here play only a minor role.

On the other hand, past experience in economic cooperation shows that implementation of the basic needs strategy gives rise to conflicts within the national economic and political power structure. Support for the rural and urban poor and for grass-roots organizations is opposed by

3) Rostow, Walt W.: *The Stages of Economic Growth: A Non-communist Manifesto*, 2. ed., Cambridge 1971. For the different modernization theories see the summary in: Grimm, Klaus: *Theorien der Unterentwicklung und Entwicklungsstrategien. Eine Einführung*, Opladen 1979, pp. 23, 67.

4) BMZ (Ed.): *BMZ-aktuell, Grundbedürfniskonzept der Bundesregierung*, Bonn 1983, p. 30. See too: 5. Bericht der Bundesregierung vom März 1983.

economically or politically influential local interest groups who benefit from the current power structures and now feel threatened. In some countries, violence tolerated or even backed by the State is a frequent weapon employed against those who strive to change conditions in favour of the poor and disenfranchised sectors. Thus violations of civil and political human rights are a response to the promotion of self-help at the grass-roots level.<sup>5</sup> This raises the question of to what extent legal services and human rights projects can support and reinforce strategies for integrated rural development and satisfaction of basic needs.

The second reason for the legal nihilism mentioned earlier appears to be that the legal systems of many developing countries mainly serve to bolster the power of elites and are, moreover, full of loopholes, incoherent and contradictory. A glance at the legal systems of most developing countries reveals that the law constitutes a considerable impediment to development. In all English and French-speaking countries in Africa, the law is heavily influenced by the legal systems of the former colonial powers. The constitutions of the English-speaking countries of Africa, for instance, stipulate that all laws that were valid at the time of independence remain in force until they are annulled unless they are inconsistent with the constitution. While it is true that African courts later deviated from British jurisprudence, most laws, including for instance large sections of penal law, remain unchanged<sup>6</sup>. When new laws were devised, laws promulgated by the former colonial powers were often just copied with no regard to the specific economic, social, cultural and political conditions of the society concerned. The laws in Latin American countries have also been influenced by European Law. Peru's Civil Code of 1936, for example, adopted extensive tracts of the Swiss civil code and these later influenced the new 1984 version. Likewise the Peruvian Penal Code of 1924 was heavily influenced by prior Spanish, Swiss and Italian legislation<sup>7</sup>.

5) O'Brien, James: *Private Agencies collaborating together*, March 1983 (unpublished paper), p. 7.

6) Seidmann, Robert B.: *The State, Law and Development*, New York 1973, pp. 34, 37.

7) Nunez, Estuardo: *La influencia alemana en el Derecho Peruano*, in: *Revista de Derecho y Ciencias Politicas*, Organo de la Facultad de Derecho y Ciencias Politicas de la Universidad Nacional Mayor de San Marcos, AÑO 1, Lima 1936, pp. 366, 398. Hurtado Pozo, José: *La ley “importada”, Recepción del derecho penal en el Perú*, Lima 1979, pp. 59, 131.



The problem with these legal transplants is that laws which mainly came from European legal circles were imposed onto a culturally distinct and heterogeneously structured society. Since law is a cultural phenomenon, every superimposition of alien laws is tantamount to cultural intrusion. Bob Seidman comments: "the same rules of law and their sanctions in different times and places, with different physical and institutional environments will not induce the same behaviour in role occupants in different times and places"<sup>8</sup>. So it is not surprising that the effectiveness of these laws or the extent to which they are obeyed is limited.

Furthermore, the legal systems of Latin American countries are only intelligible to a small group of specialists. This is not only because of the esoteric legal language employed but above all because of the large number of new, but largely incoherent and contradictory, laws<sup>9</sup>. In Peru, for instance, 24,254 laws and regulations were promulgated between 1904 and mid-1985<sup>10</sup>. It takes lawyers an enormous amount of time just to discover which of these laws is still valid. Citizens are thus placed in the dilemma of having to obey the law without being able to know what the law says. The liberal principle whereby "Everything that the law does not forbid is permitted" is useless in practice; Radbruch's requirement that the legal consequences of laws must be foreseeable is not met.

Given this alien and impenetrable system of national law, it is hardly surprising that large sections of the urban and rural poor in Latin America and Africa continue to use autochthonous systems of customary law. This is most apparent in the evolution of the informal sector with its own rules and sanctions outside the structure of the formal legal system.

National law in, say, Peru or other Latin American and African States can hardly be described as expressions of Rousseau's "Volonté générale". It is, on the contrary, established by a minority, essentially in the interests of their own social and economic circles. In this way, the law reflects the

8) Seidmann: (1978), p. 36.

9) Novoa Monreal, Eduardo: *El derecho como obstáculo al cambio social*, 5 ed., México 1981, p. 51.

10) Oficina de Presupuesto y Planificación del Sector Justicia (Ed.): *Notas para un análisis de la problemática del sector Justicia*, Cuadernillo N° 1: Ordenamiento jurídico, Lima, May 1985.

social relations of domination: it tends to perpetuate the economic, political and cultural marginalization of the poor majority of the population. However, since the law claims to be valid for the whole of society, the system suffers from a lack of legitimacy. For numerous writers this is a consequence of the class character of the law: "The quantity and often contradictory nature of the claims made on the State mean that the State can only handle them by giving up the principle of equality and by satisfying individual interests piecemeal in a permanent state of crisis management"<sup>11</sup>. The State is said to be particularly incapable of establishing its authority and regulating legal relationships among the marginalized urban informal sector. This sector is forced to subsist on the borderline between legality and illegality and is viewed as a threat to public order. Hence the State takes it upon itself to defend society from the part which has been separated<sup>12</sup>. In order to protect the status quo, the State is forced to use illegal measures, which are inconsistent with the rule of law. This means: "Constitutionality for citizens who own nothing"<sup>13</sup>. Human rights violations are, according to this approach, endemic to capitalist developing countries as a means of holding on to the power.

This generalizing hypothesis cannot be accepted fully because it fails to explain considerable differences regarding respect for human rights and constitutional law in individual market-economy oriented developing countries. Nevertheless it is clear that law can be described as an instrument of domination. In almost all developing nations, and as a result of the lack of a broad, politically active citizenship, the law is established, manipulated and applied by a minority. In extreme, but nevertheless frequent cases, constitutional guarantees, for instance, are often suspended through the declaration of a state of emergency. It is also evident that the legal needs of the majority of the population are seldom taken into account in the legislative process and that the tangle of laws and regulations has in many developing nations given rise to a Kafkaesque bureau-

11) Sellin, Harald / Toepper, Barbara: *Die Rolle des Staates im peripheren Kapitalismus Lateinamerikas als Gegenstand sozial- wissenschaftlicher Forschung*, in: Hanisch, Rolf / Tetzlaff, Rainer (Ed.): *Staat und Entwicklung, Studien zum Verhältnis von Herrschaft und Gesellschaft in Entwicklungsländern*, Frankfurt a.M. / New York 1981, pp. 94, 101.

12) Simonis, Georg: *Staat und politische Integration im peripheren Kapitalismus*, in: Hanisch / Tetzlaff (Ed.), (1981), pp. 111, 140.

13) *ibid.*, p. 142.



cracy. In most Third World countries the law is regarded as a web in which citizens are caught, rather than as a structure providing predictability and security. An often quoted Peruvian proverb — "hecha la ley, hecha la trampa" — suggests that every law contains the seeds of its own destruction and that a mechanism for evading the law is born simultaneously with the regulation itself.

It is also clear that access of ordinary people to justice is hampered by almost insuperable obstacles such as incomprehensible procedures, legal jargon, the obligation to use a lawyer, costs, corruption and procrastination during court cases.

All these factors, which vary from country to country and can here only be described briefly, explain the legal nihilism mentioned earlier. What, therefore, can legal service projects achieve? Do they merely serve to legitimize and reinforce the status quo or do they contribute to structural change? What are the social, political and economic limits to these programs?

First it must be pointed out that the legal systems of developing countries are not just instruments of class domination, because the laws not only regulate the exercise of power; they also set limits to that exercise of power and to state intervention. They contain social rights and protective rights. It is true that G. Myrdal<sup>14</sup> considers that the elite in a developing country can afford to pass egalitarian laws because their own unchallenged position allows them to prevent precisely those laws from being applied. But this does not explain why it was necessary to pass those egalitarian laws in the first place. The discussion often ignores the fact that the contents and limits of law are determined by the balance of political power in a given society, that the "juridical system" corresponds "with the particular coordinates of political struggles" in society<sup>15</sup>. Political struggles between classes lead in developing countries, as in others, to compromises, which "the law expresses and fixes normatively"<sup>16</sup>. It is true that

14) Myrdal, Gunnar: Politisches Manifest über die Armut in der Welt, Frankfurt a.M. 1970, p. 216.

15) Poulantzas, Nicos: Staatstheorie, Politischer Überbau, Ideologie, Sozialistische Demokratie (L'Etat, le Pouvoir, le Socialisme) Hamburg 1978, p. 83.

16) Wagner, Heinz: Recht als Widerspiegelung und Handlungsinstrument, Beitrag zu einer materialistischen Rechtstheorie, Köln 1976, p. 18.

civil law protects the property and rights of the wealthy. Yet the content of and limits to the right to property are not static but subject to processes of change.

Furthermore, laws can be passed and applied as instruments of social change, like the Peruvian Agrarian Reform at the beginning of the 1970s, which expropriated large estates and created cooperatives.

Achievements in the struggle for the rights of freedom and equality, political participation and social security are not just self-deception or attempts to play down the repressive nature of the State. They are rather "inroads" for the lower classes into previous relations of domination<sup>17</sup>.

The struggle of the rural poor, of the inhabitants of slums, of employees, street vendors, ethnic minorities and other marginalized groups to obtain recognition for their self-help organizations, a greater share in social wealth, participation in the development process, social security, and the right to take part in and shape politics is a struggle for legal status. The same is true of the battle against discrimination, oppression, arbitrariness and violations of human rights. Frequently it appears to be forgotten that in developing nations as well as in the industrial countries law is the end of politics and that, on the other hand, politics in many countries is accomplished through the law.

Emancipatory legal service programs can play a part in this struggle by helping the non-privileged or disenfranchised to strengthen their organizations, articulate their interests and defend their legitimate individual and collective rights both politically and/or juridically. This is currently the main emphasis of legal service programs. Nevertheless, in pursuing a "double strategy", legal services projects are not only directed at grassroots organizations. Given certain democratic preconditions, they may also include the public bureaucracy and judiciary, so as to promote an unbureaucratic, citizen-friendly and efficient civil service capable of respecting human rights and fundamental democratic principles.

17) Blanke, Bernhard / Juergens, Ulrich / Kastendiek, Hans: Zur neueren marxistischen Diskussion über Analyse von Form und Funktion des bürgerlichen Staates, in: Probleme des Klassenkampfes N° 14/15, pp. 51, 78.



Finally, in specific cases in which the same preconditions are given, the projects may include technical advice for the law-givers.

It would, however, be wrong to idealize legal services projects. Within development policy, they only complement economic strategies, especially those applying to "integrated rural development" and "satisfaction of basic needs".

### 3. Experience with traditional legal services projects

When using the term "traditional" with respect to legal service projects I am referring to the North American "legal development assistance" of the 1960s and 1970s which was supported by numerous organizations, such as AID, the American Bar Association, the American Society of International Law, the Ford Foundation, the International Legal Center and a series of outstanding North American law schools (Harvard, Yale, Wisconsin, etc.). The support was directed mainly towards the training of students at law facilities, particularly in Latin America, but also in Africa and Asia, and the granting of scholarships for studies in the United States; improvement of the judiciary; and support for "legal aid clinics" for the poor<sup>18</sup>.

Such legal development assistance strategies which ultimately proved unsuccessful, were based on utopian precepts, including the following:

1. The State is envisaged as the most important protagonist of social control and social change, as the agent which defines and applies the law as a key instrument in attaining these goals.
2. It is assumed that the State is the product of the organization of free and equal individuals in society, and that the law is therefore established through pluralist, democratically legitimized procedures aimed at the common good.

18) See: Gardner (1980); p. 6, Trubek / Gallanter (1974), p. 1065; Trubek, David M.: Unequal Protection: Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America, in: Texas International Law Journal, 1978, Vol. 13, No 2, p. 243.

19) See: Trubek / Gallanter (1974), pp. 1070, 1078.

3. It is supposed that the individuals in society tend to adapt their behaviour to legal norms, so that legal reforms can also bring about changes in behaviour (legal behaviourism).
4. The courts are seen as the central institutions of the legal order which, by rational interpretation and application of the law, see to it that legal norms are respected and that citizens behave in accordance with them.
5. The training of law students as future lawyers, judges, officials and politicians acquires paramount importance in the development of democracy and the constitutional state.
6. In addition to the promotion of professionalism among lawyers, legal aid clinics for the poorer classes are deemed necessary. The assumption here is that the poor suffer a legal disadvantage vis-à-vis the rich because they cannot afford a lawyer to defend them and therefore are not able to present their case adequately in court.

However, they do not reflect reality in developing countries so much as the ethnocentricity of North American jurists at that time<sup>20</sup>.

The model they had in mind presupposed democratic-pluralist conditions whereas in some project countries, such as Brazil, authoritarian or dictatorial regimes were in power. Legal behaviourism applied to developing countries fails to see that national law is not always neutral, frequently corresponds only with the interests of specific groups in society and therefore not recognized by the majority of the population. It also fails to acknowledge that in practice legal reform seldom contributes to socio-economic development. The attempt to implement legal behaviourist theorems in developing countries was a dubious undertaking from the start since legal behaviourism was already undergoing a crisis in the United States<sup>21</sup>.

Contrary to the model's assumptions courts in many countries are neither independent nor particularly important as regards the settlement

20) Gardner (1980), p. 7.

21) Macaulay, Steward: Law and Behavioral Sciences: Is there any there there?, Working paper 1983-16, University of Wisconsin Law School.



of disputes. Out of court, extra-legal, autochthonous or common law aspects of the mechanisms for solving conflicts were ignored<sup>22</sup>.

It is by no means automatic that improvements in the study of law promote among graduates the commitment to social change or to the constitutional state and human rights. Under the guidance of North American experts, who Gardner describes as "legal missionaries"<sup>23</sup>, students in Latin American law faculties and North American law schools were trained to become "legal engineers" and "pragmatic problem solvers". Largely excluded were the cultural, social or ethnic dimensions of law in developing countries<sup>24</sup>. The instrumental nature of law was overemphasized while ethical values were neglected. Law was in danger of becoming a voluntaristic political instrument. When envisaged in merely technical terms and divorced from the value of natural law, law in practice becomes subservient to anything and everything. Law thus loses its emancipatory functions. Gardner points out that Latin American dictatorships eagerly grasped the legal model we have described in order to use law and the legal profession as instruments of authoritarian policies. Some of the jurists who received training under the programs later became technicians or apologists of military dictatorships<sup>25</sup>. On the other hand, the "law and development programs" also produced a small group of critical and committed jurists, such as the so-called "Wisconsin boys" in Peru, who later gave new impetus to national debates in law studies and helped create a new approach in the legal service programs. Nevertheless, on the whole experience with the "law and development movement" was frustrating: "The American legal missionaries had carried abroad the patented medicine of social engineering and rule-skeptical, instrumental legal thought only to learn that this was not a cure but a disease"<sup>26</sup>.

Nor were the heavily backed legal counsel programs or "legal aid clinics" for the poor as successful as had been hoped. They contributed no

22) Trubek / Gallanter (1974), p. 1080; Gardner (1980), pp. 6, 44, 264.

23) Gardner (1980), p. 8.

24) *ibid.*, p. 9.

25) *ibid.*, p. 11.

26) *ibid.*, p. 11.

doubt to the solution of numerous individual legal disputes, and unjustly (politically) persecuted persons were occasionally defended efficiently. But the legal aid clinics backed by the State or bar associations proved to be inadequate.

They dealt only with isolated cases and treated them from a formal legal point of view. This excluded any problem not directly connected with the case at hand and did not assist those concerned in overcoming social and economic problems. Those who worked in the legal aid clinics were underpaid lawyers and law students. Their services were of low quality. Their social and economic status, their frequent lack of social sensitivity, their alien legal language and the client-lawyer relationship created new barriers without breaking down the old ones. The State-backed legal aid clinics were also suspected of merely soothing the poor than significantly improving their lot<sup>27</sup>.

It became apparent, in other words, that the underlying root causes of unjust and inappropriate social and legal structures in society could not be solved by resorting to superficial reforms like better training for jurists and legal counsel for the poor<sup>28</sup>. Failure led to a deep crisis in the "law and development movement" and to the search for new concepts.

#### 4. The need for innovative legal services projects

During the past decade, above all in Latin America and Asia, new legal aid strategies have been developed which are called "innovative" or "alternative" in deliberate contradistinction to the traditional approach. These new models build on experience gained in the "law and development movement", but at the same time try to overcome its legalistic, legal positivist and ethnocentric limitations.

The new strategies begin with an extremely critical look at the specific role of the legal system in the development of each country concerned. With respect to Asian countries A.C. Espiritu writes: "Development and

27) Thome, Joseph R.: New Models for Legal Services in Latin America, Working paper 1984-2, University of Wisconsin Law School, p. 9. Zemans, Frederick H. (Ed.): Perspectives on Legal Aid, An International Survey, London 1979, p. 346.

28) Trubek / Gallanter (1974), p. 1084.



human rights require not simply the upholding of the existing law; they can never be realized without radical changes in social structure"<sup>29</sup>. So long as legal aid is handed out in the form of charity for the poor, it does not contribute to development. In the Philippines and in Indonesia this basic principle initiated a change from "traditional" to "structural" or "development" legal aid<sup>30</sup>. Similar new conceptions took root in Latin America<sup>31</sup>. Legal aid is now understood as an instrument for the democratization of power and for reforming the economic and socio-political framework. In contrast to the traditional approach, emphasis is not so much put on increasing the professionalism of legal careers and institutions as on support for grass-roots organizations and self-help groups among the poor and underprivileged, in other words the majority of the population. The new mottos are: empowerment and mobilization of the rural and urban poor aiming at improvement of their living conditions, and self-reliant and self-determined development, as well as economic and political participation<sup>32</sup>.

The strategies employed in innovative legal services projects signify a radical break with the main features of the traditional legal profession :

- work acquires a development policy perspective. The group is no longer seen to be a set of clients towards whom a neutral position is adopted. On the contrary, the contribution is now consciously to take sides.

29) Espiritu, A.C.: Law, Development and Human Rights in the Asean, in: Human Rights Forum, Newsletter on Development and Human Rights in Asia, April-June 1985, Jakarta/Indonesia, pp. 1, 2.

30) Mulya Lubis, T.: Legal Aid in Asean, in: Human Rights Forum (ibid.), pp. 16, 18.

31) Thome (1984), p. 7.

32) See: Paul, C.N. / Dias, Clarence J.: Law and legal resources in the mobilization of the rural poor for self-reliant development, International Center for Law in Development (Ed.), New York, 1980, p. 11; Paul / Dias: The importance of legal resources in strategies for the rural poor in sub-saharan Africa (unpublished seminar paper), Dakar/Senegal, April 1983, pp. 5, 17; Paul / Dias: Educating for Alternative Development: Sharing knowledge about law (unpublished seminar paper), Penang/Malaysia, November 1983, p. 3; Paul / Dias: Introduction: Underlying concerns and the field to be examined, in: International Third World Legal Studies Association (Ed.), Third World Legal Studies — 1982: Law in Alternative Strategies of Rural Development, New York (1983).

- Problems are not just solved juridically. Rather an attempt has to be made to include the social, economic and political dimensions of conflicts ("meta-legal approach"). The team working in innovative legal services projects differentiates between individual or personal conflicts on the one hand and social or collective disputes on the other. Emphasis is placed not on settling isolated personal legal cases, but on promoting collective rights (such as the right to form coalitions, to hold assemblies, the right to strike and the joint rights of a group of people, for instance the right to ownership of land, access to urban infrastructure, protection from pollution). Attention is also given to defending those involved in typical cases of disadvantage or violation of rights ("interest-group advocacy"). In cases where this discrimination stems from the prevailing legal or socio-economic structures, the work involves trying to change these conditions in favour of the disadvantaged interest groups.

- In order to strengthen grass-roots organizations "alternative" legal service projects try to construct participatory and democratic organizational structures as well as to strengthen self-help resolve in the group concerned. Training courses are organized for leaders and members of grass-roots groups and "para-legals" (legal assistants) so as to inform participants about the rights the law of the country grants them or about those (international standard) rights it withholds from them.

The aim is to undermine the lawyers' monopoly of knowledge concerning the law so to pave the way for "legal self-reliance" and thus bolster the bargaining strength of the group concerned<sup>33</sup>.

Also new is the interdisciplinary approach of the legal service projects, especially those in Latin America. Community workers and sociologists are involved who help the groups organize themselves, articulate their collective legal problems and develop appropriate strategies; teachers, who

33) See for Asia: Dias, Clarence J.: Legal Aid in Asia; a Basic Human Right (unpublished seminar paper), New Delhi, October 1985, p.4; Espiritu (1985), p. 2; Mulya Lubis (1985), p. 16; for Latin America: Thome (1984), p. 12; Asociación Interamericana de Servicios Legales (ILSA): Primera Conferencia sobre organización y prestación de servicios legales en Latinoamérica y el Caribe (San José, 13-17 Oct. 1981), Bogotá/Colombia 1985, p. 8; Chirinos Luis: La profesión legal y los sectores populares: aproximaciones (unpublished paper), Lima 1986; Pásara, Luis / Parodi, Jorge: Los grupos "innovadores" de servicios legales en el Perú: Estudios de caso (unpublished paper), Lima/Perú 1985.



impart the relevant legal knowledge that the group wants to acquire and who train para-legals and promoters; and, finally, lawyers who present group interests in court or to the administrative or legislative bodies. All this work is grass-roots oriented. The team does not work for, it works with the group concerned.

This broad so-called "meta-legal" and inter-disciplinary approach of the innovative legal services projects is known as the "legal resources approach"<sup>34</sup>.

Finally, the concept of law applied in the projects has also shifted: By "law" one means not only the set of laws of a given state. The notion also embraces internationally recognized legal principles, human rights declarations and conventions (even when these have not been ratified by the country concerned) and traditional customary law. Through education and advice, these programs attempt to overcome unjust and anachronistic legal customs (for example the oppression of women).

The impact of "innovative" legal services programs can be quite wide. They can 1) strengthen self-help groups both internally and externally and 2) influence state decision-makers (officials, judges) into responding to the basic needs and justified demands of the afflicted groups (i. e. those based on constitutional and human rights).

Internally, in the self-help groups, the measures may:

- help those involved to build up participatory and democratic organizational structures,
- promote consensus on the need to change the conditions under which one lives,
- point out new ways of settling group conflicts,
- create awareness that certain basic needs also constitute legal rights,

34) Paul/Dias (1980), p. 18; Paul/Dias (April 1983), pp.21, 26; Dias (1985), p. 15; see above.

- help grass-roots groups to train their own para-legals,
- strengthen resolve and capacity for self-help,
- mobilize groups to stand up for their rights actively<sup>35</sup>.

Externally, legal aid can help to:

- justify claims for access to goods and services (for example, access to social and urban infrastructure in the slums),
- present the above demands effectively both in the courts and to the administration,
- justify group action, such as boycott, strike or demonstration,
- organize and legalize groups' economic activities (e.g. the establishment of cooperatives),
- reorganize groups' relations with the outside world so as to eliminate restraints on production and trade (by, for example, getting rid of exploitation by money-lenders and traders),
- develop ways of cooperating with other organizations, networks and umbrella organizations,
- defend existing rights and negotiate new ones (e.g. collective bargaining agreements),
- sue in cases of corruption, arbitrariness and the misuse of power, accumulation of power and legal evasion,
- achieve political participation for the members of grass-roots organizations<sup>36</sup>.

35) Paul/Dias (November 1983) pp.5, 7.

36) Paul/Dias (April 1983) p. 17; Paul, James C.N.: Developing Human Rights for Development by and for People, in: International Third World Legal Studies Association (Ed.), Third World Legal Studies — 1984: Human Rights and Development, New York (1985), p. 61.



This listing of goals is not meant to imply that they are all attainable in any individual project. It would be beyond the scope of this survey to assess some typical legal service projects here. Nevertheless, some of the problems of legal service projects will be discussed in Part 6.

## 5. Types of project (overview)

Grass-roots oriented legal service projects in the past few years have above all been directed at the following groups and their respective self-help organization:

- small farmers and the rural poor
- slum-dwellers/marginal urban groups
- ethnic minorities
- trade unions
- women
- domestic servants
- prisoners.

Legal service projects that are not specially directed towards grass-roots self-help organizations include:

- the work done by national and regional human rights organizations
- projects dealing with education in human rights in schools and adult education
- the training of justices of the peace and judges
- praxis-oriented research.

A few types of projects are illustrated below. The complex problems of each group concerned and the measures taken vary widely according to

continent and region, and will therefore only be described in the broadest terms.

## 5.1 Legal services projects for self-help organizations

### 5.1.1 Target group: Small farmers and the rural poor

These target groups face numerous problems which vary tremendously but which are in principle all rooted in the power structure. These include, for instance: dependence on, or oppression and exploitation by, large-scale landowners, traders, money-lenders and the local representatives of the political or state apparatus; lack of land titles leading to expulsion from rural areas that have traditionally been farmed by the group; mini-sized farms; low income; soil pollution or contamination of fishing areas by industrial installations and so on.

The organizations providing legal aid in this sector<sup>37</sup> were active in the following areas, depending on the specific and varying needs of the self-help organizations, and with partly different strategies: they carried out studies of the different circumstances and, together with the grass-roots organization, produced a list of possible solutions; ran training courses for leaders and members of these groups regarding their rights and economic, political and social problems; provided organizational and collective

37) In Latin America for example:

Centro de Defensa dos Direitos Humanos/Asesoría e Educação Popular, Paraíba/Brasil; Prodesarrollo, Quito/Ecuador; Centro Peruano de Estudios Sociales (CEPES), Lima/Perú; Comité de Iglesias, Asunción/Paraguay.

In Asia:

Consumers' Association of Penang (CAP), Penang/Malaysia; Participatory Research and Organization of Communities through Educational and Selfhelp Services (PROCESS), Manila/Philippines; Free Legal Assistance Group (Flag), Manila/Philippines;

There is little literature available:

Asociación Interamericana de Servicios Legales (ILSA), Primera Conferencia... (ibid.) and: Segunda Conferencia Regional de Programas de Servicios Legales (Villa de Leyva, Colombia, Junio 1985), Bogotá, 1986 (to be published in 1986); Kanniah, Rajeswari/Raman, Meenakshi (CAP): People's Access to the Legal System: A Grassroot Perspective, Penang 1986; Human Rights Forum, Newsletter on Development and Human Rights in Asia, April-June, 1985, Jakarta/Indonesia.



advice, in particular legal disputes; represented the self-help organizations in the relations with the authorities and in the courts; devised radio programs for target groups in cooperation with regional and national radio stations; and trained "para-legals" and "bare-foot lawyers".

Since 1985, the Friedrich Naumann Foundation has supported the "Participatory Research and Organisation of Communities through Educational and Selfhelp Services" (PROCESS) project in the Philippines, which has set up a Legal Aid Institute working at village level with groups of local farmers, fishermen and plantation workers and trying, with the help of rural promoters, to mobilize the local population in solving their economic, legal, social and political problems.

The Foundation also supports the Consumers Association of Penang (CAP), which defends and promotes the rights and interests of consumers, and, as part of its extensive programs, defends small farmers from expulsion, fights against contamination of fishing grounds by fishermen's cooperatives, and trains promoters with a view to strengthening self-help groups so that "the voiceless majority of the population can make itself heard" and no longer be the mere object of government or corporate decisions<sup>38</sup>.

### 5.1.2 Slum dwellers/marginal urban groups

Twenty years of migration from rural areas in Latin America, Asia and Africa has led to a mushrooming of the cities, the megalopolis syndrome, and an expansion of slum areas that Europeans can scarcely imagine. The slum-dwellers problems are: unemployment, lack of income with which to pay rent, inadequate urban or state housing policies, clashes with police following "invasions" by slum-dwellers of publicly or privately owned land, the need for legalization of housing arrangements, access to urban and social infrastructure, increasing levels of crime, and so on.

Legal services projects have not been able to find a lasting solution to these problems. They have instead attempted the following: to create or consolidate organs permitting democratic community self-administration;

38) Tiranti, Dexter/Tiranti, Troth: People with a purpose, The consumer's association of Penang, Penang/Malaysia, 1984; Kanniah/Raman (1986).

to strengthen the community self-help organizations internally and externally, through advice and training, in their dealings with municipal administrations and the courts; to rationalise conflicts and prevent violence by the group concerned, owners of private property or the security forces; to regulate the distribution of plots and obtain legal titles; to inform citizens of their rights and duties; to develop awareness of neighbourly and solidarity patterns of behaviour; to promote cooperative action to build homes and communal installations; to train the leaders of community self-administration organs in seminars, courses and working groups; to provide legal advice concerning social, economic, political and cultural problems; to advise groups on how to form worker run (cooperative) companies; to devise and distribute training materials and information concerning community, administrative labour law and economic and other matters connected with grass-roots work; and, finally, to represent self-help groups before the authorities and in the courts.

Especially in Latin America, work in the projects is interdisciplinary: it involves lawyers, social workers, teachers, economists, engineers and architects.<sup>39</sup>

Since 1985, and in difficult political circumstances, the Friedrich Naumann Foundation has supported legal services projects in favour of the black population in South Africa. In cooperation with the Legal Resources Center in Johannesburg, the project produced manuals and teaching material for "bare-foot legal advisors" working in the black "townships" around Johannesburg. The Foundation also supports workshops for these legal advisers and it backs the Worcester Advice Office near Capetown. These legal services programmes thereby help counter, in specific instances at least, some of the legal handicaps imposed on the black and coloured population by apartheid.

### 5.1.3 Ethnic Minorities (Indians)

The loss of cultural identity in its social, economic and cultural dimensions is the greatest problem facing the Indian population of Latin America today. This complex process has been termed *ethnocide* for the follow-

39) In this sector the following organizations are active: Comisión de Justicia y Paz, Varadouro Olinda (Recife)/Brasilien; Centro de Investigación, Documentación y Asesoría Poblacional, Lima/Perú; Asociación de Defensa y Capacitación Legal, Lima/Perú.



ing reasons: because Indians are denied the right to develop their own language and culture; because their traditional lands, the basis of their economy, are taken away from them (because they lack land titles); because they are unjustly persecuted by the law (for land "invasions", for instance) and discriminated on racial grounds; because they are physically threatened by colonists and wood choppers; because they are decimated by illness for lack of immunity and the State fails to provide them with an adequate social infrastructure (i. e. health centres); and because they are disenfranchised by both the State and society.

Legal services projects have been undertaken in this sector during the past few years<sup>40</sup>. Based on, or accompanied by, anthropological research, they have attempted to devise strategies and concrete programs for supporting Indian communities in their fight for survival.

The project participants (lawyers, ethnologists, economists, forestry experts, and agronomists) have striven to obtain the legalisation of their land ownership and labour laws or economic and political issues. They have promoted the creation of umbrella organisations by acting as political "pressure groups"; written didactic material and carried out training activities connected with relevant legal problems and other basic needs; and they have defended the organisations in their relationships with the courts.

## **5.2 Legal services projects not directed at self-help organisations**

### **5.2.1 Human rights organisations, adult education in human rights**

Legal services projects not especially directed at self-help organisations include, in the first place, the work done at national or regional level by human rights organisations.

The subject is complex and can only be briefly touched on here. A distinction must be made between organisations which work under a dictatorship (e.g. in Chile) and the rest. Almost all human rights groups are concerned with the following: advice, care and defence of the victims of

40) Legal services projects were being run by the following organizations: PROPUBLICOS, Bogotá/Kolumbien; Centro Jurídico de la Unión Campesina del Azuay, Cuenca/Ecuador; Centro de investigación de Promoción Amazónica, Lima/Perú; Centro Amazónico de Antropología y Aplicación Práctica, Lima/Perú.

human rights violations; documentation and public indictment of such cases; research into the fate of the so-called "disappeared"; publication of the findings; counselling of relatives; and cooperation with international organisations and solidarity groups. A number of human rights organisations also carry out training programmes on human rights for different groups (e.g. threatened persons, relatives of victims, trade unions, slum dwellers, campesinos, women)<sup>41</sup>.

### **5.2.2 Educational programmes on human rights in schools and other educational centres**

One of the reasons why the pluralist-democratic constitutions of Latin American countries and international human rights declarations and conventions have so far failed to prevent human rights violations to any significant extent is that the content and meaning of human rights are not embedded in the consciousness of the populations. This in turn is because social and democratic attitudes and forms of behaviour are still only weakly developed in these societies. Changes in attitudes may come about in the long term when human rights are taught as a subject in schools and other educational institutions.

Since 1985, the Friedrich Naumann Foundation has supported a project of the Inter-American Institute of Human Rights in Costa Rica which, with the help of experts from Latin American countries, prepares and tests teaching material for schools and adult education and carries out seminars on how to devise courses based on this material for teachers, education officials and national human rights organisations.

### **5.2.3 Training of Lay Judges**

Another way of promoting social justice and human rights is to back local, autochthonous or informal institutions — or lay judges — for settling conflicts. In some countries influenced by Roman Law, i. e. Peru, justices of the peace are the lowest level of the judiciary. They are members

41) e.g.: Instituto de Defensa Legal, Lima/Perú; Comisión Episcopal de Acción Social, Lima/Perú; Vicaría de la Solidaridad, Santiago/Chile; Comisión Chilena de Derechos Humanos, Santiago/Chile; Academia de Humanismo Cristiano, Santiago/Chile; Comisión Ecuemenica de Derechos Humanos, Quito/Ecuador; Instituto de Estudios Legales y Sociales, Buenos Aires/Argentina.



of the village community (i. e. Indians, campesinos) who are proposed by the community and appointed by the judiciary to handle certain limited kinds of local disputes and for a limited period of time.

The justice meted out by the justices of the peace is the poor man's justice in Peru. Their importance is evident from the fact that there has to be one, according to the constitution, in any reasonably sized village. They make up 79 % of all judges in the country and deal with and normally settle the majority of all legal disputes. Unlike the formal judicial set-up, the justices of the peace system is trusted by the people because it is closer to them, is directly accessible (without formal filtering procedures), relatively cheap and quick, and because the lay judges come from the community and speak the mother tongue (Quechua, Aymara) of the parties to the dispute. Culturally, the justices of the peace practice on the borderline between national legal culture (in as far as it exists) and traditional, autochthonous legal notions and customs.

For this group the "Centro de Investigaciones Judiciales" (Centre for Judicial Research), backed by the Friedrich Naumann Foundation since 1979, has carried out more than 240 seminars, attended by more than 6,000 justices of the peace. The project contributes towards improving the legal system, especially for the poor majority of the population. It is a response to people's elementary basic needs and at the same time a contribution to social justice.

#### 5.2.4 Continuing Education for Judges

Another means of improving legal services is the promotion of continuing legal education facilities for judges.

Most courts in Latin America suffer from extremely bureaucratic and highly chaotic organisational procedures, while the judges themselves are poorly educated, inclined to formalism and legal positivism, and only sparingly endowed with social sensitivity. Moreover, little publicity is given to court decisions and there is a lack of uniform criteria for reaching such decisions. Only rarely is a verdict examined critically. Many judges are susceptible to corruption and make their decisions more or less arbitrarily. The result is that access to the judiciary especially for the lower classes, is blocked by numerous obstacles and that the machinery generates injustice instead of providing material justice.

One way of inducing reform within the judiciary might be a judges' academy. However, an institution such as this only makes sense given certain constitutional and political conditions. Minimal requirements for a reform in the sense of a social and democratic opening up of the judicial apparatus and the creation of more legal security and material justice are, among others: that the constitution guarantees a pluralist democracy (so that verdicts are not ideologized); that the structural organisation of the State embodies a division of powers and an independent judiciary; and that this group will be able to influence the shaping and carrying out of the project. In terms of content, this effort should not restrict itself to mere improvement of judges' formal legal know-how. A major concern should rather be to help judges reflect, through training and continuing legal education programmes, on the part played by the judiciary in development, the social function of the judge in society and the need to improve lower classes' access to the judiciary. The project should be aimed at achieving a change in judges' attitudes and consciousness, in the sense of increasing their social sensitivity and encouraging them to honour constitutional and human rights in the trials they conduct. Attempts should also be made to reconcile criteria for reaching verdicts that are consistent with the constitution.

A project of this nature, sponsored by the Friedrich Naumann Foundation, is about to begin in Peru. A similar, although less ambitious, project, placing emphasis on technical, legal and administrative improvements of the judiciary, is being carried out by the Latin America Institute of the United Nations (ILANUD) in Central America and the Caribbean<sup>42</sup>.

Two international workshops in India (1983) and Kenya (1985) showed that judges and lawyers in Asia and Africa are also debating the need for a democratic opening up and a transformation of the judiciary from a repressive organ safeguarding the status quo into an apparatus dispensing social justice<sup>43</sup>. Efforts in this direction ought to be encouraged. In a decision of the supreme court of India, Justice B. Bhagwati observed: "The

42) Instituto Latinoamericano de las Naciones Unidas (ILANUD): Proyecto para el Mejoramiento de la Administración de Justicia en Centroamérica y el Caribe (Síntesis), San José/Costa Rica, Enero 1986 (internal outline paper).

43) International Center for Ethnic Studies, Kandy/Sri Lanka (Ed.): The Judiciary in Plural Societies, Reports on two international Workshops held in Suraj Kund, India on 13-15 August, 1983 and Kandy/Sri Lanka 1985.



time has now come when the courts must become the courts of the poor struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitive to the need of doing justice to the large masses of the people to whom justice has been denied by a cruel and heartless society for generations. . .<sup>44</sup>.

## 6. Dangers, Possibilities and Limits of legal services projects

Innovative grass-roots oriented legal services projects that attempt to alter socio-economic and political conditions in favour of the poor soon come up against the economic, social and state limitations of the system. In Indonesia, Malaysia, Thailand and the Philippines legal services projects have in the past been impeded by repressive laws<sup>45</sup>. Above all in the dictatorships such as in Chile, projects of this kind can become risky for both the national organisation and the institution funding it. A careful feasibility study therefore ought to precede any legal services project and answer at least the following questions: To what extent does the national organisation have room to manoeuvre? And will backing from an international organisation increase this room for manoeuvre, because the State shies away from confrontation or could it be diminished because of the foreign backing?<sup>46</sup>

In Chile, as in Paraguay and other countries, the Church forms a kind of "protective shield" for human rights and legal aid organisations. International organisations could possibly also provide a similar kind of protection. Assessment of the risks involved must above all take the counterparts' views into consideration, since it normally has a better grasp of the local rules of the game and can therefore assess the dangers better. The participants of almost all legal services projects are convinced that they have to run certain risks. When a local representative of the funding institution runs too high a risk, the project should be run from a neighbouring country or as part of a regional project.

44) Cited by: Paul/Dias (April 1983), p. 27; Dias (October 1985) p. 3.

45) Espiritu (1985), p. 5; Mulya Lubis (1985), p. 20.

46) O'Brien (1983), p. 38.

The second danger for legal services projects is bias from the interests of a specific local political party. In Latin America there are cases where left wing parties have regarded some legal services projects as a means of making political contact with grass-roots groups in society. Such a strategy oriented towards catching voters regularly leads in the long run to political squabbles within the grass-roots groups and, as a result, to the failure of the original aims of the project.

Another danger is that legal aid organizations bypass the interests and needs of the grass-roots either because of ideological prejudice, because of lack of sensitivity or because they have made a false diagnosis of those needs. An unpublished study of legal services projects in Peru found that in one case attempts were made to carry out training courses with groups, although these groups were merely interested in finding a solution to their specific problems, not in a general course about the legal order<sup>47</sup>. The project teams failed to observe the rule that every type of adult education must have a practical application and start from the real and concrete interests of the target group. Here paternalism (in case of women's projects: maternalism) is frequently evident, as well as a lack of participation in the legal service projects by the people concerned.

Legal service programs can often be criticized for lack of efficiency and productivity. This is frequent because the legal service organizations do not have to compete with their services in the market. On the contrary, their activities are exclusively financed by international organizations, which rarely assess the effectiveness of the projects<sup>48</sup>. A discrepancy may arise between the value of the service rendered and the sum of money provided. One consideration is whether and to what extent grass-roots groups are in a position to pay certain (low) fees for the services of the legal aid organizations. In most cases the grass-roots will not be entirely devoid of funds. Willingness to pay even a symbolic sum says a lot about the value of the legal services provided.

47) Pásara/Parodi (1985), p. 10.

48) *ibid.*, p. 11.



Despite the dangers and problems, the net impact of most legal services projects is positive. The effectiveness of the projects could be further increased if, at national and international level, there were more exchange of information about experience gained and greater cooperation.

## Human Rights and Legal Resources for Development

Clarence Dias

### 1. Inhuman and Dehumanizing Development

In virtually every country in Asia (and indeed most of the Third World), to a greater or lesser extent, we witness today several alarming and intolerable trends:

- (a) the growing impoverishment, exploitation and powerlessness of a majority of the rural and urban population;
- (b) the growing incidence of malnutrition, hunger and starvation and growing permanent degradation of the physical environment for the production of food;
- (c) the worsening of already intolerable conditions of those subject to multiple oppression and exploitation such as women, children and religious or ethnic minorities;
- (d) the routinization of the debasement of human beings leading to the very devaluation of human life itself;
- (e) the increasing adoption, by the elites in such countries, of a lifestyle (aping Western models of conspicuous consumption) whose affluence can only be sustained by the pauperization and exploitation of others;
- (f) the growth of fundamentalist trends in religious revivalism making religion a divisive rather than a cohesive force;
- (g) the increasing incidence of ethnic violence and cultural genocide;
- (h) the growth of material and moral corruption among bureaucracy and their virtual total lack of accountability;