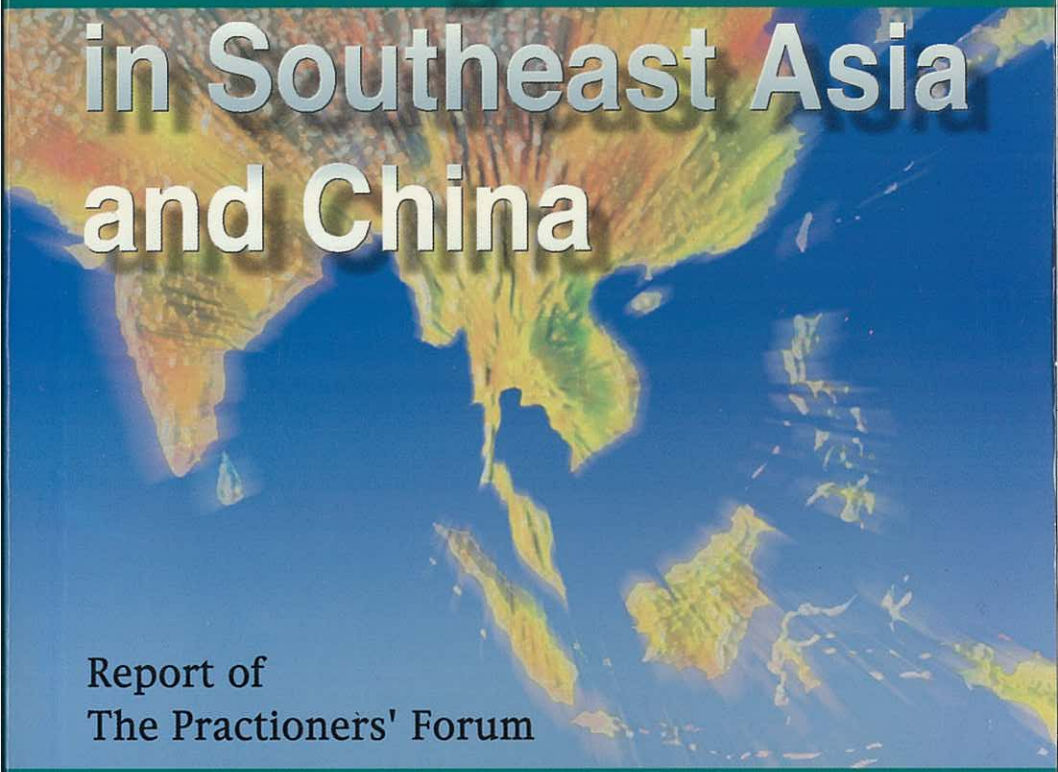
An IHRLG & AHRC Joint Publication

Rule of Law, Human Rights and Legal Aid in Southeast Asia and China



Report of
The Practioners' Forum

9-12 June,1999
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Introduction

The idea for the Legal Aid Practitioner's Forum originated from the International Human Rights Law Group's Cambodian Defender's Project (CDP). Established in 1994, CDP started as a training program for Cambodian activists to become free legal assistance providers to the poor facing criminal prosecutions in Cambodia. The Project has long since expanded to include civil complaints, women's legal issues, freedom of the press issues, and land disputes.

Over the years, the impact of CDP's work has grown beyond the individual cases and the clients served by the project. The work in Cambodia has had significant impact on the development of a human rights culture. Cambodians are now able to assert their rights in court and in society at large. Civil society is developing into a robust and vibrant force where human rights NGOs are a dynamic, critical force in building political participation and human rights activists are better equipped to reform their society from within. From the success of CDP came the notion that it would be important to reach out to other legal assistance projects in other countries, to network, to learn from each other, to share lessons learned, and to begin to identify our work in Cambodia as being part of a larger movement of great significance in this region and globally. Thus, the Practitioner's Forum in Bangkok came to be.

The Forum brought together legal activists from different countries to share experiences of running law programs. Topics discussed ranged from technical practices such as advocacy, operating methods, and strategic case management, to larger issues such as the relationship between this work, a human rights culture, and promotion of "rule of law."

Rule of law is a politically neutral concept. The question that enveloped that Practitioner's Forum was this: The rule of *what* law? Recognizing that law can be a weapon of domination and oppression, or law can be an instrument of social change, participants in the forum talked about "strategic lawyering" - the role that lawyers play in transformative change. Seen in that context, the role of lawyers is to empower the disadvantaged, expand the political space for opposition, remove the obstacles to mobilization of civil society, reform oppressive structures and give a voice to those who have been silenced in communities where oppression reigns.

This booklet was compiled to present a summary of the Legal Aid Practitioner's Forum in hopes of assisting activists in strategic decisions about the methodology for societal change, as well as to further understandings of the roles activists play in strategic lawyering.

Gay J. McDougall
Executive Director
International Human Rights Law Group
United States

CHAPTER 1

Judicial And Legal Reform: Preparing The Field

By Basil Fernando[1]

"Exploring yet again that extraordinarily rich episode of Pooh Bear and the bees, let us reconsider, now a Kantian point of view, two utterances of Pooh: 'The only reason for being a bee that I know of is making honey... And the only reason for making honey is so as I can eat it.' Incredible though it is, we must admit that some Ursinian students have read this as evidence of limited intelligence and even gluttony. It is, of course, - naturally among other things - an obvious teaching device for explaining Kant's basic principle that our knowledge is strictly conditioned by the constraints of our own minds. Pooh's (assumed) inability to conceive of bees as anything but honey producers, and honey except as food for him, represents Kant's doctrine of our inability to conceive of the world except in terms of space, time and causality. —Pooh and the Philosophers- By John Tyerman Williams

[1] Executive Director, Asian Human Rights Commission (AHRC) and Asian Legal Resource Centre (ALRC) based in Hong Kong.

This quote explains the difficulties involved in a dialogue on the problems of practitioners of law and human rights between Asians and those coming under the broad category called Westerners. For the purpose of this discussion I will use this term to mean those who have been trained under American, British and French systems of law. The natural inclination of such persons is to take for granted that a written or unwritten Constitution exists, a more or less independent judiciary exists, the necessary texts of law and procedure exists and a tradition of judicial interpretation of law exists. This is like WINNIE THE POOH presuming that all pots contain honey.

If all those conditions exist, the practitioner's task is not very difficult. He/ She must learn to use them and sometimes help to improve them. What happens if these preconditions do not exist at all or do not exist to a significant degree? For a Western observer, the question may not have much meaning, as for example what can we who live on earth do about something happening in moon or mass? A better option seems to be to ignore the problem and work on the hypothesis that a more or less similar basic legal structure is present everywhere. After many years of work on the basis of such a hypothesis, the Western practitioner may become frustrated. This happens often. The blame then, is placed not on the wrong hypothesis, but on other factors, such as cultural limits of some peoples or obstinacy of some political leaders.

Could we not for a moment look at the validity of the hypothesis itself? Let us ask ourselves a few questions: Does wearing of a judges gown and sitting on a place which looks like a court makes one a judge? Are the actual powers that a person called a judge has - the basic qualification and competence, a basic tradition of judicial fairness, and basic procedures - a consideration if examining whether an institution called a judiciary exists in a given place? Does a docu-

ment become a Constitution simply because it is called Constitution? Does something called a trial still remain a trial even if it is only meant to be a sentencing session? Should trials have an accepted trial procedure written or unwritten? Should the confession of an accused in a place where the practice of torture is common be treated as evidence? When lawyers are not allowed to intervene in the actual process of trial, what are we to think of their role? Where Internal Security Laws and Emergency Regulations suspend the powers of courts, can we still trust the legal system? When there is no real system of police or the system has more or less collapsed, does that affect things like fair trials and independence of the judiciary? If the corruption is deep and all embracing, can we get out of the difficulty by saying corruption exists everywhere? Are higher courts such a Supreme Court, with power of judicial review, a basic requirement of a proper legal system? In the case of real poverty and legal ignorance in rural areas, can we apply the axiom that everyone is presumed to know the law? Can we presume every one has access to law? Is a trial taking place after ten or more years after the incident still a fair trial? To this many more questions may be added.

When faced with such problems one reaction is to ask are these things true? Or are these things not exaggerations. It is WINNIE THE POOH'S problem - one is conditioned by ones own historical background and institutional framework of the society one takes for granted as a given.

Beside this there are deeper political problems: Lee Kuan-yew's conception of society as governed by a hard-core group makes judicial independence out of place. Hard core people are those who are in government and every aspect of bureaucracy and society. The theory of separation of powers is opposed to judiciary has been a part of such hard-core group of persons. It is no only a Singaporean concept. The Hard-core

concept is also part of the communist concept and is present in all former communist countries. It is also a concept applied by military regimes – the former Suharto regime for example. Even after such a regime's fall after several decades of dominance, the impact of practices of such a regime on the judiciary last a long time. Then there is the issue of legislative interpretation of law as against judicial interpretation. This issue came to intense debate in Hong Kong regarding interpretation of the Basic Law regarding right of abode issue, which was interpreted earlier by the highest court in Hong Kong. Again, this is not just a Hong Kong issue. In different degrees the same problem exists in many other places in Southeast Asia.

The problem comes in when one tries to practice. It is the same for example with golf or boxing. How can you play these games without the rules of these games being applied, without the required conditions being in place, such as the boxing ring or golf course and without the referees who are respected?

To practice one need to create these conditions. That is the issue I am raising. A practitioner in most parts of Asia has to participate in creating the conditions necessary to ensure a fair trial and human rights, within the legal system. Of course there are many legal practitioners who like the limitations of the system since they can exploit it for financial gains. Loopholes in law bring bread and butter to many a lawyer's home. If the system is bad and corruption is common, it is easy for lawyers to participate in corruption. But I believe that here we are talking about a different kind of practitioners and practice.

Creating the right conditions means engagement in activities to achieve legal reforms. If our dialogue and resolutions are to have some impact then we must find ways to understand the system's problems and help each other in

pursuing reforms. Training without reforms do not go far. One limited vision recreates another and the circle of ineffective practices will go on. My suggestion is we include into our agenda the need to develop actions to promote and pursue legal reforms to ensure fair trial, independence of judiciary and human rights.

When the legal and judicial system itself is threatened, judges can do very little to resist it. They sometimes write letters and sometimes resign. The very traditions of their professions makes it difficult for them to spearhead the resistance by way of participation in active protests even though the very system on which they stand is threatened. It is the legal practitioners, the lawyers who can and must lead the fight. The Bar Association of Malaysia has given some indication of what the legal profession can do in their recent ballots to save due process and judicial independence in Malaysia

The organizations I represent have some experience on this through our activities in Cambodia, Sri Lanka and to some very limited extent in China. It is time we have a more comprehensive program on this. If we do prepare the ground, many others will learn the game and play it well. If we do not do that others will also fall in the holes we normally fall into when we try to be practitioners.

CHAPTER 2

Rule of Law and Legal Aid in Southeast Asia and China

By Jennifer Rasmussen[1]

On 9-12 June 1999, the International Human Rights Law Group and the Asian Human Rights Commission hosted a Practitioners' Forum on Rule of Law, Human Rights and Legal Services in Southeast Asia and China, the first in a series of regional Practitioners' Fora examining the role of legal services in furthering access to justice and promoting and protecting human rights. This report outlines the main themes presented by the practitioners at the Southeast Asia and China regional Forum. The presentations from the conference are printed with the permission of the participants. Unfortunately, we were not able to include all participants' presentations, and we regret that their contributions are not reflected here.

As part of a continuing effort to promote human rights, the International Human Rights Law Group (Law Group) began analyzing legal service models operating in the develop-

[1] Southeast Asia Program Coordinator, International Human Rights Law Group, U.S.A.

ing world and their effectiveness in providing individual and community justice, and in creating and supporting a basis for governmental reform. The term legal services is used to denote all legal representation, assistance, advice or programs designed to assist a disadvantaged individual or community to access justice. Such services are rendered for no or reduced cost to the recipient. Despite the variety of types of services and service delivery, all legal service operations operate under the same general premise that a functioning justice system is essential to the protection of rights.

Legal service provided in the developmental context, however, faces additional challenges including few financial resources or government support. Even when financial resources are available, other limitations exist. Many developing countries have a disproportionate number of citizens existing below poverty level, and are therefore eligible for legal assistance under the traditional means test. Few developing countries have a sufficient number of lawyers to meet the needs of the population and trained lawyers may be reluctant to devote their expertise to indigent clients. Geography, cultural norms, lack of awareness, and other factors making legal services difficult to deliver can limit access to the judicial system. Historically, in developing countries, especially in transitional countries, the justice system may have been a significant tool for oppressing the rights they are now purporting to protect and potential stakeholders may fear using the courts. As courts work toward preserving or creating independence in a transitional country, enforcement of judgments may be weak or nonexistent, corruption can be endemic, and educated court personnel may be rare. These problems, especially the functioning of the courts, have been instrumental in formulating legal services in the developing world and are important factors in determining whether a particular mode of legal service is effective.

However, very little analysis has been conducted on the effectiveness of these different programs to promote a just system of law and the strategic role legal services play in structural reform. To determine the effectiveness in the delivery of legal services, a clear understanding of the type of services available, the goals of the organizations and the context within which the organizations operate is needed. The Forum presented an ideal platform for practitioners to highlight, share and critically examine their organizations' successes, challenges and strategies for the future.

Lawyers represented a broad spectrum of legal service providers including government-sponsored organizations, non-government organizations, bar associations, university law clinics and individual practitioners. This report is divided into two sections. The first section contains the participants' presentations, several workshop summaries, the closing remarks of the Honorable Justice Michael Kirby and the highlights of a group discussion on the more difficult and challenging issues related to providing legal service in the developmental context. The second section provides background information on the participants, their organizations, and on the conference format.

As the conditions for functional rule of law develop - separation of powers, supremacy of the law, legal knowledge, implementation mechanisms, principles of equality - tools for protection of human rights emerges and activists can begin exploring strategies for both using the system to reach their goals and supporting its continued development in a climate more hospitable to legal service organizations. Promoting political participation and social justice through the legal system is the second step in the natural evolution of legal systems designed originally to protect property interests. Throughout the region, the level of legal activism cultivated by this reform varies from nascent to sophisticated:

- In Indonesia, legal activists who have successfully cultivated the tools for cause lawyering, promoting human rights through strategic attacks on the justice system, are now faced with the new challenge of a transitional society.
- In Burma, working under extreme repression, lawyers have formulated unique strategies to push for the rights of the people inside and outside of the country. Judges in particular have come under significant pressure to conform to the military junta's positions and independence of the judiciary is severely threatened.
- In the Philippines, legal professionals work to confront injustice and demand investigation into corrupt practices, often under threats of bodily danger. As international attention is channeled to other areas within the region, lawyers challenging the system have had to adopt new methods for sustaining their work.
- In Vietnam, advocates are beginning to explore what access to justice means within the framework of a centralized judicial system and to determine the most effective manner of serving the rural population.
- In East Timor, prior to the referendum, the imposed justice system has failed to meet the needs of the Timorese and rule of law is viewed with learned skepticism. On the verge of independence, East Timor faces the daunting prospect of creating a justice system.
- In Cambodia, fledgling lawyers are an important driving force behind the call for rule of law. Negotiating within a transitional system heavily influenced by the West, they are still developing the skills to respond to people's basic needs and encouraging and assisting in the creation of a legal foundation.

- In Malaysia, a government which has failed to respect basic human rights standards, is now the target of popular protest and the focus of international concern as it tries to close out political opponents through a corrupt judicial system. Legal advocates are refocusing their efforts to promote change.

At the Forum, lawyers who have successfully formulated strategies for protecting human rights and challenging injustice met and strategized with lawyers in the process of discovering the uses of the judicial system. By examining successful systems and sharing lessons, the Forum accelerated steps toward creating a methodology of effective legal activism.

Legal service organizations are at the forefront of promoting law as a resource for the disenfranchised and in creating a just society that respects human rights. By building on lawyers' knowledge, legal empowerment of the disenfranchised in society establishes a framework of expectations of the legal system and the government, which runs the system, both positive and negative. Eventually, rule of law and empowerment of the people under a just system emerges as the basis for social change and builds an expectation of accountability of government officials. By examining the different roles legal service organizations take in promoting empowerment and accountability, a strategic platform for justice is created.

The objectives of the Practitioners Forum were:

1. To improve the dialogue and communication between individuals and groups attempting to strengthen the rule of law in Southeast Asia. Participants such as legal service lawyers, and NGO workers from the participating states were given the opportunity to critically analyze existing legal systems or the lack thereof, to determine legal reform

goals, to discuss and compare effective legal service strategies, and to develop implementation plans for legal service reform.

2. To build working relationships between regional legal service practitioners. Fostering these alliances develops domestic, regional, and international support mechanisms and key contacts for legal reform, allows exchange of strategies for legal reform through legal service, and exploration of alternative trial skills and practices. Establishing grassroots legal movements that are sustainable is a complicated and difficult challenge. Not only governments, but also powerful private interests, who have benefited from corruption in the legal system, see strategic legal service movements as a threat to the status quo. Regional networks that share "survival" strategies can be essential to ensuring sustainable programs. By sharing basic techniques, forging alliances and exploring patterns of government reaction to legal pressure, legal service groups, challenging the existing unjust power structures through their work, are better prepared to protect themselves from efforts to thwart their progress and work, hence creating a more sustainable organization to protect human rights.

3. To provide a forum for disseminating the experience and expertise of regional and international "legal experts" including legal activists, NGO representatives, and international organization actors who have specialized legal training and knowledge of the human rights principles, legal techniques, and most important, first hand experience in legal activism. These lawyers provided information on such diverse topics as trial advocacy, developmental legal service approaches, social justice campaigns, judicial independence, sustainable organizations, and international fair trial standards. Additionally, they facilitated the establishment of critical links to international multilateral or-

ganizations, and international and regional NGOs.

4. To examine the ways in which legal service organizations can use selective case representation, community mobilization, justice programs, impact litigation and cause lawyering to strengthen and promote access to justice.

By engaging the grassroots population in a dialogue to critically examine their existing legal systems, and identify their legal service organization's ability to encourage necessary legal reforms, the Forum attempted to learn from and build on individual successes. The critical next step will be to synthesize the criticisms and identified legal successes into a workable model for ensuring an effective role for legal service organizations in systematic reform. Without a centrally articulated strategy or approach to legal services, the effect legal services have on the system is limited and fragmented. By exploring and examining legal service organizations with the assistance of the regional practitioners, a clearer understanding of the challenges to legal services in the development context, the role such services play in promoting justice, and successful strategies for addressing those challenges can be identified for replication.

CHAPTER 3

Promoting Rule Of Law: The Role Of Legal Aid Lawyer

By Chandra Kanagasabai[1]

Firstly, it is important to note that the legal aid lawyer does not necessarily have to belong to an organization. Many lawyers in practice invariably do a certain amount of pro-bono work. The pre-requisite for being a legal aid lawyer is to have the two P's: Passion and Perseverance. You must have a passion for justice and for the under-dog if you are to embark on legal aid because in many areas you will end up feeling stone-walled. Perseverance is also necessary as justice is not available on a platter but has to be fought for.

The topic this morning seeks to clarify the role of a legal aid lawyer within the ambit of promoting rule of law. In essence the rule of law is a broad political doctrine that seeks to ensure that politicians who come into power and form a government observe the constitution and laws of the country.

[1] Secretary General, HAKAM, Malaysia.

Some General Principles of the rule of law include:

1. All laws should be prospective, open and clear. One cannot be guided by retroactive law;
2. Law should be relatively stable;
3. The making of particular laws should be guided by open, stable, clear and general rules;
4. The independence of the judiciary must be guaranteed;
5. The Principles of Natural Justice must be observed;
6. The Courts should have review powers over the implementation of the other principles;
7. The Courts should be easily accessible;
8. The discretion of the crime preventing agencies should not be allowed to pervert the Law.

I will in particular focus on principles 4, 5 and 8. To illustrate principles 4 and 5, I would like to refer to a case that commenced trial in Malaysia in 1993 and was completed in 1997.

P.P. v DAUN BIN TEBU AND OTHERS

KOTA BHARU SESSIONS COURT CRIMINAL CASE 62-18-93

In this case all the nine accused were aboriginal people who were charged with manslaughter for the death of two Malays. The aboriginal people claimed that the deceased had tried to drive them off their tribal land which had been earmarked as tribal land by the State Government but not gazzetted.

Initially there were only two of us lawyers defending the nine accused. The credit for enabling the accused to have access to justice must go to an NGO called the Centre for Orang Asli Concerns (COAC).

When the news first came out, the Directors went into the jungle some nine hours drive from the capital city of Malaysia on a fact-finding mission. On ascertaining the facts they approached two lawyers including me to represent the accused. This case is noteworthy for two points on the General Principles of the Rule of Law:

1. The right to Natural Justice and every citizens' right to Counsel of his choice;

2. The Independence of the Judiciary must be guaranteed.

At the mention date in court we discovered that the Department of Aboriginal Concerns had brought in a local lawyer to represent the accused. The Department was concerned over the case because the aboriginal people were under their care and had been complaining of the encroachment on their land for the last two years. Initially the Department's lawyer agreed to work with us and even offered us some relevant documents that he had sourced. However, when my colleague went to his office he refused to give the documents. Subsequently, when both of us went back to his office we were informed by his staff that he had gone to the prison some ten kilometers away. We rushed to the prison and saw his car and the cars of the officials of the Department of Aboriginal Affairs parked there. At the gate of the prison the guard informed us that there was a meeting.

To our consternation, when we entered the meeting room we saw our nine aboriginal clients seated at a long table and across from them were the Department officials and their lawyer. In front of each of our clients were a plate of cake and a large glass of tea - unheard of in a prison. Our clients

subsequently informed us that the meeting was called by the Department to put forward the benefits of pleading guilty to a charge of manslaughter.

When we complained to the officials from the Department of Aboriginal Affairs that we were not informed of the meeting we were shown a letter from the Department to the prison written a week earlier specifying that the prison officials should not allow any lawyer except the lawyer named in the letter who was appointed by the Department. This was in clear contravention of Article 5 of the Malaysian Constitution.

On the next mention date we returned armed with the necessary bail to release our clients. The Department had also obtained reinforcements and had brought in two lawyers to represent the nine accused.

When the case was called up the Department's lawyers asked the Sessions Court judge to have us thrown out and that they should be recognized as the counsel for the accused because they were appointed by the Department. The Sessions Court Judge (who should have known of the Constitutional right of every citizens to a counsel of his choice) did not request the accused to ask them who their council was but asked the counsel to be ready to make a submission in an hours time as to who was the counsel on record.

As I said earlier, passion is fundamental. My co-counsel and I went to see the High Court Judge who was the immediate superior of the Sessions Court Judge. The short end of the saga was that the High Court Judge agreed with us and indicated that he would advise the Sessions Court Judge.

Subsequently when the matter was called up in the Sessions Court, the Sessions Court Judge said: "I have been directed to ask the accused persons to choose their counsel." The nine accused persons then were told to point out who

they wanted as their counsel. The Department's lawyers needless to say were rejected. It took three and a half years to complete the case and by the time the hearing started several lawyers from throughout the Peninsular had volunteered their services *gratis*. At each hearing date the COAC transported the nine accused and nine witnesses to Kota Bharu town. They had to be housed in a hotel and fed with money from well-wishers. A total of seven lawyers defended the accused and all the lawyers paid for their own airfares and accommodations each time the case was heard.

Throughout the three and a half years my co-counsel Patrick Khoo together with Colin Nicholas from the COAC would drive overland to the Orang Asli village with food for the villagers almost every fortnight - a trip that would take 9 hours. Initially they had to do it because half of the adult male population was under remand. Later, after bail was granted it became obvious that the villagers were finding it hard to gather produce from the jungle because of the environmental changes brought about by logging.

At the end of the prosecution's case the Judge acquitted and discharged the defendants without calling for the defense. After the completion of this case word spread among the aboriginals and we began to be approached by different aboriginal groups throughout the country.

IN P.P.V YUSOP BIN MAT

KLANG MAGISTRATES'S COURT CRIMINAL CASE: 83-389-95

We were asked to defend an Orang Asli for abatement in harboring an illegal immigrant. Our client had gone to a Chinese man's house to repair an electrical appliance. While he was there, the place was raided and several illegal immigrants

were found. He was detained in custody where he refused to confess. He informed us that he lost a tooth while in custody. We took on his case and succeeded in getting an acquittal at the close of the prosecution's case.

We also found several complaints of aboriginals being forced to move off their land all in the name of development. The Bar Council Human Rights Sub-Committee set up a panel to investigate these complaints.

One of the first cases currently being heard involves several Constitutional issues. Initially when we took on the case we were not aware of the fact that some provisions of the Aboriginal Peoples Act 1954 [a pre-Constitution Act] were not in conformity with the Constitution which came into effect in 1957.

In the course of our research we discovered that the Government, when compensating aboriginal people, was not bound under the Aboriginal Peoples Act to pay for the land but only for the crops. Under the Federal Constitution however, when the Government acquires any land, it must do so in accordance with law. Article 13(2) affirms that no law shall provide for the compulsory acquisition or use of property without adequate compensation.

It is our hope that when the case is decided the provisions of the Aboriginal Peoples Act will be struck down as violating Article 13 and the Equality Provision of the Constitution.

CONCLUSION

In summary it is important to note that with disadvantaged groups we as lawyers have to reach out to them and win their confidence rather then wait for them to come to us. Once we make inroads and show them that justice is available for them, their faith is renewed unlike in the past when

they were mired in hopelessness and despair. Legal aid lawyers must also ensure the welfare of clients when dealing with disadvantaged groups. Experience has shown that sometimes one has to wear the hat of counselor and provider of basic necessities. When the aboriginals in Kota Bharu were first charged in court, they entered the dock bare-chested and bare-footed. Mr. Anthony Ratos was moved by their condition and promptly went out and bought them T-shirts and slippers which the accused wore faithfully throughout the trial. My own way of telling them apart was sometimes decided by the color of their T-shirts. Mr Ratos was also instrumental in providing the bail for releasing the aboriginal people from remand.

My experience also lead me to conclude that in working to achieve access justice for disadvantaged people, NGOs should work together or coordinate their efforts. The ultimate lesson I learned was that while one can be jaded with a system of justice it is important to remember that every judge will have a conscience. It is up to us as lawyers to keep digging.

CHAPTER 4

Delivering Legal Aid: Alternative Law In The Philippine Context

By Alvin Batalla[1]

Access to justice - at the very least legal assistance - is essential to ensuring the peoples' basic right to development. In the Philippines, demand for legal services by the poor and by sectors such as labor, the urban poor, fisherfolk, peasants and the like far outweigh the supply.

The great majority of the poor and marginalized are unable to assert their rights because (a) they are ignorant of their rights, (b) an infrastructure for free legal assistance is lacking or greatly insufficient, (c) there are few lawyers willing to engage in pro bono public work and are equipped to handle the complex problems of the poor and marginalized.

In traditional legal aid, a client's problem is reduced to a purely legal perspective. This approach narrowly concentrates on how legal redress can be achieved for the violation of an individual right.

[1] Attorney, Alternative Law Research and Development (Alterlaw), Philippines

Alternative legal aid situates the client's legal problem in the context of development or underdevelopment. This approach focuses principally on how the poor can protect and enforce their collective rights and affect changes in structures that degrade their dignity as human beings and hinder them from equalizing opportunities in society. The whole point of alternative lawyering, as articulated by the foremost human rights lawyer of his time, Senator Jose W. Diokno, is the empowerment of the recipients of legal aid. The task of the alternative lawyer therefore, is to help the poor realize that the ultimate solution to their complex and seemingly intractable problems is for them to collectively claim and struggle for their political, civil, social, economic and cultural rights. The alternative lawyer can provide support in this struggle by educating the poor about the nature of their social problems and about the law, as well as by directly providing legal assistance.

ALTERLAW'S HISTORY: MISSION & CLIENT BASE DEVELOPMENT

Alterlaw was established as a legal resource NGO to provide alternative legal aid to the poor and marginalized. As a legal resource NGO, Alterlaw focuses on human rights and social equity issues. Alterlaw's mission is influenced largely by its founders' activist orientation, which was molded and tested in the trenches of the student movement against the dictatorship in the 1970s and 1980s. When the founders became lawyers, the activist slogan of "Service to the people!" logically led to the establishment of an organization that could provide legal assistance to the poor and the marginalized.

Since 1992, through networking with development and community based NGOs and POs, Alterlaw has sought to find niches in areas and issues that other alternative legal resource groups have yet to address. It is a member of an alli-

ance of legal resource NGOs called the Alternative Law Group (ALG) that coordinates efforts on common issues and the individual directions of legal aid. In the Philippines, there are ALGs that work on such specific issues as the environment, land tenure, childrens' rights, indigenous peoples rights and the like.

Alterlaw has consciously veered towards social, economic, cultural rights issues - an equally important area of human rights law that has taken a backseat to political and civil rights concerns. To be able to reach a wider client base, Alterlaw has also prioritized cases or legal problems where POs and NGOs are recipients of legal aid services. Alterlaw is, at present, principally focusing on protecting the rights of Filipino overseas migrant workers, those in the informal sector, HIV-AIDS victims, and on human rights education, international/local paralegal training and development. Alterlaw also works on specific programs and projects involving the urban poor, political liberties and children's rights.

In these areas of interest, Alterlaw has entered into partnership agreements with other NGOs or POs. For example, Alterlaw has bilateral arrangements with migrant worker NGOs, such as KANLUNGAN, CBCP-ECMI, KAMPI, and KAIBIGAN, among others. In informal sector rights, Alterlaw has a partnership with GABRIELA, a militant feminist organization, to provide legal aid to a federation of mostly women vendors plying their trade at the Cultural Center Complex.

The general arrangement is for Alterlaw to provide legal assistance, and for the partner to undertake the necessary pecuniary and other kinds of support for the legal initiatives. Alterlaw also supports and works with partners on non-legal advocacy thrusts or projects. For example, Alterlaw is part of a multi-NGO task force that aims to amend the Migrant Workers' Act of 1995.

FORMS OF LEGAL AID & CRITERIA FOR ACCEPTING CASES

Legal assistance rendered by Alterlaw takes the following forms: (a) capacity building of the basic sectors through legal education, paralegal training and support; (b) litigation in judicial and quasi-judicial tribunals; and (c) advocacy support for structural changes in society, most especially in law and policy reform.

Alterlaw generally accepts only cases or legal problems that have the following characteristics: (a) those involving developmental issues; (b) those involving basic sectoral groups' collective rights; (c) those which require or provide an opportunity for alternative legal assistance; and (d) those which may be raised in alternative fora, such as international human rights bodies, the legislature, etc. But every case must pose a human rights issue.

ISSUES IN LITIGATION

In tackling litigation, priority is given to legal problems that impact on law reform, policy advocacy or provoke positive jurisprudential precedents or changes. These considerations determine to a large extent how a legal issue is promoted in the courts.

For example, Alterlaw is at present handling a case that involves Filipino women migrant workers who contracted a disease that wrecks the nervous system within a week or two from working in the Taiwanese plant of a European multinational corporation.

But Alterlaw also handles straightforward litigation cases that seek to redress a right of, for example, an overseas migrant worker if this will help our partner NGOs in their organizing efforts. In such cases, the sole consideration in presenting the issue is to achieve justice in the courts.

CHAPTER 5

The Role Of The Indonesian Lawyer In Promoting Justice

By Irianto Subiakto[1]

The Indonesian Legal Aid Foundation, or YLBHI, is one of the biggest human rights non-governmental organizations (NGOs) in Indonesia with branches in about 14 cities. The Foundation itself was established in 1980 to strengthen the legal aid movement in Indonesia.

The idea of establishing a legal aid institute began in 1969, and was supported by the Congress of the Indonesian Bar Association. Then in October 1970, the governor of Jakarta announced the establishment of the Jakarta Legal Aid Institute. This Institute was organized by senate lawyers and was informally assisted by journalists, student activists and intellectuals. However, the Institute was not the first one of its kind. A legal aid institution was recognized in 1940, when a Dutch professor, Zel de Marker, founded a legal aid clinic for the poor. It is now a university. There was also a legal aid institution for ethnic Chinese. In addition to these individually started institutions, Indonesian law schools, such

[1] Director, Civil and Political Division, Indonesian Legal Aid Foundation (YLBHI).

as the Indonesian University, started legal aid services in 1963. Another university, Padjajaran University, also provided legal clinics, but these clinics were not successful. Some of these earlier failures were due to fact that the directors and workers were mostly students and lecturers – not lawyers and they were only able to work part time.

In the beginning, YLBHI handled all types of legal cases - criminal, divorce, inheritance, small-scale loan agreements, land disputes, labor, and housing. Then in the beginning of the 1980s, YLBHI introduced a more structured legal aid approach. This approach considered legal cases inter-related with people's rights and YLBHI realized that poor people are not only powerless in legal matters, but in social, economic and political matters as well.

With this understanding, YLBHI directed its legal focus on the root of society's problems. In shifting our focus toward structural legal aid we changed our legal aid orientation from urban to rural, encouraged extra legal approaches by inviting other social institutions to participate, and worked for responsive laws that supported structural reform and the development of fair social relationships guaranteed by law. Ultimately, our structural legal aid seeks equality for all social groups and individuals, in politics and economics. We strive to develop legal and administrative systems to enable social groups and individuals to influence and determine policies related to their interests.

Currently, YLBHI's fourteen branches only handle cases that have a structural component. So unlike in the beginning where YLBHI handled all kinds of cases, now we focus only on cases that relate to civil and political rights, land disputes, environmental issues, labor rights, and gender issues. These four categories have, in fact, become the core social problems in Indonesia, so it is logical for us to concentrate on these areas.

YLBHI's structural legal aid approach stresses the importance of people as participants in society. In order to empower people to act critically in affecting problems of injustice, our aim is to educate the people about the legal process. After understanding the process, people will be able to judge for themselves the positives and negatives of the legal system. Paralegals have such knowledge. Based on their experience of working with the legal system, they know how to deal with the police, how to deal with the military and they can understand how the system works even though they might not know the legal theories. Our approach educates people in this way, so that the people themselves understand the sources of their problems, whether it is poverty or injustice.

In addition to teaching people to monitor the legal system, we encourage the people to recognize themselves as the catalysts for changing political and structural injustices. The key lies in their ability to unite and organize. YLBHI facilitates this process and advocates for a more democratic and fair political system. YLBHI's role is to become part of society, involving itself in the movement while critically reflecting and acting for the poor. Therefore, one objective of our structural legal aid is to educate the people while we assist them in mobilizing to help themselves.

YLBHI gives priority to advocacy and people empowerment activities, but we also are involved with other functions such as documentation, policy studies and networking. So while our main activity is education, we are also advocates in litigation and non-litigation, lobbyists, campaigners, mediators in alternative disputes resolutions and documentation and information gatherers. YLBHI documents all the cases relating to our structural approach. Whether the information and documents come from the case itself or from articles, dissertations or other jurisprudence, it is collected and often used later in court or in lobbying the legislature. YLBHI

also conducts studies of governmental policies. Such work and analysis is critical because governmental policies are often the direct cause of human rights violations. We study the law in order to understand its intricacies and how it can be modified to better serve the people. For example, YLBHI had a client who was adversely affected by a new land taking policy. The client was not a rich man, but he had a business. The new land policy allowed the government to take land based on the public need rationale. So the government took this man's land without providing any compensation. Since he could not afford to purchase a new plot to live on, he came to us. With this case, YLBHI utilized our policy study to change this unjust governmental policy.

YLBHI also emphasizes networking in the community. Our work can not be done alone; we need other institutions' support and cooperation in the structural legal aid approach. YLBHI develops and participates in all types of networks - local, national and international. We are connected to people from all walks of life - intellectuals, students, laborers, farmers, professionals and workers from other organizations. As I mentioned before, one of our objectives is empowerment. To do this we have work with other groups who are more in touch with the people of that community. YLBHI's structural legal aid does all these things to promote the rule of law in Indonesia.

CHAPTER 6

The Malaysian Bar Council And Legal Services: Issues And Concerns

By R. Kesavan[1]

The Malaysian legal aid structure has three components – the first one is the Legal Aid Bureau that is run as part of the government machinery. It is totally government funded and is run by qualified lawyers who work for the civil service. Secondly, we have the legal aid centers under the Malaysian bar council and the third is the NGOs (for example Chandra's HAKAM) where they do ad hoc public interest litigation.

With respect to the Legal Aid Bureau, three people who are employed at the Bureau are qualified to represent clients in court. Now, the main limitation is that the Bureau does not provide representation in criminal cases or in cases against the government authorities. The reason for this is that Bureau comes under the jurisdiction of the attorney general.

[1] Honorary Secretary, Bar Council Legal Aid Center of Malaysia.

The legal aid provided by the NGOs is mostly on an ad hoc basis and is essentially public interest litigation. There is no formal structure however, and clients are taken on a case by case basis. The Bar Council Legal Aid Center is part of the Malaysian bar and is set up to assist clients as required under the Legal Profession Act.

Ninety-five percent of the cases we handle are criminal cases. Funding is wholly through a levy, which is imposed on all practicing lawyers in Malaysia. It works out to $26 per year for each lawyer. The budget for last year's Kuala Lumpur Legal Aid Center was in the region of $82,000. The Center was set up in 1985. Each state in Malaysia has at least one legal aid center. We have a National Legal Aid Committee under the Malaysian bar council which is in charge of policy. However, each center is independently run by the management panel of that center.

Legal representation is done wholly by volunteer lawyers. The Center cannot and does not employ professional persons to represent clients. In Kuala Lumpur, we have about 4,000 practicing lawyers and our base of volunteer lawyers is about 10% of the total.

In terms of the structural limitations we face: first, it is a wholly volunteer scheme. Due to the fact that no fees are collected, lawyers can only devote a limited amount of time to the Center. The second problem is funding in the sense that clients have to pay the costs involved in the case excluding legal fees. In addition, we have a limited number of volunteer lawyers because many law firms discourage their staff from taking up legal aid cases. Another difficulty we have is in accommodating the wide range of views held by the lawyers who fund the center. For example, some of our lawyers are uncomfortable with the work we do related to protecting the rights of migrant workers, sex workers and people who are HIV-positive.

In terms of the political environment, one of the biggest problems we face is citizens' low level of awareness of their rights. The other problem is that the courts are extremely reluctant to interfere in cases involving the State.

The advantage we have is that in general, the Malaysian bar is extremely supportive of the stands we have taken. We have taken a very proactive position with respect to human rights violations in Malaysia and they are very supportive of the work we do. Secondly, we have found it to be beneficial to start working with NGOs on the ground. Thirdly, we have seen a trend over the last two years of an increasing number of young, dedicated and committed lawyers who are interested in volunteering at the Center. I think in the last year or two we have expanded to serve over 6,000 clients, even though services are rendered by volunteer lawyers.

One of the greatest achievements of the Center over the last year was in connection to the recent upheaval in the country where we had mass demonstrations and mass arrests. The Center actually coordinated a joint trial involving 177 accused in one case and the another case involving 126 accused. The courts were not very accommodating to the requests of the lawyers. There were a lot of problems with representation at the remand hearings and with representation throughout the trial. The greatest difficulty we had was that the trial was conducted over a period of two months and none of the Center's volunteer lawyers had the time to stay on for the duration of the trial. We devised a shift system with lawyers working for two or three days in a row. It was not the best way of conducting a criminal trial, but it was necessary because of the limitations we had.

Another problem was that the judiciary was not at all accommodating to the requests of the defense lawyers. We had asked the courts for dates in which we would be free and the courts were not willing to give the dates. We had a very

short time to work on the documents and very little time to work with the accused. Nevertheless, the motivation and commitment shown by the young lawyers made it all worthwhile. The prosecution was drained with the same officers coming to court every day. The defense lawyers, on the other hand, because of the number of lawyers involved (in the first case there were 25-30 lawyers) were fresh. Fortunately, of the first group of 177 we got 172 of the accused acquitted.

The Kuala Lumpur Legal Aid Center and the Bar Council Legal Aid Center have always focused on traditional legal aid. However, over the last two years we have attempted to move toward a more structural or developmental approach. We have started working with NGOs, we have opened a migrant workers clinic, and we have begun to focus on the legal needs of disadvantaged sectors of society. Such an approach to legal services requires that lawyers begin to think about their work in a new way. At the moment, our biggest problem is the lack opportunities for our lawyers to be trained in structural legal aid. We intend to learn from your experiences here and hope that in the next year we will be able to provide these lawyers with training to increase their awareness of the need for structural change, legal reform, and the potential of legal aid to be used as a mechanism for protecting human rights.

CHAPTER 7

Developmental Law: Problems And Prospects

By Jose Diokno[1]

The history of the Free Legal Assistance Group (FLAG) parallels, in many ways, Indonesia's YLBH. At the time when structural legal aid was being written about in Indonesia, there were a few lawyers in the Philippines who were writing about developmental legal aid. Essentially, I think that the two philosophies are very similar.

While FLAG began mostly as a litigation and legal aid office, we realized that traditional forms of legal aid may not be enough where the law itself violates human rights. Traditional legal aid usually addresses private disputes of the poor not the public interest matters that would effect a greater majority. Traditional legal aid will somehow or other always support the status quo because of its own constraints. So the FLAG lawyers of that time felt that there must be a differ-

[1] Director, Free Legal Assistance Group, Philippines.

ent form of legal aid that should supplement and not supplant traditional legal aid. And that is what FLAG calls developmental legal aid.

What is the difference between traditional legal aid and developmental legal aid? First of all, traditional legal aid assumes that the law is basically sound that the law is basically just, whereas developmental legal aid is structure oriented. It realizes that the law itself may be an instrument of oppression. Our purpose whether it is handling cases, appearing before congress or doing other kinds of advocacy work, is to attack not only the personalities in the case but the structures and the systems that generate and sustain injustice.

In the beginning, most of the cases that we handled were political cases – cases of rebellion, subversion and so on. It was a time of martial law and it was a very repressive situation. Lawyers were being threatened, harassed, and eventually a number of them were killed. If fact, at least six lawyers have been killed because of their human rights activities since 1974. In addition to the harassment we suffered from the police and military, we had a lot of hardships financially – we had no funding and we were simply relying on donations given by people in the Philippines. But we were able to survive. That was from 1974 to 1986 - over a period of 12 years.

What happened when there was this so-called "people power"? Of course there was the expansion of democratic space but contrary to our expectations, the violations of civil and political rights continued because President Aquino continued with the fight against the counter insurgency.

What did that do to us? First of all, one of our main objectives was to dismantle the repressive decrees, the thousands of laws and regulations that Marcos had enacted. As far as that goes, I would say that we have only been partially successful. However, because of the opening of democratic

space, FLAG was able to generate a lot of funding from international agencies. If fact, I think we made the mistake of overexpanding. From 1986 to 1994 we were able to set up offices in sixteen regions of the country. We had had offices previous to that but during Marcos's time we could not afford to pay any salaries or any expenses. But from 1986 to 1994 we were able to generate a lot of cases, do a lot of advocacy work, lobbying, paralegal training, publication of primers and so on.

But beginning about 1994 and continuing until 1997, a lot of the international funders transferred their attention from the Philippines to other countries and unfortunately, FLAG was one of the organizations whose funding was removed. We had been aware of the situation before the funding ran out and we had also encountered some difficulties with the constraints being imposed by some of the international funders. So we figured in 1997 that maybe it would be better to go back to the situation of how we were working under martial law. We would not have to pay homage to any funders and we would continue to handle the cases that we liked. Of course, we would be more limited because we would not be able to afford to come out with primers and we would not be able to come up with very complicated legislative proposals. But still, by and large, we have managed to continue existing and in fact, as far as the media is concerned, whenever they would like to hear the opposite side of what the government is saying, somehow they come to us.

During the time of President Aquino, there were more lawyers killed than under Marcos. That is because of this continuing counter-insurgency program that she implemented. When she finished her term and President Ramos took over, we noticed a very perceptible shift in the violations of human rights. Whereas during martial law, and during the time of Aquino, it was mostly civil and political rights,

beginning with Ramos we began to get a lot of cases on economic, social and cultural rights. I think that was partly because the Filipino government was able to get a lot of money from abroad and embark on a lot of so-called "economic projects". Consequently, many poor and rural people were displaced from their homes and came to FLAG for assistance.

So while our cases shifted from political to economic and social rights, we realized that they were just opposite sides of the same coin. Because after the economic, social and cultural rights were violated, if the community still resisted the government, then came the violations of the political and civil rights. So it was just a reverse of what was happening under martial law. Of course, the harassment, death threats and so forth continued during the time of President Ramos and up to today. However, now we are beginning to see a reversion back to violations of civil and political rights. Why is that? For one thing, I don't think our President is very concerned, genuinely, about human rights and for another, the people that he has placed in the police and the military are people who were the torturers during the Marcos time. The head of one of the largest task forces in the Philippines was one of the most notorious men in the military during Marcos' time.

Why does FLAG still exist? A lot of it is based on our philosophy of developmental legal aid. Basically, we believe that while traditional legal aid has a very strong and good function, it is not enough in a society like the Philippines. We feel that we have to concentrate on changing the structures that generate injustice not only the actors or the people who are involved. Now, how do we do that? I think it can be summarized into four principles that we try to follow in every case:

1. Every law, policy and institution must respect if it cannot promote both the individual rights and collective rights of the people;

2. Laws, policies and institutions must have as their main objective the eradication of poverty at first in its more degrading forms and later in all of its forms;

3. Laws, policies and institutions must be geared towards selecting a means of developing and using our natural resources, industries and commerce to achieve a self directed, self generated and self sufficient economy in order to produce first the basic material needs of all and afterwards to produce an increasingly high standard of living for all but particularly those with lower incomes and to provide them with enough leisure to allow them to participate creatively in the development and enjoyment of our national culture; and,

4. Laws, policies and institutions must change those structures of relations between persons, groups and communities that cause or perpetuate inequality unless that inequality is necessary to improve the lot of the least favored among our people and is bore by those who have been most favored.

How do we put this into practice? We have developed a two-part strategy in our lawyering. The first part of our strategy is raising the consciousness of the poor by exploring with them the root causes of poverty and invoking the realization that to be effective they must be organized. We stress to them that we as lawyers are merely supportive to them and any fundamental changes in society will not come from the lawyers but will come from the people themselves. The second part of our strategy is to confront the regime with its policies and actions that are so detrimental to the poor that

they shock the conscious. We try to expose the inhumanity of system that the regime maintains and show how it contradicts the values it proclaims.

Essentially what differentiates us from a lot of legal aid organizations is that what we are really looking for is revolution by law. We are not content with mere reform because we believe that mere reform is only going to reinforce the status quo and not change it. We feel that in order to do that, we must lay ourselves on the line but at the same time we feel that for our organization to expand, there must also be a continuing system whereby we can continue to recruit more lawyers.

Our problem right now is really not funding. We can survive even without the money. Our problem is more of how can we attract the younger lawyers. Unfortunately, the generations of lawyers I see coming out in the Philippines are more oriented towards business law, corporate law, and commercial law. Even within international agencies there is a very strong push for access to justice, alternative dispute resolution etc. While we believe that the approach of traditional legal aid helps, we feel that the access to justice approach, in itself, which is more on a procedural level, is not enough. We feel that there has to be a substantive component to legal aid and a philosophy that keeps driving an organization.

CHAPTER 8

Defending The Defenders:

Challenges That The Legal Resources Centre (LRC) Faced During The Apartheid Era, Strategies Developed By The LRC To Protect Human Rights Activists And The Work The LRC Is Currently Doing

By Bongani Majola[1]

INTRODUCTION

I am grateful to the International Human Rights Law Group and the Asian Human Rights Commission for inviting me to this conference to discuss with you the challenges that the Legal Resources Centre faced during the apartheid era, strategies developed by the LRC to protect human rights and lawyer activists and to comment on the work being done by the organisation today.

[1] National Director, Legal Resource Centre, South Africa

I must state from the onset that the South African experience is to a large extent different from experiences in other countries. For example, South Africa is the only country that perfected and institutionalised the system of racial discrimination and hatred, the system of apartheid whose main basis was the discrimination and oppression of people because of the colour of their skins. It was a country in which the promotion and protection of human rights were prohibited by law. According to the government of the time, fundamental rights and freedoms did not exist until they were granted by the legislature. Some of the laws were passed and ruthlessly applied in order to prevent the development of such rights. Some of those who propagated the idea of human rights and advocated the respect for fundamental freedoms were thrown in gaol often without trial or fair trial. Others were tried and hanged by their necks until they died or were clandestinely but brutally executed by the state and its agents without any trial. The work of the Truth and Reconciliation Commission has revealed a lot of atrocities that the apartheid governments committed against those who dared to raise their voices and hands against it and many of those who advocated human rights and justice. The brutality of the state spared no one; not even the lawyers.

In a country that denies citizens their human rights, often the methods of oppressing its people and violating their rights are many. South Africa used many ways. Among others, it used its legislative muscle to take away rights. A lot of propaganda and misinformation campaigns, deceit and coercion ensured that some of the oppressed bought into the system of apartheid and supported their own oppression. The history of the homeland system is fraught with examples.

The South African government also used courts of law. The criminal law was the one used most violate the rights of the oppressed. Civil courts were also used mostly to silence critics of the government and its media. The government never hesitated or missed an opportunity to claim damages for defamation, for example, and some judges were readily willing to award damages without any regard to the fact that they were being used to take away basic human rights such as the freedom of expression.

Because of the nature of the threat to human rights posed by the South African government, there were many efforts initiated by activists to promote justice and human rights in South Africa. There was, among others, the underground struggle that sought to overthrow the South African government and all it stood for. There was peaceful resistance and political interventions. The Legal Resources Centre chose to use mainly the courts of law as an instruments for bringing about justice. Before I speak about the work of the Legal Resources Centre it is appropriate that I say a few words about the organisation.

THE LEGAL RESOURCES CENTRE

The Legal Resources Centre is a public interest law firm that renders free legal services to the poor and marginalised people of South Africa who cannot afford to pay for the services of lawyers. It was started in 1979 almost two years after the killing of Black Consciousness Movement leader, Steve Bantu Biko and three years after the Soweto uprisings. The LRC was established by a group of practising lawyers with the objective of providing free legal services to the masses of oppressed black people of South Africa. It was and is still concerned with the plight of the ordinary poor and marginalised people. Its mission is to use the law as 'an in-

strument of justice and to work for the development of a democratic society that functions in accordance with the principles of social justice and human rights.

Presently, the Legal Resources Centre has five regional offices and a constitutional litigation unit, in addition to an administrative capital. It employs about 109 staff members, of whom 34 are practising lawyers, 16 trainee attorneys and 11 paralegals. The rest are administrative support staff. Its first National Director and co-founder was the current President of the South African Constitutional Court, Justice Arthur Chaskalson. Its first board consisted of among others, the present Chief Justice, Judge Ismail Mahomed and advocate Sydney Kentridge QC of the London bar.

One of the reasons the LRC employs litigation to protect the rights of its clients is that South Africa uses the system of precedents. Once a court has passed a judgement on a particular legal point, that decision becomes law and must be obeyed. During apartheid, the South African governments publicly proclaimed that they respected the separation of powers and therefore that they were bound by decisions of the country's courts. The use of litigation meant that in cases where it was successful, the litigation created a body of law that the government was obliged to observe. I must add that although it reduced the incidents of violation, in some cases the government did not really stop the violations where judgement had been obtained against it.

THE CHALLENGES THAT THE LRC FACED DURING THE APARTHEID ERA

As a former British colony, South Africa's constitutional system was of British origin. In terms of the doctrine of parliamentary sovereignty, parliament was the highest law making body. It could make and unmake any law. Courts had no power to pronounce on the validity of any law made by par-

liament except insofar as the invalidity arose from the failure by parliament to follow its own procedures in making the law. This made it virtually impossible to challenge legislation in court. How do you challenge unjust laws using a legal system in which parliament is supreme and courts cannot invalidate bad laws? The first challenge of that the LRC faced therefore was to try and do the impossible, that is, to find invalidity of laws or of executive actions performed under a system that permitted the government to do anything.

Under the doctrine of parliamentary sovereignty, the South African parliament made many laws which took away fundamental rights, especially the rights of blacks, and legalised their discrimination, oppression and enslavement. The doctrine enabled the apartheid government to take away the franchise and to deny Blacks proper education and training, ownership of land and access to housing, water, electricity, adequate food and jobs. This denial of rights was sustained through laws which penalised protest against the injustices of the apartheid system. Accounts have been given before the South African Truth and Reconciliation Commission by both victims and violators of the nature of the brutality and callousness with which these laws were applied. This brutality inspired great fear in the minds of the victims. And the fact that the government agents spared no one, not even lawyers, made many victims afraid of complaining and reluctant to bring court challenges against the government. Sometimes the challenge was to get a victim / client who would be prepared to bring action against the government. In spite of difficult conditions, the right client came to the LRC from time to time and this enabled the organisation to do some of the work that it is now famous for.

The amount of legal work that needed to be done, especially in the early eighties demanded lots of financial and human resources. These were never sufficient and the chal-

lenge was to make the most with the little that was available. The type of client that came to the LRC was both illiterate and poor. This required that the LRC should provide financial support for each case it took. Since the organisation had been established to help those who were oppresses and too poor to afford the services of ordinary lawyers, the LRC had no problem with this challenge, except, as I have already said, at some stage the demand was greater that the available human and financial resources.

WHAT STRATEGIES DID THE LEGAL RESOURCES CENTRE EMPLOY?

1. *Sustainability of the Organisation in the then Existing Political Climate*: The founders of the LRC, who had seen other organisations perish under the banning orders of the government, knew that it would experience the same fate unless its sustainability was ensured. The approach of the government in putting an organisation out of action was first to infiltrate it, then declare it a prohibited organisation, close it and confiscate its assets. In the process it would detain its leaders. To counteract this threat, the founders established the Legal Resources Trust as the governing body which did fundraising, held the bulk of the available financial resources and decided policy. The LRC was established as an operating arm of the LRT. Progressive judges and lawyers were appointed to the board to trustees. This meant that the government would not easily declare the LRT and the LRC as prohibited subversive organisations because it would thereby imply that its own judges were communists and terrorists or that they supported communism and terrorism. The LRC went through quite difficult times, like all human rights organisations. However, in spite on many threats[2] to ban it and close it down, the government never actually did so.

The other strategy for ensuring the sustainability of the LRC was to let its lawyers work together in any matter. First, it obtained permission of the various law societies and bar councils to house both attorneys and advocates in one office. This ensured that opinion of counsel was readily available and that if and when emergency matters were to be brought, counsel was available even in the middle of the night. It also ensured confidentiality of information in the various client's files. The LRC was careful in the appointment of lawyers and in the choice of outside lawyers to share ideas with. It shared views and ideas only with sympathetic human rights lawyers in private practice. So, the strategies for fighting human rights violations and for mounting court challenges were done as a joint effort, not only by LRC lawyers but by them in collaboration with independent human rights lawyers outside the LRC. This strategy of co-operating with outsiders paid dividends especially in fighting prominent cases under the state of emergency, forced removals of blacks from their land, and cases under the Group Areas Act[3].

2. *Dealing with individual victims' cases and collaborating with communities*: The widespread brutalisation of people sometimes for no apparent reasons inspired many of the oppressed with fear. The strategy followed was therefore to take the case of each individual victim and defend or prosecute (not in the criminal sense) it vigorously while at the same time looking for test cases that would be used to break the backbone of the instruments of oppression used. The LRC worked very closely with communities and community based organisations. This strategy was used in fighting the infamous pass influx control laws.[4] The LRC worked a lot with organisations like the Black Sash to fight the pass laws. It litigated a high volume of cases challenging

almost every action of the government officials relating to the pass laws and influx control. In a way, the strategy was to harass the government officials and the courts that had been established to implement these laws.[5] The litigation of high volume cases was combined with a search for test cases. Working in collaboration with the Black Sash and other community organisations, the LRC eventually identified what would be ideal test cases. On of those was the seminal test case in **Oos-Randse Administrasieraad v Rikhoto** 1983 (3) SA 595 (A). The Rikhoto case dealt with the interpretation of Section 10 (1) 8 of the Urban Areas Consolidation Act, Act 25 of 1945 which gave rights of residence to Blacks to reside permanently in urban area only when they had worked continuously for one employer for a period of ten years. Although Rikhoto had worked continuously for one employer for more that 10 years the government officials would not give him the endorsement that he was entitled to permanent residence in the urban area of Johannesburg. They based their refusal on the fact that once per year, Rikhoto took leave and went back to his homeland. The government argued that this broke the period of employment. It argued that when he returned from leave he started a new period of employment with his employer. According to this interpretation, no Black in Rikhoto's position would ever qualify for permanent residence in an urban area. The labour legislation made it mandatory for employers to give employees leave once per year. The court decided that temporary absence from work due to illness or injury or other legitimate purpose such as leave did not break the continuity of employment and that Rikhoto had thus qualified as a permanent resident of Johannesburg after completing ten years working for one employer. The court held that although Rikhoto's services were rendered under a series of separate contracts, he and

his employer had a common and continuing intention that he would remain in the employment of his employer. This judgement had a huge impact on hundreds of thousands of Blacks who had been working for decades in urban areas but were denied the right of permanent residence in urban areas.

Test cases were selected on the basis of the wide impact they would have if successful. The impact of the Komani[6] case, for example, was that it removed the legislative barriers which the government had adopted to prevent spouses of those Blacks who had gained residential rights in urban areas from joining them and living with them there as families. The success in Komani meant for thousands of Black families that husbands who worked in urban areas could, for the first time, bring their wives and children to live with them as families in the urban areas.

The LRC soon learnt that enforcement of the judgement and compliance with it did not follow immediately once a test case had been won. In most cases, government officials simply continued as if no judgement had been given. The strategy of mobilising community organisations ensured that there was enforcement of judgements. It also shared information with other organisations such as the Black Sash[7] and also provided the legal and litigation backup to them. This collaboration with other human rights organisations ensured that violations were detected and brought to the LRC for litigation and enabled the identification of test cases. The network served to alert the LRC of such non-compliance with court judgements and the latter usually brought many cases enforcing the judgements before the state started complying[8]. Without this co-operation from the network, the impact of the judgements would have been much less.

This strategy was used in fighting human rights battles in other spheres of the lives of South African blacks. I will briefly give example of some of those areas:

a) Regarding problems of forced removal of black communities from their lands, the LRC worked with a number of community based organisations. In the old Transvaal, for example, it worked with the organisations such as TRAC and ACTSTOP. The administration boards who were responsible for implementing forced removals at some stage resorted to knocking down houses of people being removed. The LRC brought litigation declaring such conduct to be unlawful and obtained court judgements ordering the administrative boards concerned to rebuild the houses. Where a government minister passed regulations, the LRC scrutinised them and challenged their validity on a number of grounds. In the case of **Joseph Makama v Administrator of the Transvaal**[9] concerning the disestablishment of the Oukasie township and the intended removal of its inhabitants to another location, the LRC challenged validity of the regulations issued by the minister on various grounds, including that the regulations had been passed for an ulterior motive. Another case relates to the forced removal of the Driefontein community in the then Eastern Transvaal. Another impact litigation case was done by the LRC in 1986, in **Mahlaela v De Beer N.O.**[10] in which the court compelled the government officials to apply their minds to client's application and declared invalid those actions which were done for ulterior motives or for reasons not authorised by the empowering statutes.

b) During apartheid the right to strike was not recognised in South Africa. Striking constituted a criminal offence under the many security laws that the country had passed. The strategy of the LRC was to work with trade unions and

give them readily available legal back-up. Some of the trade union cases came to the LRC via or through lawyers in private practice. The example is the case of **Marievale Consolidated Mines Ltd v The President of the Industrial Court and Others**, (1986) ILJ 152[11] which was brought to the LRC by and done jointly with Cheadle, Thompson & Haysom.

3. *Establishment of Legal Support Structures within Communities:* One of the successes of the Legal Resources Centre lay in the establishment of advice offices, run by community members within the communities it worked with. It provided training to paralegals and other advice office workers and empowered them to monitor violations and, at the same time, to give free legal advice to members of the community in times of need. LRC lawyers and paralegals visited advice offices on a regular basis to give legal back up to them and to identify matters for litigation. Many test cases that were subsequently litigated came from advice offices. The network of advice office became important also after the test case had been won. They were sources of information on the whether the government was in compliance of the court decisions. This enabled the LRC to bring further litigation to enforce compliance. The importance of paralegals and the work they did during the human rights struggle in South Africa cannot be overemphasised. They were always among the people and sharing their suffering. They understood exactly what violations were troubling each community and were always there either to give prompt advice or to contact lawyers at the LRC and other public interest law groups. They took statements, from witnesses, of violations soon after they had taken place and were there to comfort and reassure the victims that help was available. Many human rights activists and communities would have cracked under the apart-

heid onslaught had it not been for the ever presence of paralegals who kept alive the thought that help was a phone call away. Of course I must say that paralegals did not stop the violations and that they were not immune from the human rights violations. Often they were targeted by the police and harassed because the government felt that they were teaching revolution. Many withstood the onslaught because of the co-operation they had with organisations such as the LRC. The LRC itself had its own paralegals but made extensive use of paralegals from independent advice offices.

4. *Partnership with the Liberal Media*: The LRC joined forces with editors of prominent independent and liberal newspapers. The newspapers publicised abuses which occurred in the country and those cases taken by the LRC and other human rights organisations against the government. When an important case had been won, the newspapers were used to give a lot of publicity to the outcome. Not only did this expose the violations to the outside world, but it told the masses whose rights were being violated, that they could do something about it through the LRC and other human rights organisations. On the other hand this publicity forced the government to explain itself and to justify the violations, a factor which forced it to reduce the violations. Newspapers were also useful because journalists did a lot on investigations and supplied a lot of information that proved useful in the cases we litigated. One may wonder why we did not use television and radio. These are very powerful tools to use when one has access to them. In South Africa everything was controlled by the state and, as you will imagine, both radio and television were used extensively by the state as its propaganda machine.

5. *Collaborating with Members of the Legal Profession and with other Professionals*: Cases brought against the government

were complex. In order to deal with this challenge, the LRC worked in partnerships with other lawyers in private practice. LRC lawyers held regular consultation meetings with these lawyers and exchanged ideas and strategies relating to cases. Sometimes they would do cases jointly. There were times when outside lawyers passed on cases to the LRC for litigation. When doing inquests into the deaths of people suspected of having been killed by the police and other government agents, the LRC also worked with pathologists. This co-operation greatly strengthened the LRC and increased its capacity, thereby placing it is a position to take a litigate impact cases that really mattered.

6. *Inquests to Prove Police Complicity in Murders*: Many human rights activists were simply killed by the police or secret state agents. Every time an activist was killed, the government tried to portray itself as innocent. In order to expose the fact that government was murdering the activists, the LRC decided to represent the families of the deceased at inquest. This strategy not only proved that the state had a hand in the killings but that it was part of a big cover-up. Inquests were heard by magistrates, who were at that time public servants. In every case the magistrates found that no one was to blame. Inquests are some of the areas in which the LRC could not have made any impact if it had not worked closely with other professionals. It worked with pathologists, among whom Dr. Jonathan Gluckman is notable[12]. One inquest done by the Legal Resources Centre to expose police complicity in murder followed the brutal killing of a 19 year old boy by police in the Vaal area. It is the Simon Mthimkulu inquest. In spite of the overwhelming evidence pointing to the police, there was, as expected, the verdict of no one to blame. George Bizos, SC gives details of this inquest in his book, *No One To Blame?*[13] The other inquest of note is that of the Cradock Four which is

also extensively discussed in chapter 6 of George Bizos's book.[14]

7. *Doing Impact or Test case Litigation*: Although the LRC decided to almost every case, it strategy was clear that it would in the process identify those it would use as test cases in order to weaken the system of oppression used by the government. One such system was the pass law and influx control system. Test cases were selected on the basis of the wide impact they would have if successful. The impact of the Komani[15] case, for example, was that it removed the barriers which the government had put preventing spouses of those Blacks who had gained residential rights in urban areas from joining them and living with them there as families. The success in Komani meant for thousands of Black families that husbands who worked in urban areas could, for the first time, bring their wives and children to live with them as families in the urban areas.

Most of these strategies worked. Some even worked well. It will take a very long time to describe the context within which these and other strategies were applied. It needs to be said that there was wide spread state intimidation of human rights campaigners, activist lawyers and ordinary people in the country. This was aimed at discouraging people from leading others in questioning and challenging the government. The other aim was to pressurise witnesses not to prosecute any legal remedies against the state. It was not uncommon for a plaintiff in an action against the state to suddenly come back and withdraw the action or to simply disappear. There were also legal barriers. For example, in order to bring about an effective court challenge to actions of the executive of government, it is necessary to know the reasons of the executive for taking those actions. Under apartheid, the executive was generally not obliged to supply reasons for its actions. In spite of these chal-

lenges, the Legal Resources Centre, acting in collaboration with others as illustrated above, was able to do a lot of important work in the promotion of human rights during the apartheid era. Having said this I must state that some of the human rights problems in South Africa required political solutions. In that case, legal remedies were just not suitable. Indeed, the political solutions are the ones that made significant changes to the status of the country and transformed[16] it.

THE WORK OF THE LRC IN THE POST-APARTHEID ERA

What I have stated above is history, considering that South Africa is now a democracy and apartheid has been discarded. When the transition to democracy occurred, the challenge which faced the LRC and other public interest and human rights organisations in South Africa was how they would continue to enhance access to justice and promote the culture of respect for human rights under the new constitutional, political, economic and social order. Under apartheid there had been a clear enemy of the people, the state. Under the new dispensation and a democratic government that has adopted as its priority the protection, promotion and fulfilment of human rights, the question that human rights organisation found themselves facing was what is our role in the new South Africa?

The Republic of South Africa Constitution Act, Act 108 of 1996 sets a strong framework for the establishment of constitutional democracy and the creation of a culture of respect for human rights and the rule of law. It entrenches a unique Bill of Rights which provides, among others, for the right to housing, health care, education, food, water and social security. In addition to guaranteeing the universal franchise, which

apartheid had denied to Blacks, the Constitution provides for a democratic parliament, an independent[17] judiciary, a Constitutional Court[18] and for state institutions supporting constitutional democracy.[19] Seeing this dramatic change, a number of, especially foreign donors (some of whom had been supporting the human rights work of NGOs for decades) started asking NGOs to explain why their support was still needed. They pointed at countries like Rwanda and Burundi as deserving of their assistance. One of the challenges brought about by the new dispensation in South Africa is to convince supporters of human rights work that the above changes are an important step but that it is the first in a series of steps that will bring about true and lasting democracy in South Africa.

South African democracy is still very young and infirm at the age of five years. It must therefore be accepted that our constitutional democracy and the creation of the culture of respect for human rights and the rule of law are still at their early stages of development. With this in mind, the Legal Resources Centre sees as part of its mission "...the development of a fully democratic society based on the principle of substantive equality, by providing legal services for the vulnerable and marginalised, including the poor, homeless and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic and historical circumstances." Our history has inspired the lawyers and other people at the Legal Resources centre to commit themselves to:

- ensuring that the principles, rights and responsibilities enshrined in our National Constitution are respected, promoted, protected and fulfilled;
- building respect for the rule of law and constitutional democracy;

- enabling the vulnerable and marginalised to assert and develop their rights;
- promoting gender and racial equality and opposing all forms of unfair discrimination;
- contributing to the development of a human rights jurisprudence; and,
- contributing to the social and economic transformation of society.

The Present Challenges Facing and Strategies Employed by the LRC

As already stated above, the advent of democracy in South Africa has changed the manner in which the world sees the human rights problem in South Africa. During apartheid rule, the South Africa that the world saw on television and read about in the print media was one characterised by police brutality and the enforcement of laws that were designed to oppress the black majority and to flagrantly violate their rights every minute of their lives. Scenes of police assaulting people and setting vicious dogs on them, scenes of dwellings being torn down by bulldozers and its inhabitants being scattered by baton-charging, sjambok-wielding and teargas and gun firing policemen no longer take place and are therefore no longer seen on television. Instead, the world sees Mandela hugging friends and receiving foreign dignitaries, dancing with children, making peace deals around the globe, announcing his acceptance of the authority of the courts of the land, etc. Consequently, many of the supporters of the liberation struggle in South Africa have taken the view that South Africa has made it and that it does not need any more support from the world community as far as human rights are concerned. This is characterised by the withdrawal of funding which used to flow to non-governmental organisations. Some donors, both local and foreign, believe

that the present government must be assisted to run the country and have therefore switched support to government. One of the real challenges that human rights organisations therefore face in South Africa is to convince the world that the adoption of a democratic constitution with an entrenched bill of rights is not an end of the process of creating a culture of human rights but that it is just the beginning.

South Africa carried the legacies of apartheid into the present dispensation. One of those legacies is that of grave inequality especially between blacks and whites. This inequality is almost across the board except insofar as concerns political power. There is still inequality in wealth distribution. Blacks still suffer from a severe shortage of housing and the provision of services like water and electricity, access to health care and education. Positions of influence are still largely in the hands of whites. A lot of discriminatory practices still carry on as before, some openly and others in disguised and subtle ways. Land is still largely in the hands of whites, including the land forcibly taken away from blacks and given to whites by the apartheid governments. In the government service, the present government inherited a public service which served the apartheid governments. It is a public service that had been used for many decades as an instrument of oppression and violation of human rights.

In addition to these legacies of apartheid, South Africa inherited laws and practices which are not conducive to the development of a culture of human rights. Although some of those laws are invalid by virtue of the dictates of the Constitution, it is not as clear cut and straight forward with others. Finally, there is the challenge of interpreting the Constitution and applying it to everyday lives of the people it is intended to protect.

The strategies we use include some of those that were used during the apartheid era.

1. *Working in Partnership with others*: Both in the Constitutional Rights Programme and in the Land, Housing and Development Programme, the work of the LRC relies heavily on co-operating with others. We work in loose partnerships with organisations such as prisoners rights groups, gay and lesbian rights activists, women's rights groups (including the South African Gender Commission), children's rights organisations and environmental rights organisations such as the Environmental Justice Network Forum to strengthen constitutional rights. The LRC has recently been working in collaboration with the Gay & Lesbian Coalition of South Africa on a case aimed at enforcing equality regarding gay and lesbian couples[20]. In terms of the Aliens Control Act, a foreign spouse of a South African citizen can apply for permanent residence in South Africa by virtue of marriage[21]. However, the Department of Home Affairs refuses to extend the privilege to gay and lesbian partners of South African citizens. The full bench of the Cape of Good Hope Provincial Division of the High court has declared Section 25 (2) of the Aliens Control Act as unconstitutional. It gave Parliament a period of one year within which to remedy the defect by removing the inequality.

Within the land programme we work with development agencies, NGO such as the Surplus People's Project (SPP) and with the Department of Land Affairs. For example, the SPP was recently contracted by the Northern Cape Provincial Government to advise it on policy guidelines concerning the acquisition and disposal of provincial land[22]. The SPP in consultation with the government requested the LRC to assist with the formulation of the policy guidelines. The LRC gave the requested assistance and also helped in the preparation of a new Bill to regulate the matter. The partnerships on land issues has contributed a lot in land law reform and in the advancement of the program of land

restitution and redistribution. We have made major successes in the restitution of land to its rightful owners who were dispossessed by apartheid governments. Riemvasmaak was one of our first big rural restitution cases. It resulted in 74,000 hectares of land being restored to its owners — a community which had been forcibly removed from it in 1974. The most recent restitution case was finalised about two months ago and Thabo Mbeki was present at the handing over of the restored land to the San people. It is the **Mier** case[23] which resulted in the San people being given, in terms of an agreement of 13 March 1999, 27,500 hectares of land inside the Kalahari Gemsbok Game Park, four large farms outside the park plus about two million (R2m) rand for dispossession.

There are many complicated issues that arise in the interpretation and application of the South African Constitution. The LRC works in partnerships with lawyers in private practice and with research agencies such as universities and independent research institutions, both local and overseas.

2. *Providing Legal Support to Communities:* The LRC has continued its relationship with community advice offices. It has structured the legal support given to them so as to empower the communities served by each advice office to serve the community more effectively. The LRC lawyers and paralegals still visit advice offices from time to time to update paralegals and other advice office workers on developments in the law and to educate them and members of the community about rights and the protection thereof. They give legal advice on cases coming to advice offices and even take others for litigation. The case of Raloso referred to below is one of such cases. Advice offices are a very important component in the process of building rights awareness among members of the community and in the

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enforcement of the culture of respect for human rights.

3. *Taking Mostly Impact Cases*: The shrinking financial resources mean that the LRC can no longer take every case that is brought to it. As a result, our strategy is to take those cases which have the potential to create impact in a particular area of law. For example, the LRC collaborated with others to challenge the constitutionality of the death penalty in the Mankwanyana Constitutional Court case. In the **Mankwanyana** case[24], the Constitutional Court abolished the death penalty in South Africa. Although the death penalty has been abolished, there are still vestiges of apartheid which undermine the right to life. The organisation has also been involved in another right to life case, that of **Raloso v Minister of Safety & Security**[25], in which we challenge the constitutionality of Section 49 (2) of the Criminal Procedure Act, Act 51 of 1977. This section permits a member of the South African Police Services to kill a person who either resists arrest or attempts to flee arrest when such a person is suspected of having committed a scheduled offence. In this case a police officer shot and killed a small boy whom he was trying to arrest on suspicion of theft. At the beginning of the court action the Minister of Safety and Security relied on Section 49 (2) to justify the taking of life. The trial judge expressed the view that he was in no doubt that this section was unconstitutional. At that stage the government had made an undertaking to amend it. The judge therefore refused to refer the matter to the Constitutional Court. As a result of our challenge, the government has taken steps to amend the offending provision and thus ensure greater protection for the right to life. At the time of writing, legislation amending Section 49 was close to finality. This case highlights the importance of the partnership between the LRC and community based advice offices. The matter was brought to the LRC

by an advice office which asked us for legal back-up. As already stated, during the apartheid era, many important test cases were brought to the LRC by community based advice offices that we had partnerships with. Once a favourable judgement had been obtained, advice offices monitored compliance by government officials and quickly brought cases of non-compliance to the LRC. Even now advice centres are major indicators of what happens in communities and are a source of test cases which we litigate from time to time.

The Legal Resources Centre has recently represented prisoners who wanted to protect their right to vote which is entrenched in the South African Constitution. In this case, of **August and Another v Electoral Commission and Others**[26] the Independent Electoral Commission had decided during the preparations for the June 2, 1999 general elections that prisoners would not be permitted to register as voters and to vote. The LRC brought a court action in the Pretoria High Court, challenging the constitutionality of the decision of the IEC. The LRC lost but took the matter to the Constitutional Court. The Constitutional Court held that, unless Parliament passes a law excluding prisoners from voting, the Independent Electoral Commission, has no authority to take away the entrenched right to vote. As a result of this decision, both awaiting trial and sentenced prisoners were able to exercise their voting rights on 02 June 1999. The success of the challenge was partly due to co-operation with other organisations. In addition to working with the Centre for Applied Legal Studies at the University of the Witwatersrand, the Constitutional Litigation Unit of the Legal Resources Centre requested and worked with two prominent advocates from the Johannesburg Bar.

4. *Trying to bring about economic empowerment to communities:* Our experiences have often taught us a lesson that

bringing about the respect for civil and political rights is not the whole answer to the needs of the South African people, especially the poor. We accept, however, that human rights work has traditionally focussed on the intangible and rarely involved itself directly in economic issues. The issue of socio-economic rights has been rejected in many Western democracies. As a result, many countries are still looking for ways in which these rights can be given meaning. Inspired by the entrenchment of socio-economic rights in the South African Constitution[27], the LRC and other organisations[28] are busy with concerted efforts to find a way of enforcing these rights.

In the restitution of land area, the LRC has been able, although on a limited scale, to bring about some economic empowerment for the communities whose land is restored. The one case is the **Mier** case already referred to above. The fact that the San people now own 27,500 hectares of land within the Kalahari Gemsbok National Park means that they now share in the wealth that is produced in the park through tourism and the sale of wild animals. The other one is the **Makuleke Land Claim** in terms of which the Makuleke community acquired a portion of the Kruger National Park. The Land Claims Court ordered, on 15 December 1998, that the land be transferred to the community, subject to certain conditions precedent. The **Richtersveld - Transhex**[29] is one of a few matters in which we see the possibility of the restitution of mineral rights and the establishment of a mining lease on a mine which is situated on trust land. A successful prosecution of this claim would make a huge impact and set a precedent and pave a way for other reserves and community land situations where the community never had an opportunity to hold title to mineral rights.[30]

The work of the Legal Resources Centre is no longer focussed solely on defending human rights activists. Since the advent of democracy, there is human rights activism within government. Our task is therefore to channel that energy into strengthening constitutional democracy in the country. We have, for example, willingly assisted government departments that were putting together policy white papers and drafting legislation thereby seizing the opportunity of making government produce laws that are as human rights sensitive as possible. We have also participated and continue to do so, in parliamentary portfolio committee hearings during the legislative process.

There is a tremendous amount of work that is done at the LRC. It would take a long time to deal with it all. In my talk, I have tried to indicate the challenges we encounter and the strategies we employ. Perhaps at this stage I should say that the work of the LRC has taken a certain approach or approaches. The large number of cases done in the post-apartheid era reflect the following trends:

a) Removing apartheid laws and practices that are in conflict with the spirit of the constitution. Examples involve cases on the death penalty, corporal punishment, civil imprisonment debt, fairness of criminal trials, the rights of prisoners to appeal against their convictions and sentences and many others.

b) As far as land is concerned, the restitution and redistribution of land and, in the process the economic empowerment of communities where possible and the strengthening of security of tenure for farm labour tenants and people in similar situations.

c) The expansion of the boundaries of rights laid down in the Constitution by seeking the most liberal of interpretations. The prisoners' voting rights, the freedom of religion, en-

forcement of socio-economic rights and the issue of the status and recognition of Muslim, gay and lesbian and customary African marriages characterise this trend.

d) General watch dog initiatives in terms of which the government is kept on its toes regarding almost all rights.

e) Making a statement about some of the appalling human rights violations of the past.

I have discussed some of the work that falls within these categories. Perhaps for your interest, I should give you a menu of what other work is or has been done.

Religious Freedom

The Legal Resources Centre brought a constitutional challenge against a private school, an Anglican institution, which sought to compel one of its lady teachers to worship as a Christian with the rest of the school[31]. Since it received public funds in the form of state subsidies, we felt that the private school was not entitled to enforce religious observance. Unfortunately, we could not get a precedent from this case as the school backed down and the matter was settled.

As stated earlier, one of our aims is to widen the boundaries of rights entrenched in the Bill of Rights. For example, we are involved in a matter dealing with the interpretation of Section 15 (1) of the Constitution[32] regarding the freedom of religion. In the **Prince** matter[33] we brought review proceedings challenging the decision of the Cape of Good Hope Law Society to refuse to register Mr G. Prince, a Rastafarian, as an articled clerk in terms of the Attorneys Act on the grounds that he has a previous conviction for possessing dagga (marijuana) and his intention to continue marijuana use. Our client argues that the smoking of dagga is part of his religious practices as a Rastafarian. We have lost the matter in the

court of first instance but have been granted leave to appeal to the Supreme Court of Appeals. We believe that he is being denied the right to religious freedom. We are considering taking the matter to the Constitutional Court if we do not get relief at the Supreme Court of Appeals.

Harmonising the Constitution with Customary Law and Muslim Law

The system of African customary law in South Africa is characterised by male superiority and domination and the inferiority of women. This is also the position under Muslim law. As a result, Muslim women and African women living under African Customary Law are still treated inequitably by members of their own communities and by the state. Doing the work of bringing about equality in this sensitive area has been both difficult and sensitive. It is seen as an attempt to destroy the basis of either system of law. The Cape Town office of the LRC brought a High Court action in **Rhylands v Edros** challenging the consequences of the Muslim divorce law which provided that, upon divorce, the women are not entitled to anything because a marriage by Muslim law or custom is contrary to public morals. Through the favourable judgement in this case we have established the principle that such marriages are not contrary to public morals and that they have contractual consequences. This has brought relief to all Muslim women in the same position as Mrs. Rhylands was. The LRC has also brought a number of High Court cases challenging the inequality under African Customary Law. We are currently challenging the principle of intestate succession under African Customary Law which provides that succession occurs only through the male line. The practice which has gone on for decades, is that when an African man and woman are married but have only daughters, both the woman and her daughters are not allowed to inherit from the man if

he dies intestate. This practice is applied even to people married by civil rites. It creates untold hardship for the wife and children.

Our challenge to this rule of African Customary Law in **Mthembu v Letsela and Another** [34] was unsuccessful in the Transvaal Division of the High Court. Among others, the Court held that the disqualification of Mrs. Mthembu's daughter to inherit from her deceased father flowed from her status as an illegitimate child and not from the fact that she was a girl and that the system of primogeniture was applied in Customary Law. The Court concluded that there could have been no talk of unfair discrimination therefore on the grounds of gender and her right to equality had not been infringed. We have taken this judgement on appeal.

The Voting Rights of Prisoners and People in Awaiting Trial Detention

As already stated above, the Legal Resources Centre has just won a major constitutional victory for prisoners and awaiting trial prisoners. The case **August and Another v Electoral Commission and Others**[35] held that since neither the Constitution nor the Electoral Act contains provision that disqualifies prisoners from voting, they retain their right to vote. The Court held that Parliament cannot by its silence deprive any prisoner of the right to vote, nor can its silence be interpreted to empower or require either the Commission or the court itself to decide which categories of prisoners should be deprived of the vote and which should not. While the court stated that its judgement should not be understood to mean that Parliament cannot deprive prisoners of the right to vote, it categorically rejected the view that by going to gaol, a person deprives herself of the right to vote.

The Rights of Prisoners to Appeal in Person

In the case of **S v Ntuli**[36] the Constitutional Court declared, on 08 December 1995, unconstitutional the provisions of Section 309 (4) read with Section 305 of the Criminal Procedure Act, 51 of 1977, which provided that convicted prisoners who lack legal representation and who had been convicted in magistrates courts did not have an automatic right of appeal to the Supreme Court (High Court) unless a judge of the Supreme Court had a judge's certificate certifying that there were reasonable grounds for the appeal. The Constitutional Court noted that all other types of prisoners did not require this certificate in order to appeal. After declaring the provision unconstitutional the court suspended the declaration of invalidity and gave government until 30 April 1997 to remedy the defect in the law. It happened that by 30 April 1997, the Department of Justice had not amended the law. It approached the Constitutional Court, in **Minister of Justice v Ntuli**[37] for an extension of the period until the end of 1998. The Legal Resources Centre opposed the application. The court refused to extend the period and stressed the importance of government's obligation to ensure that fundamental rights are upheld.

Opposing Applications for Amnesty before the Truth & Reconciliation Commission

To make a statement disapproval of some of the egregious past violations of human rights the LRC decided to appear on behalf of the families of some of the human rights activists who lost their lives as a result of the activities of the apartheid state agents. The LRC vigorously opposed the application for amnesty by security policemen who are responsible for the death in detention of the late Black Consciousness Movement leader, Steve Bantu Biko. The whole of South Africa was pleased when at the end of the hearing, the Amnesty Committee of the Truth and Reconciliation Commis-

sion denied them amnesty. We have similarly opposed the applications of those security officers who murdered Mathew Goniwe and three others, popularly known as the Cradock Four. Because it also deals with violence against a woman, we are opposing the application for amnesty by a security policeman, Bellingan, whom out of greed and wickedness killed his wife for threatening to expose the fact that he was stealing money from a liberation organisation. The LRC has been involved in opposing other amnesty applications.

CONCLUSION

I would like to conclude by going back to the remarks I made at the beginning of my presentation. The account of human rights work I have given about represents the South African experience and experienced by the LRC and narrated by me. The story I have told is rich in success stories. But I must say that there have been a lot of failures too. It is human nature not to highlight failures above one's successes. However, I must hasten to state that the LRC learnt from some of its failures and setbacks. On many occasions, it did not anticipate to fail. In others, especially during the apartheid era, it took a matter and mounted a challenge against the government although it was clear that the prospects of success were almost nil. The failed challenge had the effect of making a statement to the government, to the LRC's clients and friends and to the outside world. It was used as tool to harass the government and its officials and it gave a few lessons to the LRC itself. To what extent the lessons we learnt from our successes and failures are of use to others in different parts of the world is not certain to me.

I have spoken about the work of my organisation being quite mindful of the limitations of litigation. Perhaps I should emphasise that litigation is combined with other initiatives such as advocacy and law reform initiatives although it re-

mains the main activity of the LRC. During apartheid the use of the law and litigation was even more limited than it is today. Often it meant using the very oppressive law that our strategies were opposed to. Two human rights activist, one a lawyer, highlight the limitations of legal intervention during forced removals in the 1980s. Anninka Claassens in *Rural Struggles in the Transvaal in the 1980'S*[38] eloquently describes and illustrates this problem in her article. Nicholas Haysom in *Practising Law Democratically*[39] tells of the failure of legal remedies in the heart-rending forced removal case of the Magopa tribe[40]. The cases dealt with by these authors are not necessarily cases done by the LRC. On the other hand, legal interventions have not all been a failure. Although their successes were as a result of their combination with advocacy and the resilient spirit of resistance and struggle for liberation that characterised many South African communities, one can point at many examples of the effectiveness of legal intervention in South Africa. One example is the abolition of the pass laws and the system of influx control. There are others. The constitutional and political set up in South Africa presently, make legal intervention one of, but not the only, major tools for strengthening constitutional democracy and the rule of law. However, it is clear to me that no one solution is adequate. Therefore legal intervention must be combined with other strategies. Advocacy, rights education, law reform initiatives, lobbying where possible and political remedies, to mention a few, must be combined to bring about change.

Whatever intervention one is thinking of, it seems that it is important to work with communities whose rights are being asserted. Rather than lead the communities, perhaps human rights activists and lawyers should empower the communities to lead themselves and avail from their support. A struggle of the people has more than nine lives and is more

sustainable than struggles that are driven on behalf of the poor and oppressed and the marginalised. The struggle for gender equality in South Africa has gained much because it is, in part, a struggle that is being waged by women. The Legal Resources Centre succeeded in many instances because it was the communities that were struggling for their rights. The lawyers were there to provide the required back-up.

Although I have indicated the uniqueness of the South African experience I have failed to resist the temptation to point out what I think can be learnt from that experience. Before I say more, perhaps I should thank the organisers of this conference for inviting me to this conference and you for listening to me. Thank you.

End Notes

1. National Director, Legal Resources Centre, South Africa.
2. At one of its annual general meetings held at a hotel called Mount Grace, the Trustees discovered that the security police had been recording the proceedings of the meeting. The then Chairperson of the Board of Trustee took some of the judges who were trustees and went to confront the then Minister of police about the matter. This must have made it even more difficult for the Minister to ban the LRC.
3. Act 36 of 1966.
4. The pass laws required every black person of 18 years and above to carry at all times, an identification document. This document bore a photo of the bearer and details of where the person was allowed to live, where she or he was working or allowed to look for work, whether he (in the case of males) had paid tax for the current year, and other details that imposed maximum restrictions on black people. The influx control laws were used to prevent blacks from rural areas and townships from living and working in towns and cities of South Africa.
5. One of the LRC's strategies was to literally flood the government with litigation. In areas where there was systematic abuse by organs of the state the LRC's strategy would simply be to flood the government with court actions. Among others, this was done with police brutality cases. Sometimes the cumulative effect of such flooding litigation against the apartheid government forced it to scale down or stop some of the violations of the rights of the oppressed.

6. Komani N.O. v Bantu Affairs Administration Board, Peninsula Area, 1980 (4) SA 448 (A).
7. For more information on the collaboration between the LRC and advice centres, such as the Black Sash, see Rick Able, *Politics By Other Means*, Chapter 3.
8. Ibid.
9. Reported as Makama and Others v Administrator, Transvaal, 1992 (2) SA 278 (TPD).
10. 1986 (4) SA 782 (TPD).
11. See also National Union of Mineworkers v Marievale Consolidated Mines Ltd (1986) 7 ILJ 123 (IC).
12. Dr Gluckman had been consulted by the lawyers representing the family of the late Black Consciousness Movement Leader, Steve Bantu Biko. His evidence at Biko's inquest exposed police complicity in spite of the usual finding by the inquest magistrate.
13. *No One To Blame*, (David Philip) 1998 contains a wealth of information regarding inquests in South Africa and gives a clear picture of some of the underhand activities of the apartheid state.
14. At pages 163 - 239.
15. Komani N.O. v Bantu Affairs Administration Board, Peninsula Area, 1980 (4) SA 448 (A).
16. The term "transformation" has many sometimes loaded meanings in South Africa. As a result, some people in that country may argue that the transformation process has started in South Africa but that it is far from over. I use the term to imply that South Africa was changed from a dictatorship to a democracy.
17. Sections 165 (2), 178.
18. Section 167.
19. See Chapter 9, especially Section 181 (1) which lists them as the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities, the Commission on Gender Equality, the Auditor-General and the Electoral Commission.
20. The action challenges the constitutionality of the government's refusal to grant permanent residence rights to same-sex partners on the same basis as it does for heterosexual partners. It was supported also by the South African Gender Commission.
21. The National Coalition for Gay & Lesbian Equality represents 70 organisations countrywide.
22. Matter no. 4113/97/15/KP.
23. Matter no. 2724/91/HS.

24. It is a Constitutional Court decision: CCT 3/94.
25. It is reported as Raloso v Wilson and Another 1998 (4) SA 369 (NCD) and as Raloso v Wilson and Another (1998) 1 ALL SA NC 540.
26. CCT 8/99.
27. See among others, Section 26 on housing and Section 27 on health care, food, water and social security.
28. Including the Community Law Centre at the University of the Western Cape.
29. Matter no. 2502/98.
30. Another case is the Richtersveld - Alexkor matter. Matter no. 4186/97.
31. In contravention of Section 15 (2) of the Constitution.
32. It provides that everyone has the right to freedom of conscience, religion, thought, belief and conscience.
33. Matter no. 4071/97/03/VS.
34. 1998 (2) SA 675 (T).
35. CCT 8/99. The Constitutional Court held that the right of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. See page 13.
36. CCT 17/95.
37. CCT 15/97.
38. In Christina Murray & Catherine O'Regan (editors), *No Place to Rest : Forced Removals and the Law in South Africa* (1990) Oxford. See p. 42.
39. Fn 37, at pages 108 -109.
40. He writes that "The tribe's fresh water pumps were removed, (by the apartheid government) depriving them of access to fresh water. The tribe's schools were closed and then demolished. Public transport to and from the nearby town was discontinued. Payment of pensions was refused and pensioners were referred to the local authority (Hundreds of miles away) in the Marico district...The community's four churches and the medical clinic were bulldozed, as were houses of some of the absent migrant residents.

    In the face of failure of the campaign of harassment, the 'velvet glove' was removed." He tells of the cordoning off of the farm and the forcible loading of members of the community onto trucks by police and driven to Marico where the government wanted to move them. By the time the Appellate Division declared the removal unlawful, the government had already expropriated the land without notice to the tribe. So although the tribe was entitled to return to their land in terms of the judgement of the Appellate Division of the Supreme Court, if they did they would face charges of trespass for being on property owned by the government.

CHAPTER 9

University-Based Legal Service In China

Guo Jianmei[1]

The Beijing University Women's Legal Service Center is a prime illustration of how legal aid is organized in China. The Center, specializing in legal services for women, is part of Beijing University, but it is independently funded. There are about 50 members including professors, lawyers, and students. The Center is a new concept in China because it is a non-governmental organization.

In China, there are only two high profile organizations of this nature. One is this Center and the other is the Wuhan University Legal Service Center. Although the Center is well known, there are various difficulties related to our work. The difficulties include lack of funding, lack of human resources, and lack of protection from society. Despite these difficulties however, the Center enjoys a relatively high level of independence and flexibility. This is because the Center is not funded by any government agency or department. In China, many organizations lack our kind of flexibility because they are

[1] Executive Director, Center for Women's Law Studies and Legal Services, Peking University, P.R. China.

supported by the Chinese government. The Center's independence allows us the freedom to create our own structure, to decide on our own personnel, mandate, and direction. This ability has also allowed us to become an active, high profile NGO in China.

Over the past three years, we have developed our own governing structure. The structure includes Beijing University, where we are situated, but it also involves outside participants. We have a team of legal experts who focus on high profile cases. These experts promote change by doing research and submitting reports to the government. The Center also has a well-established network with women's organizations, legal organizations, the media and the judiciary. Additionally, we have a friendly and cooperative relationship with the government and we receive support from other professionals, as well as the press, in handling some of our difficult cases.

The purpose of establishing this broad network is to solicit support from society. Networking is important in China because of society's lack of support for non-government legal institutions. Historically, traditional Chinese culture and society determines the only method of governance and of approaching problems. Because NGOs are relatively flexible, free and have their own mandates, society in general is suspicious of them. Therefore through networking, we have created an environment which helps make our work more successful and accepted. This methodology has been very affective and useful to the Center's work. Through our associations we strive to involve the Center in community networks and promote legal research and legal aid.

The Center has streamlined its efforts into three categories of legal aid. The first area of aid encompasses individual women's rights. We provide free legal aid to poor women whose rights have been violated, many of whom are not even aware

of their entitled rights. The second type of case involves serious rights violation against women in general. These cases often impact society as a whole. The third kinds of cases we take are cases related to the economic transition in China. These are usually labor cases involving peasant women working in big urban cities, as a result of China's changing economy and demographics.

We chose to narrowly focus the Center's legal aid services because of our limited financial and personnel resources. In China, there is such a large population of poor people and the need for legal aid is so tremendous that the gap between the need and the supply of service is huge. The need is greatest at the grassroots level - in counties, districts, townships and villages.

In the first two years, our Center was handling all kinds of cases. We were extremely busy. There were crowds of people needing legal help each day and our personnel were exhausted from the volume of work. After this experience, the Center changed its policy and has hence adopted these three standards for taking on cases. In China, handling a few dozen or even a few hundred cases can not solve fundamental problems. Therefore, the Center defined our priorities and became focused in legal representation.

Our legal aid model is different from the clinical model introduced by American professors because the clinic model seems to basically be opened to all kinds of clients, whereas our Center has to be very selective. We choose big, high-profiled cases so we can learn something from each case. These cases also provide us with information to use in our lobbying to promote change in the government. This method helped us to decide to take on cases that are similar in nature and by doing so we hope to promote change in society.

In our other areas of substantive work and in our legal research, we try to find common or important factors that could be useful in the handling of similar cases to ensure positive, predictable results in future cases. Based on the tracking and research of cases, over the last three years the Center has played a significant role in legislative change. It has submitted a few dozen proposals to the National Congress, the National Political Consultation Conference, the legislature and the enforcement agencies.

It is clear that countries should create their own model, whether traditional or structural, of legal aid. The important thing to remember is that each model should promote the development of the rule of law. In developing countries, because there is such a need for legal aid, the traditional model may not achieve as much as a structural one because of the scattering of efforts. For us, a structured selection of cases has made a more profound impact on Chinese society.

The Center has only been in existence for three years. We are still relatively young, but we are already well recognized in China. We are high profile and more importantly, we have the support of the people. Of course we still have problems and difficulties, but I hope that as we progress, we will create a better society through structural legal aid.

CHAPTER 10

Delivering Legal Aid: The Structural Form Of State Legal Aid Center Of Cantho Province

Truong Thanh Tri[1]

I. GEOGRAPHICAL FEATURES

Cantho is a province lying alongside Hau River in the Mekong Delta. Geographical co-ordinate: 1050 14' 15" to 1060 17' 57" of the Western Longitude and 90 10' 53" to 100 19' 17" of the Northern Latitude.

Border lines: The north of Cantho is adjacent to An Giang and Dong Thap Province. The south is adjacent to Bac Lieu and Soc Trang Province. The east is adjacent to Vinh Long Province. The west is adjacent to Kien Giang Province.

[1] Executive Director, Cantho State Legal Aid Center, Justice Service of Cantho Province, Socialist Republic of Viet Nam

II. CANTHO'S POPULATION AND THE ESTABLISHMENT OF CANTHO LEGAL AID CENTER

***Area*:**	**2,962Km²**
***Population*:**	**1,963,104**
Men:	**943.627**
Women:	**1,019,477**
***Ethnicity*:**	
Kinh (Major):	**1,891,267**
Chinese:	**32,599**
Khmer:	**38,699**
Other:	**569**
Poor people:	**48,485 households**

People mainly live on farming (about 80.06%). Their education is still low; therefore, their understanding of the law is not high. As a result, the Cantho Legal Aid Center was started on November 22, 1996. It is the first Center established in Viet Nam.

III. CANTHO CENTER'S ACTIVITY MODE AND ITS ACTIVITY RESULTS FROM THE DATE OF BEING ESTABLISHED (NOV. 22, 1996) TO SEPTEMBER 30, 1999:

1. CANTHO CENTER'S ACTIVITY MODE

- Giving direct legal advice.
- Organizing mobile legal aid units that travel to rural villages far from the Center.

- Inviting lawyers and advocates to cooperate with the Center by providing consultation, defense, and representation.
- Encouraging lawyers and advocates to temporarily work in remote villages in order to help the communities in their mediation and law disseminating activities.

2. LEGAL AID SCOPES:

- Answering the legal queries of the poor.
- Compiling and making suggestions for applications and texts relevant to citizens' rights and obligations.
- Giving legal advice for necessary procedures and providing referrals to organs in charge of solving the problems of the poor.
- Delivering legal information.
- Negotiating, signing, and mediating activities on civil cases, family and marriage cases, labor cases, and other legal problems not belonging to the commercial field.
- Giving petitions to competent organs relating to the cases in need of legal aid.
- Inviting lawyers or advocates to participate in defending and protecting the legal rights and interests of the poor when legal aid is required as stipulated by the law.

3. ACTIVITY RESULTS:

Legal Advice Cases:	**6,208**
Defending and representing cases:	**192**
Mobile Legal Aid Times:	**46**
including Cases:	**2,255**
Petitions:	**95**

Total number of legal aid receipients:		**6,208**
Women:	**2,912**	
Men:	**3,296**	
The poor:	**4,864**	
People eligible to State policy:		**561**
The ethnic:	**74**	
Other opponents:	**706**	

IV. THE FACTORS AFFECTING CENTER'S ACTIVITY MODES:

1. Structural Limitations, Political Environment, and Legal Limitations:

Our Center is administered by the Government. Therefore, we get favourable conditions in relation to competent organs to solve relevant problems between the clients and the Government. However, there are some petitions we send on behalf of the clients that the Government has not replied to. The reason is that in the litigation procedures as well as in other official texts of the Government, there are still no specific stipulations requiring competent to organs answer these petitions.

2. Clients' Specific Concerns:

The majority of cases we take are related to land, housing, or inheritance. The rest of cases pertain to labor conflicts and debt problems. In addition, we provide assistance in areas such as real estate, birth declaration, marriage, and testament procedures.

3. Funding Sources:

From the State: delivering the building and furniture (desks, chairs); paying salary for our staff member; paying a part of administrative expenses.

From NOVIB: supplying a computer, printer, and copier; paying for the cooperators who carry out our mission by giving legal advice, providing representation, writing petitions, and working in the mobile legal aid unit.

V. THE DIFFICULTIES IN OUR ACTIVITY PROCESS:

1. On Organization:

There are only seven staff members. Their skills are still limited. Sometimes that factor affects how they defend and give advice to the poor. Our staff is divided in the following way:

Cooperator:	**42 lawyers and advocates**
Advocates:	**19**
Lawyers working in remote areas:	**26**
Voluntary Cooperators:	**11**

A majority of the cooperators live in the city and towns. As a result, they do not have the means to interact with clients frequently and therefore, our legal aid mission is still limited.

2. On Activity:

We mainly operate in the Center's office. Every month, we go to 5 remote villages, but we are still unable to entirely meet the legal needs of the poor.

3. On Physical Facilities:

Our office is very small and we have more and more people coming to the Center every month.

VI. OUR FUTURE PLAN:

- Frequently train our experts and cooperators;
- Strengthening the number of cooperators, especially voluntary cooperators;
- In order to allow the poor the have greater access to the law, we need to take advantage of the State's budget as well as call for the domestic and foreign organizations to support our work.

CHAPTER 11

Legal Services In China: A Canadian Perspective

By Dr. Vincent Yang[1]

I thank the Law Group for inviting me to this Forum. I am here as an individual participant, rather than a representative of an organization. In the English world, very little has been published about legal aid in Southeast Asia, especially countries in transition in this region. This Forum has provided some information about the work of NGOs and lawyers in providing legal aid. This exercise is informative to me although we need to spend more time to understand the nature of these NGOs and see a broader picture of legal aid in these countries. To make the service sustainable, we need to build a system. The development of a system for legal aid in a country in transition requires technical cooperation with the outside world.

Unlike many institutions represented here, the institute I work with is not a legal aid agency. However, in the past two years, I have had the pleasure of managing a CIDA-funded China-Canada Legal Aid Legislative Research Project.

[1] Director, China-Canada Legal Aid Legislative Research Project.

Today, I want to use this Project as an example to demonstrate what roles international organizations can play in assisting the development of legal aid in a country in Asia. The Project is to assist the Legal Aid Centre of the Ministry of Justice of China to conduct multi-national research for the drafting of China's first Legal Aid Law. The Chinese Centre drafts the Law, and we provide information, advice, and assistance. Through this Project, we have provided our Chinese partner with research materials from Canada, the U.S., England and a number of other western jurisdictions. We have worked with the Chinese partner in organizing several international exchange activities for legal aid managers and experts in both countries. Efforts are made to systematically expose and address some of the key issues in the development and operation of a legal aid system. The financial contribution from CIDA is very modest, but the results are very visible and sustainable in China.

To my knowledge, only a few international donors have provided support for legal aid in China. They are:

- CIDA (Canadian International Development Agency), which funds the China-Canada Legal Aid Legislative Research Project, with a focus on legislation;
- The Ford Foundation which funds projects doing "theoretical research" on legal aid and supports several Chinese legal aid centers (e.g., the Centre for Women's Law Studies and Legal Services at Beijing University and the Women's Legal Service Centre in Qianxi County);
- The UNDP which supports the operation of the Qindao Legal Aid Centre by paying the salaries of 6 Chinese staff lawyers for a period of 2-3 years.

These projects demonstrate that international donors can play important roles by providing limited funds to well-selected Chinese legal aid institutions. The roles are:

1. To assist in the introduction or reinforce the promotion and implementation of relevant international standards in domestic law and legal practice. We have succeeded in demonstrating these important facts: (a) in all developed countries legal aid has become an important part of the system for equal access to justice; (b) to build a system, the states must take the principal responsibility in providing legal aid; and (c) the ICCPR and other international instruments require a strong political will and long-term financial commitment to legal aid. These are supportive to the initiative of developing legal aid in a developing country.

2. To assist the sharing of expertise in establishing and operating legal aid systems. Official statistics indicate that there is an emerging consensus within the Chinese government regarding the need for a legal aid system in China. However, recognition of values is not enough. The challenge is how to establish a legal aid system that can address the needs of the people in a cost-effective and cost-efficient way. This requires specialized knowledge and working expertise. At present, only the western countries have this kind of "know-how." With the support of international donors, we can facilitate the sharing of this expertise through exchange visits, seminars and conferences. The Legal Aid Conference held in Beijing in March 1999 was very encouraging to both the Chinese and Canadian/American participants. I enjoyed the discourse at the Conference with many Chinese, Canadian and American colleagues.

3. To provide seed funding to support research and create model legal aid agencies or model services. Both the CIDA and Ford projects are research-oriented but have strong policy implications. The UNDP project in Qindao serves as a good example of assisting institutional development. However, the sustainability of a legal aid organization will be

questionable if the organization relies on foreign funds. Indeed, the public and the local government may become very suspicious if the operation of a legal aid provider wholly relies on funds from the international donors. People may question whether it is a foreign agency or an agency working for a foreign regime.

It is impossible to set up a legal aid system unless the government is really committed to it. International donors can only help, but they cannot substitute for the government. In this region, the governments may have some very different views about legal aid, but the NGOs will not be able to establish a legal aid system. In western common law countries, the various legal aid systems have evolved almost along the same route: from the pro bono work of individual lawyers to legal aid plans managed by the Bar, then became state-funded plans. In China, it was the former Minister of Justice who launched the initiative to develop a legal aid system. International donors can provide assistance to both the government/GOs and the NGOs. In China, there are certain roles that the government is much better equipped to play than NGOs:

CREATING A LEGAL FRAMEWORK FOR THE LEGAL AID SYSTEM

Without legislation, legal aid services, including NGO-based services, can only be "legal aid activities" rather than a system. A legal aid system consists of a well-structured legal framework and certain national or provincial standards and procedures. The laws and standards must clearly articulate the state's responsibility in the provision of legal aid, the governance structure of legal aid services, coverage and eligibility tests, and the relationship among the state, the bars and the legal aid agencies. If these basic elements are not clearly

defined in law, there will be no equal protection of rights in the country, the services will not be sustainable, and a great deal of resources will be wasted on negotiation and struggles.

SETTING UP LEGAL AID AGENCIES AND MANAGING OR PARTICIPATING IN THE MANANGEMENT OF LEGAL SERVICES

In most provinces in Canada, legal aid services are managed by independent boards. The government has representation on the board. In western countries, with this model of governance for their legal aid plans, many believe that although the state should not dominate the board it should have sufficient representation on the board.

FUNDING LEGAL AID PLANS

Government has to be the principal provider of funds for legal aid services. Once it starts to do so, it has all the reasons to monitor, or somehow control, the use of its funds. No international donor can be the substitute to the government in providing funds for legal aid services in any country. Nearly all legal aid plans in western common law countries are still facing serious financial crises. So the best a foreign government donor could do for a developing country is perhaps sponsor the operation of a very small number of legal aid agencies in that country for a limited number of years.

The development of legal aid service can be a test of political will and legal culture. The international community and the NGO can help, but the government has to take the responsibility in building and maintaining the system to protect the rights of the people.

CHAPTER 12

Legal Assistance Under An Occupied Force: East Timor Before The Referendum

By Aniceto Guterres Lopes[1]

Yayasan HAK Foundation (HAK) is the only organization that is working on legal assistance in East Timor. Our experience has been rather different from our friend in Indonesia. East Timor is nothing more than a battlefield where human rights violations take place.

The human rights situation in East Timor is very dim. Terror and intimidation take place everywhere. The logic the Indonesian military use is nothing other than the logic of war. The law does not function at all and oppression is the only way to settle problems. In such a situation, HAK cannot contribute a lot to upholding human rights.

[1] Director, Yayasan HAK Foundation, East Timor.

As far as legal assistance, the major problem is that the people of East Timor do not believe in the Indonesian law or legal system because the law is the main instrument for repressing the people.

Another problem is that the political system that prevails in East Timor is still characterized by the administration of Suharto's regime. The judicial court is not independent. Historically, judges have been the proponents and instruments of Suharto's regime.

Terror and intimidation has made the people very afraid to express their ideas and opinions. The Indonesian government considers NGOs to be a threat to the unity of Indonesia and therefore an enemy. Thus, NGOs that work for human rights suffer from terror and intimidation from the Indonesian military.

An additional challenge is that we are a very young foundation with very limited resources. The number of lawyers is very limited. Legal awareness within the society is very low and East Timorese people have no confidence in the legal system.

We work alone. But the problem is so big that we cannot handle it by ourselves. These are among the challenges that we are faced with now. I hope that our friend from Jakarta will assist my foundation in upholding the human rights in East Timor. And I hope all of you can share this information and help me solve the problems in East Timor.

DISCUSSION POINTS:

- The international community and legal aid lawyers from the region should assist the East Timorese in establishing a just system on all fronts – funding, training, gender issues.

- One of the most difficult issues is how to serve the population. Many East Timorese do not want to acknowledge the occupying power by utilizing the Indonesian supported courts. Thus, legal assistance, in the traditional sense, is not the aim of HAK. The primary objective is to promote awareness of the people about their rights.
- Judges in East Timor lack independence and decisions are made before the case has begun when the case is political. Defendants are found guilty not matter what the crime and they are sentenced according to how strongly they oppose the Indonesian government.

Yayasan HAK (HAK Foundation) was established in Dili, East Timor on August 20, 1996. At present, Yayasan HAK has twenty-three permanent staff and five volunteers; only four of whom are licensed to practice law. These permanent staff work for one of Yayasan HAK's four divisions. Those divisions are:

- The Case Handling Division that functions to handle legal problems, both court and non-court related;
- The Advocacy Division that functions mainly to monitor and investigate all instances of human rights violations and to conduct public campaigns on human rights;
- The Educational and Organizational Division that organizes and conducts legal and human rights education to grassroots community groups;
- The Research Division that conducts all studies and research activities, as well as preparing legal drafts for presentation to the government.

Yayasan HAK manages an annual budget funded from local, national and international funding sources.

In keeping its vision and mission, the majority of cases handled by Yayasan HAK are political cases (for crimes of opposing or attacking the legal government) and a small number are structural civil cases. The policy to determine which cases will be accepted is as follows:

- Criminal cases are determined based on whether they relate to human rights violations or regular crimes.
- Civil cases are determined based on establishing whether a case is structurally connected with the interests of less advantaged groups. Such cases include enforced land appropriation by the government, workers' issues, violence against women, or state administration cases. Yayasan HAK serves clients who are financially, socially and politically disadvantaged.

As a non-governmental organization, Yayasan HAK has very rarely had any interaction with the government on legal concepts or legal drafting as a result of the political factors. The political environment and the government's negative image of Yayasan HAK has made it impossible to conduct a campaign involving disadvantaged communities which are Yayasan HAK's primary stakeholders.

The main objective of Yayasan HAK's law assistance program is to promote the rule of law and the improvement of the grassroots community's awareness of their legal rights and human rights as stipulated in the Universal Declaration of Human Rights.

A common difficulty experienced by political prisoner clients is access to the courts because the judicial process lacks independence and transparency. Interventions from extra-judicial institutions often constitute the primary obstacle to the judicial process. These interventions occur during the investigation stage up through the court process, and also during imprisonment. Political court cases are used more

as tools to legitimatize state policy rather than in order to decide a case based on law (and the presumption of innocence) so the clients' rights are often ignored. As a consequence, both clients and lawyers are pessimistic and skeptical about the possibility of justice.

Besides conducting legal assistance through the judicial system certain cases are dealt with through Alternative Dispute Resolution. In addition, Yayasan HAK also provides direct law consultation to clients and to the community in general through the mass media. All services and assistance are aimed at changing the unfair structures and relationships that exist between the authorities and the people.

Substantively, despite all the legal strategies applied, there has yet to be any change in the criminal judicial system. The pattern of resolution in both civil and criminal cases is based on political considerations.

Indeed, there are many challenges that can be discussed here. One of these is the fact that legal aid lawyers have not been officially acknowledged as a component of law enforcement along with others (police and prosecutors) in the judicial system. This results in a tendency to place legal aid lawyers outside the system in dealing with the state. In such a position, and in the context of a paternalistic court system, lawyers bargaining position and ability to influence the legal system is very weak. Hence, the law and the judicial system plus the political and security situation in East Timor are the main challenges in administering an effective legal aid program.

Peoples' knowledge of the legal system, in East Timor is very limited. Perhaps understanding is greater among the middle class, especially among those who are well educated. People who have had dealings with legal matters experience legal injustice, political violence, bureaucratic inefficiencies, and a law that is biased in favor of the government.

In general, society still expects the formal legal system to be an institution for resolving disputes as is demonstrated by the number of cases brought to court through Yayasan HAK. However, the at same time, there is pessimism and doubt within society with respect to bureaucratic court practice, the attitudes of law enforcers and the lack of independence of the courts in resolving disputes and cases.

Alternative methods of resolving dispute (outside the judicial system) can be found in many indigenous communities in East Timor. In this point, the role of indigenous leaders is not only to act as a mediator for the parties in dispute but also to rule on the cases like a judge, based on their ability to interpret customary law. To put it simply, the process is much like solving the case in court. It starts with complaints from the party who feel harmed, then the indigenous leader will call both parties and, after agreement is reached, the party in the wrong gives compensation (customary fine) to the wronged party. The mediation program is one of Yayasan HAK's priorities.

In order to strengthen its advocacy network, Yayasan HAK also has partnerships with various non-governmental organizations both in and outside East Timor such as the Legal Aid Foundation (LHB) in Jakarta, the Legal Aid Institute, Indonesian Women's Association for Justice (APIK), and the Institute of Study and Advocacy in Jakarta (ELSAM). Yayasan HAK has no links with professional associations, except on an individual informal basis.

Other training relevant to our organization includes techniques to improve lawyers lobbying skills and training in out-of-court mediation.

CHAPTER 13

Lawyering In An Unjust System

By U Aung Htoo[1]

INTRODUCTION

On behalf of the Burma Lawyers' Council, I wish to thank the International Human Rights Law Group and the Asian Human Rights Commission for the opportunity to talk about the situation in Burma. My country is presently under the rule of the State Peace and Development Council (SPDC), the fourth mutation of military rule since its seizure of power in 1962. Under the SPDC there is no democracy, no rule of law and since the closure of all universities in Burma there has not been any legal education for nearly three years.

The rule of law vanished with the military's coup in March 1962. Since then the military has refused to be bound by any law. Elections were held in May 1990 "to elect representatives of the Pyithu Hluttaw" according to the Pyithu Hluttaw Election law of 1989. The Pyithu Hluttaw is the National Assembly, a legislative body under the 1947 and 1974 constitu-

[1] Coordinator of the Constitutional Drafting Committee and Secretary of the Foreign Affairs Committee of the National Council of the Union of Burma, Burma Lawyers Council.

tions. The elections were won by the National League for Democracy (NLD) by a landslide, winning over 82 percent of the seats. The political party endorsed by the military, the National Unity Party, won a mere 10 seats in the 497 seat legislature.

However by retrospective Declaration No. 1 of 1990, the military refused to transfer power to the elected assembly and asserted that the elected members were simply given the responsibility for the drawing up of a new constitution. Later, though, even the right to draw up a constitution was withdrawn, by Order No. 5 of 1996.

It is now over nine years since the election and the military rulers' refusal to transfer power to a democratically elected government. Elected representatives to the National Assembly, members of the NLD and other democracy activists have been subjected to wide-scale harassment and intimidation. Over 200 members of parliament are currently being detained by the military.

Lawyers have had an important role in Burma's struggle. Many lawyers were in the forefront of the 1988 popular uprising for democracy. The military responded to the uprising in various ways. The courts were abolished and replaced with new courts amenable to the military's rule. At times the administration of justice has been conducted through military tribunals. Lawyers defending political activists have become subject to persecution and lawyers who engages in any form of opposition to the government risk disbarment. The leadership of the Bar Association was dismissed and replaced with members who were supportive of the government. The Attorney General appointed by the SPDC has become the chairman of the Bar Council.

In this paper I will briefly discuss the legal environment in Burma, and outline some of the strategies being used by the legal profession to fight for its return. These lawyers,

both inside Burma and in neighboring countries, face unique challenges and have many restrictions on their activities. Nevertheless their willingness to continue their efforts remains undiminished, and I trust that it will not be too long before it is rewarded.

THE COURTS

Shortly after taking power in September 1988, the military regime decreed Judicial Law No 2/88 establishing a Supreme Court and providing for the creation of civilian courts at trial level. The Judicial Law stated, "Judicial proceedings shall be independent and in accordance with the law and shall contribute to the restoration of peace and tranquillity and law and order".

In reality, however, there is only the pretense of judicial independence. All courts are subservient to the directions of the military regime and there is no protection for a judge in terms of tenure or other provisions regarding dismissal from office. Judges are under clear instructions to take the lead from the military authorities in the discharge of their functions. Although martial law courts have been abolished, political prisoners still do not receive fair trials. Most cases are tried in an arbitrary manner and verdicts are determined in advance. U Tin Oo, Chairman of the Central Legal Committee of the NLD, has summed up the situation thus:

> "Not only are democratic activists charged unjustly under various laws and military decrees and denied fair trials and due process of law, the judicial system has been emasculated over the years. Court proceedings are not open to the public and defendants are very seldom allowed access to counsel. Moreover they are presumed guilty in advance and not given a fair chance to prove their innocence. There is no effective right of appeal to an independent higher forum due to the system-

atic interference of the military intelligence authorities. There has not been a single case where a political prisoner has been acquitted or given a lesser sentence by higher courts. Trials are a mere mockery of justice and punishments are far in excess of the so-called crimes. Moreover, most of the legal action taken against political prisoners falls into the ultra vires category."

THE LEGAL PROFESSION AS ACTIVISTS

Throughout the military's rule, lawyers in Burma have been at the forefront of the struggle for democracy and human rights. Lawyers have been frequently called upon to defend political activists in the courts, which have become arenas of defiance against the government. The Burmese Bar Association remained independent from the government for many years and refused to endorse the activities of the government, unlike many other professional associations. Gatherings of legal minds inevitably became forums of criticisms against the government. In the popular uprising of 1988, lawyers were among the leaders of the demonstrations.

Judges have at times sought to carry out their duties according to law, in defiance of the military regime. This has not been tolerated. Asia Watch reported that 62 civilian judges were relieved of their duties in 1989 for refusing to sentence political offenders to terms longer than the legal maximum sentence. Further, all judicial officials have been required to attend training courses to "assist them in fulfilling their duty to the military regime in producing necessary changes in the system and in implementing state policies".

Earlier this year the removal of five of the six judges of the Supreme Court by the regime reinforced the lack of independence of the judiciary. The Chief Justice, U Aung Toe, was the only judge to survive the purge, which may be explained by the fact that he is a member of the regime's Politi-

cal Affairs Committee headed by Military Intelligence Chief and First Secretary in the regime, Khin Nyunt. The Chief Justice is known to play a crucial role in legalizing the political maneuvering of the junta.

In such an environment lawyers inside Burma have few opportunities to openly defy the regime, but a few instances have occurred. Following the military coup in Burma 55 lawyers were taken into custody on charges under the Emergency Provision Act and under the High Treason provision of the Penal Code for their participation in the democratic movement. Their licenses to practice as lawyers were withdrawn, and two lawyers died in prison.

In the political sphere, legal strategies are being pursued by the pro-democracy movement. In 1998 the NLD and other opposition parties sought to convene Parliament, in defiance of the SPDC's law prohibiting this. The regime responded by detaining Members of Parliament. Hundreds of students were arrested after voicing their support for the convening of Parliament, and many received sentences of up to 52 years. There are currently around 2,000 political prisoners in Burma.

With the written consent of a majority of the Members of Parliament, the NLD and other parties formed a ten-member committee to represent Parliament until it could be convened (the Committee Representing the People's Parliament or 'CRPP'). The CRPP has issued statements challenging the legitimacy of the SPDC's laws. In this way the democratic opposition continues to use the law as a tool against dictatorship.

WORKING OUTSIDE BURMA

Burmese lawyers working outside Burma find themselves in a unique situation within the legal community. Perhaps the biggest difficulty they face is the insecurity of their own position. Burma Lawyers' Council (BLC), for example, has recently had its office raided by Thai authorities, and one of our Executive Committee members is completing a 33-month jail sentence because his identification papers were not satisfactory. These circumstances necessarily limit the range of activities that BLC can undertake.

Most of our work is focused on legal and human rights education, providing legal assistance to the democracy movement, and increasing awareness of the situation inside Burma. The precarious security situation has limited our capacity to provide direct legal aid services in the past, but we are now setting up schemes to deliver legal aid assistance, particularly to women, refugees and democracy activists from Burma.

The Bangkok office of BLC is cooperating with Thai NGOs and lawyers to take legal action on behalf of a young Karen refugee girl recently raped by a member of the Thai authorities. It is hoped that this will pave the way for further joint legal aid schemes. This will provide a possibility of redress for the many other refugee rape victims who currently have no recourse to the law.

We have also taken the first concrete steps in this direction in our India office, which has taken on the case of 42 democracy activists illegally detained by officers from the Indian army on Indian territory. The activists were persuaded to travel to a remote island, where six of them were shot and the remainder kept on the island against their will.

It appears that this was part of a cooperative arrangement between the SPDC and some Indian military authorities who would like to establish good relations with the SPDC

for their personal benefits from Burma. It should not have taken place on the dignified Indian Soil that has been well respected by the international community as the largest democratic country in the world in which the principle of the Rule of Law is being applied and the independence of the judiciary is highly practiced. In order to seek justice for the innocent six people who were executed and other thirty-six democracy activists who are being imprisoned without trial for one and a half year, BLC is acting in conjunction with Indian lawyers and human rights NGOs to bring proceedings in the courts in India. I am pleased to report that the latest development is that these combined efforts have led to all detainees being released on bail.

For the protection of our helpless people from Burma, the more human rights violation cases the BLC take, the worse insecure situation the BLC lawyers face. The BLC itself needs the assistance and protection of the international legal community for the security of its member lawyers.

BLC disseminates information about legal issues relevant to Burma. We produce a quarterly journal as well as special publications on specific areas, such as an analysis of the SPDC's constitution drafting process. We also produce a Burmese language journal discussing constitutional issues which is distributed along border areas and inside Burma.

It will be apparent from these activities that BLC is endeavoring to prepare for what will come after democracy is restored. If it is to be sustainable, the people of Burma must have a solid understanding of civil society, and have the confidence and willingness to take an active role within the community. An integral part of the training courses we run is discussion and exchange of views about federalism and how it might work in Burma. One of the biggest challenges we face in preparing for the future is to ensure that all of our ethnic nationalities are well-informed about federalism, con-

stitutions and the actual practice of democracy. It is our hope that education and discussion will lead to genuine consensus on these issues, and give us a lasting civil society founded on the rule of law.

CHAPTER 14

Sustainable Legal Aid Institutions

By Sok Sam Oeun[1]

INTRODUCTION

The NGO is a new concept in Cambodia. The first NGOs came into existence in 1993. During that period, many legal aid NGOs were established but most have since disappeared. At the moment, there are only three legal aid NGOs in Cambodia – the Cambodian Defenders Project (CDP), Legal Aid of Cambodia (LAC) and the Legal Aid Department of the Bar Association (BAKC).

When CDP was first established, we did mostly training but very little legal representation. After 1995, CDP began to focus more on providing legal aid. Initially, we only took criminal cases but in 1996 we expanded our scope to include some civil cases.

[1] Executive Director, Cambodian Defenders Project, Cambodia

In 1995, the Ministry of Justice attempted to close down all legal aid NGOs in order to have full control over the provision of legal services. We began an intensive lobbying campaign to convince the government to allow us to remain in existence.

The Ministry of Justice stated that from 1997 forward, they would only allow accredited lawyers to appear in court. This presented a problem for CDP because the staff was composed primarily of non-lawyer defenders. We were able to negotiate an agreement with the Ministry of Justice that would allow our defenders an opportunity to take the bar exam. With assistance from the International Human Rights Law Group, we were able to obtain training and most of our lawyers passed the exam.

HOW TO ENSURE ORGANIZATION'S SUSTAINABILITY

In some ways, CDP is different from other legal service organizations represented at this conference in that we began as an international NGO and are in the process of becoming a local NGO. When CDP was first established, the public perceived us as being very weak. So we needed to establish ourselves as a strong force for human rights and to look for ways to ensure our survival.

To be sustainable, an organization must at least have enough funds to be able to provide a consistent level of service. To do this, an organization must find funders who share their mission, concerns and objectives.

When an NGO is set up, it must first establish a mission. In our experience, it is better to have a broader mission than to have a very specific mission because it is easier to find funders whose objectives are within our organization's mandate. In addition, a broader mandate allows greater free-

dom to set new goals as the circumstances change. For example, CDP's mission is to promote human rights, rule of law and democracy in Cambodia. This broad mission allows us the freedom to expand into a variety of different areas and makes it easier to identify potential funders.

In order to sustain our effectiveness in providing legal aid we need to consider four factors:

1. The external environment;
2. Characteristics of the organization;
3. Characteristics of the staff;
4. Managerial policies and practices.

In evaluating the NGO's effectiveness and sustainability, we also need to look at other NGOs that are engaged in similar work. For example, in the beginning, there was a lot of overlap between CDP and LAC. We found it useful to meet with LAC and coordinate our activities so that each organization could more effectively meet the needs of the community.

In Cambodia, it is also VERY important to have international support even if it means just having one expatriate advisor in the office. It is still very important to maintain that connection.

It is important to have clear divisions of work within the organization. For example, at CDP, we are divided into a criminal department, a civil department, and a women's rights department. This allows the staff to specialize and refine their skills in a specific area.

An organization must define a clear "chain of command" so that expectations and lines of authority are clear.

It must maintain a high degree of transparency and communication between all staff members.

It is important to provide staff with training opportunities so that they are able to continue to learn and refine their skills. At CDP, each lawyer spends at least one month per year in training.

In order to keep the staff motivated and committed to the organization's mission, it is important for the management staff to be aware of the different skills and abilities among its employees, to reward effective performance, and to set goals that are specific, challenging and realistic.

As far as managerial policies and practices, it is important to have the organization's policies and procedures written out so that all the staff understand them. It is important to make the staff feel that they will have a job for a long time. Otherwise, they will have no commitment to their work.

LEGAL SERVICES

Now I would like to talk about our legal work. In politically sensitive cases, we usually join forces with others legal aid NGOs. For example, sometimes if we have co-defendants, we have lawyers from all three legal aid groups defend them. In some cases, we try to involve other human rights organizations. For example, sometimes we request that clients have the United Nations office refer them to us in order to secure UN support. We also sometimes enlist the support of the media for added security.

As a legal aid NGO, we try not to involve ourselves directly in politics so as to maintain the public's perception of us as working to improve society as a whole and not for any political party.

CHAPTER 15

Principles Of Legal Service Provision Discussion

Salma Sobhan – Moderator

Salma Sobhan: Sometimes when we are getting involved in campaigns for social justice we as lawyers have some reservations about some of the relief that we are wanting. We have to consider whether we take up a particular case if it legitimizes the whole system. Do we take that case? For example, because women are oppressed and because women suffer violence, do we make the law stricter even if other rights are sacrificed? When we are getting involved in campaigns for social justice, as lawyers, are there "no go" areas? What do we have to be careful of when we are mounting those campaigns or supporting them? Are there no restrictions? If we really want something should we go for it, no matter what? If being a lawyer is a constraint, what kind of constraint should it be?

Rick Wilson: Could you give an example from your own experience?

Sobhan: For example should the burden of proof be moved to the defendant in a rape case or should rape defendants be held for 90 days without bail.

Gay McDougall: What I hear you saying is that you are looking to crystallize principles. The principle that I heard from your example was that as a "cause lawyer" the relief that we seek for our clients must be consistent with human rights principles as well so we can't go beyond the boundaries of human rights simply to get a better outcome for an individual client.

Sobhan: Or a class of clients...women for example.

Basil Fernando: Our movements as they currently exist have certain "no go" areas. Because we are not taking those avenues, we have limited options regarding rape, for example. How do you get a proper and just solution? There is so much rape because, to a great extent, the police and the system have a lot of defects and as lawyers we have not taken up issues of reform in these areas. Only when the incident happens do we make a lot of noise. Then hysteria is built and the state uses that to reinforce something that it wants to do. In many places there is an increase in crime where the state has failed to provide the proper machinery for the investigation of crimes, the police are very poorly paid, there are not proper investigators and they are overloaded with work. Given all those factors, the machinery of law is not working. But we have considered these to be "no go" areas. We don't do anything about the structural problems so all we can do is take the incident and start shouting.

Sobhan: Yes, this is what I like to call "cost free legislation". When a government responds to public clamor it does something that it thinks is going to be flashy and gain a lot of public support and it is not really dealing with the root problems. Maybe one of the things we can say in response to what Basil is saying is that the campaigns that we as lawyers

get involved in should look to the root causes of the problems before we look at the solutions. You can't solve the problems without analyzing the nature of the problem. So that might be one of the things that we might want to do.

Wilson: I see the question as one more of competing values and priorities and it seems to me that your organization decided that the value of a fair trial or the value of due process in some way outweighs that narrower value of the protection of women in that way. The couple of examples that came to mind was that in the formulations of the rape provisions in the international criminal court statute and the statute for the Yugoslavian tribunal, there were provisions that eliminated the term "consent" from the provisions for rape and there were also provisions which were originally enacted to protect women as victims which allow anonymity of witnesses. In the first of the cases in which they were used, they were actually used by a man to protect his identity because of fear of reprisals and it turned out to be a bad idea in that particular case because his protected identity allowed him to falsify evidence. So there was a question about the legitimacy of having established that and I remember reading a couple of articles in which the feminist position defended the rule and the due process side argued that they were a bad idea.

We are struggling with that issue in the United States, about what kinds of evidence should be permitted and the extent we compromised the defendant's rights in order to protect the victim. It's a hot debate in the US as well. Issues of sexual history are also fought out between due process people and feminists.

Sobhan: Yes, but I wanted this dialogue to be across the board - not just on women's issues.

Skip Gant: There is human rights organization that provides legal services to the poor, civil and criminal. Should such an organization represent a person charged with genocide? What is the impact of taking on such a case by a human rights organization in terms of how they are perceived by donors and the public. I think this is a critical issue in some of these countries.

McDougall: I would just add two points to the hypothetical situation. We are taking about an organization that has as its mandate to take all cases and that this person otherwise meets the eligibility criteria of the organization.

Sobhan: Well, by giving those two last points, you have negated what I was going to say which was that by definition, the person would not fit the criteria. If they are a legal aid organization, they are mandated to do this because they are a legal aid organization and as Gay said that genocidal person, despite his great powers of murder, fits the means test. I think my concern is whether in fact someone who is a legal aid practitioner can make those sorts of decisions about a person or not. I think that the way I see it is that certainly as a legal aid organization, one would be expected and bound to intervene if there was lack of due process in a trial that was taking place. If one knew that this person, horrible though he was, was being held in prison and beaten up and being generally mistreated, I think as a legal aid organization one would be bound to intervene at that stage. That is one of the whole things behind the penal reform issue. As to the question of whether we would be bound to take the case, I don't want to give a blank answer to that. I think you would have to look at the circumstances and see why no one else was doing it. Take the Skokie incident - this was when a neo-Nazi group asked permission to march through an area where there were a lot of holocaust survivors and I think the mayor refused and the Nazis went to the ACLU and they backed that

right. I actually never agreed with the ACLU about the march although I can see the way they got there. In the case of someone guilty of genocide, I'm certainly willing to see due process, I'm not necessarily willing to stand up and argue for them in a court of law. It's a very personal answer and I don't know that I could formulate a legal response but I'd like help.

Bongani Majola: I think the issue that Skip raised in an important one but I what I don't understand is that the debate seems to be proceeding from the assumption that the person is already guilty. My sense is that in many democratic dispensations one of the measured principles of democracy is the adherence to the principle that the person in innocent until proven guilty so I don't know at what stage you get to the conclusion that you are not defending the person because you know the person is guilty. Have you seen this person committing genocide or it is alleged and you have no firsthand information?

Sobhan: I was assuming that you did have firsthand information.

Majola: My sense is that I would defend this person because the governments that I have lived under, including homeland governments, in order to remove you from society they simply drum up charges against you. The possibility exists that they are drummed up charges and for that reason alone I would defend the person.

Sobhan: I don't think anyone would have any problems with that but I was assuming that you had some additional knowledge of what went on. For example if the person came to you and said that, "Well, I was part of this mob and I didn't know what I was doing, will you defend me."

Majola: But in that case you know and it is no longer an issue.

Gant: In this case it is simply an allegation and the person had been taking into custody and accused of being part of a genocidal regime...that's it.

Sobhan: Let me throw another question back because this question is different from where someone is taken into custody and charged with rape and there is a victim there who is saying that this person raped me. What sort of situation do you have there. I'm just throwing that out. In genocide, you don't know because the people are dead. In the rape case, there is a victim who says that this man raped me and you are taking his case against me. This is a much more likely problem and one that is equally difficult to answer.

Vincent Yang: I read an interesting article written by one of OJ Simpson's defense attorneys entitled, "How Can You Defend These People?" He wrote that these guys might be guilty but the point is that it is not up to the lawyer to decide whether the defendant is guilty. The defense attorney's responsibility is to make sure that he gets a fair trial.

Sobhan: Yes, but if we are talking about legal aid and we have agreed that we are going to turn away some indigent people because we have to make choices, if you are turning away people simply because they are individuals, why would you have less autonomy in this case? Why can't you say, "I'm not doing this case – go somewhere else."

Fernando: Behind this discussion I see a big danger which I have seen in many places. One of the biggest attacks that the socialist system made against the fair trial system is that you are taking the side of the accused when you should be taking the side of the victim. People in Cambodia are very familiar with this argument. It's the State that puts forward that argument: We are trying to help the victims and now you are trying to help the criminal. Behind this, if human rights degenerate into an ideology, that prevents the basic rights of people to defend themselves then I think we are not

progressing in the human rights movement - we are going backward. The issue is that whatever the crime people have certain norms by which they should be judged. It is these norms that determines whether you take over cases or not and protection of these norms are much more important to keeping the human rights standards. What better way to condemn someone accused of genocide than to give him the best trial possible and at the end of it let everyone see that he gets the rights that he denies to other people. This idea of public opinion trying to punish people - this is going back to the Middle Ages when the church came forward and used mass pressure to punish people for having children out of wedlock. It is the same ideology.

Sobhan: Is this one of the principles that we are trying to get at? That a lawyer cannot prejudge an issue? That prejudging an issue is not part of a human rights lawyer's brief. In other words, it is not just that s/he would see fair play but that s/he has to play an active part.

Fernando: And be ready to be unpopular. The legal profession has never grown with a lot of popularity. It has always been an unpopular thing to defend criminals.

Sobhan: I agree that it is unpopular to say that the rapist deserves the benefit of the doubt.

Bob Spangenberg: In the US, there is no question. Assuming that this person was indigent, there would be no question...the lawyer must accept the case – they have no choice. The only leeway would be if the public defender had 20 lawyers and one of the lawyers employed by the agency refused to accept the case and there was another lawyer in the agency who was willing to take the case. But the agency itself must take the case under the Constitutional Rights of the 6th amendment. There is no choice.

Chandra Kanagasabai: Something that Basil said triggered a thought of a case that I was involved with. This was a case of a Vietnamese refugee who was kept in a camp in Malaysia who murdered a fellow refugee over a young woman and when I was asked to defend this case. I thought I should try to figure out why he did this because he had spent such a long time trying to get out of Vietnam and within the first ten months of his freedom in a detention camp in Malaysia, this had occurred. When I talked to him I discovered that had had made several unsuccessful attempts to leave Vietnam and it was on his third time that he succeeded and in the first two attempts he had been thrown back into jail. His reason for wanting to leave was that he was persecuted because of his religion. Prior to that he was a teacher who would not teach what the Viet Cong wanted so they made him clean toilets as punishment. When you take the whole story it is a lot for any one human being to go through. And I considered the whole thing, and wrote to the attorney general and said that in light of all that he had gone through maybe they should reduce the charge because this was a man who had gone through so much. But then you think of the other victim who also was in the center and who had so much hope and then died and then think of the girl who would never be the same again. But nothing would have been served by having a trial, fighting the case, perhaps getting him off on a technicality. Everybody's life can only move on if we look at the situation as a whole and perhaps realize that no matter what happened it has to stop here and things have to move on. So he agreed to plead guilty of a lesser charge and the upshot was that he was sentenced to nine years in prison and reduced to six. The point is that as a legal aid lawyer sometimes you have to make a decision after

you look at all the facts. Its not just that you want to act for the accused or for the victim but its that you want things to move on from there.

Sobhan: So how would you put that in some snappy way?

Kanagasabai: A lawyer must take the interest of society as a whole?

Sobhan: Yes, it is a good point that there is a wider picture than just being a lawyer for the person. You are serving a wider societal purpose by being part of the due process.

Majola: What strikes me as being difficult to understand is why are we grappling with this problem at all. I come from South Africa and my experience there has been that you find dictators coming in and passing all kinds of laws and building jails and they end up in those jails being judged according to those laws. So there are no human rights that exist for some that do not exist for all. If you are a human rights lawyer, you should make sure that there is a standard of human rights that applies to *everybody.* If you create exceptions than one day, you will fall into the exception. And my sense is that if our starting point as a measure of principle is that a person is innocent until proven guilty we should take a case. We cannot say that because they say the person did XYZ that we are not taking the case. If we do we are weakening the job that we are trying to do and we are weakening human rights. We have got to take all those cases. If Skokie were to happen in South Africa, if the AWB were to fight to march in Johannesberg and the ANC Government refused to allow it, I would not think twice about taking the case. Because next time it will be someone else who wants to march and this will be quoted as an example to say that under certain circumstances you can't march.

Sobhan: So I think that if we were to go back and formulate what we were talking about, the point is that even in very emotive issues like women's rights issues, it is still not legitimate to go along with certain amendments to the law which go against people's basic fundamental rights like the moving of the burden of proof and holding people without bail. This principle is then expanded by Skip's question about whether as human rights lawyers in our private practice should we afford ourselves the luxury of sitting in judgement (privately) on issues that we are asked to defend. I think fairly unanimously, those who have spoken from Chandra who says, "You may be able to negotiate with the accused so that he may plea bargain for a lesser charge," to Bongani who says that it is not your job to second guess when someone says that they are innocent. It is your job to become part of the process.

So you cannot do one without doing the other – as a legal aid organization interested in human rights you have to be there to serve everyone who comes before you and is part of your clientele. So I don't think that anyone has any problem with that but I think it is important to spell it out. I think lawyers do get a lot of flack because they are seen as defending the rich criminal when s/he should be going to prison. And there are situations when that does happen but behind that situation is a more basic situation which is something we should not lose sight of.

Sok Sam Oeun: In Cambodia right now some former Khmer Rouge leaders are facing trial in the not too distant future on charges of genocide. Every family in Cambodia lost someone during the genocide. This question was raised within my organization and we agreed that as human rights lawyers we should represent any case because we respect human rights, we respect the presumption of innocence, and we respect the right to council. But we ran into another problem

which is that in a case such as the Cambodian genocide, where everyone in the country has lost a family member, it may be very difficult to find a lawyer who feels that they could represent the accused effectively. And we should certainly show respect for the sentiment of the lawyer. This is also important to think about.

Sobhan: But then you are getting back into the same situation where you are making judgements about whether the person is guilty or innocent. If you have a prejudice against a person who is accused of genocide then you are in the same position as the example that Skip gave.

Fernando: But if you feel like you could not do a good job as defense council, then you should not take up that case.

Sobhan: But then you are making a personal judgement, aren't you?

Gant: But you are making a judgement about your own personal capabilities.

Sobhan: Yes, his personal capabilities because somewhere at the back of his mind, there is something about the client that is upsetting him.

Fernando: For personal reasons, not on principle.

Sobhan: Yes, but your personal reason is that because you have been a sufferer in this situation, anybody who had been tainted by suspicion you could not deal with.

Majola: But I think the point is simply this: That any accused person is entitled to competent, fair defense and that if you are already prejudice against people of that class you are not likely to do the best you can. In other words, the element of competence would be lacking and then you decide not to defend that person not because you find it objectionable but because you think the person is entitled to someone who will do the best that they can. You know because of the feelings you have you are unlikely to do the best job.

Sobhan: But it seems to be to be a very fine point - sort of hairsplitting for a reason which is acceptable and a reason which is not acceptable.

Michael Kirby: I have three points: First, as to the point of taking on unpopular causes, I agree with the point that was made earlier in that sometimes things are unpopular at a particular point in time but a couple of years later they are all the rage. For example, a couple of years ago when I was in Australia and was a young lawyer in the Council for Civil Liberties, we very rarely talked about aboriginal issues, we almost never talked about women's issues and we absolutely never talked about gay issues. And now they are real civil libertarian questions. So what is unpopular at one point can sometimes come to be seen in a new light. So I think it is important for lawyers to keep their minds open and to realize that we don't ever have the full truth – we are all discovering truth as we are developing. It is important for us to keep our minds open to new perceptions of human rights. Human rights are always developing and our wisdom and our ability to see them is, we hope, advancing as well.

The second point I want to make and I make this as a judge. I agree a little bit that there has to be commitment and there has to be passion but really, (and I say this to you as a judge) it has to be passion controlled by knowledge of the law. If you are all passion and you are not looking at the matter from the point of view of the law, and of the principles to be applied, you are not doing a good job for your client. What is needed is passion which is informed, and disciplined and able to really make it hard for your opponent. And so I think it is very important to keep in mind that fact. As well as that, it is important not to prejudge - that is the job of the judge and jury. And in fact our system of law only really works where this is so.

Now, the third point I want to make is that it may be that some amendment to the United States Constitution requires lawyers to take all cases but that is your funny old constitution and it does not apply to the rest of the world. We have to break this gently to Americans – they seem to think that their Bill of Rights applies everywhere. Well it doesn't. And the rest of us have a very practical problem that the chairperson raised. That is that if you have scarce resources, you really have to do a triage. You have to choose which cases you'll do and no constitution will solve that problem. You have got a certain amount of resources which are exceedingly small in comparison to the obligation that you have got to do. So there have got to be principles for deciding which cases have priority and which cases you'll take on and I think its just ignorant of economic choices to say that you have got to do them all because in practicality you generally can't.

Sobhan: I have a question for the rest of the group: Would it be justified in a rape case for me to say that I don't believe that the accused necessarily committed the crime, but I empathize so much with the rape victim that there is no way I can argue for the defendant. Would that be alright?

Group: YES!

McDougall: But the other thing is that you can decide beforehand to limit your caseload to for example, particular legal problems faced by women. I think that the problems we are raising here are ones where the decision has already been made to take every case that comes forward where someone is accused of a criminal offense. We agree that you can make strategic decisions about case selection...

Sobhan: That has been a broader principle rather than a personal question.

McDougall: That's right...and that is another kind of organization but the question is: If your organization is one which takes every criminal case that comes before it, can you/should you as a matter of institutional decision decide that if someone comes forward who is accused of genocide that because of the heinous nature of the accusation, could you decide not to take the case?

Kanagasabai: I just want to say one thing in response to what Justice Kirby said about passion. When we were talking the other day about passion and I wanted to make it clear that we were talking about it in the context of legal aid lawyers having a passion for their work and the focus was on justice and not on unbridled passion as in losing sight.

CHAPTER 16

Seven Lessons Of Bangkok

By The Hon Justice Michael Kirby AC CMG[1]

SEVEN LESSONS

It is in the nature of human experience that we perceive things through the filter of our own lives. Seeking to derive lessons from this practitioners' forum, each of us will take home instruction from the many vigorous interventions as they impinged upon our own thinking. In offering these closing remarks, I can do no more than to collect some of the chief thoughts as they seemed important to me. Doubtless each participant would have his or her own lessons to list and to think about. My list has no special authority. But it may help to organise the reflections of other participants. And, to some extent, it is likely that we will all have drawn common conclusions.

[1] Lately President of the International Commission of Jurists. Laureate of the 1998 UNESCO Prize for Human Rights Education. One-time Special Representative for the Secretary General of the United Nations for Human Rights in Cambodia. Justice of the High Court of Australia.

RESPECTING DIFFERENCES

The first lesson we have learnt is the danger of engaging in too many generalities. The situation in each of the countries represented at this forum is different. The problems for the rule of law and for legal aid are different in each country. Thus, in the case of East Timor we were informed that those who are struggling for independence have no real faith in the independence of the courts or the capacity of courts to provide strong decisions: striking down lawlessness and upholding neutral principles. In Burma, although the situation is different again, the report of the removal from office of five of the six judges of the Supreme Court, indicates vividly the fragility of judicial tenure in that country. Yet tenure and respect for the judicial office are essential to upholding legal decisions that maintain the rule of law and fundamental rights. In China the reports on the provision of legal aid by university institutions was greatly encouraging. So are the indications of the steady growth of legal rules and judicial institutions in that great country. However, particular difficulties continue to be experienced where the litigant may wish to challenge governmental power in cases having a political context. Furthermore, given the size of China, its vast population and the multitude of legal disputes that must be coped with in the expanding court system, the capacity of universities to afford meaningful legal aid on a national scale must be doubted. In Malaysia, which has an established legal tradition, events of the past decade have undoubtedly caused damage to the reputation of the courts. Yet the Bar has remained strong and independent. Even in Sri Lanka, we were informed of new problems that have arisen in respect of the independence of the judiciary. Concern has been expressed about aspects of certain appointments to the Bench and about

the reliance of judicial officers on the Executive Government of the day for promotion both within Sri Lanka and to international tribunals.

In my own country, Australia, in the past decade or more, we have seen the spectacle of the legislative abolition of State courts and tribunals with the consequent effective removal from judicial office of people having the title and functions of a judge. So no country is without difficulties and problems. It cannot be assumed that the rule of law is completely safe anywhere. There is a need for vigilance. In considering the work of practitioners and the utility of legal aid, it is necessary to keep steadily in mind the differences that exist between jurisdictions. Generalities have only a limited utility.

PROFESSIONAL LEGITIMACY

The legitimacy of practitioners derives from their performing the work of representing individuals, corporations and governments before the courts. This forum has certainly brought home the importance of research, of the gathering of statistics and information and of discussion amongst practitioners and specifically those engaged in the provision of legal aid. All of these functions have legitimacy and importance. However, the true foundation of the activities of legal and paralegal practitioners lies in the work they actually do in advising and representing others who have problems of a legal character. Discussion and analysis is no substitute for giving advice to a client looking anxiously across a desk. Or rising in a court room at the table in front of a judge, magistrate or tribunal and putting forward the arguments which the client would advance if he or she had the same training and experience with the courts. The foundation for research and the true basis of cooperation between legal practitioners and institutions depends upon actual hands-on work in the

business of the law. That is what gives legitimacy to the activities of practitioners and entitles them to call themselves lawyers.

REGIONAL AND INTERNATIONAL COOPERATION

An important lesson of the forum is the necessity, in today's world, to achieve cooperation between individuals and institutions operating in a number of jurisdictions. Whereas in the recent past the law was substantially, if not entirely, bound to a particular national jurisdiction, times are changing. Every legal jurisdiction must now operate in the context of its region and the global economy. That is why initiatives such as the Mekong Regional Law Center, established in Thailand, are so important. But it is necessary to explore not only global and regional contacts of a general character. There are particular legal problems which have been called to notice in this forum which require transborder cooperation if they are to be tackled effectively or at all. One such problem clearly relates to trafficking in women and children, principally for the purposes of prostitution. But there are many other transborder issues that require transborder legal cooperation. The legal problems of people living with HIV/AIDS may be instanced as examples. The general problem of discrimination against foreigners and refugees is doubtless another issue of this kind.

THE UNPOPULAR CLIENT

One of the most important discussions of the forum concerned the obligations of the legal practitioner to represent a person accused of horrible crimes or offensive activities. Problems of this kind present the universal dilemmas of personal responsibility and professional duty. There was a general consensus that practitioners ought not to pre-judge the guilt of a person accused of crime. Such determinations are the re-

sponsibility of the court or tribunal before whom the accusation is made. Courts and tribunals only operate effectively and with manifest impartiality if those who are accused can be properly represented before them. Without such representation the proceedings may be little more than a charade.

To secure the rule of law it is necessary to ensure that unpopular individuals are defended to the best of the practitioner's ability. Popular majorities can generally look after themselves. The rule of law is tested when the person before the court is a member of an unpopular minority or is accused of heinous crimes. Thus, there was a general consensus that a person accused of a grave crime of genocide was in need of representation which ought not to be denied by legal aid authorities simply because the accused may be guilty or the accusation is specially horrifying. Legal aid authorities must operate on this footing.

Two qualifications were mentioned to limit an absolute obligation to accept every case involving a criminal accusation. In the first place, if a practitioner felt personally incapable of putting the case with the vigour and commitment that is the client's right, that particular practitioner would be personally disqualified. But such a conclusion should not be reached too readily lest an unpopular accused find himself or herself without legal representation. Practitioners must represent and advise saints and sinners. They should beware of prejudgment. True professionalism requires the putting to one side of attitudes of prejudice. Every individual is entitled to proper representation. To an extent, the graver the charge, the greater is the need that the representation should be strong and effective.

A further qualification relates to the funds available for legal aid. Many of the participants drew attention to their limited resources. In this sense, they must perform the kind of triage choice that are made every day in the provision of

health care. Practitioners must ration the legal assistance they can give in accordance with the resources they have available. This is true of the wealthiest countries. And it is certainly true of those in the South-East Asian region and in China where the demands are great and the resources of legal aid are still very small.

JUDICIAL INDEPENDENCE

All participants emphasised the vital importance of judicial independence. Unless courts and tribunals are independent, the utility of representing an individual before them will be distinctly limited. If a decision is predetermined, the individual may have excellent representation and abundant legal aid. But it may lead nowhere because the proceedings in the court or tribunal are but a farce or a pretence of law and justice.

Article 14.1 of the *International Covenant on Civil and Political Rights* guarantees that everyone should be equal before the courts and tribunals. In the determination of any criminal charge or of rights and obligations in a civil suit, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The three requirements of competence, independence and impartiality state the essential prerequisites to the achievement of the rule of law. The scope for derogations from these prerequisites is great. They go beyond bribery or direct intervention in court proceedings by the government. They may include self-censorship by supine judges anxious to win the favour of the government on whom promotion and personal advancement may depend. Departures from the requirements of competence, neutrality and independence of courts and tribunals must be called to the attention of the community by judges and tribunal members and also by the independent legal profession. A point given great emphasis during

the forum was the central role which an independent Bar plays in upholding the integrity of the courts and thus the observance of the rule of law.

Several participants suggested the need for effective complaints mechanisms concerning judges and tribunal members whose competence, neutrality and independence are questioned. The institution of continuing education for members of courts and tribunals was also emphasised. The provision of such training is now generally accepted in all parts of the world. Immediately prior to my participation in this forum I took part in a conference in Belfast, Northern Ireland connected with the peace process in that Province. The conference was examining, amongst other things, the institution of formal judicial training in human rights questions in Northern Ireland. Provided such training is substantially in the hands of the courts and tribunals themselves, it will not involve any diminution in their independence. On the contrary, it will enlarge the capacity of their members to respond adequately and competently to the problems that are presented to them.

LAW REFORM

Many of the interventions in the forum called to notice the obligation to extrapolate from the experience of particular cases and to consider the needs of law reform which they point up. In Cambodia, the legal defenders have been engaged at the one time in the representation of individuals before courts and tribunals but also in the building of the legal system which was so shattered and almost destroyed by the years of war, revolution and genocide. But particular cases may highlight the need to change the law. The rule of law envisages a constant vigilance to ensure that the law being enforced is just, relevant and up to date.

Take for example the trial of the former Malaysian Minister, Mr Anwar Ibrahim. In so far as the charges against him relate to the crime of sodomy, a question is starkly presented: should such a crime remain on the statute books, at least so far as the "offense" is alleged to have occurred in private and between consenting adults? In the many jurisdictions where this offense has not been abolished, it appears to be one of the most unlovely legacies of the criminal law introduced to its former colonies by Britain. Practitioners should not blindly assume that the law is always just and appropriate. Sometimes laws inherited from other times and other places need to be carefully re-examined for their relevance to contemporary society.

The so-called emergency legislation in force in a number of former British colonies, taken up and continued with unseemly enthusiasm by the successors to the colonial rulers, represent another example of a case in point. Practitioners who see the law in operation are better informed about its defects than most citizens. It is their duty to call defects in the law to public notice. It is essential to have appropriate mechanisms of law reform constantly to submit the law to scrutiny, modernization and renewal. Only in this way will laws that are no longer appropriate be removed from enforcement. The rule of law does not require blind, unquestioning obedience to every law. It assumes a law-making system which will adapt the law where necessary so that it is in tune with society and its sense of justice.

THE BOTTOM LINE: FUNDING

The endemic problem of legal aid bodies, wherever they exist, is that of obtaining adequate funding for the many demands placed upon them. To some extent legal practitioners can provide assistance by offering their services pro bono. Yet a number of participants pointed out that this has its

limits. It is always necessary for practitioners to earn their living. They cannot be expected to devote more than a proportion of their time to work free of charge. Similarly the provision of foreign aid presents various difficulties. In China the government has refused to permit agencies to accept foreign aid to fund the actual representation of persons in court; limiting foreign assistance to activities of a general kind such as research and analysis. It emerged during discussions that some countries, such as Burma, are completely cut off from the kind of foreign aid such as has been afforded to the Cambodian Defenders Project. Several participants suggested that a lesson should be drawn from the experience of foreign aid funding during the apartheid years in South Africa. Although at that time foreign assistance was denied to the government of South Africa and its manifestations, it was largely maintained for the non-governmental organizations which represented the victims of apartheid before the courts. A similar discernment is necessary in many other countries where the victims of oppression and harsh laws are in need of legal representation which cannot presently be met by available legal aid.

Yet even if foreign aid funding could be maintained and expanded, the problem of ensuring proper representation before courts and tribunals of all those who have serious cases to present or defend, remain. This is why in a number of countries great attention is now being paid to the delivery of legal services. The adaptation of legal institutions and procedures to ensure that people can adequately put their cases themselves where they cannot get legal representation, is a common theme. It must march in parallel step with the expansion of legal aid. No court system should ever be so distant from the citizens which it serves that it appears an alien place. Courts work best where litigants are represented by

legal practitioners. But where they cannot be so represented or prefer to represent themselves, it is necessary that courts and tribunals should bring justice to their cases.

LESSONS OF EXPERIENCE

One of the most fruitful opportunities which I enjoyed for work in our region arose during the years (1993-1996) when I served as Special Representative for the Secretary-General of the United Nations for Human Rights in Cambodia. In that time I had the privilege to work with colleagues in the United Nations and with the Royal Government of Cambodia and many Cambodian organizations and fine individuals. I learned to respect the human rights groups which have grown up in Cambodia. They are the flowers of the garden of the United Nations which will take root and grow and renew themselves to strengthen the infrastructure of a society which defends the rule of law and upholds fundamental human rights. It cannot be expected that this will be achieved overnight. It will take time. In my work in Cambodia I learned that it is necessary to have both patience and impatience in equal measure.

I will never forget the anxious eyes of the judges of Cambodia as I talked with them about the requirements of competence, neutrality and independence. Their work is difficult. Their training has not always been sufficient. Their remuneration is inadequate. The law which they apply is frequently uncertain. I was convinced that most of them were truly dedicated to performing their duties with integrity to the best of their skill and resources. I developed a healthy regard for the Cambodian Defenders who have filled the gap in the legal system because of the lack of trained lawyers. They continue to fill that gap and they still enjoy my admiration.

Few countries have suffered such a devastating blow to their legal institutions as Cambodia did. Yet in Cambodia and in the other countries of the region strong moves are afoot to build rule of law societies. It is impossible to have a strong and growing economy without a strong and growing legal system. That is why the subject matters of this forum have been so important for the people of the countries represented at it.

I congratulate the participants. I thank the organizers. I pay tribute to the International Human Rights Law Group and the Asian Human Rights Commission. I hope that this forum will be but the first of an ongoing dialogue between the bodies and individuals in the region that are making such an important contribution to building the rule of law. And in those societies in the region where the rule of law is absent, fragile or damaged, we must hope that the new century will replace the rule of power with the rule of law. And that legal practitioners throughout the region will play an honourable part in this transformation.

STATUS REPORT
Section I.

Institution	Date Est'd	No. of Staff Members*					No. of Off.	Est. Annual Budget	Source of income
		Pf	Pp	Sf	Sp	V			
Ain O Salish Kendra (Bangladesh)	1986	109					7	US$400,000	Grants donations consultancies
Alterlaw (Philippines)	1992	5	2	5	1		1		
Bar Council Legal Aid Centre (Malaysia)	1985	7		2		400	1	US$82,000	Bar Members
Burma Lawyers Council	1994	5	20	5			3/4	US$85,000	NOVIB, NED, F. Naumann Foundation
Cambodian Defenders Project	1994	34		24	6	3	5	US$1,000,000	USAID, Forum Syd UNIFEM
Center for Protection of Disadvantaged Citizens (China)	1992	10	6			40	2	US$50-70,000	
Commission for Disappearances and Victim of Violence (Indonesia)	1997	10		15		10	6		Local Community

*Pf= professional full-time, Pp= professional part-time, Sf= staff full-time, Sp= staff part-time, V= volunteer

STATUS REPORT
Section I.

Institution	Date Est'd	No. of Staff Members Pf	Pp	Sf	Sp	V	No. of Off.	Est. Annual Budget	Source of income
Free Legal Assistance Group (Philippines)	1974						15	Currently no funds	Formerly foundation
HAKAM (Malaysia)	1990	9					1	US$1,600	Memberships Donations
Legal Aid of Cambodia	1995	29		25			9		NOVIB, Degis
Legal Resources Centre (South Africa)	1978	48		51		2	5	US$3,000,000	Public Donations
State Legal Aid Center of Cantho Province (Vietnam)	1996	6	19				8		Government NOVIB
Surabaya Legal Aid Institute (Indonesia)	1980	9		6		5	2		YLBH
Yayasan HAK (East Timor)	1996	23				5	1		

STATUS REPORT
Section II

Institution	Type of Organization	Civil/ Criminal	Case Intake Policy	Activities		
				Litiga-tion	Emp ower ment	Ref-orm
Ain O Salish Kendra (Bangladesh)	Legal NGO	Civil	Internal merits of case	Y	Y	Y
Alterlaw (Philippines)	Legal NGO	Civil (labor)	-impact on community -available resources -institutional arrangements (other NGOs)	Y	Y	N
Bar Council Legal Aid Centre (Malaysia)	Bar	Mostly Criminal	-overriding public interest(no means) -OR comprehensive means test	Y	Y	N
Burma Lawyers Council	Legal NGO			N	Y	N
Cambodian Defenders Project	Legal NGO	Both	-income and disadvantaged	Y	Y	Y
Center for Protection of Disadvantaged Citizens (China)	University based	Civil	-cases involving women, disabled, seniors -caseload of center - cases importance or influence	Y	S	N
Commission for Disappearances and Victim of Violence (Indonesia)	NGO	Criminal	-human rights abuse- involuntary disappearance, state violence -structural case- impact -income and disability	Y	Y	Y

STATUS REPORT
Section II

Institution	Type of Organization	Civil/ Criminal	Case Intake Policy	Activities		
				Litigation	Empowerment	Reform
HAKAM (Malaysia)	NGO	Both	-all cases involving human rights abuses	Y	Y	N
Legal Aid of Cambodia	Legal NGO	Mostly Criminal	-income determination	Y	Y	Y
Legal Resources Centre (South Africa)	Legal NGO	Mostly Civil	-income or member of marginalized group -impact benefit many people in class -must fall within a program or project of the LRC's focus	Y	S	Y
State Legal Aid Center of Cantho Province (Vietnam)	Gov't Bureau	Both	Poor and ethnic minorities according to state policy	Y	Y	Y
Surabaya Legal Aid Institute (Indonesia)	Legal NGO	Both	-impact on structure/system -poor, powerless, uninformed	Y	Y	Y
Yayasan HAK (East Timor)	Legal NGO	Mostly Criminal	-human rights violations -structurally connected with the interests of less-advantaged groups	Y	Y	N

STATUS REPORT
Section III

Institution	Goals	Difficulties in accessing justice	Litigation Strategies	Overall results to criminal justice	Challenges
Ain O Salish Kendra (Bangladesh)	1. Promoting rule of law 2. Legal literacy 3. Representation	1. Delay 2. Court failure to see legal point	1. Increase access 2. Widen law's scope 3. Public Interest litigation	1. Immediate relief when successful 2. rule of law principles incorporated	- demonstrate expansion under the law for equitable decisions - obtain decisions based on legal arguments (not sentiment)
Alterlaw (Philippines)		1. Poverty 2. Lack of knowledge	1. Involve clients 2. Include policy advocacy	N/A mostly civil	- corruption - slow procedures
Bar Council Legal Aid Centre (Malaysia)	1. Representation 2. Legal literacy	1. Access to representation 2. Reluctance of courts to interfere in cases involving the State	1. Involve clients 2. Raise constitutional issues 3. Establish legal rights	- police and judiciary come up with a protocol for magistrates at remand hearings	- police harassment - coordination of trials with many defendants - limited resources/scheduling of lawyers time - dedication of volunteer lawyers
Burma Lawyers Council	1. Rule of law 2. Legal literacy	1. No rule of law			
Cambodian Defenders Project	1. human rights 2. legal literacy 3. represent-ation	1. access to represent-ation 2. gaps in law	1. target common problems 2. media	Slow improvements	- low police skills - too few lawyers - too few laws
Center for Protection of Disadvantaged Citizens (China)	1. Consultation 2. Representation 3. Legal awareness	1. Legal knowledge 2. Poverty	1. Group litigation 2. Media use	Many	

STATUS REPORT **Section III**					
Institution	Goals	Difficulties in accessing justice	Litigation Strategies	Overall results to criminal justice	Challenges
Commission for Disappearances and Victim of Violence (Indonesia)	promoting rule of law	1. Lack of knowledge 2. Lack of political will to uphold the law	1. Legal campaigns 2. Legal opinion	- not satisfactory	- court system
Free Legal Assistance Group (Philippines)	1. Public interest law 2. Changing law and social structures to be more equitable 3. Legal literacy	1. Knowledge of the law 2. Inadequate existing legal procedures and institutions	1. Change structures that generate injustice 2. Empower clients	- change system	- corruption - inefficiency - low morale among justice workers - lack of credibility in system
HAKAM (Malaysia)	1. Promoting rule of law	1. Lack of education 2. Intimidation	1. Expose unjust laws and discriminatory practices		- purposeful inefficiency - bureaucracy
Legal Aid of Cambodia	1. Representation 2. Promote rule of law 3. Legal literacy	1. Corruption 2. Lack of laws 3. Failure to enforce 4. No judicial check 5. Lack of independence of the judiciary 6. Lack of competence	1. Direct contact with clients	1. Show error of courts 2. Individual justice 3. Societal justice	
Legal Resources Centre (South Africa)	1. Representation 2. Law reform 3. Legal literacy 4. Alleviation of poverty through justice	1. Poverty 2. Illiteracy 3. Geography 4. Limited ability of gov't to deliver services	1. High impact cases 2. Law reform 3. Encourage negotiation and mediation	1. Rt. To fair trial est. 2. Raised rts. awareness 3. Removal of inequitable (apartheid) legislation	- inadequately trained judicial personnel - overly cautious courts - demoralization of the police and court personnel (i.e. criminal rts.) - shortage of funds

STATUS REPORT **Section III**					
Institution	Goals	Difficulties in accessing justice	Litigation Strategies	Overall results to criminal justice	Challenges
State Legal Aid Center of Cantho Province- Vietnam	1. Representation 2. Legal literacy	1. Education level 2. Difficult economy (poverty) 3. Geography	1. Bring lawyers to the rural areas	protection of legitimate personal interests	- ineffective system of justice - lack of population's faith in lawyers
Surabaya Legal Aid Institute (Indonesia)	1. Legal literacy 2. Representation 3. Training paralegals 4. Networking	1. Participation of client 2. Short term goals 3. Failure of group action	1. Raise public awareness 2. Litigation as education 3. Litigation to reform system 4. Active client participation	ongoing process of awareness and empowerment	- understanding the client's viewpoint - lawyer's ability, skills and knowledge
Yayasan HAK (East Timor)	1. Promote rule of law 2. Legal awareness	1. Lack of independence and transparency 2. Extrajudicial institutions 3. Lack of faith in justice	- change unfair structures	- no change	- no official acknowledgment of lawyers - lawyers bargaining power and ability to influence is limited - political situation - security situation

STATUS REPORT **Section III**			
Institution	Community's Awareness	Expectations of the System	Alternative Dispute Systems
Ain O Salish Kendra (Bangladesh)	Skeptical Cynical Reasonably knowledgeable	1. little positive expectations 2. anger at unjust decisions	Don't use because: elitist, patriarchal, gender insensitive, easily manipulated
Alterlaw (Philippines)	Low	1. vindication of rights 2. corrupt 3. slow	Indigenous cultural communities use customary systems which are not binding in the national system
Bar Council Legal Aid Centre (Malaysia)	Low	1. Expensive manner of seeking justice 2. Assumption of guilt or need to cooperate 3. Lack of understanding of criminal consequences 4. Legal aid is generally available	Penghulu Courts (village head) small fines but still by gov't sanction
Burma Lawyers Council	Very limited	1. Negative	
Cambodian Defenders Project	Low	1. corrupt 2. lack of understanding about independent judiciary	Community justice system especially for family disputes, mob justice
Center for Protection of Disadvantaged Citizens (China)	Basic		family disputes are handled by mediation
Commission for Disappearances and Victim of Violence (Indonesia)	poor	- negative	Community elders and mediation programs are common, unity consensus
Free Legal Assistance Group (Philippines)	very low- public perception that only lawyers can understand the law	negative	Arbitration law. Voluntary and compulsory arbitration in labor and Construction (Construction Industry Arbitration Commission)

STATUS REPORT Section III			
Institution	Community's Awareness	Expectations of the System	Alternative Dispute Systems
HAKAM (Malaysia)	mediocre to poor	- belief in justice - lack of faith in system	
Legal Aid of Cambodia	low	- correct application of laws creates justice - incorrect application hurts the community	Commune system, elder mediation
Legal Resources Centre (South Africa)	low among blacks higher among whites	- fair, based on equality, color blind - increase in crime, flight of foreign investors - unemployment, poverty increase	- through organizations
State Legal Aid Center of Cantho Province- Vietnam	gradually improving	- More access to the law - More access to lawyers	commune systems with mediation groups, however understanding of the legal system is low. Few use mediation
Surabaya Legal Aid Institute (Indonesia)	increasing	- some reliance	Mediation exists, but violations of agreements are brought to the court
Yayasan HAK (East Timor)	very limited	- resolve disputes - pessimism and doubt about independence	Indigenous communities use similar to court- priority for this organization

STATUS REPORT
Section III

Institution	Model Benefits/Limitations	Keys to Organizational Sustainability	Cooperation	Skills Training Needs
Ain O Salish Kendra (Bangladesh)	- can respond to clients who do not have "perfect" cases (assist with documents, etc.)	- abreast of current laws - improve legal skills	Yes	Everything
Alterlaw (Philippines)	- independent from government - financial constraints	- form law firm to handle for profit cases to supplement funds	Yes, a member is part of Bar Legal Aid Committee	- network to access substantive law and procedures in foreign countries
Bar Council Legal Aid Centre (Malaysia)	- large base of lawyers for expansion - partnerships with NGOs and increasing accessibility - budget constraints - voluntary, no full-time lawyers	- wider participation of volunteer lawyers - inculcating the right values on volunteers - expanding funding base	Legal Aid Bureau of the government International legal aid centres	- documentation - legal literacy and human rights campaigns - data and information compilation
Burma Lawyers Council	no current system		International Bar Association, Law Society of Thailand, legal academia	- computerized documentation system - trial observation
Cambodian Defenders Project	- huge demand - limited resources - limited laws - broad coverage	- clear mission - sound financial and administrative policies - international and local NGO support	Work in conjunction with the Bar Association, other NGOs and regional groups	- land law - trafficking in people - data and information collection, interpretation and presentation
Center for Protection of Disadvantaged Citizens (China)	-huge demand -limited resources	- quality of the services	Other legal aid centers by referring clients	- litigation skills - documenting evidence

STATUS REPORT
Section III

Institution	Model Benefits/Limitations	Keys to Organizational Sustainability	Cooperation	Skills Training Needs
Commission for Disappearances and Victim of Violence (Indonesia)	- can pressure government - networking - cooperation with other NGOs	- continuation of human rights abuses by State	professional association for legal literacy campaigns, and political issues to pressure government	- investigation - trial advocacy - documenting skills - law campaigns
Free Legal Assistance Group (Philippines)		- commitment of members (not funding)	Integrated Bar of the Philippines, other lawyers' NGOs, human rights NGOs, people's organizations, Amnesty International , Swedish Bar Association, Asia Watch, Regional Council for Human Rights in Asia, UN Special Rapporteurs	
HAKAM (Malaysia)	- lack of funding - lack of committed practitioners	- increase membership	Joint activities with the Human Rights Sub-Committee of the Malaysian Bar Council	
Legal Aid of Cambodia		- clear strategic plan - good budgeting - good management and leadership - specialization of staff	Bar Association of Cambodia, CDP, Human Rights NGOs, National Assembly, Ministries by workshops and conferences, working groups	- Management and leadership - effective case strategies - documenting evidence - creating profile cases - administration and computer skills

STATUS REPORT **Section III**				
Institution	Model Benefits/Limitations	Keys to Organizational Sustainability	Cooperation	Skills Training Needs
Legal Resources Centre (South Africa)	- operates under license and strict limitations from bar and law societies - depends on public donations which vary thus threatening program - wary of gov't sponsorship - can challenge gov't bc independent	- dealing only with high impact/relevant cases - clear strategic focus - rendering good, relevant, accessible services - devising income-strategies that decrease dependency on donor funding	Ad hoc cooperation with domestic associations	- effective case strategies - capacity to manage, monitor and report on projects - fundraising - developing a Board of Trustees
State Legal Aid Center of Cantho Province- Vietnam	- government attention - government assistance	- upgrade professional skills - improve sense of serving clients	Provincial Bar Association	- building effective case strategies - documenting evidence - defending skills
Surabaya Legal Aid Institute (Indonesia)	no answer	- commitment to advocating for poor - networking - community attention - community trust	Advocacy teams with Bar associations or other professional associations	- profile cases - building case strategies - documenting evidence
Yayasan HAK (East Timor)	- independence in designing and developing strategies - can establish networks and alliances without government regulations - alternative perspectives to the government - government limits environment for operations	- grassroots involvement	LBH, Legal Aid Institute, Indonesian Women's Association for Justice, Institute of Study and Advocacy in Jakarta	- lobbying skills - non-court mediation

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