I. PROBLEMS OF LAW AND DEVELOPMENT IN THE PHILIPPINES: PERSPECTIVES AND APPROACHES

A. Problems in Perspective

It would be audacious to deal with the process of social change in Philippine society in all its ethnocentric, religio-cultural complexity as combined with the dynamics of political motive forces and their legal instrumentalities. To identify in particular the function of the legal system in this process necessary entails the hazard of theoritization and abstraction based on both historical data and assumptions. This effort, it is realized, becomes all the more formidable in the difficulty of designing a paradigm by which such social reality is to be interpreted in the context of "law and development." At any rate a statement of perspectives may be attempted as a response to this challenge.

There is hardly any significant connection between the cultural or ethnographic character of indigenous or traditional Philippine society and the making of what is now established national law. The socio-ethnological premises in the origins of the country's national law were not historically situated in the Philippines. This phenomenon is traceable to the complete displacement of the customary or indigenous law and its ethnico-cultural values by the legal system of colonialist Spain and, later, by Anglo-American jurisprudence of imperialist United States. This total displacement was accomplished by the establishment of a State system as the administering mechanism of Spanish colonial empire and its subsequent replacement by a neocolonial State as a framework of American legal culture. Basic native ideas pertaining to rights, obligations, and modes of dispute settlement did not have the benefit of systematic consideration in the wholesale transfer of legal culture through colonial annexation.

The highly formalized process of law-creation engaged by the State system thus implanted became instrumental in expediently screening out customary law from effective operation and thereby excluded the entire social context integral to the development of law. What did not emanate as legal norms from the recognized organs of the Colonial State could not have the status of law. At best, under the new Civil Code, what may have been observed

by the native population as customary law, are accorded the status of "custom" which is required to be proved "as a fact, according to the rules of evidence," (Civil Code Article 12) and it will not be given effect if "contrary to law, public order or public policy"(Civil Code, Art. 11). It was not until the 1970s that Muslim personal law came into formal recognition and became part of national law. Not until the advent of the Organic Act of the Autonomous Region in Muslim Mindanao in 1989 that a token gesture was made through a formal requirement on the Regional Assembly to provide "for the codification of indigenous laws and compilation of customary laws" towards a Tribal Code — on which no significant work has been done to date.

Despite the alienation of the national legal system from the cultural and social context, no work of any significance has surveyed the critical problem areas, such as in the administration of justice or in dispute settlement. Almost nil is the investigation of the social and political impact of laws enacted, studied, interpreted, and applied in a foreign language, on the receptiveness of the people to law compliance and based on the social and cultural values it embodies. But the problem is hardly defined only in terms of translation of the legal text into the native languages. That the very concepts or categories of thought in the law are transported from a foreign legal culture and drawn from a different stage of social development, constitute the more fundamental level of dislocation. It is on the vehicle of this language problem that the social alienation of the legal system is perpetuated. In the first place, conceptualized and articulated in a foreign language, the law breaks down as a means of communication in governance between the state authorities and the broad masses of people. Secondly, failing to reflect the distinctive traits and social values of the people, the law can hardly be the mobilizing force of their creative energies which the legal system must assimilate to fulfill its social function in development. If the discordance of the legal system with society is on the axiological level, it stands the danger of operating as a centrifugal force, incapable of performing an organizing role in a purposeful program of development. Lastly, the legal system in such a social incongruity becomes identified with the interests of the elite whose mental processes and style of life are sustained by Westernized world outlook from which the premises of the imported legal culture is historically and conceptually derived.

But hardly is the law perceived as a phenomenon disjointed from the social and cultural character of the people. What is propagated instead is the idealization of the law as a realization of a Judaeo-Christian conscience and as the embodiment of the Anglo-American revolution for the rule of law. The development of the Philippine legal system is largely a process of how the people have been made to grow into the law as it has developed

in its varied ramifications from the colonial legal culture. This continuity is indeed striking, but more so is the socio-cultural distance of the law from reality. Legal education is thus heavily oriented toward the perpetuation of such ideals, which are transformed into mythic values without much socio-cultural substance the moment they acquire contact with reality in terms of the outlook of the broad ranks of people.

Towards a definition of the problem, a program on law and development may start from a synthesis of the social structure and level of development of Philippine society at a relevant historical period. Given the main modalities of colonialism through the legal system, its impact on Philippine society in terms of law-and-development problems may be assessed. The general directions of law reform may be drawn up in the light of the projected path to development as objectively required by the general nature of the problems in the legal system in relation to social objectives. With these points as background and premise, the relation of law with development may be brought into significance in the light of globalization trends and the adjustments these would require on the Philippine legal system.

B. The Function of Law in Development

In Asia, Latin America, and Africa, law reform projects have been undertaken in which law assumed a distinct function as an instrument for achieving the desired economic and political developments (*See* David M. Trubek, Toward a Social Theory of Law: An Essay over the Study of Law and Development, 82 Yale L.J. 1, 2-3, 9-11, 42-47 (1972). In a larger frame, this legal instrumentalism has been interpreted as a mechanism in a political teleology of modernization along the Western model of development. As synthesized by a leading intepreter, a core conception of law may "prescribe positive programs for the legal developments of the Third World" in which —

> … there is the implicit concept of development which equates it with gradual evolution in the direction of the advanced, industrial nations of the West ….[This conception] quite predictably equates modern law with the legal structures and cultures of the West. The Third World is thus assumed to be doomed to underdevelopment until it adopts a modern Western legal system (Trubek, at 10-11).

In the Cold War period, law-and-development projects assumed an ideological motive force on the part of the capital-exporting Western powers and as part of a broad

policy orientation to provide conditions of stability for market mechanism in the developing countries. In the face of socialist-oriented influences, law reforms in Third World countries as sponsored by Western sources propagated "rule of law" institutions to provide appropriate conditions for the promotion and protection of private foreign investments (*See* Merlin M. Magallona, "The Philippines-United States Tax Convention: Suggestions for a Perspective", in Merlin M. Magallona, International Law Issues in Perspective, pp. 274, 301-302, 315-329 (1996). The process of decolonization that accelerated in the 1960s under the influence of the United Nation anti-colonial policy accentuated the drive of the Western powers in competition with the socialist bloc to influence Third World developments toward liberal democratic directions and free-enterprise capitalism. In this light, law-and-development studies became intensely political not only in terms of sectoral or piecemeal changes but, more significantly, in the rational structuring and canalization of State power as well. Legal developments in the wake of the independence struggle became an integral part of State construction in the post-colonial regime, which both ideological camps took strategic stake in influencing. Legal instrumentalism finds contemporary context in the transition of the socialist States in the former Soviet Union and Eastern Europe into liberal democratic market economies. Even as constitutional framework undergoes adjustments, legal reforms involves the introduction of democratic regulatory measures in the shift of "command economies" into "market economic societies", from etatist ownership system to privatization.

Following the implosion of the Soviet Union, legal instrumentalism acquired a formidable role as a medium for developing market forces and the dissolution of etatist elements. On a macro-level the function of law finds important place in the reconstruction of the structure of political power in the relations between the government and the individual citizens and in the relation of the political system with the economy (*See* Mihaly Simai, "The Democratic Process and the Market: Key Aspects of the Transition in Comparative Perspective", in Mihaly Simai (ed.), The Democratic Process and The Market: Challenges of the Transition, pp. 37, 46-48 (1999)). On the micro-level it involves the introduction of free-market categories in law such as in contracts and property. Without the rule of law, it is feared that the process of marketization, side by side with the freedoms of liberal democracy, would result in "klepto-capitalism" or "gangster economics" as in Russia of the early 1990's (*Id*., at 46. See also Oleg Bogomolov, "Interrelations Between Political and Economic Change in Russia and the CIS Countries: A Comparative Analysis", in Mihaly Simai, *op. cit. supra*, note 4 at 77, 88-89). As noted by one commentator in this light, "the rule of law has been considered another fundamental postulate of the political transformation

in societies where the ruling party was "above the law" and arbitrary decisions and government decrees provided the bulk of the institutional framework" (Mihaly Simai, *op.cit., supra* note 4 at 46).

On the theoretical plane, these approaches find affinity with the function of law in Weber's paradigm in which the legal system has its highest stage of development in the rationality of modern capitalism associated with the purposive choice of means to attain a clearly defined goal towards profit (*See* Max Rheinstein, "Introduction", in Max Weber in Economy and Society, p. lviii (1954)). Weber connects the rationality of law with the development of capitalism, although he remains imprecise in defining to what extent economic influences affect legal development. Even as he rejects economic determinism in shaping the rationality of law, he is of the view that "certain rationalizations of economic behavior, based upon such phenomena as a market economy or freedom of contract, and the resulting awareness of underlying, and increasingly complex conflicts of interests to be resolved by legal machinery, have influenced the systematization of the law" (Max Weber, Economy and Society: An Outline of Interpretive Sociology, Guenther Roth and Claus Wittich (eds.), p. 655 (1978)). Weber's rationality in law or legal system has been interpreted as refering to a system governed by rules, characterized by legal analysis, and the controlling place of the intellect in a systematized legal order (*See* Anthony T. Kronman, Max Weber, pp. 72-75 (1983)).

From the historical experience of Western industrial countries, a course of legal evolution has been abstracted into a concept of social development as intertwined with legal culture. Law as a social process entails the enforcement of a system of rules as immanent in modern society. Social control goes into the essential function of law. The institutionalization of social control in the development of law inevitably entails the transformation of tribal norms or traditional customs into universal or general rules as well as the formation of common social objectives which are subserved by law as a purposive system. Thus, the "core conception" of modern law in social development as contrasted by Trubek from the social ordering of traditional societies, may be presented as a process of disintegration of indigenous or customary law. This process is integral to the centralization of political authority in the formation of a state. In the "social ordering of traditional societies", patterns of conduct are defined and maintained by primary social groups, such as the village, lineage, or tribe. As a result, normative prescription varies with geographic place and social situation: There is a separate "law" for each village or tribe, and the "law" that binds the lord is not the law that binds the serf or burgher. Modern law, on the other hand,

consists of general rules applied by specialized agencies universally and uniformly through all regions and to all social strata. Modern law is also relatively autonomous from other sources of normative order. Thus, one unitary and superior social entity — the modern legal system — replaces the village or tribe in social control (David M. Trubek, *op. cit*., *supra* note 1, at 5).

Instead of a contrast as Trubek does, this phenomenon may be seen as a process of universalization of norms of social control, in which the installation of a state system assumed a central role. Thus, "the rise of modern law supplants local, 'paternalistic', and traditional forces, and … [becomes] the vehicle through which the State replaces communal or traditional authority" (*Ibid*.).

C. Law and Development in Historical Experience

1. The scale of social and economic reality encompassed by Philippine encounter with European colonialism is certainly not comparable with the methods of law-and-development projects in the contemporary context. However, the introduction of a legal system, such as on registration or recording of land rights, by the colonial power as an integral part of colonization may serve to illustrate how legal instrumentalism could impact with such massive violence on the life of the indigenous population, with enduring imprint on the country's social structure today. The peculiarity in the function of law in question is that it came as a logical extension of the colonial power's level of social development, in which land even at that time had already become private property and land rights had been commodified.

On the other hand, among the indigenous population as well as among the migrants that settled in the Philippine Archipelago then, land was considered as communal. The distribution of land parcels by the chieftains or *datus* of the social units called *barangays* was on the concept of usufruct, not on fee simple (John Leddy Phelan, The Hispanization of the Philippines, Spanish Aims and Filipino Responses, p. 117 (1959); William Henry Scott, Barangay, Sixteenth Century Philippine Culture and Society, pp. 229-230 (1995)). In the Cordilleras, the indigenous communities took landholding as a shared resource of all the members together with ancestors, the gods, and future generations (Cordillera Studies Program, "Land Use and Ownership and Public Policy", in Episcopal Commision on Tribal Filipinos, Indigenous People in Crisis, pp. 23, 25-26 (1983)).

The wholesale deprivation and dispossession of lands on the part of the indigenous population came with the imposition of the regalian doctrine that unless private rights to

lands were proved, all lands belonged to the Spanish Crown (See Owen Lynch, Jr., "Land Rights, Land Laws and Land Usurpation" (1565-1898), 63 Phil. L.J. 82, 83-85); this legal principle prevailed together with the European concept of private, individual ownership, (*Ibid*.) which was implemented by a documentation system. The advent of a more elaborate land registration system all the more accelerated concentration of land ownership, side by side with the widespread loss of land rights on the part of the natives and indigenous communities that were unable to show documentary proof of ownership over communal lands and ancestral domains. Land acquisition became a prerogative of the members of the native elite and those who had access to Spanish colonial authorities. Thus, the colonial land law operated as a means of usurpation *en masse* that lead to a social organization consisting of broad dispossessed masses and led by a land-owning elite that came to be the repository of political power in the post-colonial era.

The Spanish land registration law gave motivation for the *datus* who were the trustee of the communal lands of the *barangays* to have these lands registered in their name as individual owners. In the 16th and 17th century the native elite, led by the Filipino upper class (the *principales)* enlarged their registered landholdings by encroaching on *barangay* communal lands and crown lands, leading to the formation of vast tracts of lands for plantation purposes (*haciendas)* (See Owen Lynch, Jr., *op.cit., supra* note 16, at 90). The Spanish friars were not to be outdone. "Ecclesiastical estates", Phelan notes, "were the largest single item of Spanish-owned latifundia" (John Leddy Phelan, *op.cit., supra*, note 14, at 118).

2. Among the economic factors that motivated the conquest of the Philippines by the United States in the Spanish-American War of 1898 was the prospect of exploitation of its mineral resources. Immediately following the victory of American naval forces at Manila Bay on 1 May 1898, U.S. Secretary of the Interior C.N. Bliss arranged with the U.S. Secretary of War for a "geologist of the U.S. Geological Survey to accompany the U.S. Military Expedition to the Philippines for the purpose of procuring information touching the geological and mineral resources of said islands" (Renato Constantino, "Origin of a Myth ", in James H. Blount, The American Occupation of the Philippines, 1898-1912, p. 8 (1968), quoting James H. Blount, The American Occupation of the Philippines, p. 48 (1912). The report of the geologist "read like a mining stock prospectus" (*Ibid.*).

Following the military occupation of the Philippines, the U.S. Congress enacted "The Philippine Bill of 1902", which provided for the administration of the country's first civil government. Well-known as the vehicle for the historic introduction of the bill of civil

and political rights into the Philippines, this law substantially was a mining code. Of its 88 articles, 43 came under the heading "Mineral Lands", declaring "all valuable mineral deposits in public lands … to be free and open to exploration, occupation, and purchase" and providing for a detailed procedure of mineral claims and patents. The bill of rights appeared to be a sideshow of the mining law; it became a medium of guarantee that US nationals would have the fullest freedom under a rule of law in the exercise of mining rights.

3. Historical experience clearly demonstrates that the colonial powers did not have any interest in the development of law as an end, independent from the political and economic motives of colonialism. Obviously, it was inevitable that law was employed as a means integral to that motivation. However, although admittedly law was an instrument of colonial expansion and was applied as a means of social control on the native population,

> … on the other hand, it also set some limits to European intervention and manipulation. Whether these limits were to the advantage or to the disadvantage of the indigenous population is open to debate — but limits they were (Jorg Fish, "Law as a Means and as an End: Some Remarks on the Function of European and non-European Law in the Process of European Expansion", in N.J. Momonsen and J.A. De Moor (eds.), European Expansion and Law, pp. 15-16 (1992)).

For example, while the bill of rights in the Philippine Bill of 1902 assured U.S. nationals the freedom to deal with mineral resources as part of the general condition to do business, the impact of the guarantees of due process, the rights of the accused person, the freedom of speech, speech, assembly, and of religion, and the right against unreasonable searches went into the foundation of a limited government, which operated as a constraint on the modalities of State power installed by U.S. imperialism at the time.

4. The complete displacement of indigenous or local law by Spanish colonial law may have been an inevitability springing from the nature of colonization that was at once a process of State construction out of relatively independent *barangays* in the sixteenth-century Philippines. The formation of a centralized State was not merely a political process; the religious mission of civilizing the natives by converting them to Catholicism was also a campaign of moral cleansing, the elimination of what appeared to the Spanish priests as superstitions embodied in customary law or indigenous morés. The strengthening of

colonial rule had to overcome the archipelagic nature of the Philippines by a centralized state structure as the basis of local governments.

The advent of U.S. imperialism, this time with the objective of exploitation of natural resources, the expansion of market for American manufactures, and the beginning of direct investments entailed the penetration of Philippine culture and society with commercial and financial laws within the regime of liberal democratic state that provided the widest latitude for the freedom of markets and profits. More than that, this required the development of a concomitant broad legal culture to be propagated and maintained by a local intelligentsia. The logic of that legal culture has gone to an absurd extreme in which the country's fundamental law and legislative enactments are conceptualized, judicially interpreted, popularly disseminated, propagated in the law schools, and effectively applied, all in the English language, the language of the elite and the intellectual sectors that stand apart from the vast masses of people on account of their Westernized educational and cultural values. Hidden from view behind legal structures and democratic forms, is this social predicament that obstructs the mobilization of the people for meaningful changes through law.