A Human Right to Legal Aid

Danish Institute for Human Rights
2010

A Human Right to Legal Aid

THE DANISH INSTITUTE
FOR HUMAN RIGHTS

Danish Institute for Human rights
2010

Colophon

A Human Right to Legal Aid

Editors: Hatla Thelle and Paul Dalton

Publishing Editor: Klaus Slavensky

Layout: Carsten Schiøler

Production: Handy-Print A/S, skive

Published in Denmark, 2010

The publication was made possible with financial support from the Danish Ministry of Foreign Affairs

Table of Contents

Introduction
Paul Dalton and Hatla Thelle, DIHR 7

1 CONTEXTS AND CROSS-SECTIONS

A Human Right to Legal Aid; *Simon Rice* 15

Access to Justice and Legal Education: Challenges and Suggestions; *Thomas Geraghty* 27

Where there is no lawyer: a strategy to develop primary justice services; *Adam Stapleton* 39

2 CASE STUDIES

China:
China under transition to Rule of Law – the Role of Legal Aid and Advocacy organizations; *Huang Jinrong, Wang Fang & Hatla Thelle* 75

Malawi:
Access to Justice: the State of Legal Aid Services in Malawi; *Bruno Kalemba* 99

The Philippines:
Developmental Legal Advocacy: Meeting the Challenge of Relevance and Responsiveness; *Leo Battad* 107

South Africa:
Holistic Approaches to the Delivery of Legal Aid Services – the South African experience; *David McQuoid Mason* 135

Uganda:
Redefining Access to Justice: Informal Justice Mechanisms and Alternative Dispute Resolution; *Elinor Chemonges* 164

Zambia:
The Challenges of Fostering a Human Rights Culture and Best Practices in the Provision of Legal Aid Services: the Zambian situation; *Paul Mulenga*. 178

Indonesia:
Assessing the performance of court-appointed lawyers in Indonesian legal aid according to the international standards; *Uli Sihombing* 205

Russia:
Legal Aid in Civil Cases in the Russian Federation; *Anton Burkov* . 216

South Africa:
The Promotion of Access to Justice by University Law Clinics in South Africa; *Seehaam Samaai* 231

Appendices:

1. The Kyiv Declaration on the Right to Legal Aid, 2007
2. The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004
3. Resolution 100(XXX) 06 of the African Commission on Human and People's Rights Resolution on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System, 2006
4. Republic of Uganda Statutory Instrument, 70/2004, *The Advocates (Student Practice) Regulations*

Introduction

Paul Dalton & Hatla Thelle

In what ways does the provision of legal aid services contribute to the promotion and protection of human rights and what are examples of rights--based legal aid programmes that have achieved good results and which can inspire legal aid lawyers and experts in other countries? These were the questions posed at an international conference in Kyiv, Ukraine, which resulted in the adoption of the Kyiv Declaration on the Right to Legal Aid, 2007, which is attached as an appendix to this publication. The Kyiv Declaration underlines the responsibility of Governments to implement sustainable, quality controlled, legal aid programs that deliver legal aid services without discrimination to all people within their jurisdictions.

In the classical legal aid scenario, the timely intervention of a legal aid lawyer for an accused person in criminal proceedings will in many cases be instrumental in securing fair trial guarantees for his or her client. Furthermore, legal aid programs addressing the needs of vulnerable groups: e.g. juveniles in conflict with the law or women in abusive relationships, will by their nature serve to improve the access of these groups to legal mechanism, and may also be instrumental in protecting and securing fundamental rights and freedoms.

From a human rights perspective, the provision of legal services for the poor can be seen as an affirmation of and a means by which to strengthen the rights of the poor to recognition by and equality before the law. In many cases, however, the connection between provision of various legal services - on a spectrum running from the dissemination of legal information to representation in legal proceedings - and realization of human rights is not always so clear.

This publication examines the connection between provision of legal aid services and realization of human rights guarantees through a series of thematic and country-specific articles, drawn from experiences of authors from 13 countries in Africa, Asia, Australasia, Europe and North America.

In the opening article, Simon Rice argues for a right not only to legal representation, but to legal aid, as a corollary of a fundamental right of 'access to law'. The right to legal aid should be much more than State provision of

legal representation in (some criminal) trials, as it has been recognized in various regional and national courts and been incorporated into numerous national criminal procedure laws. It should extend to provision of legal services that make it possible for the individual to access those legal mechanisms and structures in society on which the realization of his / her rights depend. As he writes, 'the universally rule-based nature of our social existence gives rise to a fundamental right to effectively know the rules of society.'

In their articles, Uli Sihombing and Paul Mulenga describe some of the systemic challenges facing legal aid lawyers in Indonesia and Zambia in working to promote and protect the rights of their clients. The current Indonesian Criminal Procedure Code (CPC) provides for state-sponsored legal aid for persons accused of the most serious crimes, but is silent on the provision of legal aid for persons who do not have the means to retain their own lawyer. Likewise, the CPC is silent on the subject of legal aid for persons of reduced mental capacity, for juveniles, or, for that matter, for adults of full mental capacity who are unable to defend themselves effectively due to the complexity of the proceedings and of the legal issues involved. Non-governmental legal aid organizations are seeking to provide services to these groups of people, but there is a pressing need for Government to recognize the needs that exist and provide State funding as well.

In Zambia, a long-standing Supreme Court ruling that illegally obtained evidence is admissible so long as it is relevant to the issues before the court places criminal suspects at increased risk of torture or other unlawful treatment by criminal investigators. Furthermore, it reduces the incentive on the part of law enforcement officers to comply with the law in their search and surveillance activities.

Anton Burkov describes the legal and structural framework for provision of legal aid services in Russia today and the inadequacy of the system in practice as a mechanism for rights protection. In Russia many indigent Russians cannot access legal services either at law or in practice because the right to legal aid is narrowly defined in the law. Russian human rights and legal aid organizations are seeking to increase awareness amongst Russian judges and public officials of the decisions of the European Court of Human Rights, with a view to ameliorating the weaknesses in the existing Russian legal framework.

In the article on legal aid in China, Wang Fang describes an initiative by a

Beijing law firm in Beijing to provide legal assistance to migrant workers and their families, a group that previously had very limited access to legal assistance, despite the fact that they are vulnerable to workplace practices and subject to widespread discrimination with regard to access to education, health and social services. The legal aid program for migrant workers started by this law firm has since been replicated by similar programs in a number of other cities in Eastern and Central China, with support and training from the Beijing law firm.

Where court systems or mechanisms for the execution of judgments are dysfunctional, or where customary or other informal dispute resolution mechanisms are either inoperative or in conflict with international human rights norms, alternative legal assistance strategies may be called for.

In this regard, Leo Battad describes the experiences of legal activists in The Philippines who have developed a dynamic concept of legal assistance called 'Developmental Legal Advocacy' (DLA). The aim of DLA is to secure development for and empowerment of the poor and the oppressed so that they may participate meaningfully in the decisions and policies that affect their lives. 'Traditional legal aid', the provision of legal advice and representation to poor people, is of limited value to development, since it is actor, not structure-oriented and assumes that the law is just and that injustice results from the frailties of those who make or enforce the law. The objective of 'developmental legal aid', on the other hand, is not merely to enforce the law but, more importantly, to change the law and the underlying social structures which cause or sustain injustice and inhibit development.

In his contribution to the China article, Huang Jinrong relates the development of the legal advocacy movement in China. Over the past decade, a small but growing number of Chinese lawyers and legal academics have been seeking to harness the potential of law and legal mechanisms to achieve social change in Chinese society. The large majority of public interest lawyers have shunned dramatic gestures and avoided actions that might be perceived by the authorities as political in nature. Instead they choose to use the administrative and legal means at their disposal to draw attention to social problems and injustice: instances of discrimination, labor conditions, environmental protection issues, and others. In a few cases, lawyers have succeeded in achieving their goals directly through litigation. In most successful cases, however, the decisive element was public advocacy drawing attention to the issue in question; i.e. through a combination

of media coverage and targeted legal interventions. Through their actions, public interest lawyers promote the concept of respect for the rule of law within society and hope to achieve gradual but lasting improvements in rights protection.

More consideration needs to be given to relationships – as they currently exist and as they could develop over time – between actors in the public and private sectors. An explicitly rights-based strategy for legal aid programs has most commonly been pursued by private or community-based rather than State-funded or managed programs. But given that it is the State itself which bears the obligation to promote, protect and facilitate the enjoyment of human rights it is prima facie in the interests of all Governments to develop such programmes or to link its efforts to those of others who are doing so. These interests can be significantly advanced where the State maximizes the impact of its resource allocation to legal services by working closely with volunteers and non-profit organizations.

On this subject, Bruno Kalemba writes of the experiences of the Legal Aid Department in Malawi and of the recognition within Government that active co-operation with non-government legal aid providers is the only way to combat the gap between resources and needs. Experience from many countries across continents points towards a need for more active co-operation and resource-sharing between State and civil society initiatives, based on a foundation of common values, goals and objectives.

In a 2005 report, the Malawian Law Reform Commission (MLRC) recommended that the phrase 'legal aid' be redefined to include legal advice, assistance, and education. Such a change would expand the legislative scope of legal aid and expand the field of legal aid providers beyond criminal defence lawyers to also include paralegals, law students, schools, library services, and adult trainers. It would be a decisive move away from the traditional view that legal aid and legal representation are synonymous and can only be provided by lawyers.

The Malawian law reform proposal reflects what is already taking place on the ground and in many other countries in Africa and further afield. The role of paralegals is gradually becoming accepted as an essential and integral part of all legal aid systems.

In his article Adam Stapleton argues persuasively for a paradigm shift in legal aid thinking away from legal professionals and towards an increas-

ing and decisive involvement by paralegals and 'bare-foot' (that is, not formally trained) lawyers. In most African and Asian countries, very few lawyers are located outside the large cities. If legal services are to be provided at all to people living in these countries, it will be through paralegals and non-lawyers, not through the legal profession. On the same theme, Elinor Chemonges illustrates the decisive role that paralegals are playing in many African countries today in providing access to justice for poor people through her description of the work of the Paralegal Advisory Service in Uganda.

Tom Geraghty writes in his article on clinical legal education, that the legal profession in Uganda has even gone a step further than paralegals and recognized the important contribution that students of law can make to increase supply in an overburdened and under-resourced legal aid sector. The involvement of students of law in legal aid provision, with appropriate guidance and monitoring from their teachers or from qualified lawyers, is not only a good way to make legal aid funding go further, it also places in the hearts and minds of the next generation of legal professionals a sense of social responsibility and an understanding of the potential of the law as an instrument for social justice and reform.

The same mechanism is used extensively in South Africa. Seehaam Samaai relates the experiences of South African university legal aid clinics in working together in 'clusters' to increase the scope and financial sustainability of their activities. The university legal aid clinics were the first organizations in South Africa to focus on providing access to justice for poor South Africans. In recent years, the State's contribution to legal aid service provisions for the poor has increased markedly. Nevertheless, there is still an important role to play for the university legal aid clinics, as a supplement to other legal aid service providers and, as in Uganda, a training ground for the next generation of legal professionals and leaders.

David McQuoid Mason describes the South African experience of holistic approaches to the delivery of legal aid services; a mixed model for delivery of free or subsidized legal services is adopted where the clients can choose for themselves which of the 'offers' of assistance available are best suited to addressing his or her particular problem. A holistic system may arguably be better positioned to respond to the specific situation of the individual as the rights-bearer; that is, the person whose rights may have been violated by the State and / or are not being addressed by the State in its policy and programming.

As in South Africa, the Chinese legal aid system is also developing along holistic lines, despite obvious and marked differences between the culture, history and legal and political systems of the two countries. In her overview of the development and current status of legal aid services in China, Hatla Thelle describes a surprisingly wide variety of legal mechanisms and service providers, formal and informal. The Chinese Government has actively supported the development of legal aid programs by private lawyers and community-based organizations; it has also provided funding for Government-operated legal aid centres. The Chinese legal system is currently not capable of effectively protecting the human rights of its citizens, but within the space that does exist for legal aid providers to operate, positive results are being achieved, both for individual clients and their families, whose 'right to law' is being respected and realized, and for the community as a whole, which benefits from the influence of the work of legal aid lawyers and others who are working to publicize and remedy injustice and disadvantage in society.

The articles in this publication describe the difficulties faced by poor or marginalized people in accessing legal mechanisms and in safeguarding their legal rights. And they document some of the ways in which these difficulties can be overcome. A recurring theme throughout is the desirability of cooperation of a variety of state and civil society actors in delivery of legal aid services. The message of the book is that effective access to law is best facilitated through a holistic approach to legal assistance programmes and through the application of core human rights principles.

1
Contexts and Cross-Sections

A HUMAN RIGHT TO LEGAL AID

Simon Rice

Introduction

Legal aid programmes are widespread and spreading wider. They are part and parcel of the rule of law, and where the rule of law is, or is being developed, so legal aid programmes are, or are being developed. Nowhere, however, is legal aid a right, except within closely defined circumstances. Speaking to an international conference on legal aid and human rights,[1] was an opportune time to set out an argument for recognition of legal aid as a human right, a fundamental right for all people.

In this chapter I note first, the limited scope of 'legal aid' as it is commonly understood¸ that is, as being confined to the state's provision of legal representation in court. I then consider the cases and the human rights treaties in which legal representation in court has received some recognition as a right, and I conclude that even that right is available only in limited circumstances. In light of this not-very-encouraging analysis, I outline an argument for a fundamental human right not only to legal representation, but to 'legal aid' – access to law – in its fullest sense.[2]

Legal aid as legal representation

Legal aid commonly means nothing more than 'state provision of legal representation in court' and there, understood in that way, a right to legal aid in some circumstances. It is a right that has been found to be implicit, at least for some criminal trials, in various legal systems and in human rights instruments. To have established that right is a significant achievement. In a criminal trial, the state is at its most powerful, and the liberty of a person is most at risk. Because of a right to legal representation in criminal trials, countless thousands of people are represented and defended where they would not have been otherwise.

---

1) Conference on the Protection and Promotion of Human Rights through Provision of Legal Services: Best Practices from Africa, Asia and Eastern Europe Kyiv, Ukraine 27-30 March 2007.

2) Contributions to the important volume Francesco Franconi (ed.) Access to Justice as a Human Right OUP 2007, identify existing rights to procedures and remedies, but do not go further and speculate on a possible universal right of access to law at its broadest.

But legal aid could mean much more than legal representation, and a right to legal aid could mean much more than a limited right to representation in court. Instead, we can think of legal aid as providing public access to law that is preventive and protective, that brings change and hope that relieves poverty and promotes prosperity. We can think of legal aid as providing public access to legal information, to legal advice and to legal education and knowledge. None of this broad and bold conception of legal aid – legal aid beyond legal representation – is recognized as anyone's by right.

When there is legal aid beyond legal representation, it is provided for a range of reasons – Smith has suggested six: charity, poverty reduction, efficiency in the legal system, rule of law, lawyers' self-interest, and human rights.[3] Such legal aid is discretionary, provided by the state or by non-state actors as and when they can or wish. Indeed, some aspects of the full scope of what legal aid could be would never be provided willingly by the state; it is quite simply not in the state's interest to encourage the aggressive use of law as a force for change.[4]

As I argue below, the key to establishing a right to this broader idea of legal aid lies in a different understanding of the role of the state, and that different understanding is offered by the theory of human rights.

The right to legal representation

A right to legal representation is rarely stated explicitly. Rather, it is established by inference from the systems and institutions of the state. Superior courts and learned writers around the world have recognized a right to legal representation in some circumstances, through two ways of thinking: by implication in constitutional guarantees of equality, and by implication in a guarantee of a fair trial.

Criminal matters

In the United States of America, the Sixth Amendment limits an explicit constitutional right to legal representation to federal criminal matters. By reading this right with the separate constitutional right to due process in the Fourteenth Amendment, the United States Supreme Court in *Gideon vs*

3) Roger Smith, 'Legal Aid as a Policy', discussion paper to London School of Economic seminar Legal aid: a human right or a mere luxury, 28 January 2007, unpublished.

4) See e.g. Richard Abel, 'Law Without Politics: Legal Aid under Advanced Capitalism' (1985) 32 UCLA L. Rev. 474 at 528-9.

Wainwright[5] was able to infer a right to legal representation in *all* criminal matters. But what a court gives, a court can take away, and the United States Supreme Court subsequently limited the right to legal representation to cases when a gaol sentence is possible, saying that it is 'the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments' right to counsel in criminal cases, which triggers the right to appointed counsel'.[6] As a result, the availability in the USA of a right to legal representation, already limited to criminal matters, is subject to the state's discretion in prescribing gaol as a possible sentence.

The Australian High Court in *Dietrich*[7] gave Australians access to an even more narrowly conceived right. Recognising a right to a fair trial in Anglo-Australian common law, the High Court decided that 'depending on all the circumstances of the particular case, lack of [legal] representation may mean that an accused is unable to receive … a fair trial'.[8] The High Court cautioned that whether a trial will be unfair for want of legal representation is 'inextricably linked to the facts of the case and the background of the accused'.[9] The effect of *Dietrich* is that the state, depending on the circumstances, may be obliged to provide legal representation in criminal matters that are serious. Again this limited right to representation is further subject to the state's discretion, this time as to whether a criminal matter is classified as 'serious'.[10]

Non-criminal matters

Because *Gideon vs Wainwright* and *Dietrich* found the right to representation in criminal matters to be implied in the availability of other rights – due process and fair trial – they have been the basis for persistent, and persistently unsuccessful, calls for recognition of a similar right to representation in non-criminal matters.[11] A significant obstacle has been the refusal by courts and policy makers to treat the needs of a party in a non-criminal case as deserving the same right to representation that an accused has.[12]

---

5) 372 U.S. 335 (1963).
6) Lassiter v. Department of Social Services 452 U.S. 18 (1981) at 25.
7) Dietrich vs The Queen (1992) 177 CLR 292, [1992] HCA 57.
8) Ibid, at 309.
9) Ibid.
10) Generally understood to be a charge that proceeds on indictment before a superior court rather than summarily before a magistrate.
11) See e.g. Frances Gibson, 'Legal Aid: A decade after Dietrich' (2003) 41 NSW Law Society Journal 52.
12) See e.g. Lassiter note 7 above, where only potential loss of liberty is serious enough to warrant a right to counsel.

There is certainly an inequality of arms when an accused faces the state in a criminal trial, but the same inequality of arms occurs in many non-criminal matters that involve well-resourced parties on one side of a case. Sometimes (as in *Lassiter*[13]) that well-resourced party is the state. I agree with Luban when he says that there is a 'lop-sided emphasis on physical liberty over all other interests'.[14] It is a crude exercise, unsustainable on any rational basis, to measure the relative seriousness of one person being gaoled for a year with another person losing his or her home or family or means to earn a living.

On the few occasions when a right to representation in non-criminal matters has been recognized, the courts have always heavily circumscribed the right.

In Canada, in *New Brunswick v G*,[15] the state was a party in a non-criminal matter where the provincial Community Services Minister wanted to take a woman's children into care. The Canadian Supreme Court decided that when the rights of life, liberty and security of the person, guaranteed by s.7 of the *Canadian Charter of Rights and Freedoms*, are at risk (as they were in that case), the state 'is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the [party], the government may be required to provide an indigent [party] with state-funded counsel'.[16] As in *Dietrich*, a limited right to counsel, depending on the circumstances, is derived from the right to a fair hearing.

Similarly in South Africa, the Land Claims Court said in *Nkuzi*[17] that an effective right to a fair hearing obliged the state to provide legal representation, but only when it was required by the complexity and seriousness of the matter, and the limited capacity of the applicant, and the risk of 'substantial injustice'.

---

13) See note 7 above.

14) David Luban, 'The Right to Legal Services' in Alan Paterson and Tamara Goriely (eds.) Resourcing Civil Justice, OUP 1996 at 59.

15) New Brunswick (Minister of Health and Community Services) vs G (J) [1999] 3 SCR 46; 1999 Can. L. J. I 653 (SCC).

16) Ibid at 7-8.

17) Nkuzi Development Association vs South Africa (unreported); see generally J. Perelman 'The Way Ahead? Access to Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: The Nkuzi Case' (2005) 41 Stanford Journal of International Law 357.

Perhaps the best-known consideration of a right to representation in non-criminal matters is the decision of the European Court of Human Rights in *Airey*.[18] The Court observed that the state has a duty to secure for a person an effective right of access to the courts, and decided that, in some circumstances, the possibility of appearing in person before a court does not provide an effective right of access, saying that Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 'may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory … or by reason of the complexity of the procedure or of the case'. [19] But the Court was at pains to reassure the state that its conclusion 'does not hold good for all cases concerning "civil rights and obligations" or for everyone involved therein'. In terms very similar to those used in the decisions discussed above, the Court observed that 'much must depend on the particular circumstances'.[20]

In *Steel and Morris*[21], the European Court of Human Rights reiterated the conditional nature of any entitlement to legal representation in non-criminal matters, saying that '[t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend inter alia upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively'.[22]

In summary, courts have been prepared to imply a right to legal representation in court in a particular context, most usually a constitutional or common law or human right to fair trial. The right is most usually identified in criminal matters, and occasionally in non-criminal matters, and is limited by the subjective circumstances of the person and the case.

Reflecting on the 'right' to representation

Academic arguments for a right to legal representation adopt the courts' approach of finding a right by implication in a particular context. They have

18) Airey vs Ireland (1979-80) 2 EHRR 305, [1979] ECHR 3.
19) Ibid, at [24]-[26].
20) Ibid, at [26].
21) Steel and Morris v the United Kingdom (2005) 41 EHRR 22, [2005] ECHR 103
22) Ibid, at [61].

made the case for the right in non-criminal as well as criminal matters, and have looked beyond 'fair trial' as a source for the right, to contexts as local as the terms of a provincial constitution,[23] or as broad as a democratic political system generally.[24] When Luban argues for a right to representation based on the USA's constitutional guarantee of equality before the law, he recognizes that his argument is context-specific, and disavows any claim to be articulating a right to representation beyond the scope of the USA's system of law and politics.[25] Indeed, Luban doubts whether *any* transnational claim can be made, precisely because of the differing politico-legal contexts from one state to another.

Luban is correct for as long as the source for a right to representation is inferred from the processes and institutions of a state, and the right to representation that I have described above is always one that arises in a particular context, as part of a particular system.

Since Luban wrote, the type of processes and institutions in which he and others were finding a right to representation is now widespread and is rapidly spreading more widely. The western 'rule of law', with its associated democratic process, right to fair trial and guarantee of equality before law, is being exported and transplanted around the world, in particular through conditions attached to developmental aid funds and membership of economic and political communities.[26] The wide establishment of this particular legal system carries with it an associated implied right to legal representation. But it is a right that is available only in very defined circumstances. Most importantly, it is not a right that stands on its own; it is derived from processes and institutions of the state. Because the existence and nature of the implied right to representation is tied to the state's trial procedures, the state has the lawful power to define the right, to modify it, to interpret it, and even to deny it, by defining what is fair in a trial, and redefining the circumstances in which the courts say the right arises.

---

23) D. Perluss, 'Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice vs Fundamental Interest' (2003-4) 2 Seattle Journal of Social Justice 571.

24) F. Zemans, 'Recent Trends in the Organization of Legal Services' (1986) 11 Queen's Law Journal 26.

25) David Luban, 'The Right to Legal Services' in Alan Paterson and Tamara Goriely (eds.) Resourcing Civil Justice, OUP 1996 at 47-48.

26) See e.g. Roger Smith, 'Old Wine in new Bottles: Legal Aid and the New Europe' (2005) 2 Justice Journal.

The one constitutional statement of an explicit 'right to legal aid' is not all it seems. When the European Union's *Charter of Fundamental Rights* says that 'legal aid shall be made available to those who lack sufficient resources' (Article 47), it does so in the context of a right to a fair trial and the right to be advised, defended and represented. The term 'legal aid' is used there not in any broad sense, but only to mean state-sponsored legal representation. That is only the same right to legal representation that the courts have already said is implicit in a right to a fair hearing.

By spelling out the circumstantial nature of the right to representation, I do not mean to undermine its importance. However, the exercise does highlight that even this most prominent aspect of legal aid is contingent, and has failed to establish itself as a secure and broadly available right within the structures of the state.

If the right to legal representation is of such limited availability, then it is fanciful to think that courts, in any circumstances, will imply a right to a broader conception of legal aid. What is needed is a way of freeing a rights claim of its contingent provenance, and conceiving it in universal terms. This idea of a right's universality suggests the modern conception of human rights.

A universal right to legal aid

Identifying human rights

In the conventional contemporary account of human rights, the source of a human right is neither the state nor any particular system, it is the person. This is the key to its universality. A human right is a right that every person has; it inheres in the person, it is with each of us from birth, it is ours because we are human, and it is necessary to our living with dignity, to our exercise of reason and conscience.[27]

It follows that those who do not enjoy their rights are not without rights – they are deprived of their enjoyment of them. Impoverished people surviving under a cruel and oppressive state have human rights, but are deprived of their enjoyment. It is necessary to recall this because my argument is for the recognition in principle of a human right to legal aid; whether and how that right can in fact be enjoyed is a necessary but further issue.

27) Article 1, Universal Declaration of Human Rights.

The first answer to the question 'what are the rights that inhere in our being human?' is the positive statement of human rights in the *Universal Declaration of Human Rights* and the related International Covenants on Civil and Political Rights, and Economic Social and Cultural Rights. But there is little there that speaks directly to the relationship between the person and law: Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) speaks of the guarantee of legal representation in criminal cases 'where the interests of justice so require'.

The positive list of fundamental rights is, however, neither closed nor immutable. It is always the subject of exposition, debate, refinement and the pursuit of better understanding. Rights are interpreted, particularized, and augmented. Identifying a new right is not remarkable. Few would deny, for example, a human right to a clean and healthy environment, although no such right is clearly set out in the Universal Declaration or any related treaty. The claim for such a human right is argued for from first principles, supported by interpretation of existing rights such as the right to health, and a form of it now appears in Article 37 of the *Charter of Fundamental Rights of the European Union*.

It is possible, therefore, to explore the possibility of a new human right – not its creation but its realization, a right that might exist but has so far not been identified and articulated.

Identifying a human right of 'access to law'

The 'person' who is the source of human rights is not an abstraction or a specimen, but lives in society, exercising reason and conscience. Human rights are those rights and freedoms necessary for a person to function with dignity *in society*, in whatever circumstances, and whatever state, a person is. People's social relationships give rise to practices and expectations, to rules of behaviour, which become vastly magnified in their number and complexity as society becomes larger and more complex. Human life, in society, is universally rule-based. These rules – call them 'law' – may be oppressive or beneficial, setting limits or permitting conduct, denying remedies or enabling claims. Law in some form is, universally, a part of a person's environment.

I suggest that whatever polity is built on these rules, whatever system of laws develops, it is universally so that people's opportunity to live with dignity, and to fulfil their human potential, depends on their engagement

with rules that govern their relationships with each other and with whatever constitutes the social authority – what, for us, is the state.

We cannot live with dignity, exercising reason and conscience, if we do not know these rules, cannot comply with these rules, and cannot use these rules. Just as we must be able to express ourselves, to associate with others, and to have access to education, so must we know, and be able to abide by and use, the rules of our society.

This is fundamental. We cannot be human with dignity if, through ignorance of the state's rules, we face censure and sanction; if, through inability to use rules, we face loss and damage; if, through confusion about rules, we lose opportunity. The universally rule-based nature of our social existence gives rise to a fundamental right to *effectively* know the rules of society.

The established human right to take part in the conduct of public affairs is based on a very similar rationale. Article 25 of the ICCPR guarantees that right, which the Human Rights Committee describes as a right 'to an effective opportunity to enjoy the rights it protects . . . whatever form of constitution or government is in force'.[28] I suggest that just as it is a recognized human right for people to participate, and participate effectively, in the political system of which they are a part, so it is fundamental that people be entitled to participate, and participate effectively, in the system of rules – the legal system – of which they are a part.

As a fundamental human right, the right of access to law is held by everyone. It is a right that all people have at all times. Differently from the approaches taken by courts to identify a right to representation, it does not have to be searched for and inferred from a constitution or a legal system. It is not peculiar to certain types of matters. There is no room for a state to argue away the fundamental right, and there is a presumptive position that the right will be effectively available. Unlike rights created within and by the state, the state does not have the power to create, or to deny, a human right.

A common shorthand term for the 'right to take part in the conduct of public affairs' is the 'right to vote'. A shorthand term for the 'right to know, and

28) United Nations Human Rights Committee General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service CCPR/C/21/Rev.1/Add.7.

to be able to abide by and use the rules of society' could be the 'right of access to law'. Access to law envisages a broad and fully realized idea of 'legal aid', which includes, but is much more than, representation in court.

Implementing a human right of 'access to law'

The content of the right of access to law is not a right to a lawyer; any more than a right to free expression is a right to make a radio broadcast, or a right to education is a right to private tutoring. 'Access to law' means a right to be told the law, to be given the opportunity to know and understand the law, to use and comply with the law, to gain its benefit and protection.

How any human right is realized is a separate question from whether it exists, and it is an eternally vexed one. There is cost and complexity in giving effect to human rights, and there are inevitable limitations on the extent to which human rights can be realized in a state.[29] But the prospect of difficulties in implementing a human right cannot undermine the idea of the right itself.

The range of steps a state might take to give effect to a fundamental right of access to law is limited only by imagination: from wide publication of plain language legislation to transparent judicial appointments; from public training, education and information to simplified compliance and legal procedures. There are manageable and affordable steps any state can take.

This publication brings together examples of imaginative and effective initiatives to promote access to law: the long history of Community Advice Bureaux in the UK, the extensive use in Africa of paralegals[30] and traditional law systems,[31] the established networks of community law centres in

29) See e.g. the European jurisprudence on a 'margin of appreciation', which tolerates the exigencies of local conditions.

30) See e.g. Vivek Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide' (2006) 31 Yale LJ 427.

31) Penal Reform International 'Access to Justice in Africa and beyond: Making the Rule of Law a reality' PRI, 2006.

Canada and Australia, the internet-led revolution in accessible legislation,[32] and didactic television drama in Armenia[33] are only a very few.

These measures have often been taken apart from or in spite of the state, and have been motivated by a social justice ethos: a sense simply of what is necessary to be fair. A human right of access to law is a single comprehensive concept that underpins these measures.

Conclusion

Legal representation is one way of achieving access to law and, as cases like *Airey*[34] and *Nkuzi*[35] show, there will be times when legal representation is exactly the measure that is necessary. Rather than relying, as the courts did in those cases, on implications from trial processes, a right of access to law is an immutable basis for recognising a right to legal representation. Instead of being dependent on a right to fair trial, and on the court's deciding that the circumstances are appropriate, a right to legal representation will be recognized because in any court, in any place, at any time, there is a human right of effective access to law.

A human right of access to law is a universal and independent rationale for sustaining measures of access that do exist, and for advocating for measures that do not. It is a new and stronger starting point for practical debates about policy and expenditure in states' justice systems. It gives the state programme of legal aid, in all its variety, a pre-eminent place in social policy as the programme through which the fundamental human right of access to law is realized. It gives new meaning to a requirement, as is found, for example, in the Copenhagen criteria for EU accession,[36] to establish a legal aid system.

A human right of access to law both obliges and enables a state to consider a wide range of measures that will promote access to law in the particular

---

32) See e.g. Carol Harlow, 'Access to Justice as a Human Right: The European Convention and the European Union' in Philip Alston (ed.) The EU and Human Rights, OUP 1999, 187 at 209.

33) See Klaus Decker, Caroline Sage and Milena Stefanova, 'Law or Justice: Building Equitable Legal Institutions', World Bank (2005) accessible via the 'Publications' link at http://go.worldbank.org/ID1AJ9UAX0.

34) See note 19 above.

35) See note 18 above.

36) See Roger Smith, note 27 above.

circumstances of that state, and is a universal standard by which the adequacy of any legal aid system can be judged.

It was my hope in proposing a human right of access to law to the conference, and it remains my hope now, that to characterize legal aid work as not only being in pursuit of human rights, but as implementing a human right itself, will sustain legal aid workers in their noble cause to ensure access to justice for all.

ACCESS TO JUSTICE AND LEGAL EDUCATION: CHALLENGES AND SUGGESTIONS

Thomas F. Geraghty

Background

The basic assumption of this essay is that a major purpose of legal education is to train future lawyers, not only to be competent practitioners, but to be sensitive to the need for improvements in existing justice systems as part of their professional responsibility.[37] This assumption carries with it the notion that such training will have important and positive impacts on access to justice. Although this underlying assumption regarding the purpose of legal education has taken hold in the U.S.[38] and in some other countries, this central purpose of legal education is not universally recognized or implemented, particularly in countries in which legal education is severely under-resourced. This reality should inform the strategies that legal educators and advocates for access to justice utilize in efforts to inform and to improve legal education's response to common and world-wide shortcomings in making universal access to justice a reality.

The December, 2008 Kigali conference on access to justice in Africa sponsored by the Danish Institute for Human Rights[39], and previous conferences in Kiev[40] and in Lilongwe[41] brought together leaders of service organizations and practitioners from around the world to discuss strategies for improving access to justice. The strategies suggested ranged from increased

37) This formulation regarding legal education is drawn from Frank Bloch's succinct statement regarding access to justice and clinical education Frank S. Bloch, Access to Justice and the Global Clinical Movement, 28 Journal of Law & Policy 111 (2008).

38) Preamble of the American Bar Association's Standards for Approval for Law Schools http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Preamble.pdf.

39) See Danish Institute for Human Rights website: http://www.humanrights.dk/; see Newsletter of the Legal Aid Forum, Thematic Conference on Access to Justice and Legal Aid in Africa, 6th Ed. (March, 2009).

40) Conference on Protection and Promotion of Human Rights through Provision of Legal Services (27-30 March 2007), conference report available at http://www.crin.org/docs/Kyiv_Conference_Results.pdf.

41) Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa (22-24 November 2004) Lilongwe, Malawi, conference report available at: http://www.law.northwestern.edu/legalclinic/LilongweLegalAidDeclaration.pdf.

support of the paralegal movement to increase in funding by NGOs and governments of legal aid programmes. Much was learned through the sharing of experiences and approaches.[42] The Lilongwe and Kiev conferences produced declarations[43] that have become part of the developing international law regarding access to justice.[44]

During the same period, legal educators from around the world met regularly to discuss access to justice issues and worked in the field to promote access to justice. The work of David McQuoid-Mason[45,] Leah Wortham[46], Frank Bloch[47], Elizabeth Cooper[48], and Peggy Maisel[49], and the work of the organizers of the Global Alliance for Justice Education[50] (GAJE) describe the important contributions of clinical legal educators to the global access to justice movement.

The reports and declarations of the Lilongwe, Kiev, and Kigali conferences, as well as those of the GAJE conferences, and the work of the scholars mentioned above, constitute a firm basis for understanding the history of the access to justice movement, for assessing the current state of the access to justice movement, and for making judgements about how best to proceed to make justice more accessible for all.

---

42) See conference reports:
http://www.humanrights.dk/files/pdf/Engelsk/International/Kyiv_Conference_Results.pdf; http://www.penalreform.org/resources/rep-2004-lilongwe-declaration-en.pdf.

43) See The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa: http://www.penalreform.org/resources/rep-2004-lilongwe-declaration-en.pdf; See Kiev Declaration on the Right to Legal Aid.
http://www.humanrights.dk/files/pdf/Engelsk/International/Kyiv_Declaration_Right_to_Legal_Aid.pdf.

44) On 27 April 2007, during its 16th session, the UN Commission on Crime Prevention and Criminal Justice adopted the Lilongwe declaration.

45) David McQuoid-Mason, Access to Justice in South Africa, 17 Windsor Y.B. Access Just 230 (1999); David McQuoid-Mason, Legal Aid Services And Human Rights In South Africa, see Public Interest Law Institute website:
http://www.pili.org/en/content/view/155/26/; McQuiod-Mason, O'Brien & Greene. Human Rights for All, West Publishing Co, Minneapolis/St Paul (1997)

46) Leah Wortham, Teaching Professional Responsibility in Legal Clinics Around the World, Klinika *1* (Fall 1999) 241; Leah Wortham, Aiding Clinical Education Abroad: What Can Be Gained and The Learning Curve on How to Do So Effectively, 12 Clin. L. Rev. 601 (2006).

47) Frank S. Bloch, Access to Justice and the Global Clinical Movement. 28 J.L. & Policy 111 (2008).

48) Elizabeth Cooper, Global Collaboration in Law Schools: Lessons to Learn, 30 Fordham ILJ 346 (2007).

49) Peggy Maisel, Expanding and Sustaining Clinical Education in Developing Countries: What Can We Learn from South Africa, 30 Fordham ILJ 374 (2007).

50) See generally The Global Alliance for Justice Education, http://www.gaje.org/.

Also critical to the development and funding of access to justice strategies is the work of the United Nations[51], the World Bank[52], the Open Society Institute[53], the Ford Foundation[54], the MacArthur Foundation[55] the British Government[56], USAID[57], and many other foundations, international organizations, and governments. These entities have been the major funding sources for access to justice initiatives and have also been leaders in evaluating the success of the many approaches to improving access to justice.[58] Indeed, these organizations have produced a rich body of work that discusses and analyses the history, present status, and new directions for the access to justice movement.[59]

As noted above, leading clinicians from the U.S. and abroad have written eloquently about the potential of clinical legal education to provide immediate access to justice and training for a future corps of practitioners that will expand governmental and non-governmental initiatives to support access to justice initiatives. This body of scholarship is based upon solid and extensive experience in teaching and in service delivery. The work of practitioners working on the ground is similarly well-informed.[60] The initiatives of funding agencies is based upon the experience of a long history in pro-

---

51) See generally United Nations Development Programme, http://www.undp.org/; United Nations conference: Enhancing Global Rule of Law Assistance. New York. 20-21 April, 2009.

52) See Linn Hammergren, Balanced Justice and Donor Programmes: Lessons from Three Regions of the World, 2008. http://www.afrimap.org/english/images/documents/Balanced_Justice.pdf.

53) See Open Society Justice Initiative: http://www.soros.org/initiatives/osji.

54) Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World (Mary McClymont & Stephen Golub eds., 2000).

55) MacArthur Foundation, Advancing Human Rights and International Justice (March 2008). See website: http://www.macfound.org/site/c.lkLXJ8MQKrH/b.4689039/apps/s/content.asp?ct=5132631.

56) See British Department for International Development - Africa: Western & Central – Major Challenges. http://www.dfid.gov.uk/Where-we-work/Africa-West—Central/Sierra-Leone/Major-challenges/.

57) See USAID: Sub-Saharan Africa, Democracy and Governance. http://www.usaid.gov/locations/sub-saharan_africa/sectors/dg/index.html.

58) See e.g. Hammergren.

59) Idem.

60) See Malawi Prison Service: Paralegal Advisory Services, http://www.mps.gov.mw/paralegal.htm; Penal Reform Int. & Bluhm Legal Clinic, Northwestern University School of Law, Access to Justice in Africa and Beyond: Making the Rule of Law a Reality, Penal Reform International (2007).

viding support for rule of law and access to justice initiatives and on the many studies and evaluations of this work.[61]

Based upon the wealth of expertise and experience that has been devoted to access to justice issues by academics, practitioners, governments, NGOs, and funding agencies and organizations, here are some modest suggestions for greater and more effective involvement of legal education in the access to justice movement.

Take the long view

We are all anxious to see measurable results within a relatively short period of time. This is particularly true of the funding community which uses financial support as an incentive to produce 'deliverables.' The results of investments in legal education, indeed of investments in education generally, are not likely to be seen for years after the investment is made, although in many African countries, recent law school graduates quickly assume major responsibility as government officials and as judges, and so such investments have the potential to bear fruit relatively quickly. The effects of efforts to improve legal education are difficult to measure in the short term, and perhaps, even in the long term. Indeed, such effects can probably only be measured by studies such as those conducted by scholars who trace the career paths of law school graduates.[62] These studies rely in part upon data that is accumulated over long periods of time.

Provide substantial funding for law schools in developing countries that focus on collaborative efforts to increase resources for under-resourced law schools

Law Schools in developing countries, particularly those in Africa, are starved for resources. Faculty salaries are so low in most law schools in Africa that law teachers find it difficult, if not impossible, to devote full-time to teaching and mentoring law students. Many law schools in Africa also lack the resources to design and to implement curricula that will support the teaching of access to justice in either traditional classroom or clinical settings. Funding organizations should make substantial investments in legal education in under-resourced law schools.

---

61) See fn 18-24 infra.

62) See e.g., Heinz, Nelson, Sandefur & Laumann. Urban Lawyers: The New Social Structure of the Bar. University of Chicago Press (2005)

The funding of legal education in developing countries by foundations has a long, complicated, and cautionary history[63] that I will not chronicle here. Funding organizations, universities, and governments must work together to ensure that the priorities and needs of the under-resourced law schools are recognized, and that meaningful and achievable goals are established and met. Governments and local institutions must be finally responsible for the support of their law schools.

It will not be feasible to provide support for every law school in every African country. Priorities must be set. Initially, demonstration or pilot programmes may be most effective in helping chart a meaningful course strengthening legal education. One priority should be to focus on countries in which access to justice is most compromised. Another criterion should be to identify countries in which sound foundations exist for improvements and in which there are on-going relationships between funders and university and law school leadership. There are many law schools in Africa, legal academics, and leaders of NGOs and funding organizations who maintain such constructive relationships. Those personal and institutional relationships will be key to the development of effective collaborations to support legal education in developing countries.

Provide support for long-term collaborations between well-resourced law schools and under-resourced law schools

It takes time and effort to develop personal and institutional relationships that will form the basis for effective collaborations. When the Council on Legal Education for Professional Responsibility (CLEPR) was formed to support the establishment of clinical programmes in law schools in the U.S., the plan was for a 10 year project.[64] Similarly, the programmes that provided early support for law schools in Africa were envisioned as multi-year projects.[65] More recent grant-funded programmes supporting collaborations

63) See Thomas Geraghty & Emmanuel Quansah, African Legal Education: A Missed Opportunity and Suggestions for Change: A Call for Renewed Attention to a Neglected Means of Securing Human Rights and Legal Predictability, 5 Loy. Int. L. Rev. 87(2007).

64) Council on Legal Education for Professional Responsibility. Law School Teaching Clinics: Plans and Pictures- Council on Legal Education for Professional Responsibility, Inc. (1977).

65) See generally, John S. Bainbridge, The Study and Teaching of Law in Africa, (Fred B. Rothman & Co., 1972); Quintin Johnstone, American Assistance to African Legal Education, 46 Tulane L.R. 657 (1972).

between law schools in Africa and in the U.S. have had shorter time lines.[66] Although such programmes have had the positive effect if initiating dialogue and relationships, without continuing support for travel and visits, collaboration inevitably falters. The notion that recipients of short-term grants (either U.S. or under-resourced law schools abroad) will be able to support on-going relationships is simply not realistic. This pattern of short-term funding for collaborative efforts should be changed.

Provide support for instruction on access to justice in law school classrooms and through clinical instruction in the field

Access to justice curricula

Much work is being done to develop access to justice curricula.[67] A concrete proposal to further the adoption of access to justice curricula in the U.S. and abroad would be to fund collaborative efforts to institute and to jointly teach courses at law schools in the U.S. and abroad. As noted above, there is a wealth of scholarships and evaluations and reports that could form the basis for access to justice courses that would sensitize future leaders of the legal profession to the need to create survey courses describing the present state of access to justice and the legal profession's role in improving access. Such courses would include discussion of creative options such as the delivery of legal services by paralegals, the challenges of implementing such creative solutions (i.e., possible opposition by the organized bar), the role of law students in the delivery of legal services, and increased reliance upon traditional/customary practices where appropriate.

Clinical instruction

Instruction based upon representation of clients and fieldwork

There is no better way for law students to learn about shortcomings of justice systems than by providing closely supervised services to the underserved. In addition, clinical programmes provide services to underserved populations that would be otherwise unavailable. The twin missions of clinical education - education and service - are particularly well-suited to

66) African Legal Initiative Sister Law School Programme (AFLI), http://www.faqs.org/abstracts/Law/To-Africa-with-law-a-new-ABA-initiative-links-US-and-African-law-schools.html.

67) See Worldwide Conference of the Global Alliance for Justice Education. Manila Conference December, 2008: http://gaje.org/index/conference; http://law.gsu.edu/gaje/index/conference/program.

supporting a law school's mission to improve both access to justice and quality of justice.

The barriers to the creation of effective clinical programmes in developing countries are, however, significant. These barriers include lack of receptivity to clinical programmes by law school faculties and governments, lack of funding to support full-time and qualified clinical instructors, resistance of the organized bar to full-fledged student participation pursuant to student practice rules, and scepticism from judges and public officials regarding the ability of law students to provide competent services. Such objections to clinical programmes were made early-on to clinical programmes in the U.S., but were easily met when it was demonstrated that clinical programmes were of immense educational value, that properly supervised law students provided excellent service, and that clinical programmes posed no threat to the organized bar.

However, in many African countries where bar membership is jealously guarded, and where the activities of law school clinics could conflict with the interests of government, a law school's representation of clients could pose considerable political difficulties for law faculties. While it should be hoped that these difficulties can eventually be overcome, political and economic realities in some countries may dictate that law school clinical programmes rely on an externship model that would insulate law schools, their faculty members, and their law students from actual representation of clients. Students practice rules - rules permitting law students to practice under the supervision of qualified practitioners - are essential to disclose twin educational and service goals of legal education.[68] If the externship model is chosen, supervision of such programmes by faculty who are qualified to identify and to assess field supervisors and who have the necessary experience to guide students as they reflect upon their experiences will still be necessary. For example, the ABA rules on supervision, Standard 305. Study outside the classroom, state that '…(e) A field placement programme shall include: (1) a clear statement of the goals and methods, and a demonstrated relationship between those goals and methods to the programme in operation; (2) adequate instructional resources, including faculty teaching in and supervising the programme who devote the requisite time and attention to satisfy programme goals are sufficiently available to students; (3) a clearly articulated method of evaluating each student's academic perfor-

68) See The Advocates (Student Practice) Regulations, 2004, included in the appendices to this publication.

mance involving both a faculty member and the field placement supervisor; (4) a method for selecting, training, evaluating, and communicating with field placement supervisors; (5) periodic on-site visits or their equivalent by a faculty member if the field placement programme awards four or more academic credits (or equivalent) for field work in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate; (6) a requirement that students have successfully completed one academic year of study prior to participation in the field placement programme; (7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn four or more academic credits (or equivalent) in the programme for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.'

Simulation-based instruction in professional values and ethics

Well-rounded clinical programmes provide students with exposure to the practice of law in real-world settings and classroom instruction in professional values and skills. Instruction in professional values includes, in the U.S., for example, instruction on the history and objectives of the legal profession as well as in the rules that govern professional conduct. Professional customs and values differ from one country to another, indeed sometimes they vary from region to region within a country. However, virtually all codes that apply to the conduct of lawyers note the central role of the legal profession in providing access to justice. The question of how this role is implemented in particular national and political contexts is often a complex legal and political issue. Nevertheless, a discussion of the role of the legal profession should be central to any law school's professional values curriculum.

Instruction in professional values can be taught effectively utilizing a simulation-based, clinical teaching methodology in which students are placed in role as lawyers and are asked to solve problems that present dilemmas involving professional role and ethics. Support is needed to create country-specific teaching materials and to train law faculties to employ a 'learning by doing,' simulation-based approach.

Simulation-based instruction in professional skills

Clinical instruction in the overwhelming majority of law schools in the U.S. also includes instruction in professional skills utilizing a simulation-based,

or 'learning by doing' model. Students are placed in role as lawyers and are required to interview a client, counsel a client, conduct a negotiation on behalf of a client, participate or conduct mediation, or to conduct an opening statement, direct or cross-examination, or closing argument. These exercises are evaluated by faculty members and feedback is given to the student immediately after s/he has performed the assigned task. Support is needed to train legal educators in under-resourced law schools to employ and/or to adapt this method of clinical teaching to local legal practice. It is generally acknowledged that this interactive teaching methodology is more powerful and effective - especially in imparting professional skills - than traditional lectures or Socratic dialogue. This method of teaching is also particularly well suited to developing the skills necessary for effective advocacy on behalf of those seeking access to justice in a variety of settings including mediations, interactions with government officials, and courts.

Encourage and support bar involvement

Members of the bar have experience and influence that should be a source of support for both legal education and for the access to justice movement. Members of the bar are a wonderful resource for training law students and fellow members of the bar in advocacy skills, as well as in the various substantive law courses that relate to access to justice. This model has worked well in the U.S., where the American Bar Association accredits law schools. This accreditation process focuses on all aspects of law schools' programmes for legal education including curricula for the development of professional skills. The ABA's Council on Legal Education follows written standards in its assessment of law schools. The American Bar Association has also undertaken assessments of legal education abroad.[69]

National and local bar associations, as well as other voluntary lawyers associations, provide training for law students and for practicing lawyers that is extremely valuable for lawyers and non-lawyers engaged in access to justice programmes. For example, the National Institute for Trial Advocacy[70] (NITA) publishes materials for advocacy teaching in law schools, and has conducted trial advocacy workshops for lawyers and judges in South Africa and Namibia for many years. NITA's advocacy programmes have recently expanded to include advocacy training in Liberia, Ghana, Uganda, Malawi, Mexico, and Japan. These courses are taught utilizing a 'learning by doing' model, primarily by practicing lawyers who volunteer their time.

69) See ABA website: http://www.abanet.org.

70) See NITA website: www.nita.org.

NITA's programmes also include annual teacher training programmes that are designed to prepare practicing lawyers to provide advocacy training for their bar associations, legal organizations, and law firms. These programmes have been attended by lawyers from around the world, and could easily be duplicated abroad.[71] How bar involvement might play out in different countries, will, of course, depend on the local legal culture and availability of resources.

The bar associations and continuing organizations mentioned above (The ABA and NITA) are only two of many lawyers organizations that provide support for legal education in the U.S. and abroad. Other such organizations include the International Bar Association[72], the International Commission of Jurists[73], and Lawyers without Borders[74].

Encourage law firm and corporate involvement

Recently, large law firms and corporations have become active in supporting legal education in developing countries and in the access to justice movement. The DLA Piper law firm, in cooperation with the Northwestern Law School, has recently been active, through its New Perimeter Project[75], in supporting legal education in Ethiopia. Other law firms have provided training for prosecutors and judges at international tribunals.[76] DLA Piper's teaching in Ethiopia has included courses in international arbitration, negotiation and mediation, international financial transactions, and international criminal law. Northwestern law professors have taught gender and human rights in Ethiopia, and have provided input regarding the creation of clinical programmes. Private sector initiatives are particularly well-suited to supporting legal education initiatives that foster access to justice because they can react quickly to opportunities to teach in under-resourced law schools.

---

71) For information about NITA's teacher training programmes see: http://www.nita.org/page.asp?id=7&catid=22.
72) See IBA website: http://www.ibanet.org/.
73) See ICJ website: www.icj.org.
74) See Lawyers without Borders website: www.lwob.org.
75) See website: www.newperimeter.com.
76) See Shearman & Sterling website: http://www.shearman.com/about/probono/probonoprojects/europe/.

Encourage the involvement of justice-oriented NGOs, funding agencies, and foundations

The organizations that fund access to justice programming should make investments in legal education. This support should include providing the financial resources to teach particular courses, supporting individual faculty members and research centres focusing on access to justice issues, support for fellowships to support the work of faculty members, and support for clinical legal education. As noted above, initiatives to support legal education have the potential to make substantial short-term and long-term contributions to improvement of access to justice.

Justice-related NGOs and funding agencies and foundations are present in many countries in which legal education is under-resourced. The personnel employed by these organizations have experience and expertise that should be shared with law schools through the teaching of courses such as criminal law, domestic relations law, professional responsibility, gender and the law, and children and the law. Not only are NGO personnel very likely to be talented and inspiring teachers, they can bring real-world experience in the area of human rights and international human rights standards into the classroom. Teaching part-time in law schools should be one of the strategies employed by human rights NGO personnel to advance their human rights agendas and to promote access to justice.

Encourage law schools to identify best practices for promoting access to justice

The funding and provider communities have worked diligently to identify best practices promoting access to justice. Law schools, particularly those in the countries urgently in need of services that will promote access to justice, should play a role in evaluating programmes and in suggesting new directions. The evaluation of the efficacy of access to justice programmes requires knowledge of existing access to justice programming as well as knowledge of country conditions and practices that impact the delivery of justice-related services. Encouraging under-resourced law schools to become part of the evaluative process could lead to local teaching and scholarship that would inform culturally relevant initiatives. The exposure of law students to this area of study will create heightened interest among law students to the challenges of making access to justice a reality.

As part of the process of identifying best practices, law schools - both well-resourced and under-resourced - should devote library resources to the collection of relevant studies, reports, and other information now available from a variety of sources but not collected in one place. This would provide scholars, administrators, and advocates with the information that they need to make the most intelligent decisions about how to promote access to justice. Such collections should be accessible in countries hosting access to justice programmes as well as at law schools where the donors reside.

Conclusion

Many legal educators, funding agencies, and advocates on the ground are working tirelessly in support of access to justice approaches and programming. However, support for legal education in countries in which there are vast under-served populations is meagre. Yet law school graduates in these countries quickly assume positions of responsibility in their justice systems. Working together, legal educators, advocates for individuals and groups, and funding organizations can do much to impress these young professionals with the need to make their justice systems more accessible and more responsive to community needs.

WHERE THERE IS NO LAWYER: A STRATEGY TO DEVELOP PRIMARY JUSTICE SERVICES

Adam Stapleton

Abstract

This paper considers the criminal justice system based on the English common law and where it does not work - whether because it has been destroyed or is dysfunctional due to a host of problems.

It notes that in the absence of any formal justice system - and for reasons of cultural preference - especially in Africa and South Asia, the traditional or informal dispute resolution process is relied on to settle the overwhelming majority of disputes. It highlights the work of civil society groups in bridging the gap left by government and the legal establishment in providing legal aid (in the broadest sense of providing free legal advice or assistance) and suggests how the judiciary as well as others justice agencies (such as police, prisons and traditional authorities) might take a more pro-active role in administering justice locally.

The paper argues that the main obstacles to justice (formal or informal) experienced by ordinary people are common to most countries - whether the system has been destroyed or become dysfunctional. It claims that state/donor driven Big Picture reforms have not worked. It advocates a more local approach and examines the success of a number of 'good practices' (i.e. activities that are effective, low cost and measurable) that have been developed exclusively by civil society actors in Asia and Africa. It focuses in particular on the Madaripur Mediation Model developed over many years by the Madaripur Legal Aid Association in Bangladesh; and the Paralegal Advisory Service developed by Penal Reform International with paralegals in Malawi which emerged in 2007 as the Paralegal Advisory Service Institute (PASI).

It illustrates how these local measures have built up partnership with, and the trust of, local justice actors (formal and informal) - based on open communication, co-ordination and co-operation. It observes that the ideas behind these practices are not new and that in many instances they build on what is already present (though in less developed form) and so they are replicable (subject to adaptation) to differing contexts.

It proposes that by advancing discreetly at a local level, these measures can build a system that meets the basic justice needs of ordinary people and lays the ground for more far-reaching reforms to follow. It argues that where the political will is present, government should be open to public/private partnerships with responsible civil society groups to work towards a concerted strategy to provide primary justice services in line with the primary health services offered by the health sector.

Where there is no lawyer…

Justice reform has proceeded slowly in those countries that have emerged from colonial rule. The legal system has, in the main, continued to adhere closely to the 'establishment' left by the formal colonial powers. On the other hand, the health sector has made considerable progress in providing primary health care services. Why is it that 'primary justice services'[77] - as provided by the state - remain a distant prospect for the majority of the world's poor?

In 2004, a conference was convened by Penal Reform International with the Malawi Ministry of Justice and Constitutional Affairs to tackle this question. The conference produced the 'Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa' and Plan of Action.[78] The Lilongwe Declaration recommended, inter alia, that the definition of legal aid be broadened (to include advice, assistance, education, and sensitization); that legal aid be provided (free) at all stages of the criminal justice process;[79] and that legal aid service providers and delivery systems be diversified to include trained personnel outside the formal legal establishment.[80]

The ECOSOC resolution on 'International Cooperation for the Improvement of Access to Legal Aid in criminal justice systems, particularly in

77) This term is taken from 'Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone and Worldwide.' Vivek Maru. Yale Journal of Law, Vol. 31:427.

78) Adopted by the African Commission at its 40th Ordinary Session, 15-29 November, 2006 ref. ACHPR/Res.100 (XXXX) 06; and by the Economic and Social Council, United Nations in 2007 (Report on the Sixteenth Session, 28 April 2006, 23-27 April 2007, and 29-30 November 2007. Official Records, 2007. Supplement No.10. E/CN.15/2007/17/Rev.1).

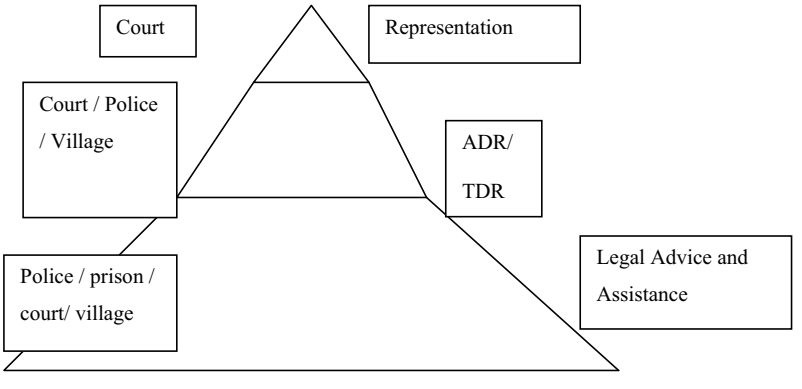
79) Recommendation 3.

80) Recommendations 6 and 7.

Africa'[81] (which adopted the Lilongwe Declaration and Plan of Action) noted that not only did the prolonged incarceration of suspects and pre-trial detainees violate their fundamental human rights but *recognized* that 'providing legal aid to suspects and prisoners may reduce the length of time suspects are held at police stations and detention centres, in addition to reducing the prison population, prison overcrowding and congestion in the courts.'

It observed that many countries 'lack the necessary resources and capacity to provide legal assistance …in criminal cases' and, again, recognized the 'impact of action by civil society organizations in improving access to legal aid in criminal justice.' It then called on member states implementing criminal justice reform 'to promote the participation of civil society organizations in that endeavour *and to co-operate with them*.'[82]

Research conducted around the world[83] on the legal services ordinary people require project an emphasis away from the formal state courts because they have failed to 'move with the times' and provide a prompt and affordable service to citizens. A demand-led approach suggests the highly specialized expertise of the lawyer represents the 'tip' of the iceberg of legal services needed. Ordinary people in general prefer to resolve their matters locally and amicably where possible.



81) ECOSOC Resolution 2007/24.

82) Idem at para 2. Emphasis added.

83) Voices of the Poor series, World Bank, 2000; Access to justice in sub-Sahara Africa: the role of traditional and informal justice systems, PRI, 2001; 'Promoting the Rule of Law Abroad In Search of Knowledge'. Ed. Thomas Carothers. Carnegie Endowment for International Peace. 2006.

In general terms, the need is for basic legal advice and assistance to guide people in their immediate choices and enable them to navigate the justice system; for education on the law delivered in a fashion that empowers people to apply the law to their own set of circumstances and use the law as a lever for bringing about change; and, in terms of criminal justice, for immediate access to legal advice and assistance at the police station on arrest and during interview, at court on first appearance and in the prisons.

A consideration of the situation on the ground, in the village, at the local level - far from the discussion of strategies, budgets and the politics of 'ownership' - discloses a picture stripped of complicated layers and conflicting interests. The needs of people are simple: they want remedies and equitable resolution of their problems so they can get on with living their lives. They want to live safely and securely.

The courts are remote, expensive, often corrupted and slow. Lawyers are few and far between, urban-based and beyond the economic reach of the majority of the citizenry. People apply to their local headman/chief/traditional authority (TA) to arbitrate over the dispute quickly and at low cost, in a way in which they understand and which - in the main - they accept.

Where an individual cannot get resolution in the village (because the decision of the TA is not acceptable; or the matter is too serious or complex), s/he then must apply to the formal system for remedy. This is where the problems and obstacles begin.
Whether recovering from conflict, battling with poverty, or building for sustained growth, we find a similar range of problems and obstacles in the criminal justice system.

Firstly, we find there is a 'system' (Graphic 1). All countries have one. The problem[84] is that it has either been destroyed (through conflict) or grown dysfunctional. Some of the principal causes of this dysfunction are examined next (Graphic 2).

These causes of dysfunction present obstacles and challenges which further add to the pressures already bearing down on the actors and institutions

84) The 'problem' may go much deeper and refer back to the imposition of the system by the colonizing powers. However this is a matter for broader and more searching reforms in the long term and falls outside the purpose of this discussion.

operating the system. We next look at some practical measures that can be taken to relieve these pressures (Graphic 3) that are proven to be effective, are low cost and build on local initiatives.

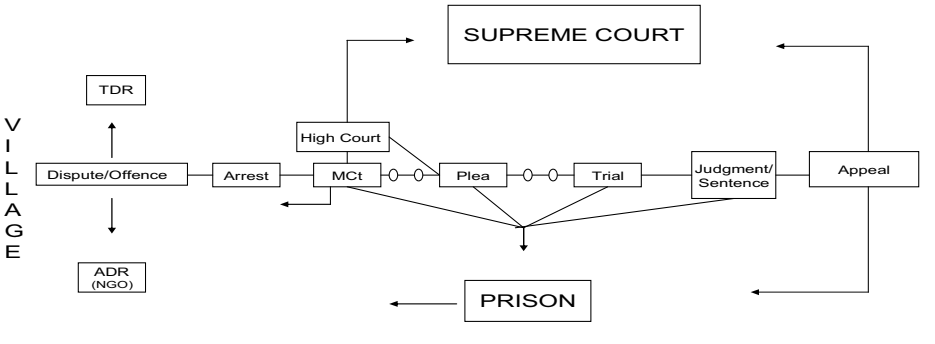
Emphasis is placed on working locally, since experience suggests that it is here that relationships between the various justice agencies and civil society are closer and that innovative measures can be taken 'underneath the radar' - as it were - of political and vested interests in the capitals.

Having relieved some of the pressure, attention is then turned to incremental measures that enable the system to function (Graphic 4) and so demonstrate what can be done through a step by step process ('sequencing') involving all actors, without huge resources, in a short space of time, showing a measurable impact. This in turn restores public confidence that 'something is being done', improves the morale of the actors involved and informs more medium-term and long-term reforms.

The 'system'…
The diagram below read from left to right sets out the criminal justice process in most developing countries, which apply the English common law. Terminology may differ but the process will be familiar to practitioners.

At the village/community level, the parties seek a remedy through an arbitrated traditional process ('traditional dispute resolution', 'TDR'); or

The Criminal Justice System



other alternative dispute resolution method ('ADR'). This failing, or where a serious offence has been committed, the matter goes to the police and so through the formal justice system. Most disputes and minor offences, however, are dealt with at this level.[85]

A statement is recorded by the police, or complaint is made before a magistrate, a case is filed and, almost invariably, a summons or arrest warrant issued. The case is then set down for a plea and, assuming a not guilty plea is entered, is listed for trial.

There are numerous adjournments before the matter is heard until, at the close of the trial, the accused is either acquitted or convicted when s/he is sentenced. There is then the possibility of an appeal to the higher courts. Usually, at each stage a decision is taken whether or not to remand the accused in custody or on bail.

In most countries such a system is, or was, in place. However, it is either dysfunctional or has been destroyed.

The major causes of dysfunction to the system…

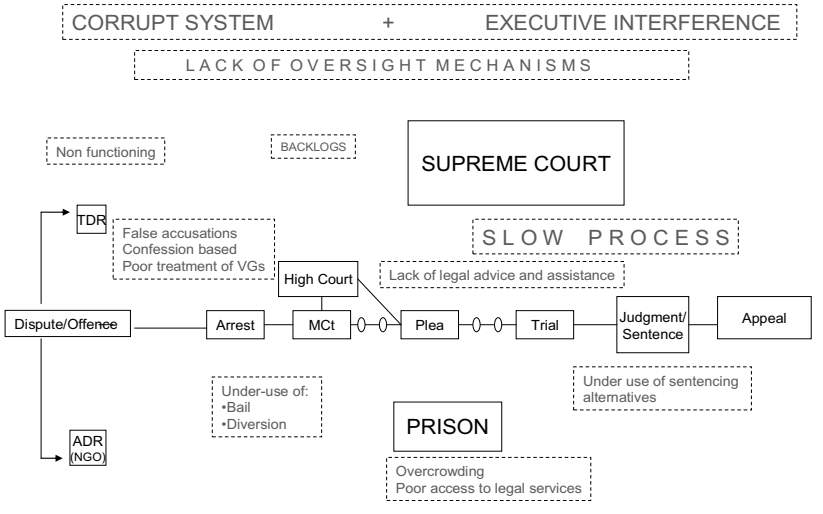
Graphic 2 below indicates the main blockages and problems common to most jurisdictions that render the basic formal system inoperable.

In the community, most people refer their disputes to traditional 'courts' or fora. Usually, they are overseen by 'traditional' or locally elected authorities who in the main are elderly men. The procedures are simple and relaxed. The decision is reached under the public gaze usually by way of arbitration.[86] These fora are by and large ignored by the formal justice system.

---

85) DFID estimates that 'in many developing countries, traditional or customary legal systems account for 80% of total cases'. DFID, Safety, Security and Accessible Justice: Putting policy into practice, 58. OECD: 'non-state systems are the main providers of justice and security for up to 80-90% of the population' in fragile states. OECD/DAC Network on Conflict, Peace and Development Co-operation, Enhancing the delivery of justice and security in fragile states, August 2006, at 4.

86) John Wuol Makec, judge of the Constitutional Court in Sudan and authority on Dinka customary law, summarizes the justice system under customary law as follows: 'a) the traditional court or judge plays the role of advocate for both parties without becoming partial through the investigatory system; b) simplicity and flexibility of court procedure ensures that no party will fail on grounds of procedural irregularity; c) at the end of the case, there is no winner or loser as in the adversarial system.' Access to Justice in Africa and Beyond, NITA, 2007, p.135.



There are well-grounded criticisms to be made of these fora or courts: that they are susceptible to corrupt practices, or lapse into trial by ordeal; or fall short of basic international standards (imposing corporal punishment or imprisonment without the safeguards of fair trial procedures), or are biased against women, the young and other marginalized persons; or maintain the status quo in place of delivering a just result.

This said, it is increasingly recognized that the role of informal/traditional/customary systems represent a 'key area'[87] that needs to be taken into account in post-conflict countries[88] and may offer a 'more attractive route for developing countries to pursue than relying on the creation of a full-blown 'rule-of-law' legal system.'[89]

87) 'Rule of Law Programs in Peace Operations'. Agnes Hurwitz and Kaysie Studdard, International Peace Academy Policy Paper, The Security-Development Nexus Program, August 2005

88) 'In the immediate aftermath of conflict, one of the most important steps is to rebuild neighbourhood forums for dispute resolution. These usually stress mediation or arbitration. Without such informal venues, the capacity of any formal judicial system is likely to be overwhelmed. Local forums can help to fill the gap while new judges and lawyers are trained and gutted courthouses rebuilt.' 'Courts and Democracy in Post conflict Transitions: A Social Scientist's Perspective on the African Case.' Jennifer Widner, 95 AJIL 65 (2001).
Penal Reform International report of a needs assessment mission for the Ministère des Affaires Etrangères, France, May 2003 at para 17 on file with the author p. 189.

89) Carothers et al supra, 'Mythmaking in the Rule of Law Orthodoxy' Frank Upham at p. 98.

The Malawi Minister of Justice, Henry Phoya, in asking how government should approach the task, put it in the following way:

'Do we view these structures as an opportunity - or a threat?'

'Do we seek to incorporate these fora in the formal justice system - so that every case starts there?'

'Do we allow them to continue in parallel - without regulation not knowing whether the constitutional guarantees we accord all Malawians are being flouted?'

'Do we simply look the other way?' or
'Do we recognize their existence and look into ways of cross-referring cases between the two systems.'[90]

The police and lower courts, especially, are widely perceived to be corrupt and there is executive interference at all levels.[91]

Few oversight mechanisms or structures exist in most countries. For instance, the police operate within, and jealously guard, their own space. The judiciary fails to inspect on any systematic basis either the lower courts or the prisons. Neither the judiciary nor Law Society has codes of conduct to regulate their conduct (or they are 'works in progress'). The judiciary tends to invoke 'judicial independence' as a shield to deflect any criticism or questioning of judicial action or behaviour; or (where they are not independent) apply contempt laws to similar effect.

The national institutions commonly found in many countries, such as the Anti-Corruption Commission/Bureau, do not function well or at all as, once established, they are either peopled by government appointees (as sine cures) or starved of funds and therefore unable to conduct investiga-

90) H. Phoya, MP, Minister of Justice, Malawi, opening address to the Lilongwe Conference on Legal Aid, November 2004. See too 'Customary law and policy reform: Engaging with the plurality of justice systems'.

91) For the poor's perception of police see: Deepa Narayan, Voices of the Poor: Can anyone hear us? 249-64 (World Bank ed., 2000). For judicial corruption in Africa, *see*, *e.g.*, The Warioba Report, Tanzania (1996) at para 12.

tions. Recently, we have seen in Kenya[92] and South Africa[93] how any effective voice is quickly stifled. The roles of Human Rights Commissions, Ombudsperson and other watchdogs are similarly neutralized.[94]

In few countries are there effective structures for receiving and dealing with complaints related to the police or prison officials, or for monitoring conditions at prisons. As a consequence, these issues are addressed through public interest litigation in some cases, through media exposure or individual charges against the concerned officers in others.

Access to police and lower courts: confession based evidence…
It is at the police station that most ordinary people are at risk of abuse.[95] Where police officers are under-trained and under-resourced they are inclined and needs driven on occasions to take the simplest path to gathering evidence in a case, by seeking a confession from the accused.

A voluntary confession to a crime is the best evidence in a case. However, it is a ubiquitous and repeated observation that the interview process is abused by police officers with impunity. Police in many countries tend to arrest first and investigate later (a process that can take years and often does if the accused is indigent), to over-arrest (for minor offences especially where a formal caution would be appropriate); or abuse police powers by arbitrary use.

---

92) John Githongo resigned as head of the Kenyan ACB in 2005 after his attempts to pursue corruption allegations within government were blocked. He then fled to the UK.

93) Vusi Pikoli, head of the Scorpions established to root out corruption and graft, was suspended by President Mbeki after it was learned that he was about to order the arrest on corruption charges of the head of the police, Commissioner Jackie Selebi. He was to face a parliamentary enquiry in February 2008. Cape Argus, 14 January 2008: 'Scorpions aim for the final sting.'

94) In Brazil, the budget of the Special Secretariat for Human Rights was cut in 2005 and its ministerial status withdrawn. Amnesty International, Briefing on Brazil's Second Periodic Report on the Implementation of the International Covenant on Civil and Political Rights, 25 October 2005 p.4.

95) The Committee for the Prevention of Torture (CPT), established under the European Convention against Torture and Other Inhuman or Degrading Treatment or Punishment has observed: 'The CPT wishes to stress that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment.' Extract from the 6th General Report [CPT/Inf/(96)21].
See too: General recommendations of the Special Rapporteur on Torture E/CN.4/2003/68 para 26 at (g).

There is usually a legal bar to the provision of legal aid or assistance to the accused at the police station, but in practice it does not happen whether because there are not enough lawyers or a legal aid certificate is not granted until the accused appears before a court.

… and false accusations

A popular perception is that the police entertain false accusations without making adequate investigations (either through inducement of some kind or professional laziness); and that they refuse to accept complaints where, in their view, the issue concerned does not constitute a crime (e.g.: in cases of domestic violence, or in cases of violence against certain minorities), or in other cases where some powerful quarter has exerted either monetary or political influence over them to refuse to record a statement. Police treatment of women, young persons and ethnic minorities - whether as the complainant or the accused - are commonly regarded as unprofessional and often insensitive.

In many countries police both investigate and prosecute. This combined with the absence of any effective oversight mechanisms within the police; and weak and delayed scrutiny by the courts, facilitate the making of false accusations, and the institution of false prosecutions based upon these further clogs the caseload and contributes to congestion in prisons.

False accusations affect both the powerful and the powerless. The fact that they can be brought with virtual impunity even against people who are otherwise highly placed, if sufficient political muscle is exerted, not only encourages the public to fear the law enforcement agencies, but also suppresses the growth of any culture of claiming rights or seeking accountability.

Under-use of early release mechanisms: bail

The power to grant bail rests with the police and with the Court before whom the person is produced by the police (and if it refuses, then with the Courts above). Again, the perception is that bail is granted more easily to those with access to power and influence, rather than to the vulnerable and disadvantaged.

In many cases, the bail 'bond' or 'surety' for future attendance is set too high with the result that notwithstanding a finding by the court that a person does not constitute a threat to society, s/he is nevertheless remanded in custody because s/he lacks the means to pay the amount set by the court.

This is one of the highest contributing factors to the high remand populations in many prison systems around the world.[96]

In other cases, the magistrate refuses bail for the protection of the accused. This is a legitimate fear in some cases as community members often do not understand the bail process. After they have walked a person several miles to the nearest police post and surrendered him/her to police custody, they find (to general anger and dismay) the same person back in the village the next day and assume that s/he has got off 'scot-free'. The resulting fury can often be fatal for the person bailed.

Referring appropriate cases back to the community for resolution

Many cases can be resolved by restorative justice processes and need not be adjudicated by the courts unless alternative dispute resolution mechanisms fail. In the absence of any such mechanisms, the courts and prisons become congested - often needlessly.

The UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)[97] offer guidance here. The Rules are intended 'to promote greater community involvement in the management of criminal justice' and 'to ensure a proper balance between the rights of individual offenders, the rights of victims and the concern of society for public safety and crime prevention.'

Following the success of 'restorative justice' processes in wealthier countries,[98] the United Nations adopted the 'Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters'.[99] Recognising 'that these initiatives often draw upon traditional and indigenous forms of justice', the Basic Principles define a 'restorative process' as 'any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together

96) 96) Awaiting trial population as a percentage of the total prison population in selected countries: Liberia: 97%; Mali: 88%; Nigeria: 65%; Cameroon: 65%; DRC: 70%; Mozambique: 72%; Honduras: 63%; Argentina: 57%; Bolivia: 75%; Lebanon: 62%; Saudi Arabia: 58%; Bangladesh: 67%; India: 69%; Pakistan: 66%; Philippines: 67%; Timor Leste: 70%; Italy: 58%; Monaco: 61%; Turkey: 60%; *Source:* World Pre-trial/Remand Imprisonment List. International Centre for Prison Studies. 2008 www.prisonstudies.org.

97) Adopted by General Assembly Resolution 45/110 of 14 December 1990.

98) Most notably in New Zealand and Canada.

99) ECOSOC E/2002/INF/2/Add.2.

actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.'

In appropriate cases then, good practice suggests that the formal courts should refer the matter for settlement outside the formal justice system.

Diversion[100]

'Diversion' can be simply defined as 'the referral of cases [normally of juvenile offenders but increasingly of adult offenders as well] alleged to have committed offences away from formal court procedures, with or without conditions'.[101]

Diversion can be as simple as a formal caution by a police officer or act of apology for the offence committed, with or without an offer of restitution or compensation.

Slow judicial process

The justice process is slow due to the non-appearance of magistrates, lawyers, witnesses; and/or the volume of cases and weak case management system; and/or the loopholes and complexity in the procedural laws; the shortage of courts, and 'the complex pattern of the existing system itself' which 'has created attitudes, values and traditions which would resist any attempt to change.'[102]

Few countries have enough lawyers to go round. In all countries, lawyers are to be found in the urban centres and few are willing to enter prisons or allowed to enter police stations. As a result, basic procedural safeguards (i.e. presumption of innocence and right to silence) and constitutional freedoms (i.e. from arbitrary arrest and torture) go unprotected. Without a mechanism or 'intervention' to push cases along and through the system, they get stuck and increase the backlog.

Alternatives to prison

Alternatives to prison are not seen as a priority in post-conflict situations where the concern is with serious violent crime committed by demobbed

100) Tokyo Rules at 5.1.
101) South African Child Justice Bill (B49-2002).
102) The Bangladesh Jail Commission Report 1980 ('The Munim report') at para 63.

soldiers or remnants of an insurgency. Yet minor crime is still committed (simple theft being the most common).

By and large, governments invest little in 'community-based sanctions' as an alternative to short prison sentences. A problem is that western models depend on a costly support structure of probation and social services which post-conflict countries do not have and less wealthy countries cannot afford.

However, as the flow from police and courts gathers in volume, the choice will be: build more prisons to accommodate the numbers; or reduce the flow by diverting people at various stages of the criminal justice process and providing alternative sanctions to those sentenced by the courts.

General remarks

These then are some of the common problems and obstacles encountered by the ordinary person without means as s/he navigates his/her way through the formal criminal justice system. The protections and fundamental freedoms enshrined in his/her national constitution (and/or set down in international standards) are ignored.

What then is to be done? Where to start?

On the one hand, it is asserted with some authority that piecemeal approaches to justice reform have not worked. The justice system is a chain of events, involving a range of actors who are all inter-connected. Therefore, any intervention should include all these agencies and actors ('cross-cutting') and address the Big Picture ('holistic' or 'sector-wide') if there is to be any sustainable impact in the sector.

However this Big Picture approach has also fallen short of expectations. There are many reasons for this and they are usefully discussed elsewhere.[103]

---

103) Carothers et al: Supporting Security, Justice and Development: Lessons for a New Era. Christopher Stone et al, June 2005.
See individual government poverty reduction strategy papers, e.g. this from Bangladesh which calls for a 'sharper engagement' with implementation challenges. The reference here is to the 'consistent burden' of under-completed or under-funded projects within the Annual Development Programme (ADP). In 2002, a report to GoB found a project completion rate at 56% with 15% of projects showing 'zero progress.' 'Unlocking the Potential: National Strategy for Accelerated Poverty Reduction' 2004-2007 para 4.7 at p.46.

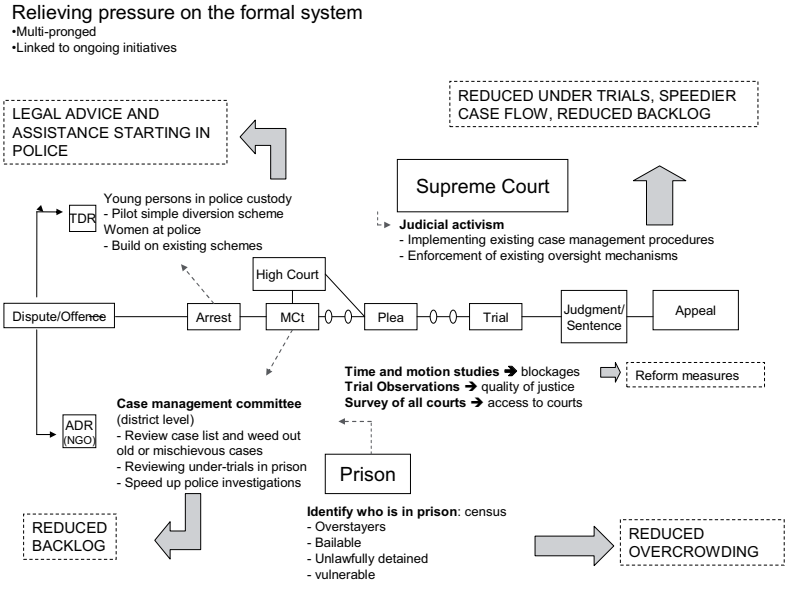
Considerable time and expense is spent on mapping, strategizing, sequencing and designing by individual donor agencies. More time is then spent validating the proposed reforms with the 'change agents' in the institutions and line ministers responsible and getting the government/institution to sign off on the proposal so that the funds can be released. Then the recruitment process starts.

There is another more action-oriented approach that can run in local sites in discreet parallel to other more institutional reforms. These actions can test and seed-fund innovative, pilot schemes and adapt 'good practices' from elsewhere and, where they prove successful, roll them out nationally.

These schemes demonstrate what can be done through 'norm graduation' rather than policy action. In other words, they bring about change through a sensible action that gains local support (i.e. because it works). It is this local endorsement (ownership) that puts pressure on the politicians and institutional high-ups to 'buy-in' later on and roll out reforms at the national level.

Relieving pressure on the system

In the third graphic, we examine how small-scale, local initiatives (that include all the actors) test what can be done (the 'political economy of reform') and show measurable returns for little cost.



We see criminal justice systems everywhere are under pressure. Rather than seek to reform the whole, we consider practical ways that relieve some of the pressure on the system.

This action-oriented approach includes the participation of all in closer communication, co-ordination, and collaboration: it is strategic (and holistic) and system-building rather than reforming.

Providing legal advice and assistance in the police station

Getting access to police stations is difficult in any country even where there is a tradition of accredited 'paralegals' attending at the interview stage.[104] Juveniles, in particular, offer a useful entry point since police officers are usually uncomfortable having children in the police station. Victim support services are also generally uncontroversial.

It is understood that not all police officers are cruel, most work in degrading conditions in a brutal working culture and that where a practical rights-based approach is demonstrated which a) enhances their esteem in the eyes of the public and b) enables them to do their work better, they tend to respond.

In 2003, paralegals under the Paralegal Advisory Service (PAS) in Malawi, gained admission to police stations initially to track the parents/guardians of juveniles who had been taken into custody. Paralegals drew up a code of conduct in consultation with police officers. They visited the police stations on a daily basis to check if there were any juveniles in custody. Where there were, they immediately set about tracking down the parents. They then suggested that they 'screen' the juvenile to see whether or not s/he could be 'diverted' from the criminal justice process. They drew up a screening form in consultation with social services and police and started in the target police stations. After twelve months, a joint PAS/police evaluation of the scheme in the four pilot sites was conducted and was unanimous in support. At a meeting of senior police officers, it was agreed that the PAS should be invited into all police stations. Between 2004-2007, the PAS diverted an average of 77% of all juvenile cases away from the criminal justice system.

104) In the UK, solicitors send usually young 'legal executives' or paralegals to attend on their clients at police at interview; and to visit them in prison.

The PAS then sought the support of Malawi Police trainers to train all paralegals in investigative interviewing skills that were taught to CID (detective) officers. In this way, paralegals undertook the same training as police officers and so could tell the difference between aggressive and oppressive interviewing techniques. Paralegals then applied to attend at police interviews of adult suspects. A 24/7 call-out service was initiated so that paralegals could be on call at any time to attend at the police station.[105]

Managing the caseload

The situation in the lower courts tends to lie between two extremes producing the same effects, namely: slow process and case backlog. In the one, magistrates and court personnel lack resources and support and the heavy daily caseload becomes a battle against time and numbers rather than the administration of justice. Cases are not dealt with 'expeditiously' but protracted for months and even years since the judge/magistrate will only sit for a couple of hours a day before moving on to the next case or set of duties. In the other, the caseload is low, the court rarely sits and when it does only adjourns the case.

Both situations produce added burdens on the parties and their witnesses in terms of cost, time, and anxiety, to name some. By way of response, some donors have offered to computerize court registries investing in the belief that technology will solve the management problem while ignoring the basic conditions that contribute to the problem (i.e. intermittent electrical supply, weak/expensive maintenance support, poorly trained personnel etc).

Much can be achieved instead through enhanced communication, co-ordination, and co-operation between the justice agencies themselves - especially at the local level. Monthly gatherings of local actors (magistrates, police, prisons, social services, the Bar and civil society) to discuss local problems, often produces local solutions at low cost. By rationalizing the caseload, it can be categorized, prioritized and managed.

The Chain Link Initiative in Masaka Magisterial district, Uganda, demonstrated that the justice agencies were all part of the same chain that makes

105) The Paralegal Advisory Service 'Changing the Landscape'. Final Evaluation Report. Martin Pierce. March 2007 at p.21.

up the administration of justice process and that they all stood to benefit from working more closely together and sharing information. Some of the immediate benefits included:

- 600 'deadwood' cases identified and withdrawn with the stroke of a pen by the Director of Public Prosecutions

- Joint prison visits with agreed action in relation to priority prisoners identified including release of those found to be imprisoned unlawfully.

- Development and distribution of agreed performance standards for different stages in the administration of justice process.
- Introduction of court 'open week'.

- Joint meetings to weed out old cases and co-ordinate the scheduling of trials.

The Chain Link initiative has paved the way for the introduction of a co-ordinated approach to planning and budgeting on a national, sectoral level for the Justice, Law and Order sector programme (J/LOS) in Uganda today.[106]

In addition to improving coordination between courts and prosecutors, the Chain Link Program has recognized that improved case management also requires coordination with citizens. For instance, among other innovative ideas, a Chief Magistrate has assigned a clerk to monitor the grounds around court to ensure that persons sitting there know what to do, where to go, etc (see PAS below). This same court has also designed posters and guides for court users in various languages and pinned them at the entrance of the court. These measures make it more likely that defendants will arrive promptly in court, prepared to present their cases.
The Case Flow Management Committee in the Chain Link project is also known as a 'Court Users Committee' (Malawi) and 'Access to Justice Committee' (Kenya). These committees operate at the local level to identify problems and come up with local solutions. They meet regularly (monthly) and have proved effective in improving communication, co-ordination and communication between criminal justice agencies and settling local crises.

106) www.justice.go.ug/jlos.htm.

In Malawi, the meetings are minuted and action points agreed. This has enabled the committees to identify local blockages and solve them. For instance, the overcrowding in one prison became so bad that prisoners were taking it in turns to sleep. Paralegals, supported by prison officers raised the matter at the CUC, the Chief magistrate visited at night and the next day, he returned with three magistrates, police prosecutors and court clerks and released a number of prisoners to ease the congestion.

The Committees require little in the way of funding: $10 per meeting is budgeted for in Malawi which covers the cost of local transport and some refreshments. The CUC provides practitioners with a forum to address temporary crises as in the example above and also to discuss on a continuing basis ways of reducing the caseload by referring appropriate cases to the Community Service officers (who also attend these meetings); or back to traditional authorities for local settlement - as well as encouraging the police to speed up investigations and gather the evidence before the person is remanded in custody rather than afterwards.
In the Punjab in Pakistan, a Tri-Partite Committee meets once a month on a structured basis. The Committee consists of the District Magistrate, a Sessions Judge, and the Deputy to the Senior Superintendent of Police. It visits the District prisons, where it is able to monitor administrative records, interview some prisoners and is able to uncover malpractice on the part of the police. Where necessary the Committee can arrange for bail to be granted; and when deemed appropriate for cases to be discontinued under powers granted by the Home Secretary. It is claimed that in a fifteen month period 35,000 prisoners have been released from prison through this process.[107]

Encouraging greater leadership and activism from the superior judiciary

Plea bargain and credit for early plea
The plea bargain is a common, legitimate device to encourage an accused to enter a plea of guilty to a lesser charge than the one on which s/he was originally indicted. Thus, where the indictment charges murder, but it is a borderline case, the prosecution may indicate to the defence (through the lawyer) that s/he might accept a plea to the lesser charge of manslaughter. The pre-trial hearing facilitates this type of 'bargain'. Where there is no pre-trial hearing and the matter is simply listed for trial, this type of discussion

107) Index of Good Practices in Reducing Pre-Trial Detention. PRI. Version 7, October 2005 at p. 18: www.penalreform.org.

and reflection may take place in court before the trial starts. Many cases 'collapse' at court in this way.
In a number of countries the plea bargain is less a 'bargain' than a request that the police or State prefer the right charge. For instance, in many jurisdictions the police routinely charge 'murder' where a person dies, notwithstanding the facts of the case plainly disclose manslaughter. In this situation, the plea to manslaughter is entered less on the basis that 'if you reduce the charge, I will plead guilty' and more on the basis that 'I am not guilty of murder, but I am guilty of manslaughter'.

Paralegals under the PAS in Malawi conducted trial observations of 91 capital cases in 2001. Of these, 75 hearings were ready to start; and of these 45 ended in pleas to manslaughter (or 60%, i.e. costs thrown away).
In October 2003, the PAS conducted clinics in one prison to explain the difference between murder and manslaughter. As a result, 33 prisoners indicated their willingness to enter a plea to manslaughter. The paralegals informed the legal aid department and the court. The cases were listed and 29 pleaded guilty at court and were sentenced.

In 2005, paralegals carried out a complete census of all homicide remand prisoners in Malawi and conducted their legal education clinics. As a result they estimated that 50% of the 800+ backlog of cases could be dealt with other than by a jury trial (i.e. by way of plea or dismissal) at savings to the judiciary in excess of $400,000.

This provides a three-fold benefit in terms of: 1) improved case management; 2) reduction of the backlog and breaking down the remainder into manageable numbers; and 3) substantial savings to the judiciary in terms of judge days spent trying the matters and in terms of costs.

Many people in prison are guilty of something (not all are innocent) and by preferring the right charge many will enter a plea. Further encouragement is provided by the courts giving credit for a guilty plea (in England and Wales, a third off the sentence is given that would have been imposed had the accused been found guilty after a contested trial).

Sentencing guidelines also focus the minds of those in custody so that they know the tariff (or 'going rate') for an offence of burglary, rape, wounding, and so forth. These simple directions are easy to introduce and enable the courts to reduce the backlog of cases and increase efficiency in pushing cases through the system.

By informing those awaiting trial on the law and procedure, paralegals can reduce any 'arm twisting' by the prosecuting authorities. Further, they refer all those intending to enter a plea to a serious charge to a lawyer so that the individual is properly advised as to his/her defence and the implications of entering a plea of guilty in court.

Relaxing bail conditions
The senior judiciary can also encourage greater use of bail by magistrates and the lower courts. One obstacle in developing countries is that local people do not understand the procedure. A village that has apprehended a thief and walked him some kilometres to the local police post does not take kindly to finding him back in the village the next day.

Paralegals in Malawi developed a visual aid to explain the meaning of bail in consultation with police, courts, prisons and prisoners. The final poster was widely distributed in police posts, courts, prisons and villages in vernacular languages in Kenya, Malawi and Uganda by the paralegals there.

Identifying blockages

Trial observations, time and motion studies and court surveys
It may be that backlogs are reduced and *x* number of cases disposed of in a certain period - i.e. the system becomes more efficient. But then what of the quality of the justice rendered and the fairness of the proceedings?

Did those awaiting trial have 'adequate opportunities' to consult with a lawyer[108]; or access to a lawyer 'of experience and competence commensurate with the nature of the offence'[109]? Did the 'opportunities' ensure that time was available for counsel to canvas a plea or reduce the charge?

Trial observations are useful in providing a snapshot of the workings of the criminal justice system and its fairness and in informing the judiciary on some priority measures.

The findings in Malawi from the PAS after conducting 91 trial observations included:

Police lack resources to gather evidence and complete their investigation;

108) Annex para. 8 UN Basic Principles of the Role of Lawyers 1990.
109) Idem para. 6.

over-rely on confession evidence; adduce hearsay evidence which leads to the case being dismissed at trial (often years later); individual officers are transferred and files are lost or forgotten; the system of passing the file up the chain of command for perusal causes delay and files being mislaid. This in turn encourages a blame culture with each part of the prosecuting process accusing each other of delays or loss of files. Police routinely charge murder which prejudices the defendant's chance of being released on bail.

Case management lacks system: new cases are set down for trial, while old cases are put to the bottom of the pile

Lawyers have inadequate preparation time: advance disclosure is not served on the defence; the Legal Aid department lacks the resources to prepare cases (visit the defendant in prison and take a proof of evidence; or locate potential witnesses and take statements). Both prosecution and defence lack advocacy and court craft skills.

Trial judges lack familiarity with the criminal law and procedure; there are no sentencing guidelines in common or garden 'domestic' or 'bottle store' type homicides where there are no aggravating factors which would encourage those so charged to enter early pleas.

A structured research study of a number of courts (at all levels) over a period of time provides information on the blockages and delays that protract cases and slow down process. Such a study also casts a light on the facilities available to judges, lawyers as well as members of the public; and come up with recommendations on how courts can be made more user-friendly.

Reducing prison overcrowding

The level of overcrowding in many countries has long passed acceptable parameters. There are a range of measures that need to converge at the same time if any real impact is to be had and sustained in the medium term.

A first step is to identify who is in prison. Many will be held unlawfully or unnecessarily, many will have overstayed. These cases are not controversial. Prison officers recognize them but are often voiceless when it comes to alerting the courts and police about such cases.

In 2003, the Ugandan Prison Service found that over 460 prisoners had exceeded their constitutional remand period and were due for unconditional bail.

In an earlier census of homicide remandees in Malawi (1997), 47 cases were found not to have a file and were dismissed. All the persons concerned were in custody awaiting trial and many had spent over six years on remand.

The Kenya Prison Service in 2003 identified a prisoner in Nakuru Prison who had been waiting for trial for 18 years and another in Langata who had been waiting trial for 17 years.

Recently in the USA a report by the JFA Institute noted: '…the vast majority of crimes are neither as serious as the public believes them to be nor as heinous as the media portrays them…The volume of serious crime attributed to released prisoners is also much lower than is commonly believed.' It recommends inter alia decriminalising 'victimless' crimes (e.g.: gambling, prostitution, abortion, loitering, being a rogue and vagabond and illicit drug use and abuse).[110]

Amnesties and pardons are generally ineffective in reducing prison overcrowding save as a stop-gap measure to let off steam. Accordingly, they are not recommended as: they undermine public/judicial confidence and reinforce widespread notions of impunity for certain crimes, are susceptible to corrupting influences, and dismay the prisoners.

In 1998 in Nigeria, a presidential taskforce on prison decongestion and reforms was constituted which approved criteria for release of prisoners and visited every prison in the country to verify data. Trials were speeded up and magistrates visited prisons. Between December 1998 and October 2000 over 8000 prisoners were released. Within three months the prisons were even more congested.

What is needed is something systematic and continuing: a prison census starts that ball rolling and immediately secures the release of a significant percentage. The continued oversight of paralegals working with the criminal justice agencies ensures cases keep moving.

110) 'Unlocking America: Why and How to reduce America's Prison Population.' The JFA Institute, November 2007, www.jfa-associates.com

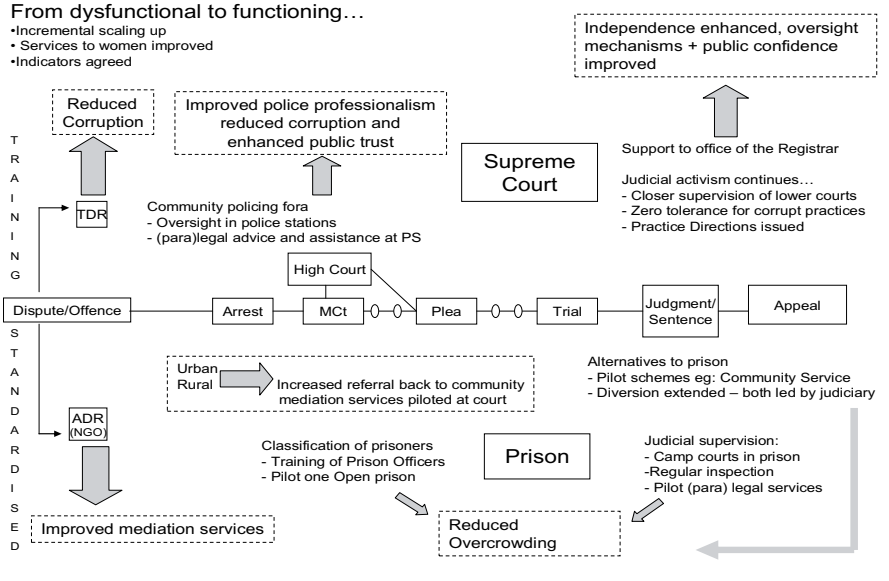
Paralegals from the Kenya Prisons Paralegal Project (KPPP) 'significantly helped decongest the prisons'.[111] In Langata women's prison in Kenya, paralegals screened all the remand prisoners and referred individual cases to the courts. Over a six week period 60 out of a total population of 80 remand prisoners were ordered to be released by the courts.

The head of Uganda's Prison Service attributed the reduction in the prison remand population from 63% to 58% over a five month period directly to the work of the paralegals under the PAS (Uganda).[112]

The PAS (Malawi) has been cited by all stakeholders as the principal cause of the drop in the prison remand population from 40-45% to a mean of <25% since 2004. Currently it stands at 17.3%.[113]

Laying the ground for broader reforms

By taking a problem-solving approach that relieves pressure at the local level, it is suggested that momentum for change develops and coalitions of interest form among local actors.



111) Msiska/Nyongesa: Evaluation of the Kenya Prisons Paralegal Project. 2005.

112) Mutahi Ngunyi/Valentine Namakula: Evaluation of Paralegal Advisory Services (PAS), Uganda. 30 October 2006, for the Legal Aid Basket Fund, Danida.

113) World Pre-trial/Remand Imprisonment List, Roy Walmsley, International Centre for Prison Studies, King's College, London. 2008 www.prisonstudies.org.

The next step then becomes - again at the local level - a move towards a more functioning system.

Community legal services at the village level
The services provided by civil society organizations in the community and in the area of both ADR and provision of legal assistance have proved their value to those accused of crime and their victims; and in addressing a wide range of disputes – both civil and criminal – that might otherwise escalate.

Timap for Justice[114] in Sierra Leone is supported by the Open Society Justice Initiative to train and equip an association of paralegals to provide 'community legal services' to poor Sierra Leoneans to solve the wide range of justice problems they face. With only 100 lawyers in the country (90% of whom are in the capital, Freetown), and local trust in and reliance on customary law, the need was to provide basic justice services 'at the chiefdom level'. The common justice problems included: domestic violence, child abandonment, forced marriage, corruption, police abuse, economic exploitation, abuse of traditional authority, employment rights, right to education and right to health. Thirteen paralegals were recruited to work in five pilot sites from those sites. They received a two week intensive training in law and were closely supervised through training on-the-job. They employ diverse working methods. For individual justice-related problems, paralegals provide information on rights and procedures, mediation services and practical assistance to people in dealing with government and traditional authorities. For community-level problems, they engage in community education and dialogue, advocacy for change and organize communities to take collective action. In so doing, the paralegals draw on customary and formal institutions depending on the needs of a given case. In some extreme or important cases, they refer the matter to lawyers for representation. Community Oversight Boards have been established in each pilot site (made up of community leaders) to monitor the work of the paralegals. In 2007, the programme won a grant from the World Bank to scale up nationally.

Like the courts, many traditional authorities also find themselves inundated with work in arbitrating local disputes. Even assuming the criticisms and concerns raised above (p. 6), many are ignorant of the human rights provisions set down in the national constitution. Others may be adroit ar-

114) This extract is taken from Vivek Maru supra.

bitrators but poor mediators. In practice, many have proved themselves highly receptive to offers from civil society groups to provide training in areas that enable them to service the needs of their community more effectively and even to take over some of the workload.

In Bangladesh, the primary distinction between the traditional *salish* (traditional dispute resolution mechanism at the village level involving village headmen or elders) and NGO-co-ordinated *salish* is that the former relies on arbitration while the latter is a mediated process. In the one, parties are bound by the decision of the officiating individuals, while in the second; the NGO training enables the decision-makers to actively engage both parties in settling the dispute, with the goal of reaching a mutually agreed solution. The process is highly participatory and results are usually complied with because a) they have been accepted by both sides; and b) the maximum participation of villagers and the role played by the local mediators further vest ownership in them to ensure compliance between the parties (i.e. societal pressure).

The leading NGO to have specialized in this field is the Madaripur Legal Aid Association (MLAA) who has developed over years the Madaripur Mediation Model (MMM). NGOs from all over the country and outside Bangladesh send staff to the Training and Resource Centre in Madaripur for training on the model where it has earned wide acclaim both in Bangladesh and abroad.

In essence the MMM works in the following way:

The NGO identifies local contact persons to disseminate information on mediation as a viable alternative to the court system in the project area;
The NGO then establishes community based organizations (CBOs) and train the members in human rights, law and mediation process (all members of these CBOs are volunteers and receive no remuneration at all. MLAA has noted that given the reality that women were subject to greater social and economic injustice in rural areas than men, the preferred selection of women has taken on heightened importance);

The NGO appoints a mediation worker to provide dedicated support to each CBO. Their tasks are to:

- receive applications for mediation;
- send letters to the parties concerned;

- arrange mediation sessions;
- supervise mediation sessions;
- follow up and monitor the solution agreed at and report to head office.

The mediation worker at the village level reports to a mediation supervisor responsible for supporting and supervising all mediation workers in his/her area. In turn, the supervisor is overseen and supported by a district co-ordinator who works with the central office co-ordinator to ensure consistency in the application of mediation support. An MLAA monitoring, evaluation, and research cell maintains updated information on mediation procedures and data on sessions and outcomes.

NGO-mediated settlements are generally regarded as more equitable, especially where women are concerned as they are encouraged to speak and put their side. Another characteristic of NGO-mediated settlements is that NGO staff, as well as local members of CBOs (villagers) follow up the settlements reached to determine if they are being carried out by all parties concerned and either bring the parties back for further mediation or apply societal pressure to encourage compliance. Where the differences are irreconcilable or one party is not complying with the terms of the settlement, the community is made aware of the failure and/or the matter is taken up for adjudication in the formal system.

Traditional authorities have welcomed the initiative as it reduces their caseload and allows them to focus on cases where arbitration is required over mediation.

The MMM operates throughout Bangladesh and was introduced in Malawi in 2007.[115]

In both Bangladesh and Sierra Leone it was found that the credibility and influence of the NGO can itself bring weight on the parties to participate in the process and reach a settlement.

Police professionalism and public trust

Where criminal justice agencies profess a rights-based approach, civil society actors need to adapt their response accordingly. Confrontation needs to be jettisoned in favour of a more collegiate approach. The notion of 'com-

115) Fazlul Huq, Founder Madaripur Legal Aid Association and Secretary: mlaa@bangla.net.

munity policing' is becoming more widespread generally, while in South Asia, the Asia Foundation has promoted community-oriented policing.[116]

Trained non-lawyers from the local community have a key role to play in providing independent legal assistance in the police station. Paralegals have demonstrated their impact with diverting young persons at the beginning of the criminal justice process in Malawi. Law students have a role to play as well.[117]

First line courts

The lower courts in urban areas particularly throng with ordinary people who attend as litigants, witnesses, relatives of a party and members of the public. They are also attended by touts, vendors and other never do wells who see a market for their services. The facilities are often poor for staff as well as for members of the public.

In the magistrates' courts in Malawi, paralegals offer general advice and assistance to the accused, relatives and sureties for the accused, defence witnesses and members of the public to orient them at court on where to go, what to do and what is going to happen. They do not advise anyone individually on the merits or not of their case.

The paralegals meet with the court clerk, magistrates, prosecutors and any other criminal justice agencies (e.g. Social Services) and acquaint them with their presence and seek the necessary permission to meet with people in custody. They follow up individual cases from prison and any matters from the previous day or week - especially release orders and old case lists.

---

116) Community-oriented policing (COP) reshapes traditional police management and operational strategies by facilitating collaborative working relations between citizens and police, based on a problem-solving approach that is both responsive to the needs of the community and sensitive to the challenges that police face in performing their duties. See: www.asiafoundation.org.

117) The Bar Association of Angola (OAA) developed a programme of assistance to suspects in police custody in 11 police stations in Luanda district supported by the UN mission then in-country whereby graduate lawyers attend police stations with public prosecutors to advise an accused person at interview. In one ten month period, the OAA project assisted at 1409 interviews and filed 69 actions requesting the release of illegally detained persons. The project focused on poor people at the initial stage of the investigative process where most abuses take place in police stations in the Luanda area. It involved young lawyers (*estagiarios*) fresh out of law school interacting with police officers and prosecutors. They were paid a stipend for each interview they attended.

They assist members of the public orientate themselves by directing them where to go; explain the lay-out of the court and introduce them to the court clerk; they explain the procedure (first hearing, bail, guilty/not guilty pleas, adjournment for trial); and they follow up at the end of the case with advice on what to do if the case is not ready for hearing; they are in the wrong court; if the name of the accused person has not been traced in the court clerk's registry.

They assist witnesses by checking the summons s/he brings along to court, explaining the lay-out of the court and introducing them to the court clerk. They explain the role of a witness, meaning of the oath and procedure. They follow up at the end of the case and advise what to do if the matter has failed to take place or has been adjourned.

They assist the accused on bail or in custody by checking the daily court record, identifying numbers of remand prisoners and status of their case. If in custody, they seek permission to visit the accused and ask if s/he is expecting a lawyer or witnesses to attend or persons to stand surety for him/her. They follow up outside with these witnesses and establish if they are present. They check that the accused is familiar with the process and offer any last minute general advice. They follow up at the end of the court hearing with a courtesy call. If the accused has any messages to communicate from witnesses/relatives or from accused and check with the police if they agree to communicate with them or they need any supplies (e.g. food, tobacco).

Where a person is granted bail, they communicate with their team member in prison so that s/he can follow up for prompt release. Where a person has been refused bail i.e. due to absence of a surety, they inform their team member in prison so that the accused can be advised to contact his family to organize a surety.
Since 2004, paralegals have assisted over 22,000 accused and 4,000 witnesses as well as countless members of the public.[118]

Supervision and direction from the superior courts
The superior courts in any given country usually retain powers of oversight regarding the performance of the lower judiciary, police investigation and prison conditions. The issue of court rulings, practice guidelines and cir-

118) PAS 'Changing the landscape' evaluation report *supra*.

culars provide guidance and criteria for these agencies to apply. Prompt enforcement by the senior judiciary when these rulings and guidelines are flouted or ignored sets clear standards. Targets can then be set by which to measure improvement. The judiciary can, for instance, order pre-trial hearings to check the progress in a case, discharge those cases that have taken too long, make cost orders against lawyers for unnecessary adjournments, speed up their own judgements, and introduce alternative sentencing disposals to prison.

Creating space in overcrowded prisons

Classification of prisoners – pilot open prison

Prison authorities often behave as the passive recipient of all the criminal justice process sends to them. However they know that not all the persons under their charge are dangerous. This category of offender in most countries (that are not recovering from conflict) occupy a fraction of the total population. By assessing each individual according to the risk s/he poses, prisoners can be allowed greater or lesser freedom within the prison system. Most will pose no risk at all. They can be allowed out to work in the community, or placed in more open prisons. Those (few) that do pose a risk can be accommodated in secure surroundings. Currently, the general situation is that prisoners are categorized as 'sentenced/unsentenced'; youth/adult; male/female. Once this is done, the prisoners are 'lumped together': violent with non-violent, professional with amateur, lifer with short term - and so on. Accordingly prison staff tend to treat all prisoners as 'high risk' which results in a 'warehouse' mentality where the prison is simply to keep people locked up rather than a place for more productive activities.

The Indian state of Rajasthan has taken 'open prisons' to a completely new level. Persons convicted of serious crimes and sentenced to life terms and who have served one third of their sentence (usually seven years) become eligible to be sent to Open (Prison) Camps. The camps are without high walls or surveillance. Warders act more as guides and helping hands than as security.

Sanganer Open Camp has been working successfully since 1963 and is the nearest to providing a life of 'free' living to prisoners who have completed a third of their sentence and are assessed to be eligible.

'Prisoners' live as they would in their own villages: they are joined by their families; their children go to the local schools; they either run their own private businesses (selling building materials, transporting goods for local industry, running phone booths), or are employed by businessmen and traders in the local town. The dyeing and printing works provide employment to several prisoners; others teach at the local schools, and still others run carpentry shops.

Half of the prisoners have built houses from their own earnings. When they leave the camp the houses become available for newcomers. The Jails Department has built one-room cottages for new prisoners with a view to increasing the numbers at the Camp. A third of the families have television sets, many have their farm animals with them and sell the milk from their cows in the open market.[119]

Informing prisoners on the law and systematic case screening

The reality for most indigent awaiting trial prisoners is that they will not have the services of a lawyer to represent them in court, even for charges attracting long prison sentences. The national constitutions of many African countries purport to provide adequate safeguards. Some constitutions make provision for legal representation at public expense 'where the interests of justice so require'[120] or where 'substantial injustice'[121] would otherwise result; but many merely allow for legal representation and remain silent on the matter of costs, or disclaim any right to state-funded assistance.[122]

With lawyers in such short supply, one of the first tasks of the Paralegal Advisory Service in Malawi was to develop a 'course' for awaiting trial prisoners on the criminal law and procedure so that prisoners could understand them and apply both in their own case at their next court appearance - whether to make their own bail application; enter a plea of guilt and put their points in mitigation of sentence; or to conduct their own defence.

---

119) Idem at p. 48.

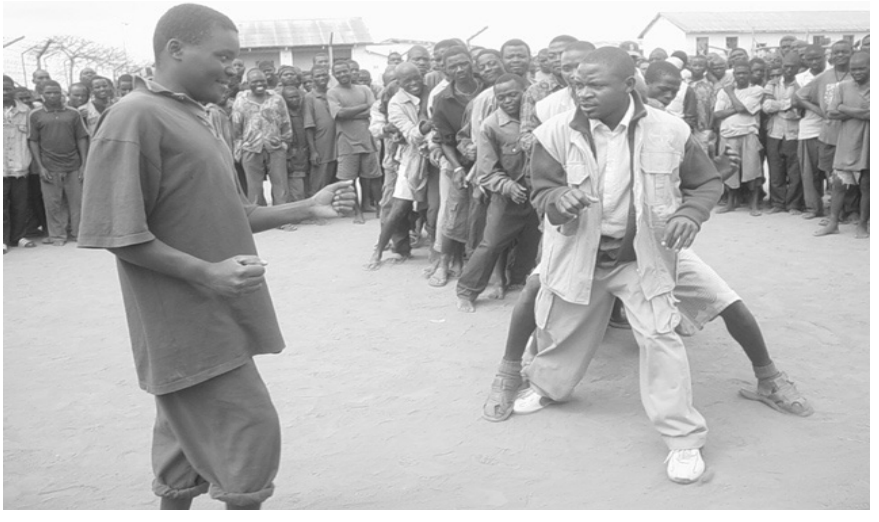
120) Constitution, Art. 42, cl. 1, § c (1995) (Malawi).

121) S. Afr. Const. Art. 35, cl. 2, § c (1996).

122) Constitution, Art. 32 (1998) (The Sudan); Constitution, Art. 77 (1992) (Kenya) (save in capital murder cases), Constitution, Art. 12, cl. 13 (Lesotho); Constitution, Art. 36, cl. 6 (1999) (Nigeria).

The theatre for development company, Nanzikambe, worked with the paralegals in Malawi to produce a series of training modules (or 'paralegal aid clinics' (PLCs) which the teams conducted each day to take remand prisoners through the justice process from arrest to appeal.

Paralegals were trained in forum theatre techniques so that the prisoners became 'active creators of their reality and learned through action'.[123] Applying these techniques, two paralegals will regularly lead a group of up to 200 prisoners in the clinic of the day. By 2007, paralegals had empowered just under 150,000 prisoners to represent themselves in court and directly facilitated the release of over 3000. As noted, the remand population dropped from an average of 40-45% to a stable average of less than 25% since 2004. Prisoners were turning up to the clinics not because they were entertaining but because they had noticed that others who had attended the clinics were not coming back to prison from court.



(An example of a forum theatre from a Paralegal Clinic session in Mzuzu prison in northern Malawi. The line of prisoners shoves forward and pushes the paralegal in the front into the path of the oncoming taxi. Discussion afterwards explores whether this was a culpable and so criminal act; or accident and so involuntary cause of death.)

123) The PLC Manual – A Manual for Paralegals Conducting Paralegal Aid Clinics (PLCs) in Prison, Second Edition, 2007. PRI/PAS Institute at p. 9.
See too: 'Freedom Inside the Walls' (53') PRI. 2005. Dir: Pierre Kogan. A film of the work of the paralegals in Malawi, Benin and Kenya, available from www.penalreform.org.

Transport is an issue for many prisons in conveying prisoners to attend court. An alternative approach is to bring the court to the prison – not to try cases but to screen them and push them along.

In Bihar, India, judicial officials periodically visit prisons to review cases and dispense rulings on the spot. These 'camp courts' only handle matters involving minor offenders. The courts are seen as a useful way to reduce overcrowding, speed up justice delivery, and restore the 'hope' factor in the life of prisoners.

In Malawi and Kenya, encouraged by paralegals, magistrates have applied this practice. The paralegals prepare lists of those awaiting trials and agree the list with the prosecution beforehand. The magistrate visits the prison to screen the pre-trial caseload and weed out those who are there unlawfully or unnecessarily and fix dates for trial. The exercise has been effective in reducing congestion and tension by restoring prisoners' confidence in the justice system when they can see that they are not forgotten.

As already mentioned, donor agencies/judicial officers often see technology as the answer here. The introduction of video links between court and prison is paraded as a cost-effective solution to this problem. However the experience of Cook County, Chicago with 'Video Bond Court' has come under severe criticism by lawyers, judges and the media - and is currently the subject of litigation by public interest lawyers.[124]

Lessons from experience

The lessons we have learned have not always been from the right teachers. Lawyers and judges make poor reformers. They see their interests better served by holding on to their 'magical knowledge'[125] rather than by simplifying or making such knowledge more accessible. Civil society groups in less wealthy countries of necessity have developed effective practices in spite of poor governance environments. They demonstrate that by building on local capacity and engaging with local actors, they can jointly produce a concerted strategy (though they would not call it by such a name)

124) '50 minutes ÷113 people = 26.55 seconds per case; Court system forces attorneys through fast and furious pace, with hardly a hint of justice.' Chicago Sun-Times, 20 June 2005.

125) Access to Justice in Africa supra: 'Legal pluralism: a new challenge for development agencies.' Markus Weilenmann at p. 88.

at the local level to weave these practices into a safety net that protects the poor, weak and marginalized in the early stages of the criminal justice process where they are most vulnerable.

The paralegals operating in Bangladesh as mediation workers, in Sierra Leone, Malawi and east/west Africa are not put forward in place of lawyers but to fill the gap where there are no lawyers or where the expertise of lawyers is surplus to the actual need. In the same way, the interventions suggested here do not seek to replace the formal justice system but to assist the 'system' function more efficiently and more equitably by a) removing the pressure on that system; and b) by providing space to enable the elaboration of wider and deeper reforms more in tune with local culture and context.

It is suggested that they offer primary justice services that are appropriate to the needs of ordinary people and that they demonstrate a real 'genius' in the 'way they adapt themselves to their unique contexts and work…with national and local social movements'[126] and in 'finding concrete solutions to people's problems'.[127]

126) Maru supre at p. 33.
127) Maru supra at p. 29.

2
Case Studies

CHINA UNDER TRANSITION TO RULE OF LAW – THE ROLE OF LEGAL AID AND ADVOCACY ORGANISATIONS

Huang Jingrong, Wang Fang & Hatla Thelle

Introduction

The Kyiv Declaration on the Right to Legal Aid, points 7-9[128], defines legal aid as including non-formal means of conflict resolution and the Declaration suggests diversifying legal aid delivery systems and service providers. This article on the Chinese system supports that understanding, since in China governmental legal aid, pro bono lawyering, public interest litigation, and counselling by civil society organizations work together and supplement each other. The same kinds of people are involved and they share the same vision. For this reason, it is necessary to consider many different institutions and activities in order to get a full picture of how free legal services are provided in China and on how legal service providers seek to protect the human rights of their clients. In this article, the term legal aid is used in this broad sense.

In the first part of this article, the legal environment which Chinese legal aid practitioners are faced with will be described. Secondly, an overview of the different forms of conflict resolution mechanisms will be provided, with a special focus on the needs of vulnerable groups. Two examples of current trends in legal aid service provision will be discussed: a) the establishment of legal aid centres which are attached to a law firm yet are still attached to the government legal aid system, and b) the rise of public interest litigation. The first of these trends is a good example of the type of public-private co-operations which have become more common in China in recent years. The second is an example of the increasing use in China of legal advocacy as a tool for strengthening protection of human rights.

The law in transitional China

From the perspective of history, China has definitely made great progress towards rule of law over the past three decades. It has changed from a country overtly proclaiming that 'no law shall restrain the people,' during the

128) Annexed to this publication

Cultural Revolution between 1966 and 1976, to a society committed to building a legal system based on the rule of law.

In recent years, leading Government officials have said that China now has a system of laws sophisticated enough to meet the requirements of modern political, economic and social life.[129] In 1999, The National People's Congress (NPC) inserted a new clause in the Constitution stating that 'building a socialist state under the rule of law' is a goal of the State. A later amendment, in 2004, added the clause 'the state shall respect and preserve human rights.' The phrase human rights, formerly a political taboo, has now been formally recognized and endorsed by the Chinese Communist Party (CCP) and the State has committed itself to protecting the human rights of its citizens.

While some may question whether the Party is really willing to submit its use of executive power to genuine judicial scrutiny, the changes to the Constitution and the emphasis on the principle of rule of law in public policy statements have inspired Chinese citizens to make use of the legal system to assert their rights and to seek judicial and administrative remedies. Chinese people are becoming more rights-conscious and there is increasing focus on how the Constitution, other domestic laws and legal mechanisms can be put into service as tools for rights protection. Academics and community advocates, among them legal aid practitioners, are increasingly utilizing public interest litigation and other legal tools to advocate for legal reform and social change.

In spite of this cautious optimism regarding China's political and legislative embrace of the concept of rule of law, the reality is that there are still many problems with Chinese laws and legal institutions that make it difficult for people to obtain justice in practice.

There exists a widespread distrust of the judiciary and even of the legal system as a whole amongst the general public. The current legal system in China still reflects in many ways socialist models and theories of law. China's legal system was inspired by the legal system of the former Soviet Union, in which the content of the written law is not necessarily determinative of the way in which executive power may be exercised by the State.

---

129) Shen Lutao, There are Laws to Abide by in Main Areas of Political, Economic and Social Lives in China, in Xinhuanet, 24 October, 2002, available at http//news.xinhuanet.com/newscenter/2002-10/24/content_607118.htm.

On the face of it, China has a Constitution which clearly states and guarantees citizen's basic rights. As stated in the Constitution itself, it is 'the fundamental law of the state with supreme legal effect'. In practice however, the Constitution cannot be relied upon by an individual in legal proceedings, as it is considered to contain guiding principles of law rather than directly judiciable legal guarantees. Many legal scholars argue that the Constitution *should* be applicable in individual cases, given that there is no provision to the contrary in the Constitution or any other law, but the Courts have thus far been extremely reluctant to do so.

Another weakness of the current Chinese legal system is that there is no clear legal principle or mechanism to ensure 'unity of law.' While other legal jurisdictions apply a principle of hierarchy of laws, by which a law adopted by a higher legislative body will prevail over a regulation adopted by the same body or over a law or regulation passed by a lower body, this principle does not exist in Chinese law. As a result subsequent regulations made by the State Council, or subsequent laws or regulations made by provincial or local Congresses can be held to prevail over earlier laws adopted by the National People's Congress.

According to the Constitution and the Law on Legislation, the Standing Committee of the National People's Congress (NPCSC) has the power to invalidate a regulation enacted by the State Council or by local peoples' congresses, but it never exercises this power in practice, it least not openly. There are various explanations for this. One is that the National People's Congress does not currently have enough authority within the overall Chinese political system to exercise such a power. Until recently, the Congress was generally viewed as a 'rubber stamp', a means by which the government or the Party could seek to obtain legitimacy for their actions. A second is that the prevailing philosophy of co-operation and avoidance of disharmony between State organs makes the NPCSC reluctant to exercise this power.

For similar reasons, the Courts are also rather ineffectual when it comes to protecting citizen's rights. An examination of judicial practice shows that the Courts are more willing to guarantee rights of the person and property rights than other civil and political rights. This is also apparent from the text of the Law on Administrative Litigation, which restricts limits admissibility to cases alleging violations of rights of the person or property rights. Cases involving protection of other civil or political rights are only admissible if there is another law or regulation explicitly stating the right in ques-

tion is justiciable. As such, most civil and political rights are unenforceable in Chinese courts.

The reputation of the Chinese legal system is undermined not only by the inability of the system to provide remedies in cases of abuse of power, but also by the poor performance of judicial officers themselves. As mentioned above, corruption is rampant within the judiciary, a fact which has greatly eroded public confidence in the institution. Judicial reforms conducted in recent years have done little to change public perceptions.

Despite this unpromising institutional environment, Chinese lawyers and legal aid practitioners are using whatever legal tools, albeit rather blunt ones, they have at their disposal to assist their clients in pursuing justice, enforcing rights and obtaining legal remedies.

Conflict resolution mechanisms: An overview

Effective protection of human rights requires institutions and procedures by which an individual can access the justice system and obtain remedies. There are a variety of different ways in which Chinese citizens seek to resolve disputes or to obtain justice, not all of them involving use of the formal justice system. This section aims to describe these different approaches, taking the perspective of a person who does not have the financial means to buy help to solve his or her problem.

As in other legal systems, most problems and grievances in China are not resolved in the courtroom but through negotiation or mediation, sometimes with the assistance of a third party, who might be a legal professional, a representative of a social organisation or of a local administrative office, or a respected individual from the local community. Furthermore, it is not uncommon for people to seek a solution to their problem in several different 'forums' at one time, making use of both formal and informal mechanisms

There are four different types of dispute resolution practiced in China today: consultation, mediation, arbitration and litigation. Some forms of dispute resolution or problem-solving date from imperial times, while others have been established more recently and are based on modern legal practice. Some are highly formalized; others are not. Dispute resolution forums can be found on a spectrum ranging from independent, community-based initiatives, through forums facilitated by commercial law firms, to pro-

cesses sponsored by academic institutions close to the political elite, to units established within Government Ministries or agencies.

In this respect, they reflect the multi-facetted nature of Chinese public and private institutions as they have been developed over the past three decades. There are various forms of interaction taking place between these different forums. The distinction between state and non-state is not as clear-cut in China as it is in some other countries. In China, the government controls the establishment and ongoing existence of organizations, but this has not stifled the dynamism of a network of advocacy groups who co-operate with the state but can also challenge it on specific issues. One example of how grievances can be brought to the government's attention is through the petitioning system (or 'visits and letters offices') which has its origins in imperial China. A more recent dispute resolution forum is the mechanism for the administrative resolution of labour disputes, which were also used during the central planning period of Communist party-rule (1949-79). By contrast, the concept of legal aid for poor people is a new one in Chinese society, having been first institutionalized in the Chinese system in the mid-1990s. Real access to justice depends on the existence of legal institutions that are accessible to all, regardless of the economic resources they possess. Each of the mechanisms described below, which were established since the start of the reform period in 1979, can be used by poor people to obtain access to justice in civil, administrative or criminal proceedings.

Basic legal service offices

Basic legal services offices have been established at village[130] or street level in many parts of the country. These offices are open to all citizens: there are no eligibility criteria. The tasks of the offices are to solve conflicts between people, disseminate knowledge about the law, provide legal advice, represent clients in court proceedings, and to coordinate between different governmental organs. A telephone service (the '148' legal service hotline) has been established for people who are unable to attend the office in person. The offices are mostly staffed by legal workers[131], supplemented by lawyers and volunteers.

Legal aid centres

In the mid-1990s, the Ministry of Justice began the establishment of a na-

130) The lowest administrative level in China, comprising more than 25,000 units.

131) Legal workers are people with a shorter law training commissioned by the local government. They correspond to paralegals in other systems.

tional system of legal aid centres (LAC), with a mandate to receive applications for assistance and to provide services to poor people with legal or social problems. The legal basis for the operation of the LACs is the State Council's Legal Aid Regulation of 2003. Under the Regulation, local government has the responsibility to establish and finance the work of the centres, which organize lawyers in the local community to carry out pro bono work. The Law on Lawyers obliges all lawyers to take on a 20 legal aid cases each year as a condition of their practicing licence. Bar associations are involved in the work of identifying and appointing lawyers or law firms to take on individual cases referred by the LACs. Local governments have the possibility to enlarge the scope of the centre's mandate through the adoption of local regulations, but few have done so.

Citizens can apply to the LAC for assistance in civil proceedings by visiting the centre and presenting valid ID, documentation of their economic status, and information about the case. Only certain kinds of cases are eligible for assistance; among these claims for state compensation or for payment of overdue wages or social security benefits. The LAC also appoints defence lawyers in criminal cases upon request by the court. The Criminal Procedure Law provides that a defence lawyer shall be assigned to an unrepresented suspect in cases where he / she is a minor, is deaf, blind or mute, or could face the death penalty on conviction of the offence charged.

Mediation committees

Mediation committees exist across the country at the lowest administrative or organisational levels of villages, residential communities or workplaces. Members of the committees are elected by the community and do not have any legal training. The concept of mediation has been known in China since imperial times; it was also applied extensively after the establishment of the People's Republic in 1949. Formerly, the committees served a double function of 'care' and 'control'; now they are used to prevent small-scale disputes from developing into serious conflicts. Decisions of the committees are not legally binding.

Courts can also perform mediation and issue mediation warrants. Government bodies can also establish special mediation committees.

The petition system (system of 'letters and visits')

The petition system has its origins in a traditional Chinese complaints mechanism which survived the founding of the PRC. First, established in the early 1950s, petition offices initially provided a means for central offi-

cials to address abuses committed by local government officials and to obtain information on the situation at the 'grassroots'. Citizens could lodge complaints with party at local petition bureaus and lodge complaints about the behaviour or decisions of lower-level cadres. Petition offices exist today in almost all local party or government units or agencies, including police stations, prosecutor's offices, courts, local people's congresses, and media offices. Anybody can contact an office and make a complaint. Complaints are rarely processed by the petitions office itself. Rather, a complaint related to a particular organ is referred by the petitions office to the next administrative level of the same organ for consideration. The Chinese government has been strongly criticized by human rights organizations outside China in relation to cases of alleged harassment or detention of petitioners by local authorities.

Labour arbitration committees

The labour dispute system was established in the late 1980s in response to growing worker unrest following the introduction of the market economy. Between the late 1980s and late 1990s labour arbitration committees were set up all over China at the county level and above. Trade unions, together with local labour bureaus, were given the responsibility of establishing legal aid centres at county level to provide assistance to poor workers wishing to make claims. Legal aid centres have also been established in some cases at lower levels, within street committees or individual enterprises. In addition to the legal aid centres, the All-China Federation of Trade Unions also provides legal assistance in labour cases at various levels

There are three stages in the dispute resolution process: mediation at the enterprise level, arbitration at the level of local government, and, if the dispute still cannot be resolved or an award made by the arbitration committee is not enforced, litigation in a labour court or a civil court. As a consequence of the dismantling of state-owned enterprises, mediation at enterprise level has declined, and most disputes now go directly to labour arbitration committees at the level of local government.

Social organizations

Since the start of the reform period, many non-governmental groups with social agendas providing counselling and support services have been established, especially in the fiels of women's rights and environmental protection. Some of these organizations offer assistance in individual cases. Non-governmental organisations can register with the Ministry of Civil Affairs as social organizations, but in order to do so they need to demonstrate a connection to an existing institution, for example a research institute.

A number of Chinese universities have established legal clinics under this registration procedure. The clinics, which are based on the American model of clinical legal education, have been developed with financial and technical support from the Ford Foundation. Law students at universities offer legal counselling services under the supervision of law professors. These clinics provide substantial help to complainants, while at the same time giving the students practical experience in working with the law and playing a role in promoting the further development of rule of law in China.

As an alternative to registration with the Ministry of Civil Affairs, social organizations can register as non-profit enterprises with local government, in which case their activities will be supervised by the local Bureau of Industry and Trade.

Some social organizations choose not to register at all. These groups have very different objectives, working methods, target groups and staff policies than other non-government organizations. Many of them provide also advice and counselling to people in need. They frequently interact with university legal aid clinics working on the same topics or target groups

The so-called 'mass organisations'; i.e., the Women's Federation, The Youth League, the Association of the Disabled and the Federation of Trade Unions, are a special category of social organisation. These are organizations with many hundreds of thousands, or even millions, of members. Established at the start of the Communist era to disseminate Party policy to non-party members, they reach down to the lowest levels of society.

In recent years they have gradually become self-financing and are thus more independent in their actions and commitments then previously. Some of them carry out important social functions, including providing legal assistance to poor people.

Finally, some *law firms and individual lawyers* work on legal aid cases for free. Self-trained lawyers (the so-called 'barefoot lawyers') perform a similar function as paralegals in the country-side, fighting for peasants' rights without remuneration.

The numbers of beneficiaries of the various legal services providers, complaints and dispute resolution mechanisms organizations found in table 1 are not based on reliable statistical data; they are provided merely to show that it is the service providers/mechanisms at the lowest levels, which re-

ceive by far the most clients/complaints. This is probably no surprise considering that the large majority of disputes in all legal systems are resolved without resort to the courts. But against this is the consideration that the decisions by complaints mechanisms at the lowest levels in China are generally not legally binding.

TABLE 1
Numbers of beneficiaries in the different dispute resolution systems

Type	Number of beneficiaries	Level
Basic legal services	6 million	Community
Legal aid centres	295,000 persons	County and up
Mediation committees	4.5 million cases	Community
Petitioning system	11 million letters and visits	All levels
Labour arbitration committees	760,000 workers	County and up
Social organizations	-	Not related to formal hierarchy

The different legal service providers and complaints mechanisms interact with and overlap with each other in a variety of ways: legal aid lawyers work in social organizations as volunteers; lawyers in legal aid centres refer clients to labour arbitration committees; social organizations are urged in the State Council's Regulation on Legal Aid to participate in legal aid work; petition offices can advise a petitioner to seek legal aid or labour arbitration; police officers mediate in minor civil cases; lawyers attached to social organizations engage in public interest litigation, etc. Furthermore, the various actors adopt similar approaches, creating the impression of a lot of different institutions doing the same kind of work without very much coordination. Legal aid centres under local trade unions, e.g., not only provide legal services but also receive petitions like the petitions offices within local government.

The positive in all these developments is that a relatively large group of persons nationwide, with varying levels of formal education, are receiving basic legal training and gaining experience in handling problems encountered by vulnerable groups in society. The more problematic aspect of the current arrangements are that some people are carrying out functions they do not have the capacity or training to perform and that information and experiences are not being gathered or analyzed in a systematic way.

Legal aid services for migrant workers: an example of non-governmental organisations providing legal aid in China

In September 2005, with authorisation from Beijing Justice Bureau, the Zhicheng Law Firm established a 'Working Station' to provide legal aid services for migrant workers (hereafter, 'WS' or 'WSMW'). Zhicheng law firm already has considerable experience providing legal aid to disadvantaged groups in society and has acquired a good reputation for serving the public interest. In 1999, it established the Beijing Children's Legal Aid and Research Centre, which became an independent organisation in 2002.

In carrying out its work, the WSMW cooperates not only with NGOs but also with the Government through the Legal Aid Centre ('LAC') of Beijing Fengtai District, where the WS is located. Each time the WS accepts a legal aid case referred from the LAC, it receives 800 Yuan from local Government as a subsidy. This arrangement is beneficial in three ways: first, the clients receive legal aid from an organisation specialising in migrant worker cases; second, the WS is able to maintain good relations with the local government by relieving the LAC of some of its workload; and third, the WS receives a contribution towards its running costs.

There are more than 500,000 migrant workers living in Beijing, together with their families. They constitute the most disadvantaged group of persons in the city, with minimal access to legal institutions, rendering them incapable of accessing justice or safeguarding their rights in a satisfactory manner. The main activities of the WS are to provide legal information, advice on specific cases and, where necessary, legal representation, to train migrant workers in rights protection issues, and to undertake analytical studies of relevant case-law with a view to advocating for reform of existing laws and policies which impact negatively on migrant worker's rights.

Among the legal problems addressed by the WS are the following: recovery of unpaid salary or compensation entitlements, determination of labour rights and obligations where a migrant worker has been employed as a subcontractor, difficulties caused by unclear procedures for defining work-related injuries, and the failure of labour supervision departments to adequately enforce workplace laws and regulations.

Legal education and awareness

The WS organizes 'know your rights' training sessions at its Offices as well and at various locations in the city where migrant workers congregate. The

aim of this training is to provide migrant workers and their family members with basic information about rights protection, with a view to further empowering them to solve problems themselves, without the need for further legal assistance. In the first year after the programme was initiated in 2006, over 220 migrant workers and 300 college student volunteers were trained on basic labour law and migrant workers rights.

Legal advice and consultation

WS staff provide free legal advice to migrant workers in person or over the telephone, explaining them how they can use the law and legal mechanisms to resolve problems with their employers. Between September 2005 and September 2006, the Working Station provided legal advice to 4,474 clients. Of this number, 1,545 were cases involving failure to pay salaries, and 509 workplace injury cases. The numbers above are calculated purely on the basis of initial consultations; many clients visit or phone the WS several times in relation to the same matter. The WS maintains a staff rotation system for receiving requests for legal advice, with two WS lawyers available for consultation every day. The provision of legal advice raises migrant workers rights consciousness and helps them to understand their options for pursuing a complaint or obtaining a remedy.

In unpaid compensation or salary cases where only a small amount of money is involved, WS lawyers call the employer directly to demand payment on behalf of their clients. This approach has proved quite successful; employers are often fearful of the potential consequences of the case being referred to the authorities.

Where a direct appeal to the employer is unsuccessful, but the issues in the case are relatively simple, the lawyer will explain to the client what evidence they need and how it can be obtained, which legal provisions or mechanisms they can use, and how to negotiate with their employer. If on the other hand the case is complicated, the lawyer will ask the client to gather whatever evidence they have or are able to obtain by themselves, and the matter will then be assigned to a legal aid lawyer.

Legal representation

On the basis of face-to-face or telephone consultations, WS lawyers assess whether a case meets the eligibility criteria in the 2003 Legal Aid Regulations, in which case representation is provided free of charge. Utilizing various legal and procedural channels – informal negotiation, mediation, arbitration and / or litigation, lawyers strive to safeguard migrant workers'

legal rights and interests. Between September 2005 and February 2007, the WS provided representation in 1,049 cases, involving some 1,357 migrant workers and over 11,020,000 Yuan in unpaid wages. Of these, 629 cases were settled by informal negotiation between the WS and the client's employer. In total, 5,737,411 Yuan have been successfully obtained through negotiation, arbitration or litigation, of which 3,817,221 Yuan has been recovered by clients, amounting to 66.53% of the total.

It is sometimes very difficult to obtain probative evidence of the existence of an employer-employee relationship. Of the 1049 cases undertaken by the WS between September 2005 and February 2007, only 45 migrants (4.3% of the total) had a formal labour contract. In their ignorance of the complexities of the law, clients may say to the WS lawyer: 'In all conscience, we do the work. You can go to the building place yourself to see!'

If a client doesn't have – or is unable to obtain – a copy of a formal labour contract, they need to obtain other evidence of employment, such as the testimony of fellow employees, construction site cards, salary slips, medical certificates etc. A few clients are able to gather this material themselves but the large majority need assistance from the WS lawyers to do so.

Various approaches are employed by WS lawyers to gather evidence in cases:

– Acquiring information about the company via the internet.
– Keeping electronic or written records of conversations between the client and his / her claimed boss. The nature of the conversation can suggest that the client and the 'boss' have been in an employee-employer relationship.
– Clients who have been working for a subcontractor (*bao gongtou*) may have never met anyone from the construction firm who is in fact their actual employer. (In Chinese employment law, a construction company is legally responsible for all employees on the site, even if the project is being carried out by a subcontractor. The challenge for the lawyer in such a case is to provide evidence of the employee relationship between the client and the principal contractor. This can be done by persuading the sub-contractor to testify that the client was employed on the building site.

Due to high litigation costs, lawyers will contact employers if the amount of unpaid wages is not so large or the injury is not so serious, and try to obtain compensation through mutual agreement. Even if the negotiation fails and the case is taken to labour arbitration committee or court, lawyers will continue to seek a friendly settlement if wherever possible.

Most cases will, however, ultimately go to labour arbitration or court and WS lawyers seek to do their best to obtain a favourable outcome. Due to the prevalence of multi-level contracting and illegal sub-contracting, it is often difficult for lawyers to be certain who they should bring the action against. Sometimes they have to file and withdraw an application several times before finding the company responsible. The WS has made a practice of publicizing the results of successful cases, so as to raise awareness of the law and to encourage other companies to desist from unlawful or unethical employment practices.

Legal research

The WS carries out research and statistical analysis of legal issues relevant to the field of migrant workers' rights protection, drawing on the experiences of its lawyers and staff. Research findings are published to facilitate joint cooperation and progress. Its publications are designed to promote the development of labour law and of legal aid methods in general. Four publications have been issued to date: '*The Migrant Workers' Legal Handbook*,' '*How to Demand My Hard-earned Wages*,' '*How to Make Labour Contracts?*', and '*Who Infringed Their Rights: An Analysis of 32 cases*'. Annual reports include potted summaries of all cases handled by the WS during the preceding year, together with opinion pieces on the legal difficulties facing migrant workers and what Government and civil society can do to ameliorate the situation. All publications draw directly on WS lawyers' experiences.

Public impact litigation

The core function of the WS is to provide legal advice and representation to individual clients. There is, however, also a role for the WS in strategic litigation on issues that affect many migrant workers and / or their family members. In the case of *Xu Yange v Beijing Kentucky Limited Company (KFC)* the applicant, a migrant worker from Shandong province, was employed by KFC in February 1995 as a warehouse labourer. In May 2004, KFC directed all warehouse staff to sign labour contracts with a dispatching company called Shi Daiqiao; if they failed to do so, they would be fired. Xu Yange and his colleagues therefore had no choice but to sign a contract with Shi Daiqiao. For the time being, however, he continued to work for KFC at the same warehouse. In October, 2005, KFC directed that Xu Yange report to Shi Daiqiao for allegedly violating KFC's employment code. He was subsequently dismissed. Since Xu Yange had been working for KFC for over 10 years, he believed that he had a right under Chinese Labour Law to claim 11 months wages as compensation for loss of employment. KFC argued,

however, that he was employed by Shi Daiqiao and that any entitlement to compensation should be met by it and not by KFC.

Xu Yange went to the WS to seek their advice. After considering his case, the WS decided to provide him with legal assistance. News travelled to other KFC employers and before long about 20 others in the same situation had approached the WS for help. The WS lawyers soon discovered that there were many employers in a similar situation to Xu Lange, who were aware that their rights were being violated, but who did not dare to take action for fear of losing their jobs. The case was typical of many similar cases across China in which labour contracts had been 'transferred' from the actual employer to a dispatching company. After about a year, KFC approached the WS and agreed to negotiate a settlement. Under the terms of the agreement, KFC agreed to pay compensation to Xu Yange and others in the same situation. Furthermore, KFC acknowledged that they were contractually responsible for the employees in question and other like them and promised to desist from the practice of forcing employees to sign contracts with subcontractors in the future. The result of the case was a victory for the WS and a vindication of its working methods. Through careful research and preparation of cases, it is possible to persuade even comparatively large employers to comply with the law and to respect their employees' labour rights.

Child labour cases

The WS pays special attention to cases involving child labour, providing legal aid to child labour victims and their families and organising workshops and public forums on the subject. It has also made submissions for reform of existing criminal and labour laws to Government and to relevant Ministries and agencies. Through publicising individual cases and raising awareness of the issue in the media, the WS has also been able to raise awareness of the problem and of the responsibility of Government officials to more vigorously implement existing legal provisions.

Since its establishment the WS has sought to raise awareness of the situation of migrant workers and of their pressing need for legal assistance. Migrant workers working stations, based on the model of the original WS, have now been established in 15 Chinese provinces, and an informal exchange and support network has been formed. Most practicing labour lawyers prefer to act on behalf of major corporations rather than victims of labour violations, but the establishment of the migrant workers legal aid network demonstrates that there also exist legal professionals who are committed to providing quality legal services in rights protection cases, despite the comparatively poor working conditions and remuneration on offer.

The 'legal advocacy' movement: harnessing the potential of law and of legal mechanisms to achieve positive social change

Although the idea of using litigation and other legal tools to further the public interest is a relatively recent phenomenon in China, it has gained widespread acceptance among individual legal aid practitioners and organizations. Many legal aid practitioners and organizations have identified advocacy of rule of law and human rights through legal aid as their explicit goals. To further these goals, they select cases which they deem have a potential to support and improve the protection of public interest, including human rights. There is no fixed determinant for when the public interest is engaged in an individual case, but public interest lawyers will usually take the following factors into consideration when deciding whether to accept a case: challenging the legality of laws and regulations; exposing important issues neglected by the society; involving a large number of people or vulnerable groups; and involving the enforcement of important legal rights, constitutional rights in particular.

A considerable number of public interest cases have been initiated by legal aid practitioners in recent years, either on behalf of clients or on their own volition. One area where pubic interest lawyers have been particularly active is consumer rights protection.

Unlike ordinary lawsuits, which seek an affirmation of an individual client's rights or interests, public interest lawsuits are brought with a view to abolishing unreasonable or allegedly unlawful policies or practices of monopoly enterprises, most of which owe their continued existence to failure by Government agencies to adequately enforce the law. Since 2004, a large number of lawsuits targeting unreasonable fees charged by public transport providers have been brought by legal aid practitioners. An example are the cases that have been brought against the Ministry of Railways, challenging the practice of raising the cost of train tickets during the so-called 'spring transportation season'; that is, the period leading up to and following the Chinese New Year festival.

Aside from consumer rights protection, the most prominent area for public interest litigation has been cases alleging discrimination against certain social groups. The existence of unlawful discriminatory practices in Chinese society was not widely appreciated by the general public, or even amongst lawyers, until comparatively recently, even though it is commonplace in many areas. Since public interest lawsuits have begun being

brought challenging discriminatory practices by Government agencies, awareness of the issues has increased. Most of the cases brought to date have been initiated by rights-conscious litigants who have found themselves denied employment or educational opportunities due to the application of discriminatory eligibility criteria or hiring practices. In October 2005, for example, a Masters student from Sichuan University Law School, Yang Shijian, brought a suit against the Ministry of Personnel in the Beijing Second Intermediate People's Court for refusing his public service entry application on the basis that he was over 35 years old. This case was the first time this long-standing public sector employment policy had been challenged in Court.

A number of public interest cases have sought to challenge various discriminatory practices targeting carriers of the Hepatitis B virus (HBV). No-one knows for certain how many Chinese people are carrying the virus, but one statistic has placed the number at over than 120 million people. Although most HBV carriers have not developed full blown infections and are as such no threat to the people around him, various discriminatory policies and practices have had the effect of systematically excluding them from civil service positions and hindering their prospects and enjoyment of rights in education, marriage and other areas. In November 2003, a lawsuit was brought by a man from Anhui Province, Zhang Xianzhu, challenging the Government policy that excluded HBV carriers from employment in the public sector. He had received the highest score of any of the candidates taking a provincial civil service examination but had been rejected for employment by the Wuhu City Government on the grounds of his HBV status. In the case he argued that his application he alleged that this decision violated his Constitutional rights to equal protection under the law and to participate in the affairs of the State. The Court overturned the Wuhu City Government's decision on the grounds that the Wuhu City Government's decision was 'lacking in evidence'. Zhang Xianzhu's victory has encouraged many other HBV carriers to take similar legal action.

In addition to consumer rights and equal treatment, public interest lawyers have cast their attention towards cases involving breaches of the right to education or the failure by Government agencies or private companies to adequately enforce or comply with environmental protection laws. Several current cases on the right to education are addressing equality in access to the education system and the accountability of Government in ensuring that compulsory basic education for all children is respected in practice. For example, children of migrant workers may be excluded from the education

system due to the irregular residential status of their parents in the city where they are living. Responding to such a case, lawyers from Beijing Dongfang Public Interest and Legal Aid law firm brought a lawsuit against Fengtai District Educational Committee in Beijing, calling on them to register a school that had been established for migrant workers' children in the District.

The birth of Constitutional rights defence

While litigation is the most frequently used legal tool by the legal aid practitioners in advocating public interest in China, review petition has also become an increasingly useful advocacy tool. An administrative procedure, created in Article 90(2) of the Law on Legislation (2000) provides an avenue for rights defence lawyers and others to protect citizens' Constitutional rights and advance Constitutional claims. Article 90(2) grants Chinese citizens the right to propose (*jianyi*) that the National People's Congress Standing Committee (NPCSC) review administrative regulations, local laws and Supreme People's Court decisions (the right does not extend to national laws) that are deemed to be inconsistent with national law or the Constitution. About 40 such proposals have been made to date.

The first proposal, in 2003, was made in response to the *Sun Zhigang* incident. Sun Zhigang, a resident of Hubei, was arrested by police outside an internet café in Guangzhou in March 2003 on suspicion of being an illegal migrant and placed in a form of administrative detention called Custody & Repatriation (C& R) which was governed by a regulation, 'Measures for Custody and Repatriation of Urban Vagrants and Beggars, enacted by the State Council in the 1950's but which for many years had been seriously abused by the police in practice. Sun Zhigang died in custody and the autopsy showed he had died as a result of injuries consistent with being beaten. The case became a national cause célèbre in the media and in internet chat-rooms. There were widespread calls for the perceived abuses by police of the C & R system to be ameliorated.

Three young legal scholars filed a proposal challenging the legality and constitutionality of the C & R measures. The principal argument cited was that C & R measures were passed by the State Council, whereas the Law on Legislation requires that all restrictions of personal liberty be based on a law passed by the NPC or the NPCSC. The proposal was widely reported, and resulted in the State Council repealing the measures, thereby avoiding the necessity for the NPCSC to formally consider the matter.

Immediately following this case, a new proposal was submitted, challenging another form of administrative detention, the Re-education through Labour System. This form of detention has also been much criticized and was vulnerable to exactly the same constitutional arguments made in the Sun Zhigang proposal, yet in this case the government refused to repeal the RTL system under challenge. Unlike the earlier case, the authorities banned media discussion of the proposal. The government was inflexible towards repealing the RTL system, ostensibly because it functions as an important social control mechanism.

In two further proposals, the authors sought to challenge the effects of discriminatory laws and standards. The first case was brought on behalf of China's 120 million Hepatitis B carriers, who were at that time excluded from employment in the public sector and who also suffered discrimination in education, marriage and other areas. The second proposal challenge the discriminatory effect of traffic injury compensation standards applied by the Supreme People's Court, that allowed for urban residents to obtain double the quantum of compensation provided to those with rural residence registration. In both cases, the issues in question had been widely discussed in the media and there was a strong groundswell of support for reform. Once again, the NPSCSC did not formally rule on the proposals, but parallel steps were taken by the government and the SPC respectively to reform existing laws / standards.

The outcomes of the proposals made to date demonstrate that there is a nexus between an issue of public interest and a degree of policy flexibility on the party of the Party and government and that constitutional review proposal can help to move forward a reform agenda, if not directly then at least indirectly. By taking advantage of the space for constitutional review that has been created, reformers can 'encourage' the government to respond to the issues raised, and in so doing the review process can be further strengthened.

Evaluation of the legal advocacy movement

Chinese legal aid practitioners have in recent years been attempting to further legal reform and positive social transformation through the use of review petitions and strategic litigation. Chinese legal aid lawyers have been inspired by the activities of public interest lawyers in other jurisdictions; first and foremost the United States, but also various European and South Asian countries with a history of public interest or human rights litigation.

But there is a significant difference between the developing public interest litigation movement in China and the experiences of other countries. Due to the special nature of the Chinese legal system in China, where courts do not have legal authority to interpret or to strike down laws, individual decisions by Chinese courts do not have any precedent value. Furthermore, the types of remedies that Chinese courts can award are rather limited, and even for those remedies that exists, enforcement mechanisms are weak. Lack of judicial independence, the inability of courts to directly apply Constitutional guarantees when deciding matters, and gaps in existing laws make the pursuit of public interest objectives through litigation difficult and frustrating. A 2006 study of the results of public interest cases showed that only 18% of cases brought are successful, success being defined for the purposes of the study as a case that was won, that was partially successful, or which ended in a mediated compromise.[132]

A considerable percentage of public interest litigation cases brought were not admitted by the courts, either on the grounds that the plaintiffs did not have the standing or that the issues raised fell outside the courts jurisdiction. In some cases, courts simply refuse to accept the application, without providing any legal reasons for their actions. Even in successful cases, the judgment and orders of the court may not be sufficient to satisfactorily address the complainant's concerns.

Legal aid practitioners have also been frustrated by the passiveness of the NPSCSC in the exercise of its powers under article 90 of the Law on Legislation. Dozens of review petitions have been lodged since 2003, but the NPCSC has rarely if ever acknowledged receipt of an application, let alone announced it decision on a petition or provided reasons.

This is not to say that the many public interest litigation cases and review petitions brought in recent years have been fruitless. On the contrary, the bringing of such cases has sometimes achieved very positive results, albeit results that are achieved through other than legal channels. For instance, in the above-mentioned case brought by Dongfang Law Firm concerning migrant workers' children access to education, the respondent, Fengtai District Educational Committee bowed to public pressure and agreed to register the school, despite the fact that the court had not ruled against them.

---

132) Huang Jinrong, A Rising Legal Movement: A Comment on the Public Interest Law Practice in China; in Beijing Dongfang Public Interest and Legal Aid Law Firm ed., Public Interest Litigation, vol.2, China Prosecutor Publishing House, 2006.

Even in cases where public interest litigation has been successful, success in the achieving the underlying objectives of the litigation have been due just as much to external factors as to the court judgment itself.

A similar pattern can be seen with respect to review petitions to the NPCSC. To date, the NPSCSC has never openly exercised its powers to strike down local administrative or judicial regulations, but there have been a number of cases where such regulations were revised or abolished following the filing of petitions and accompanying public advocacy campaigns. So we can observe a rather strange phenomenon: the efforts made by the Chinese legal aid practitioners to advocate legal reform and social change through legal tools such as the public interest litigation and review petition have been bearing fruit, but not through the determinations of the courts and other legal mechanisms themselves. What has been decisive in these cases is the social pressure caused by the wide coverage of certain cases or petitions in the electronic and print media. For this reason, legal aid practitioners have come to view information and advocacy activities as a integral element of their efforts to promote law reform and to seek justice on behalf of their clients. Many legal aid practitioners have cultivated long-standing relationships with journalists and media agencies.

The value of public interest litigation and review petitions should therefore not be underestimated, despite the decisive role of public advocacy in achieving successful outcomes. Legal actions initiated by legal aid practitioners have created a platform for civil society and legal reform advocates to seek to influence public opinion and to place pressure on Government agencies to act to address social problems and inequities. In this way, the legal advocacy movement has been able to promote the value of rule of law, to accelerate the development of legal mechanisms, and contribute to pressure for systemic reform in general.

Development in spite of political restrictions

Even though the rights and law advocacy movement often has political implications, most legal aid practitioners are insistent on viewing it as a legal rather than a political movement. They insist on using only those tools that are available to the legal profession: laws and regulations, existing administrative and judicial mechanisms, to pursue their aims. In so doing, they are underlying their belief in and respect for the rule of law.

An increasing number of intellectuals, including legal professionals, strongly believe that there have been too many political movements in China over the last century. Such movements often resulted in chaos and destroyed the possibilities for effecting change in society for a long time. They believe that many of the problems in China today cannot be solved through violence or other demonstrative methods such as what happened in Tiananmen Square in 1989. They realize that real and lasting changes are best achieved through a slow, steady transformation of the culture and institutions. In a large country like China with a long tradition in which most people, from ordinary citizens to the leadership, lack respect for the law, this moderate and steady approach is arguably the most effective way to change the minds of people and to transform society. Legal aid practitioners' insistence on using legal tools as a way to advocate for legal reform and to seek to resolve disputes through rational means and by use of existing mechanisms can set a positive example for the whole society.

Even though they are using legal tools which are too weak to be really effective, legal aid practitioners hope that their patient efforts will over time contribute towards the improvement of existing laws and mechanisms. The petition procedures described in the Law on Legislation are really no more than a right to make suggestions to the NPSCSC regarding the constitutionality of regulations adopted by local Governments. The NPSCSC is not even obliged to acknowledge receipt of a petition and can deal with it completely at its discretion. Nevertheless, the use of this procedure, flawed as it is, has already produced a number of positive results. Furthermore, publicity surrounding the petitions has increased public awareness of the Constitution and may in the future encourage the Government to undertake further legal reforms.

In the current political environment in China, legal advocacy is the best means by which legal professionals can lobby for reform. The Chinese Government's emphasis on political and social stability has made it very alert to any activity which may have political implications. In selecting a public interest case, legal aid practitioners need to be careful to choose one that is not overly sensitive but which has the potential to achieve widespread social impact. Topics like consumer protection, equal treatment, the right to education, environmental protection, and conflicts between laws and regulations are areas where it is possible for lawyers to act without risking Government intervention. Media outlets – which on the whole are controlled by the Government – can likewise report comparatively freely on cases and petitions addressing these issues.

By contrast, some radical legal aid practitioners have directly challenged fundamental state or Party interests by taking up cases linked to sensitive political issues, such as membership of the banned organization Falun Gong,[133] have adopted radical tactics (hunger strikes or appeals to western media, for instance), or have become involved in collective lawsuits or demonstrations. Some of these practitioners have been arrested and have received significant media attention outside China, but they have been almost invisible to the general public in China itself, since it is not possible for the media to report on their activities; neither have the cases taken on by these lawyers had any significant social impact.

The large majority of legal aid practitioners prefer to adopt a moderate model of advocacy; working within existing legal channels, carefully citing the existing Constitution, laws and State policy, and working on those issues on which it is possible for the media to report. Many also seek to cultivate good working relationships with relevant government bureaus with a view to furthering their social justice goals. They try to strike a balance in their dealings with Government where they can promote the need for ongoing legal reform through constructive dialogue, while at the same time maintaining their operational independence.

The presence of the political restrictions, however, does not mean that legal aid practitioners can do nothing at all with regard to more sensitive issues. As long as there is room for legal argument and legal aid practitioners do not advocate in a politicized way, they can address some sensitive or potentially sensitive issues. For example, State-owned enterprise reform is a relatively sensitive area, particularly where there have been demonstrations taking place opposing the reforms in question. In such a situation, the courts will be rather reluctant to accept a case regarding protection of workers' rights. In 2006, lawyers in Dongfang Public Interest Law firm represented three workers from a formerly state-owned enterprise in Yangzhou, Jiangsu Province, who alleged that their labour rights had been infringed during the privatisation of a State-owned enterprise. There had been a history of employee protests and strikes since the decision to privatise the enterprise had first been announced by the Government in 2003. The Yangzhou District Court agreed to hear the case, which was heard in the presence of a court-room full of indignant workers. Although the case

133) Falun Gong is a religious sect which has been banned by the Chinese government for its allegedly harmful practices and for protests against the government.

was subsequently rejected by the court on jurisdictional grounds, Dongfang law firm later organized a seminar attended by several prominent jurists and economists and succeeded in having the matter publicized in numerous influential journals, despite the best efforts of the local authorities to sweep the matter under the carpet.

A similar strategy was adopted by Yipai Law Firm, another public interest firm based in Beijing, in a case involving freedom of association. The court application challenged the actions of the Ministry of Health in repeatedly failing to determine applications made by the client pursuant to the Law on Administrative Permits to establish a national NGO called 'Association of Loving Eyes'. The case also challenged provisions in the Regulation on Registration & Management of Social Organizations, which gives Government agencies an unfettered discretionary power to decide whether or not to register an NGO, without the decision being subject to judicial review. As in the Yangzhou case, Yipai Law Firm organized a successful seminar in connection with the case with accompanying media coverage to draw attention to the need for reform of the Regulation so as to provide better protection of the right to freedom of association in Chinese law and practice.

These two examples illustrate the fact that legal aid practitioners can make use of the space that exists within the legal system to advocate for modest legal reform and social change despite the current authoritarian system. Of course, the government's frequent efforts to tighten control over the media and the actions of lawyers may limit efforts to expand such activity in the short term. In the long term, however, to the extent that the Party and the government continue to increase their reliance on the rhetoric of law as a source of legitimacy and on legal institutions to address growing instability, the prospects for law-based citizen rights action are likely to be increasingly positive.[134]

The legal advocacy movement in China is rather different to that found in Western countries. Legal aid practitioners have to face much greater legal and political obstacles than their counterparts in the West. They have to make use of legal tools in a legal system that is far from optimal. They also risk being perceived as having a political agenda for their advocacy of con-

134) Keith J. Hand, Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China, in the 45 Colum. J. Transnat. L. 114, 2007, p. 193.

stitutional rights and social justice. Nevertheless, these obstacles have not prevented the legal advocacy movement from producing unexpectedly fruitful results. If some Chinese scholars proclaimed just 10 years ago that an era of rights[135] would soon be coming to China, the legal advocacy movement shows such an era has now arrived.

Conclusion

Legal aid services in China today are being provided by a variety of actors using a surprisingly diverse range of methods. As a developing country with rapid economic growth and a large population of poor people, the Chinese government to its credit took the initiative to establish a formal legal aid system, even though the system does not always function optimally due to financial restraints and the lack of quality control mechanisms. China is seeking to establish a country of rule of law and a harmonious society, but the judicial system is currently too weak for the law to be effective and to be able to deliver effective justice to Chinese citizens, especially those from disadvantaged groups. For this reason, legal aid practitioners need to make use of the media and undertake public advocacy, parallel to filing applications and making petitions, in order to pursue their goals. Although the quantum of legal aid currently being provided is far from enough to meet the demand for services, the legal aid system continues to expand and in so doing to raise awareness within the system and within Government of the needs and legal rights of the indigent, of marginalized social groups, and of victims of rights abuses.

135) See Xia Yong ed., Marching towards an Era of Rights: A Study on the Development of Civil Rights in China, China University of Political Science and Law Press, 1995.

ACCESS TO JUSTICE: THE STATE OF LEGAL AID SERVICES IN MALAWI

Bruno Kalemba

Historical background

Malawi was a British protectorate until 1964 when it became an independent state. Because of this historical background, Malawi's laws are heavily influenced by the statutory and common law of England.
In 1994, Malawi adopted a very progressive constitution which reinforces the right of access to justice and legal remedies, right to legal representation at the expense of the state where the interest of justice so requires, and which has enshrined within it the Bill of Rights with specific provisions regarding pre-trial, trial and post-trial stages in the criminal justice system[136]. This had profound implications on the country's justice system in general and the provision of legal aid services in particular. One of the effects of the new constitution on the Legal Aid Act, hereinafter referred to as 'the Act', was that most of the limitations imposed by the Legal Aid Act fell away as they were considered to be inconsistent with the constitution.

Current legal aid system in Malawi

The Legal Aid Act (1964)
The government of Malawi hereinafter referred to as 'the government', established the Legal Aid Department in the Ministry of Justice, hereinafter referred to as 'the Department', as an agency of government to provide free legal services in all types of cases to the people of Malawi. This is a social service, which the government provides to its own citizenry. The Legal Aid Act, Chapter 4, contains the enabling legislation of the Department: 01 of the Laws of Malawi, '*to make provision for the granting of legal aid to poor persons and matters connected therewith and incidental thereto*'[137].

The Act was modelled on the Legal Aid and Advice Act (1949) of England with slight modifications.

136) Chapter 4 Republic of Malawi Constitution.
137) Narrative, Legal Aid Act Chapter 4: 01 of the Laws of Malawi.

The Act provides for the establishment of a department, within the Ministry of Justice composed of salaried lawyers to carry out legal aid work in criminal and civil matters. It limits the availability of legal aid services to specific courts, specific matters and legal aid is not available to non-court based proceedings such as the Ombudsman. Further, the Act gives the Minister of Justice very wide powers in the granting or refusal of legal aid.[138]

This service is for 'poor persons' and in Malawi as is the case with most sub-Saharan countries, most people are considered poor by the United Nations poverty index which refers to earnings below one US Dollar a day as poor. This makes more than half the population eligible for legal aid on top of other social services such as health, education, water and food that the government is required to provide.

Challenges

The prevalence of widespread poverty and illiteracy levels in Malawi and hence the resultant lack of knowledge of the availability of legal remedies has led to widespread victimization and exploitation of the poor and this has made the provision of legal aid a monumental task. This is because while in countries where people are knowledgeable about their legal rights and available legal remedies in cases of infringement, legal service providers can afford to take a reactive approach as people will seek them out when such an infringement has occurred. In Malawi on the other hand, we have more often than not taken a proactive approach, where, when an infringement has occurred, we begin by alerting the victim about the infringement and the availability of legal remedies and then offer the legal service available. For example, not many people are aware that they can sue and get compensation from either the insurer or the insured when they are involved in an accident. Therefore, for every road accident that occurs in Malawi, the Department receives a copy of the Police report and when we detect the availability of an infringement, we proceed to seek out the victims, offer them advise on the availability of legal remedies and then provide them legal representation.

Similarly, Section 42 (2) (b) of the Republic of Malawi Constitution provides, inter alia, that a suspect be brought before court within 48 hours after arrest to be charged or to be told the reasons of continued detention. Not many criminal suspects are aware of this right and there are times when the

138) Sections 4, 5, 6, 7, 8 and 9 Legal Aid Act Chapter 4: 01 of the Laws of Malawi.

police take advantage of this ignorance and unlawfully detain them for long periods. When their illegal detention is brought to the attention of the Department, we offer them legal aid.

Secondly, the inability of the Department to attract lawyers (and retain the few that join) is another big challenge. This is because government is unable to match the pay package offered by the private sector. The result therefore is that there has been a very high turn over of lawyers because the few that join leave to look for greener pastures elsewhere. The scope of work undertaken by the Department is therefore severely limited by the number of lawyers working in the Department and their expertise.
Thirdly, inadequate or limited resources at the disposal of the Department are other factors adversely affecting the provision of legal aid in Malawi. Basic office needs such as motor vehicles, computers, stationary and research materials are in short supply.

Finally, lack of national coverage, currently legal aid services are provided from three offices located in the urban centres of Lilongwe, Blantyre and newly opened Mzuzu offices. This position means that the bulk of the people who may require legal aid are unable to access this service because they are required to look for money for transport and accommodation in order to access assistance from these legal aid offices.

It was realized therefore that a number of strategic interventions be undertaken to ensure effective delivery of accessible, appropriate and affordable legal aid services. The following therefore are some of the interventions adopted to achieve this goal.

The road to reform

Law reformThe establishment of the Legal Aid Bureau
The 1994 Constitution revealed, among other things, the inadequacy of the law to deal with the operational difficulties experienced by the Department to deliver efficient and effective legal aid services and fulfil the government's constitutional obligations on ensuring every persons right to justice and legal remedies. In order to improve the delivery of legal aid services, in February 2002, the Department made a submission to the Malawi Law Commission requesting a review of the Legal Aid Act Chapter 4: 01 Laws of Malawi. A Special Law Commission on the Review of the Legal Aid Act was established in January 2003. The general mandate of this Special Law Commission was to review the Legal Aid Act with a view to improve the

legal aid system in Malawi and to determine ways of expanding the legal aid system so as to improve access to justice for all in a manner that is consonant with our constitution and other laws and the (broad) framework of the generally accepted international practice.

In July 2005, the Law Commission produced the Report[139] on the Review of the Legal Aid Act, which has several recommendations and the Draft Legal Aid Bill and the Draft Legal Aid Regulations. The Department has started implementing some of the recommendations, which do not require any legislative enactment. The Draft Legal Aid Bill seeks to 'make provision for the granting of legal aid in civil and criminal matters to persons whose means are insufficient to enable them to engage private legal practitioners and to other categories of persons where the interests of justice so require; to provide for the establishment of a Legal Aid Bureau; to provide for the establishment of a Legal Aid Fund; to allow limited eligibility of other persons, besides legal practitioners, to provide legal aid for the purposes of this Act and to provide for matters connected therewith and incidental thereto'[140].

It proposes the establishment of the Legal Aid Bureau, hereinafter referred to as 'the Bureau', required to provide legal aid - including legal advice and assistance, legal representation and public legal education[141]. The Bureau's functions, duties, and powers are wide enough to give it the mandate to provide legal aid services to poor people throughout Malawi in an efficient and effective manner. The Bureau is a government agency, which shall exercise its powers and perform its duties and functions independent of the interference or direction of any person or authority. Staff of the Bureau shall consist of the director and deputy director; such legal aid advocates, such legal aid assistants, and such other support staff as may be required for the proper performance and exercise of duties, functions, and powers of the Bureau.[142] The Bureau shall cease to be a department under the Ministry of Justice and it will become a stand alone semi-autonomous body answerable to the National Assembly.

139) Law Commission Report No. 13, Malawi Law Commission.
140) Narrative, Legal Aid Draft Bill.
141) Section 6 of the Draft Legal Aid Bill.
142) Parts 2 and 3 of the Draft Legal Aid Bill.

The role of paralegals

Under the proposed legislation, legal aid has been redefined to include legal advice, assistance, and education. This has expanded the scope of legal aid and necessitated the inclusion of other legal aid providers such as paralegals, law students, schools, library services, and adult trainers as providers of legal aid services. This is a move away from the traditional perception that legal aid was only about representation in courts and hence that legal aid can only be provided by lawyers. This expansion will ensure that the term 'access to justice for all' has a real meaning.

The recognition and enhancement of the role of paralegals as a strategic partner in the provision of affordable legal aid is another vital instrument currently being pursued. The last 10 years has seen the mushrooming of civil society organizations dealing with legal and human rights awareness programs. The bulk of their activities are performed by paralegals trained by the institutions in particular areas of law depending on the area of concern of the particular institution. The development and deployment of paralegals into the rural areas will provide ADR solutions in matters of land, family, and inheritance and they will provide civic education in a host of legal and human rights issues, which will in turn improve peoples' access to justice at fairly manageable costs because most of the financial implications associated with engaging a qualified legal practitioner to do a similar job will be avoided. They will also be involved in civic education and legal advocacy thereby enabling the many Malawians in the rural areas to recognize infringements to their rights when they occur and then be able to enforce their rights and seek compensation where necessary.

The paralegals, however, are not recognized by the formal legal sector although, for a long time, they have been rendering legal services particularly to rural areas where lawyers do not usually operate. This is due to the lingering doubts about the standard of paralegals' training (training varies from as little as a week to a couple of months), supervision and monitoring. Consequently, there is a need to develop a uniform curriculum and system of accreditation for paralegals and a defined professional code of conduct for holding them accountable for their actions.

The proposed Legal Aid bill has gone a long way towards recognizing the role of paralegals in the provision of legal services[143]. The Malawi Law So-

143) Section 2 and 12 of the Draft Legal Aid Bill.

ciety has also made proposals for the modification of The Legal Education and Practitioners Act[144], legislation that regulates the legal profession in Malawi to incorporate this category of paralegals as services providers. The modifications above are subject to the Council for Legal Education in Malawi prescribing minimum qualification requirements for a recognized paralegal.

Increased funding

Good governance is one of the pillars of Malawi Growth and Development Strategy (2006 – 2011)[145] and in this pillar therefore, developing a strong justice system, the rule of law and human rights is one of the strategies government is pursuing to ensure that development goals are attained[146]. The provision of legal aid services falls under this strategy and to this end, there has lately been a modest improvement in the funding of the Department by the government. The funding, however, is not enough, as government has to consider other competing social needs such as health, education, and agriculture. The gap between resources and needs is therefore very wide.

To bridge this gap, the Department has floated a proposal to create a 'legal aid basket fund' in which government and its development partners will pool resources out of which the Department will fund its activities directly or in-directly through out-sourcing to private service providers such as civil society organizations and NGOs. It is hoped that this process will continue until government is able to sufficiently fund the Department's activities.

To ensure proper supervision and control over service providers engaged to provide legal aid, the Department shall, subject to the existing regulatory framework governing the provision of goods and services to government, be given the flexibility to tailor make its agreements and partnerships to suit any given situation[147]. A panel of service providers shall be established to carry out legal aid work based on their expertise, areas of interest and geographical location.

The introduction of the legal aid fund, in the proposed Legal Aid Bill, is another area being pursued in order to improve the resource base for legal aid. This shall consist of various other sources of funding which shall in-

144) Cap.3:04 of the Laws of Malawi.
145) MDGS, 2006 – 2011.
146) MDGS, Theme 5 sub theme 4 and 7.
147) Section 28, Draft Legal Aid Bill.

clude, contingency fees, costs awarded by the courts to legally aided persons, deductions from the awards decided by the courts, other funds that may vest or accrue to the legal aid service body whether through the provision of legal aid or otherwise, and contributions made by legally aided persons.[148] Improved funding of the legal aid services will bring with it the expansion of legal aid services in terms of national coverage and the scope of work to be undertaken.

It is envisaged that legal aid offices will open in all district centres. The first step in that direction was taken with the opening of the Mzuzu regional offices, December 2006, to cater for the northern region. It is further envisaged that properly trained paralegals will run these offices until such a time when the Department is able to recruit enough lawyers to run them.

Improvement of information technology
The Department has embarked on a drive to fully utilize modern information technology to collect, manage and store data. Among other things, the proper management of information will enable the Department to document, analyze, and disseminate the information. It will also enhance the Department's ability to better prepare and justify its annual budgets, manage resources, preserve institutional memory, improve customer care and efficiency and determine the best practices in the delivery of legal aid services.

Finally, there will be increased use of the Internet for research.

Networking
While the Department of Legal Aid is able to provide services in a wide range of matters, it is a fact that there are other government departments which also provide services in specific areas of the law, such as the Department of Labour, in labour related matters, Department of Social Welfare, in family matters, the Administrator General in deceased estate matters and the Ombudsman in cases where government maladministration is suspected, to name but a few. The legislation governing most of these government departments gives them powers to inspect, investigate, summon concerned people for questioning, make legally binding determinations, and enforce their determinations. On the other hand, the Department would need court orders to achieve the above, and this takes away valu-

148) Section 39, Draft Legal Aid Bill.

able time and resources from the Department and leads to excessive duplication of efforts.

To avoid duplication of work the Department of Legal Aid is developing a framework to guide the referral system between these departments through information sharing and networking. This will improve resource management, flow of information and efficiency in the departments concerned. It will also help root out people who like to abuse the system by taking their matters from one office to another.

Public awareness

The Department, in partnership with other stakeholders, is undertaking legal literacy and human rights awareness campaigns, which shall involve the use of media outlets, posters, flyers, and civic education programmes. Efforts are also underway to include lessons on human rights and rule of law in the national educational curricula.

It is further envisaged that effective presence of legal aid service providers at the police stations, courts, and prisons shall go a long way towards improving the public awareness of the people on their rights.

Success in the public awareness campaign will lead to an increase in cases of people recognizing their rights and taking action when their rights have been infringed, and in addition the resources the Department uses towards tracing victims of infringements shall be saved and put to other uses.

Conclusion

The Department is the primary provider of legal aid in Malawi and therefore the right tool towards ensuring that government goals of rule of law, equality before the law and access to justice for all are achieved. It is imperative that government remains the primary source of funding for legal aid services because while other sources of funding have proved very crucial to the running of the Department, their adequacy, and consistency cannot be guaranteed. Malawi is ranked among the poorest countries in the world and as such, most of the people in need of the law or in conflict with the law are poor people who cannot afford services of a private lawyer hence the Department has been and remains the only hope for most Malawians to access justice.

DEVELOPMENTAL LEGAL ADVOCACY: MEETING THE CHALLENGE OF RELEVANCE AND RESPONSIVENESS

E. (Leo) D. Battad

Introduction

Development means the full realization of human rights: the civil and political, as well as the economic, social and cultural rights. Article 1 of the Declaration on the Right to Development (DRD)[149] thus states:

'The individual is by virtue of the right to development entitled to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.'

The DRD regards human rights as both a condition and objective of development. Its aim is to respond to 'concerns regarding the existence of serious obstacles to development, as well as to the complete fulfilment of human rights and of peoples.'[150]

The DRD suggests that to facilitate the full realization of human rights, development does not only mean economic development, i.e., the improvement of material conditions but, where the majority of the people do not have control and exercise of power, it also means political development. Political development should facilitate 'the activation of the broad masses of people into organized political force, so that the people's struggle for their own interests is the very vehicle for social development. With the people, through their mass organizations, as the medium of change, development is necessarily a movement for the revolutionary transformation of society to achieve economic democracy and social equality.'[151]

149) G.A. Res. 41/120 (1986), adopted by the United Nations General Assembly by a vote of 146 to one (the United States) with six abstentions.

150) Ibid.

151) Merlin M. Magallona, Comments on Legal Education in the Third World, 53 Philippine Law Journal 81, pp. 87-88.

Participation then is an important factor in development and the realization of human rights. In the context of human rights, participation must be active and must involve genuine power.[152] This means that individuals, groups and peoples must have the right to make decisions collectively and to choose their own representative organizations, and to have freedom of democratic action, free from interference.[153]

Democratic participation requires conditions that include 'a fair distribution of economic and social power among all sectors of national society,' as well as 'genuine ownership or control of productive resources such as land, financial capital and technology.'[154]

In the context of popular participation, horizontally, the term covers participation in all sectors of a country's public life and relates to all aspects of social, political, economic and cultural affairs affecting individuals. Vertically, the concept concerns all stages of the development process, and in particular, the following major phases:

Decision-making concerning development, which implies that those concerned take an active part in the identification, selection, planning, elaboration, formulation and adoption of projects;
Follow-up and evaluation of development programmes;
Equitable sharing of the benefits of development.[155]

Participation is also an end in itself, which meets a fundamental aspiration of human beings. Thus, people are 'the subject rather than a mere object of the right to development.' They are not merely 'resources' to be made healthy, skilled and productive; they have a right not only to survival and material improvement, but also to some measure of power.[156]

---

152) Russel Laurence Barsh, The Right to Development as a Human Rights: Results of the Global Consultation, 13 Human Rights Quarterly 322, p. 329.
153) Ibid.
154) Ibid.
155) Question of the Realization in All Countries of the Economic, Social and Cultural Rights contained in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems Which the Developing Countries Face in Their Efforts to Achieve These Human Rights, including: Popular Participation in its Various Forms as an Important Factor in Development and In the Full Realization of Human Rights, Study by the Secretary General, at 7, E/CN.47/1985/10.
156) Idem at 6.

It is in this context that Developmental Legal Advocacy (DLA) becomes relevant.

Developmental legal advocacy (DLA) and its early beginnings

DLA aims to secure the development and empowerment of the people so they may participate more meaningfully in the decisions and policies that affect their lives. The concept of DLA covers legal assistance to disadvantaged or marginalized groups, communities, and individuals on issues involving public interest, human rights and social justice. An important principle of DLA is the client's participation in problem solving, with the lawyer performing a supportive role.

In the area of human rights protection and development, the concept of DLA was not born overnight. Originally articulated by the late Jose W. Diokno, founder of Free Legal Assistance Group (FLAG),[157] in two seminal papers that he delivered in 1980 and 1981,[158] DLA evolved from the experience of FLAG lawyers during the dark days of martial law in the Philippines.

In those days, all semblance of democracy was destroyed. Its effects were far-reaching. The martial law dictatorship abolished Congress; impaired the independence of the judiciary; controlled all communications; stifled criticism; outlawed strikes and peaceful public meetings; hounded and harassed lawyers, leaders and organizers of trade unions and of student, peasant and informal settler organizations; resorted to arbitrary arrests and prolonged detention under inhuman conditions without charges or trial; carried out torture, disappearances and extrajudicial killings; and substituted military courts for civilian courts.[159] During the period of martial law there were also the forced evictions of thousands of informal settlers, and militarization in the countryside causing displacements of peasants, rural workers and indigenous peoples. The actions of the regime were propped up by countless martial law presidential decrees, letters of instructions and

157) FLAG is a nationwide human rights lawyers' organization that provides legal assistance under the DLA framework. They undertake developmental work with the marginalized groups and oppressed members of the Philippine society.

158) These papers are: (1) Jose W. Diokno, Legal Aid and Development, submitted to the Seminar on Human Rights and Development Cooperation, called by NOVIB in the Netherlands in December 1980 (hereinafter Diokno, Legal Aid and Development), and (2) Jose W. Diokno, Developmental Legal Aid in Rural Asean: Problems and Prospects, submitted to the Seminar on Human Rights and Development in the Rural Areas of South East Asian Region in 1981 (hereinafter Diokno, Developmental Legal Aid).

159) Jose W. Diokno, Legal Aid and Development, supra note 9, at 1.

general orders that sought to legitimize government's denial of or violations of human rights.

Shaped by their common experience of martial law, Diokno and a small group of lawyers founded FLAG in 1974. While this small group of lawyers worked within the system, they revolted against it. It was a unique revolt because it was waged, not by arms, but by law. Diokno described it as a 'revolution by law'. This movement, founded upon the principle of DLA, "was built on a cornerstone that is difficult to reject – '*the right of the people to development*'"[160] It aims to secure the development and empowerment of the majority of the population of the Philippines – the poor and the oppressed, so that they may participate more meaningfully in the decisions and policies that affect their lives.[161]

In rendering services to its clients, partner communities and groups, however, FLAG lawyers came to realize that legal aid alone will not suffice, at least not the type of legal aid traditionally provided to indigent people - called traditional legal aid (TLA). This is a form of legal aid that relies solely on legal remedies within the judicial or quasi-judicial bodies. It is simply limited to rendering free legal services to the poor in their private disputes (e.g. homicide through reckless imprudence, murder, physical injuries, child support, legal separation, and the like), no different from the general 'traditional lawyering' that lawyers do to the private disputes of their better off clients. This type of legal aid has its value in vindicating legal rights of private parties. But human rights are not always recognized as rights by domestic legal systems.

During the martial law years in the Philippines, and even today, some human rights continue to be denied or violated by law. Hence, where the law itself denies or violates human rights; where problems involve public disputes that question state policy or threaten social structures, TLA can do little. It has a limited value, particularly in the areas of human rights protection and development. This is because TLA is actor, not structure-oriented. It relies primarily, if not solely, on the efforts of lawyers and court personnel to vindicate legal rights of private parties and accepts uncritically the

160) Sanidad, Pablito V. Sanidad, Message, in Free Legal Assistance Group 1974-1994, at 6 (FLAG Human Rights Foundation, Inc., 1994).
161) Ibid.

basic rightness of the legal order and of the social system and institutions within which it operates.[162]

TLA assumes that the law is just and that injustice results from the frailties of those who make or enforce the law. As lawyers trained in the legal maxim *'dura lex sed lex'* (the law is harsh, but it is the law), legal aid lawyers see their function simply as upholding the law, not changing the law or society. Since development is social change, often radical and rapid, TLA is of limited value to development.[163]

To a large extent, TLA is the lawyer's way of giving alms to the poor. Like alms, it provides temporary relief to the poor and merely redresses particular injustices of the poor, but does not fundamentally change the structures that generate and sustain injustice. Like alms too, 'it carries within it the germ of dependence that can prevent those it serves from evolving into self-reliant, inner-directed, creative and responsible persons who think for themselves and act on their own initiative.'[164]

With the realization that TLA has limited value to promoting human rights and development, FLAG decided to provide another form of legal assistance, which is called developmental legal advocacy (DLA). It was not meant to supplant TLA, but to supplement it, 'concentrating on public rather than private issues, changing instead of merely upholding the law and social structures, particularly the distribution of power within society.'[165] It is an attempt to make legal service more relevant and responsive in the areas of human rights protection and development, toward a just and humane social order. Its distinctive feature is that it represents 'an attempt to make some contribution to the development process.[166]

DLA is the product of the FLAG lawyers' long experience under martial law in the Philippines, and the lessons derived from this experience led them to articulate the following platform for their work:

People, not lawyers, should determine what kind of society they wanted and what changes were needed to achieve it;

---

162) Diokno, Developmental Legal Aid, supra note 9, at 2-4.
163) Idem at 3.
164) Diokno, Legal Aid and Development, supra note 9, at 1. 2.
165) Diokno, Developmental Legal Aid, supra note 9, at 4.
166) Idem at 3.

These changes were fundamental, not just reforms, and had to be buttressed by law; and

People should organize themselves and work together with others if they were to gain enough power to make the changes they wanted.[167]

The Theoretical Framework of DLA

Vision. As a starting point, DLA pursues a vision of 'just social structures which would facilitate development towards the full realization of human rights.'[168] The excesses of the martial law regime highlighted the long existing injustices in society and compelled the FLAG lawyers to confront the injustice resulting from violations *of* the law, but also from the violations *by* the law. It pushed them to question not only the legitimacy of the legal system, but also the underlying social structures that breed this injustice. Hence, the support for structural change.[169]

Objective. Derived from a structural perspective on the causes of injustice and an instrumentalist view of the law, DLA's objective is not merely to enforce the law but, more importantly, to change the law and the underlying social structures which perpetuate or sustain injustice and inhibit development. DLA seeks to address the inadequacies of TLA by focusing on structural change to remedy injustice and on the empowerment of the people, individually or collectively, to effect societal change.[170]

To attain DLA's objective towards the creation of just social structures, the empowerment of the marginalized or disadvantaged groups or communities is a necessary condition. DLA stresses that the people themselves must rely on their own efforts to bring about the necessary changes, with lawyers merely playing a supportive role in effecting such change. This primary emphasis on the efforts of the people, and the lawyer's supportive role, is borne out by the recognition that 'where injustice is perpetrated by the law or by economic and social structures, legal aid can have a limited, albeit a useful value.'[171]

---

167) Developmental Legal Advocacy in Free Legal Assistance Group 1974-1994, at 8 (FLAG Human Rights Foundation, Inc., 1994).
168) Ibid.
169) Idem at 8-9.
170) Idem at 8.
171) Idem at 9.

The informal settlers who were forcibly evicted and criminally charged for violating Presidential Decree No. 772,[172] a martial law issuance, is a good illustration of an injustice perpetrated by law. The law, which made 'squatting' a criminal offense, clearly failed to recognize and provide an equitable solution to the severe problem of homelessness and the condition of poverty in the Philippines.[173] Although lawyers did mount spirited defences against forced eviction, all went to no avail. Forced evictions were at best postponed, but in the end, the urban poor dwellers were not only rendered homeless; they were treated as criminals as well. Their right to housing went unrecognized. To add more teeth to P.D. 772, Presidential Decree No. 1818 was issued, prohibiting the use of court injunctions by evictees of government infrastructure projects. This foreclosed any possibility of questioning the validity of government initiated projects. Expressing particular concern at this situation, the Committee on Economic, Social and Cultural Rights noted that – 'Presidential Decree (PD) 772 has been used in some cases as a basis for the criminal conviction of squatters and PD 1818 restricts the right of due process in the case of evictees. While the Committee does not condone the illegal occupation of land nor the usurpation of property rights by persons otherwise unable to access to adequate housing, it believes that in the absence of concerted measures to address these problems resort should not be in the first instance to measures of criminal law or to demolition.'[174]

The indigenous peoples faced no better situation. They were displaced from their ancestral lands and domains, in the guise of development. Hundreds of indigenous peoples were forcibly displaced from their ancestral territories for diverse causes, such as the construction of dam, geothermal plant and other infrastructure projects, awards of titles (e.g. mining rights) and other natural resource contracts. These displacements were legal, but a legal system that failed to recognize the indigenous peoples' vested prop-

172) Presidential Decree No. 772 was issued on 20 August 1975 by then President Ferdinand E. Marcos. It was subsequently repealed on 27 October 1997 by RA 8368, or the 'Anti-Squatting Law Repeal of 1997'. Prior to P.D. 772, however, P.D. No. 298, issued on 18 September 1973, directed all persons who may have introduced improvements on rivers, creeks or drainage channels to renounce their possessions and to demolish such structures under pain of penalty of fine or imprisonment.

173) Prior to P.D. 772, squatting was considered a public nuisance which may be abated without judicial proceedings.

174) Concluding Observations of the Committee on Economic, Social and Cultural Rights: Philippines (hereinafter Philippines), UN ESCOR 12th Sess., 29th mtg., at 4-5, para 31, UN Doc. E/C 12/1995/7 (1995).

erty rights and customary processes left them with little or no protection to their right to self-determination and development.

In one of the many cases of incursions to ancestral domains, Macli-ing Dulag, an elder from Kalinga, refused the offer of Jose W. Diokno to take up their case against a hydroelectric dam project. Faced with the imminent loss of their ancestral domain, his words eloquently sum up how laws and court processes could perpetuate injustice:

'If we accept, it will be as if we ever doubted that we belong to the land; or that we question our ancient law… If we accept, it will be recognizing what we have always mistrusted and resisted. If we accept, we will then be honour bound to abide by the decisions of that tribunal. Long experience has shown us that the outsiders' law is not able to understand us, our customs and our ways. Always, it makes just what is unjust, right what is not right.'[175]

From FLAG's martial law experience, its lawyers have learned one important lesson: clients must rely on themselves, not on lawyers, to realize their vision of a just and humane society, and make that vision come true.[176] This lesson is one of the most valuable contributions of DLA. As aptly stated by Diokno, '[T]o win justice, the poor, the dispossessed and the oppressed - who are the people - must rely, not on legal aid, but on their own organized efforts.'[177]

Strategy. A two-part strategy is employed in DLA to effect legal and social change necessary for the promotion of human rights and development. The first part involves confronting the government with the detrimental effects of its policies on the population and the discrepancies between rhetoric and international standards on the one hand and reality on the other hand. This is designed to cast doubt on the government's legitimacy and to undermine the foreign and domestic support that it may enjoy. The second part involves helping the marginalized or disadvantaged groups or communities (e.g. informal settlers, peasants, workers, women, or indigenous peoples) and other individuals, and is designed to increase their awareness of the

175) Cited in Marvic M.V.F. Leonen, Weaving Worldviews: Implications of Constitutional Challenges to the Indigenous Peoples Rights Act of 1997, Philippine Natural Resources Journal Vol. 10 (1): 3-44, at 42 (2000).
176) Ibid.
177) Diokno, Legal Aid and Development, supra note 9, at 1.12.

causes of their problems and to make them aware of possessing the power to act. Such awareness would encourage them to organize and act on their own initiative to resolve their problems.[178]

While recognizing the possible contributions of DLA to the development process, Diokno described the role of DLA as 'severely circumscribed, a basically supportive function whose value lies as much in educating people to their legal rights, in awakening them to the causes of their situation, and in assisting them to organize themselves and act together, as in helping them vindicate their legal rights.'[179]

Growth of DLA in the practice of law

From its origins in the early 1970s, DLA has not only evolved; it has been observed in other legal organizations that were established in the 1980s. These legal NGOs have formed a coalition known as the Alternative Legal Group (ALG) Network, which today is composed of twenty-one organizations throughout the Philippines. The legal organizations within the ALG are engaged in what is referred to as 'alternative lawyering', 'public interest lawyering', 'feminist lawyering', or 'developmental law practice,' characterized by non-traditional and creative legal services (other than the simple provision of legal aid).

The essence of 'alternative lawyering' has been described as follows:

'To be an alternative, developmental or feminist lawyer means to view law as an indispensable weave in our social fabric. It is to practice law, fundamentally for individuals, communities and sectors that have been historically, culturally and economically marginalized and disenfranchised. It is to engage in this practice systematically, under the umbrella of sustainable organizations that foster dynamic and creative individuals. The mark of such practice is that it seeks not only to create ripples of public impact from individual cases but also that it empowers in the process. To be an alternative lawyer means a clear professional commitment that the use of law is not the sole domain of those that have passed the bar and taken the oath, but could and should be shared with the individuals, communities and sec-

178) Developmental Legal Advocacy, supra note 19, at 9. See also Diokno, Developmental Legal Aid, supra note 9, at 6-8.
179) Idem at 8.

tors which it affects.'[180] Thus, rarely do 'alternative lawyers practice alone. At the very least, their clients, beneficiaries or partners participate in the process. They do so not only as paralegals but also as people who work to better their conditions. They do so as principal actors in making decisions on options which have been laid out by the alternative law group.'[181]

Thus, alternative lawyering or developmental lawyering is participatory and evocative as there is a conscious effort to actively involve the client partners in seeking solutions to their legal problems. At the heart of alternative lawyering or developmental law is the empowerment of the disadvantaged or marginalized groups and communities through critical analysis of the law and the use of the law by the poor to enforce and protect their rights. Adhering to the principles and values of developmental law, conditions, incidents and legal issues are viewed from a structural perspective. Programs for developmental legal assistance are primarily concerned with public interest, human rights and social justice issues.[182]

Regardless of the differences in the member organizations' programmes and activities, however, they have the following major components: legal services (usually limited to what they refer as 'strategic litigation'), education, research and publications, and policy reform work. These major components of organizational work are basically the same as the DLA functions of legal services, education, advocacy and networking.

DLA in practice

DLA means a lot more than simply providing legal aid. In furtherance of a two-part strategy, lawyers engage in litigation, education, advocacy and networking. These functions are not mutually exclusive of the other functions, but are often done in combination with them. The extent of lawyers' involvement in these functions (including the kinds of cases they handle), however, are largely dictated by their available resources (both material and human), their level of expertise, the needs of their clients or the pre-

180) Marvic M.V.F. Leonen, Orientation on the Conference and Introduction of the Alternative Law Group Network, in Lawyering for Public Interest, 1st Alternative Law Conference, np (Marvic M.V.F. Leonen ed., 2000).

181) Ibid.

182) Carolina S. Ruiz, et al, The Alternative Law Groups' Institutional Framework for Justice Reform, in From the Grassroots: The Justice Reform Agenda of the Poor and Marginalized, at 40-41 (Alternative Law Group, February 2004).

vailing situation. FLAG, for instance, endeavours to accomplish all functions, when resources are available. Although it handles various cases involving both civil and political rights and economic, social and cultural rights, most FLAG lawyers have developed expertise in handling violations of civil and political rights, drawing on their long experience in litigating violations of people's rights during the dark days of martial rule. *Legal services.* While litigation is a traditional tool that most lawyers employ in addressing legal problems, DLA necessitates a holistic approach at solving them. DLA requires the lawyer to reorient his/her approach to the provision of legal services, particularly because the cases involve public interest, human rights or social justice issues.

First, when clients approach a lawyer with their legal problem, the latter engages in a critical analysis of the problem in order to identify its source or cause of continuance. S/he looks into the client's difficulties, whether these involve private issues or disputes, or whether these involve human rights, social justice or public issues that affect an entire community or the public in general. Necessarily, the lawyer's perception of the law becomes important. In DLA, the lawyer views the law with a critical eye, mindful that the law, and not merely a misinterpretation or misapplication of the law, can perpetuate injustice. Hence, the lawyer is able to distinguish between legality and legitimacy of the law. This springs from the recognition that the law may not necessarily be legitimate. Following from this is the recognition of the inadequacies of the law and the legal processes.[183]

In analyzing the problem, the lawyer involves the client. It is critical that if the problem involves public interest, human rights or social justice issues, the lawyer involves the client 'in seeking to find the specific social cause of the legal problem, the particular social structure and social forces that generated them.'[184] The social awareness that this generates will 'evoke the determination on the part of the lawyer and client alike to change law and society to correct injustice. And that is the beginning of development.'[185]

Second, recognizing the inadequacies of the law and the legal processes, the lawyer informs clients of their rights and the limitations of the legal system. This is essential to enable clients to avoid being over-reliant on the le-

183) Developmental Legal Advocacy, supra note 19, at 9.
184) Diokno, Legal Aid and Development, supra note 9, at 1.3.
185) Ibid.

gal system to address their problems and to motivate them to seek not only legal but also societal solutions to their problems.[186]

Third, heightened awareness by clients of the causes of the problem and knowledge of their rights, will not of themselves lead to action unless they are coupled with awareness of the power to act. Hence, the lawyer encourages the clients he/she serves to organize and act collectively with others similarly situated to address the problem. Following from this, the lawyer and clients seek to work out both legal and societal solutions to the problem and formulate not merely a litigation-oriented approach but also the use of metalegal tactics and remedies, where necessary or appropriate, which might assist in the resolution of the problem.[187]

Metalegal tactics and remedies are goal-oriented, concerted actions of the people that go beyond the use of ordinary court processes, without openly defying existing law, to exert pressure for change in law and society. These actions are creative tactics or remedies that give life to the meaning of the four freedoms - freedom of speech and of the press, freedom of expression, and freedom of peaceful assembly. Metalegal tactics and remedies may include the use of petitions, hunger strikes, noise or text barrages, rallies and marches, mass attendance at hearings, wearing of pins and logos, among others.[188]

The importance of the metalegal tactics and remedies is one of the lessons that FLAG lawyers learned in handling cases of political detainees during martial law. These are particularly useful in cases where rights are denied, either by the law itself or through ineffective enforcement mechanisms. The identification and use of metalegal tactics and remedies in handling cases, however, may vary depending on the nature of the case, the surrounding circumstances, and the readiness of the people to employ them. At all times, the lawyer encourages his/her clients to develop their own creative metalegal tactics and remedies that would assist in the resolution of the problem.[189]

It is evident that in providing legal services through litigation, lawyers would require considerable interaction with the clients. Where the clients

186) Developmental Legal Advocacy, supra note 19, at 10.
187) Ibid.
188) Ibid.
189) Ibid.

are groups or communities, the process of dialogue between lawyer and client would be unwieldy and difficult unless there is the presence of a relatively organized community and identifiable leaders. DLA, therefore, recognizes the importance of an organized community or group in order to effectively articulate demands, to engage in a dialogue with the lawyer as to the source of the problem, and to identify solutions and undertake metalegal tactics or remedies, where necessary, in the resolution of the case.[190]

One other aspect that stands out in DLA legal services is the character of relations between lawyer and client. Unlike in a traditional legal relationship where the clients are dependent on the lawyer, DLA advocates the establishment of a type of relationship which would foster a sense of self-reliance within the clients and reduce their dependency on the lawyer; a relationship where clients are able to think for themselves and act on their own initiatives to resolve their problems.[191] The kind of relationship that is fostered in DLA is not simply one of lawyer-client, but lawyer-partner working together for the fulfilment of human rights.

For instance, in some FLAG cases involving political prisoners or detainees, where the likelihood of success through court processes is slim or non-existent, rallies or petition-delegations were resorted to in order to obtain release of prisoners or detainees. Similarly, in eviction cases of informal settlers, although FLAG lawyers went through the usual court processes, metalegal tactics and remedies were given priority, knowing that the property laws in the Philippines are skewed in favour of property holders. Clients sent petition-delegations to appropriate housing authorities to demand permanent resettlement sites, or initiated negotiations with the landowners to explore the possibility of purchasing the land occupied by informal settlers at an affordable price and instalment scheme.

The Sumilao case is an interplay of legal and metalegal tactics and remedies at its best. The effort of the lawyers and client-community working together as partners was eloquently displayed in the almost two decades of struggle by 137 Sumilao farmers,[192] to regain ownership of 144 hectares of the farm lands that was awarded to them under the comprehensive agrarian land reform of the Department of Agrarian Reform (The Department).

190) Ibid.

191) Idem at 10.

192) They are members of the Higaonon indigenous community; seasonal farm workers in a land situated in San Vicente, Sumilao, Bukidnon.

The registered owner of the farm land resisted the land reform decision and applied for land conversion from agricultural to agro-industrial to no avail. But on 29 March 1996, the then Executive Secretary Ruben Torres issued his infamous decision (Torres decision), setting aside the land reform decision and approving the conversion. The Department filed motions for reconsiderations, but were all denied. In October 1997, some of the 137 involved farmers staged a dramatic and well-publicized 28-day hunger strike in front of the Department in Quezon City, at the same time as they filed their intervention with the Office of the President, seeking reversal of the Torres decision. Then President Fidel Ramos held a dialogue with the hunger-striking farmers and subsequently issued a 'Win-Win Resolution'. The Win-Win Resolution modified the Torres decision and resolved to segregate the 144 hectares, awarding 100 hectares to the farmers and approving the 44 hectares for conversion.

The victory for the farmers was short-lived, however. In April 1998, in *Fortich vs Corona*,[193], the Supreme Court found the Torres Decision to be final, meaning it could not be modified by a Win-Win Resolution. The Win-Win Resolution was thus declared void. The death knell from the Supreme Court was a bitter pill to swallow, but the farmers respected it anyway. For the next five years, the Sumilao farmers monitored the owner's compliance with the development plan,[194] which was a condition for the grant of the land conversion. Five years passed, but nothing happened on the land. Worse, they learned that the land was sold to a big conglomerate, which planned to put up a state of the art air-conditioned piggery business. [195]

Having the knowledge that they can use law to advance their rights; the Sumilao farmers organized a paralegal training seminar and wrote their position papers with the help of their legal partner. In November 2004 the Sumilao farmers filed a petition for the cancellation of the conversion order before the Secretary of the Department for non-compliance with the

193) 289 SCRA 624 (1998).

194) The commitment to put up a development academy, a cultural center, and institute for livelihood science, a museum, a library, a golf course, a sports development complex, an agro-industrial park, forest development and support facilities, and a 360-room hotel, restaurant, and housing project, among others.

195) Kaka J. Bag-ao, Taking Steps for Land, for Justice: The Sumilao Struggle, balaod mindanaw Kudlit Special Issue, August 2008, at 13.

conditions of the conversion order.[196] With the Department dismissing their petition, the farmers raised the petition before the Office of the President, but on 3 October 2007, this Office likewise dismissed the petition.

With no end in sight to their plight, on 10 October 2007, they started their 1,700-kilometer march to Manila to register their disgust in the way government have handled their case, and to create public awareness on the state of the country's land reform process.[197] In between stops, they held dialogues and group discussions with people who came to express support, granted media interviews to those who care to cover their story. When, finally, they arrived in Manila, they had audience with Cardinal Gaudencio Rosales, performed tribal ritual in front of the San Miguel Corporation main office, and held a picket at the Batasang Pambansa (House of Representatives Building) to call the legislators' attention to their plight.[198]

In response to the Sumilao farmer's demand, the President finally revoked the conversion order. Finally, on 29 March 2008, through the backroom negotiations initiated by Cardinal Rosales, a Memorandum of Agreement was signed by all parties. After almost two decades of arduous struggle, the Sumilao farmers agreed to accept 50 hectares inside the original 144 hectare-property and to accept additional 94 hectares outside of the original 144 hectares to be able to complete their 144 hectares of land.[199]

The success of the Sumilao farmers, to be sure, was equally the success of the numerous organizations and individuals who have relentlessly supported the cause of the Sumilao farmers. Attorney Arlene 'Kaka' J. Bag-ao of BALAOD-Mindanaw puts a fitting end to what DLA practice is when she said:

---

196) BALAOD-Mindanaw, Day 37: Sumilao Farmers Have Walked 920 Kilometers, Friday, 16 November 2007, at 3 (visited 7 May 2009) http://www.mindanaonews.com/index.php?option=com=content&task-view&id=32898Itemid=279.

197) Bag-ao, supra note 49 at 15.

198) Timeline of the Sumilao Land Row, 8 December 2007 (visited 11 May 2009) http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20071208-105563/Timeline_of_.

199) Interview with Atty. Manuel J. Marlon, Executive Director of SALIGAN and one of the assisting counsel for the Sumilao case (13 April 2009) and telephone interview with Atty. Arlene 'Kaka' J. Bag-ao, Executive Trustee of BALAOD-Mindanao, (19 May 2008) and lead counsel of the Sumilao farmers. See also Office of the President, Sumilao land case resolved, 29 March 2008, at 1-2 (visited 11 May 2009) http://www/o[.gov.ph/index.php?option=com,_content&task=view&id=4662&Itemid=9.

'It is not easy to tell the story of alternative lawyering in the Philippines. There is so much to tell. There are so many who can tell it.

BALAOD's march with the Sumilao farmers eloquently illustrated the work of alternative lawyers. We do not work for the poor as their representatives or liberators. We work with the poor as their partners in a common struggle. The Sumilao March was an excellent example of the solidarity between alternative lawyers and the poor. We were not defenders, and the poor were not defenceless. We became partners of the poor who were empowered to become 'lawyers,' to see the law and use it as it should be – as a tool to promote justice, as a catalyst for social transformation.' [200]

Consistent with the first part of DLA's two part strategy, DLA lawyers challenge government polices or actions that are considered as detrimental to the population, usually through test cases.[201] In this respect, FLAG has scored victories, as well as losses. For instance, in *Freedom from Debt Coalition vs. Energy Regulatory Commission*,[202] in defence of the right to affordable electricity, the provisional Order of Energy Regulation Commission (ERC) authorizing Manila Electric Company to increase its rate was assailed, and the Supreme Court declared it void as it had grave due process implications since the ERC failed to consider the opposition and motion already filed on record. Also, in *Tatad vs Secretary of the Department of Energy*,[203] recognizing the detrimental impact of the full deregulation of the oil industry on the economic situation of the people, the validity of the Oil Deregulation Law and of Executive Order No. 392 were challenged. The Supreme Court upheld the challenge and struck down the law.[204]

---

200) Kaka J. Bag-ao's introductory message in balaod mindanaw Kudlit Special issue, August 2008.

201) Test cases are those filed in courts that usually raise novel issues regarding the interpretation or application of laws, or challenge the constitutionality of laws. For instance, a party can question the validity of a law before any court if, as applied to him/her, it is unconstitutional. The judicial power cannot be extended to matters that do not involve actual cases or controversies.

202) 432 SCRA 157 (2004).

203) 281 SCRA 330 (1997). This case is also referred to as Lagman vs Torres, where FLAG Human Rights Foundation, Inc., the registered name of FLAG, is one of the petitioners.

204) In the Tatad case, the Supreme Court stressed: 'Lest it be missed, the Constitution is a covenant that grants and guarantees both the political and economic rights of the people... the protection of the economic rights of the poor and the powerless is of greater importance to them for they are concerned more with the esoterics of living and less with the esoterics of liberty... Our defense of the people's economic rights may appear heartless because it cannot be half-hearted.'

In the same vein, under FLAG's Anti-Death Penalty Task Force, lawyers challenged the death penalty every step of the way. In 1998, in the well-publicized case of *Echegaray vs Executive Secretary*,[205] Leo Echegaray, assisted by FLAG, raised the constitutionality of a law designating death by lethal injection as a method of carrying out capital punishment for being, among others, cruel, degrading and inhuman punishment *per se*, as well as a violation of the Philippines' obligation under international covenants. The Supreme Court unfortunately upheld the validity of the law. As to the lethal injection as a way of carrying out capital punishment, it held that:

'Any infliction of pain in lethal injection is merely incidental in carrying out the execution of the death penalty and does not fall within the constitutional proscription against cruel, degrading or inhuman punishment…The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.'[206]

In the aftermath of the *Echegaray* case, FLAG and the Coalition Against Death Penalty,[207] FLAG's partner in the Anti-Death Penalty Campaign, came to the painful realization that 'it was futile to keep their guns trained on cases and the Supreme Court. The Supreme Court could not change the law; it could only go by what the law spelled out.' FLAG admitted as much in a subsequent report to the European Commission, stating that 'the Supreme Court appears to have closed its mind toward revisiting the constitutionality of the death penalty… (it) now appears to prefer to leave discussion on the wisdom of capital punishment to the legislature.'[208]This realization was the impetus for a vigorous and sustained campaign to abolish the death penalty through legislative means.

205) 297 SCRA 754 (1998).

206) Sections 17 and 19 of the Rules and Regulations to Implement R.A. No. 8177, however, were declared invalid. The Supreme Court held that Section 17 contravenes Article 83 of the Revised Penal Code, while Section 19 fails to provide for review and approval of the Lethal Injection Manual by the Secretary of Justice, and unjustifiably makes the manual confidential, hence unavailable to interested parties including the accused Leo Echegaray.

207) A coalition of individuals and about 34 member organizations, initiated by members of the Catholic Bishops Conference of the Philippines-Episcopal Commission on Prison Pastoral Care (CBCP_ECPPC).

208) Joan Orendain, Not in Our Name, at 78-79 (2008).

An encouraging development in the death penalty campaign, however, is the ruling in *People vs Mateo*[209], where the Supreme Court released its own statistics showing a judicial error rate of 71.77 percent, in effect validating the findings of FLAG's study on wrongful convictions on December 2000. As a result of their findings, the Supreme Court required an intermediate review of all capital cases by the Court of Appeals before each case was elevated to the Supreme Court on automatic review

On the protection of the indigenous people's rights, the Legal Rights and Natural Resources Center – Kasama sa Kalikasan (Friends of the Earth), Inc. (LRC-KSK)[210] provided legal assistance to leaders and members of 112 groups of indigenous peoples, interveners in the landmark case of *Cruz vs Secretary of Natural Resources*. R.A No. 8371 or the Indigenous Peoples Rights Acts (IPRA) faced a constitutional challenge on the ground that the State is deprived of its ownership and control over lands of the public domain, minerals and other natural resources within its territory, in violation of the regalian doctrine enshrined in the 1987 Constitution.

The LRC-KSK sought to expose the myth[211] of the 'time-honoured regalian doctrine and argued that the indigenous people were never disenfranchised of the land ownership right based on time immemorial possession when the Spaniards and Americans arrived; that their time immemorial possession gave rise to the presumption of private ownership, which is consistent with the Spanish colonial laws and the provisions of the Treaty of Paris. The Supreme Court votes were equally divided on the issue. Failing to obtain the necessary majority, the petition was dismissed. In a sense, it was a victory for the indigenous peoples who made a gallant effort to defend their rights with the assistance of their counsels.

---

209) 433 SCRA 640 (2004).

210) LRC-KSK is a policy and legal research and advocacy institution. The organization is also the official Philippine affiliate of Friends of the Earth International, and a member of the ALG, Inc.

211) This myth, in the words of Marvic Leonen, Dean of the U.P. College of Law, is 'the largely unquestioned belief that at some unspecified moment during the Spanish colonial period, the sovereign rights of the Philippine people's forebears were unilaterally usurped by and simultaneously vested in the crowns of Castille and Aragon. At that same moment, every native in the politically undefined and still largely unexplained and unconquered archipelago became a squatter – bereft of any legal rights to land or other natural resources.' See Marvic M.V.F.Leonen, Weaving Worldviews: Implications of Constitutional Challenge to the Indigenous Peoples Rights Act of 1997, 10 (1) Philippine Natural Resources Journal 3, 4 (2000).

In the face of legal victories and losses, the DLA lawyers are fully aware that the delivery of legal services through litigation is just one among the advocacy tool in DLA practice. It is a useful tool, but a limited one in any case.

Education. Education is integral to all of the other functions of lawyers in DLA. Lawyers need to make full use of their educative function if they are to contribute to development. Education has a central role in heightening social awareness of the people as regards their rights and the inadequacy of legal processes and/or social institutions which breed injustice and result in ineffective implementation of these rights, and in making the people aware of their power to act and take control of their problems. It facilitates human development by enabling clients or communities to engage in a critical analysis of their problems, by themselves or with their lawyer, and to develop strategies to address their problems.

Making full use of the lawyer's educative function may be done by publishing policy issues or legal primers in simplified terms, using the language understood by the people, as well as by providing or conducting paralegal training, seminars or workshops. For instance, in 1981, the first paralegal training for the disadvantaged or marginalized groups and communities in the Philippines was piloted under the joint sponsorship of FLAG and the National Secretariat for Social Action (NASSA) of the Catholic Bishops Conference of the Philippines.[212] The provision of paralegal seminars or trainings has since been one of FLAG's major activities for people's empowerment. The publication of Primers[213] and Handbooks[214] are indispensable aid in FLAG's paralegal activities.

The success of the Anti-Death Penalty Campaign spearheaded by FLAG and its partner is, in large part, attributed to the organizations' capacity to make full use of the educative function of their members. To broaden the skills and legal knowledge the front liners in the campaign, FLAG orga-

212) The First National Paralegal Training in the Philippines had 139 participants, divided along different groups (e.g. fishers, farmers, workers, informal settlers, human rights advocates, and students).

213) A few of FLAG's published primers that are intended for various groups and communities include those for Political Prisoners, Students, Workers, as well as primers on 'Your Human Rights', 'Paralegal Craftsmanship', 'States of Emergency', and the 'Death Penalty'.

214) Some of the basic handbooks produced are on rights of Workers, Urban Poor (Informal Settlers), Political Prisoners, Students, and Public School Teachers.

nized a workshop for the core group. Its members were trained in developments on the death penalty situation, the laws and procedures, and basic skills on lobby work. The Philippine Jesuit Prison Service sponsored a paralegal undertaking by FLAG for Alliance of Inmates on Death Row. The seminar aided in transforming convict-participants into inmate-paralegal workers who could conduct preliminary interviews and assist fellow convicts in gathering information on their cases. Newsletters, position papers, press statements were issued and press conference and meetings with legislators were conducted to keep the public abreast of developments on the campaign.[215]

Another important aspect of people's empowerment is the people's participation in local governance. With the Philippine 1987's mandate for local autonomy and the enactment of the Local Government Code of 1991, a new arena was opened for people's participation in local governance and for the advancement of people's agenda for justice and development. Under the Local Governance Programme of an Alternative Legal Assistance Center (SALIGAN),[216] trainings are conducted for people's and non-governmental organizations on laws and procedures affecting their rights and interests, and on the necessary skills that will enable these organizations to participate in the formulation and implementation of local ordinances, development plans and policies and push for their justice and development agenda at the local level. Trainings are also given to local government officials on knowledge and skills to effectively address the needs and interest of women, the disadvantaged groups and the local communities. Key programme components are: (1) local legislation and policy formulation;[217] (2) the barangay justice system;[218] and (3) national advocacy towards democratization.[219]

---

215) Orendain, supra note 63, at 92-99.

216) SALIGAN is doing developmental legal work with farmers, workers, urban poor, women, and local communities.

217) SALIGAN conducts legal literary and skills training on local legislation and the different venues for people's participation.

218) This involves community-based alternative dispute resolution mechanism at the level of the barangay, the basic political unit of the country. SALIGAN conducts education programmes for barangay leaders, specially the Lupong Tagapamayapa (Peace Council) and community leaders on the operation of the barangay system, and provides technical support to enable the leaders to set up and operate community-based dispute settlement mechanisms.

219) This component involves SALIGAN's advocacy to amend the Local Government Code of 1991, towards strengthening the Philippine's local government system and the enhancement of the democratic mechanisms established in the law.

Engaging clients or partners in dialogues, undertaking fora or symposia with clients or communities, or sponsoring legal programmes over the radio or television are also valuable educational activities. Apart from litigation, these activities help the clients and other communities to know 'not only what their legal rights are, but also what their rights should be; and equally important, how inadequate existing legal processes and institutions often are to vindicate these rights, and why they are inadequate.'[220] They are also able to learn other strategies in addressing their problems. Education, therefore, is important in empowering the people towards human development.

Education, however, is not a one-way process. In making full use of their educative function, lawyers also gain knowledge, enrich their perspectives and hone their legal and communication skills as they interact with their clients and other groups and communities.

The manner in which litigation is conducted (e.g. involving the clients in handling basic legal tasks such as posting bail and requesting postponements, or raising novel issues, perspectives or interpretation of the law in the pleadings) could also be a valuable educative avenue not only for the clients, but for the courts as well. The clients realize the limits of the legal processes, and are thus encouraged not to be overly dependent on litigation to resolve their problems. On the other hand, litigation affords the judges the opportunity to become aware of international and local developments in human rights, and challenges them to exercise judicial activism in the promotion of human rights. By judicial activism the judiciary 'may, in accordance with its ordinary and available procedures, so interpret the acts of the State that they do not contravene the human rights of the State's inhabitants. In other words, it may refrain from giving effect to legislation and executive acts which contravene those rights.'[221]

Equally important in education is the promotion of human rights and DLA by introducing law students and other lawyers to the practice of DLA. Through foreign and local law internships, human rights training programmes, and publication of reference handbooks and materials, law stu-

220) Diokno, Legal Aid and Development, supra note 8, at 1.4.

221) D.L. Mahoney, 'The Role of the Judiciary in Human Rights', Speech at the University of the Philippines (22 November 1980), at 6. Mahoney was a Justice of the Supreme Court of New South Wales, Australia and member of the International Committee on Human Rights International Law Association.

dents and other lawyers are able to acquire the knowledge, skills, experience, attitudes, and perspectives necessary to practice DLA.

Advocacy. Advocacy is in furtherance of the first part of the DLA strategy - confronting the government with the detrimental effects of its policies on the people and the inconsistencies between government rhetoric and reality, at the same time pointing to the government the international standards that are not adequately reflected in existing law and practice. The focus of the lawyer's advocacy is on the organs of state, notably the executive and legislature.[222]

Through FLAG's Congress Watch, lawyers engage in research and documentation, draft critiques, position papers and legislative bills; lobby members of Congress; and participate in public and committee hearings, campaigns and fact-finding missions. These types of activities were carried out, for instance, with regard to the draft of existing legislation such as the Anti-Terrorism Law, the Death Penalty Law, and the Comprehensive Forensic DNA Law.

The existence of many gender-sensitive laws in the Philippines is a testament to the determination and resolve of women's non-governmental organizations and other advocate groups in pursuing legislative advocacy as a strategy for change towards the advancement of women's rights against discrimination.

A so called Anti-Rape Law was a product of persistent advocacy and campaigning by women's groups that formed a network in 1992, appropriately given the acronym SIBOL (blossom or sprout in Philippine). The network cluster focused on violence against women issues and worked on a draft bill, with the one organization taking the lead in reviewing the old Rape Law and finally writing a new draft law from the feminist perspective of SIBOL.[223] SIBOL took five years of lobbying and campaigning before the Anti-Rape bill was finally passed and signed into law in 1997. Its successful work would in subsequent years spin off other legislative advocacies on gender-based violence, leading to the passage of the Anti-Sexual Harass-

222) Developmental Legal Advocacy, supra note 16, at 11.

223) Mae V. Villanueva, Gains in Feminist Legislative Advocacy, in Women Strategizing Justice, Women's Resource Book on Gender Justice, at 24 (Philippine Coalition for the International Criminal Court, 2008).

ment Act of 1995, the Rape Victim Assistance and Protection Act of 1998, the Anti-Trafficking in Persons Act of 2003 and the Anti-Violence Against Women and Their Children Act of 2004.[224]

Advocacy is also integral to the rendering of legal services through litigation and educational activities. For instance, FLAG lawyers perform this function through the effective use of pleadings (e.g. complaints, answers, petitions, litigated motions) in the handling of their cases. Consistent with the lawyer's educative functions, hearings and pleadings are venues to challenge government actions, state policies and laws, and to make a stand on certain issues. International human rights instruments ratified by the Philippines and major international human rights developments are invoked to confront the government of the wide discrepancy between international standards on one hand and reality on the other. In so doing, hearings and pleadings have become not only means to educate the public, but also to advocate for the cause of human rights and social justice.

Networking. Without networking, the lawyers' effectiveness in performing their functions would be severely limited. DLA lawyers need to urge their clients to cooperate with other groups, particularly those that are similarly situated, to ensure greater success in addressing problems that require not only legal but also social solutions. For instance, successful metalegal tactics often require not only organizational cohesion but also numerical strength. Being in the nature of a pressure tactic, cooperation with other groups is an important consideration.

Lawyers have to also engage in networking with other non-governmental and people's organizations in order to maximize resources, to share expertise or to create an effective division of labour. The division of labour or sharing of expertise, however, is not a rigid one. Hence, the role of the lawyer can go beyond the purely judicial sphere.[225]

The importance of networking cannot be overemphasized. The experience of SIBOL confirms this:

'SIBOL stands out as a milestone in the history of the women's movement in the Philippines, being the country's first broad formation of women's or-

224) Idem at 27.
225) Ibid.

ganizations and institutions, human rights lawyers, feminist activists and other advocate groups coming together around an agenda for legislative advocacy and policy change in issues affecting women…SIBOL galvanized women as a force in social change.'[226]

In the same vein, the abolition of the death penalty in the Philippines would not have been successful without the help of pressure groups. The Anti-Death Penalty Campaign best illustrates the power of networking with other organizations. FLAG's Anti-Death Penalty Task Force joined efforts with the Coalition Against Death Penalty (CADP), a network of all 56 units nationwide of Volunteers in Prison Service and over 34 member organizations and individuals who signed up.[227]

After eight years to the day of the campaign, private meetings held between the legislators and the organizations in the network resulted in two bills (abolishing the death penalty) being filed in the House of Representatives.[228] But the intervening event - the ouster of then President Joseph Estrada from office - saw the demise of the bills. Undeterred, FLAG and CADP continued with the campaign in 2001. FLAG drafted what was to be the final version of the abolition bill.

CADP, in tandem with FLAG, played a key role in the abolition of the death penalty. But an Association of Families of Convicts in the Death Row, organized by CADP in 1995, contributed significantly in the passage of the bill. The Association became the front liners for the campaign. The seven officers and members took on the tasks of collecting signature-pledges in the House of Representatives. They carried Commitment Letters which read: 'I oppose the death penalty and I will vote against it,' to which each legislator affixed his/her signature.[229] The campaign for the abolition of death penalty took all of 11 years before the death penalty was abolished. And the joint effort and sharing of resources and responsibilities of the part-

---

226) Idem at 24.

227) Some of the early organizations are Caritas Manila, the Catholic Church's charity arm, Bisig ni Kristo (Christ's Helpers) who are Manila City Jail volunteers, Task Force Detainees of the Philippines, Philippine Jesuit Prison Service (PJPS), KAPATID (Sibling) which were relatives of political detainees, and the Association of Major Religious Superior in the Philippines (AMRSP) Amnesty International - Philippines, Kapatirang Gomburza.

228) House Bill No. 8844 filed by Representative Roan Libarios, and Senate Bill No. 2224 sponsored by Senator Francisco Tatad.

229) Orendain, supra note, at 96.

ner organizations spelled the big difference in its success. So strong was the pressure of collective effort that it finally saw the abolition of the death penalty. Jo Orendain eloquently summed up the success of the story -

'After all the arduous work of eleven years interspersed with the heart-break and helplessness of hearing wives' and mothers' eerie wailing at seven executions, anti-death penalty adherents almost let go of the rock which, like Sisyphus, they had been determined to push up the steep mountain.'[230]

Constraints, difficulties and challenges in the age of globalization

Over the decades that DLA has been evolving in theory and practice, DLA lawyers have met varying degrees of difficulties and constraints. In the 1970's as now, lawyers face death threats, physical and psychological harassment and surveillance from state agents or armed groups for their involvement in DLA activities. For handling cases and taking up positions that question state policies or expose human rights violations, they have been labelled as 'pro-communists,' 'criminal coddlers,' 'destabilizers,' or 'agitators', to name a few.

Moreover, it is not uncommon for DLA lawyers to work long hours of the night in the office often with inadequate staff support, and to face the physical risks and emotional demands of dialogues and interactions with poor communities across the country. For those in legal NGOs, they and their staff have also to contend with insufficient financial compensation that places added pressure on what is already demanding and risk-laden work, as well as the perennial problem of dwindling resources to implement programmes and activities.

In the midst of globalization, the DLA lawyers will continue to face greater constraints and difficulties, as well as challenges. The phenomenon of flexibilization of work arrangements, the informalization of workers, and the increasing feminization of migration raises policy and legal questions that demand serious attention. In the Philippines, for instance, the phenomenon

230) Idem at 3.

of 'flexibilization' of work arrangements[231] and the 'informalization' of workers have risen over the years. Flexibilization of work arrangements has resulted, among others, in lesser take home pay (e.g. no overtime, nightshift differentials, holiday pay), fewer benefits. Flexibilization and informalization of work have also threatened the existence of unions, if not lessened the unions' opportunity to organize for greater protection. On the other hand, as workers face job lay-offs, they increasingly resort to informal work that affords almost no legal protection and social recognition for the worker.

Another factor has been the phenomenon of increasing feminization of migration in recent years brought about by the massive demand for caregivers and nurses in rich countries, most of whom are women. In 2000, Filipino women already constituted nearly two-thirds (69 percent) of those newly deployed.[232] For most part, they perform as nannies, maids and sex workers, considered the worst possible occupations in terms of remuneration, working conditions, legal protections and social recognition.[233]

Increasingly, DLA lawyers will find it more difficult to mount legal defence for workers as labour laws are inadequate to protect them from the negative impact of globalization. The DLA lawyers thus need to help workers advocate for policy and law reforms in order to afford greater protection for workers, especially the informal workers and migrant workers. They will also have to devise creative means to help organize and mobilize sectors such as informal workers, so that they are able to act collectively in

---

231) The Department of Labour and Employment (DOLE) Department Advisory No. 2, Series 2009 defined flexible work arrangements as alternative arrangements or schedules other than the traditional or standard work hours, workdays and workweek. These can take the form of: (1) compressed workweek, where the normal workweek is reduced to less than six days but the total number of work-hours (48 hours per week) remains, the normal workday increasing to more than eight hours but not exceeding 12 hours without corresponding overtime premium; (2) reduction of workdays for a duration of not more than six months; (3) rotation of workers (alternate work) within the workweek; (4) forced leaves for days or weeks using employees' leave credits if there are any; (5) broken-time schedule, where the work schedule is not continuous but the work-hours within the day or week remain; and (6) flexi-holidays schedule, where employees agree to avail the holidays at some other days, provided there is no diminution of existing benefits as a result of such arrangement.

232) Carol I. Sobritchea, Advancing Women's Rights through CEDAW, in A Gender Review of Selected Economic laws in the Philippines, at 13-14 (UPCWS, 2006).

233) The Feminization of International Labor Migration, at 2 (United Nations International Research and Training Institute for the Advancement of Women Working Paper No. 1, 2007) (visited 17 May 2009) grp-working-Page-1w-1.pdf.

finding solutions to their problems. With globalization, the DLA lawyers will also have to deal more with other human rights issues (e.g. transnational prostitution, human trafficking, cyber sex, child labour, etc).

DLA lawyers face organizational constraints as well. They have to work towards a model for long-term sustainability, where they can continue to meet the needs of both lawyers and staff, despite dwindling resources from funding agencies. Creative, viable and dependable means of cooperation with their client or partner communities or groups need to be worked out to conserve limited resources.

Further, there is lack of understanding of human rights, not only among the people, but also among those in the legal profession and the judiciary. Apart from this, there is also a lack of understanding of the roles of lawyers in DLA practice such that they are vulnerable to threats and harassment of all kinds from armed elements and state agents. For these reasons, DLA lawyers need to undertake more extensive educational activities to promote greater understanding of human rights and of the role of lawyers in this advocacy in light of recent trends and developments in human rights. But how DLA lawyers can make use of the information and communications technology that has become a major force for intensifying the processes of globalization is a challenge they will have to meet as it could spell a great difference in the way they promote human rights and mainstream DLA as a theory and practice in the years to come. For instance, the use of websites, forum, blogs, social networking and other internet media are effective avenues for advocacy and networking. While a number of DLA lawyers have started to make use of these media, many of them or their organizations have yet to maximize the full potentials of internet media in their legal work because of lack of personnel to update the posts or maintain the sites or lack of technical skills, as well as financial and time constraint.

Moreover, the imperatives of the times call for judicial and legislative reforms. In respect to these matters, the participation of DLA lawyers in judicial and legislative reforms through vigorous advocacy and education programmes cannot be over-emphasized. For instance, there is the need to gender-sensitize and upgrade the efficiency of court systems and procedures (e.g. provision for post-traumatic stress disorder as proof of fact of trauma or rape). There is also an urgent need to improve the quality and access to judicial services by the poor (e.g. physical accessibility, affordability). Equally important are legislative reforms that are gender-sensitive

and that provide greater protection of human rights (e.g. prohibition against labour-only contracting, protection against reprisal in sexual harassment, removal of gender biases in legislation).

Amidst the constraints, difficulties, and challenges, let it be said, however, that DLA practice is not without its reward. For DLA lawyers also get their share of affirmation from their clients that what they do, together with them, spells a great difference in their lives and in society. In the course of their work, DLA lawyers have received many improvised certificates of appreciation; handicrafts of political prisoners, women and farmers; art work of children; and beaded works of indigenous peoples, among many others. These have not only come to serve as mementos of their experiences, but also as living reminders of the nobility of their profession. That is to say, they responded and continue to respond to the challenge of their profession – to be agents or catalysts for social change. Call it psychic reward, but a fulfilling reward it is.

HOLISTIC APPROACHES TO THE DELIVERY OF LEGAL AID SERVICES – THE SOUTH AFRICAN EXPERIENCE[234]

Professor David McQuoid-Mason

Introduction

The South African experience is that a holistic approach to the delivery of legal aid services is necessary if an under-resourced country is to make the most of its limited resources. A holistic approach means that maximum use is made not only of the public sector legal aid bodies such as national legal aid board or council, but also of legal services providers in the private sector, such as bar associations, public interest law firms, law clinics and paralegal advice offices. An adequately funded, holistically structured, legal aid scheme can play an important role in achieving the protection of human rights through the provision of effective legal services in criminal and civil matters.

Many under-resourced countries have small numbers of lawyers *per capita* and need to overcome this by making efficient use of aspiring lawyers in university legal aid clinics, as well as law graduates required to undergo internship programmes before admission to legal practice (e.g. articled clerks or *concipiens*). However, it is trite that the nature and effectiveness of a legal aid scheme in any country will depend upon the size of the budget provided by the state, the political will of the government, and the amount of cooperation that the scheme receives from the private sector. For example, in South Africa the Legal Aid Board was grossly under-funded in its early years, when the apartheid government was not really committed to legal aid. However, during the 1990s as the country moved towards democracy funding by the State increased dramatically, particularly after the new democratic dispensation. The exponential increase from R 66.3 million in 1994-5 to about four times that amount in subsequent years is almost solely due to the effect of the Board acting as the agent of the state in respect of its constitutional legal aid obligations. For instance, the budget for the period 1995-6 amounting to R 182.4 million reflected R 66.4 million in respect of

234) See generally, David McQuoid-Mason 'Lessons from South Africa for the delivery of legal aid in small and developing Commonwealth countries' (2005) 26 Obiter pp. 207-233 and a forthcoming chapter in a book on legal aid to be published by UNDP, on which much of this paper is based.

the conventional legal aid scheme, and R 116 million for the provision of legal consultation services and legal representation by the Board in terms of the constitution.[235]

This article will discuss some of the different methods of delivering legal aid services that have been tried in South Africa. The methods used attempt to give effect to the constitutional right to counsel in criminal matters, and can also be used to ensure the protection and promotion of human rights. The South African experience is valuable because the country has established one of the most sophisticated legal aid schemes in the developing world, while operating on a modest annual budget of about $ 1.20 per head of population in respect of criminal and civil legal aid. This compares with about $ 60 *per capita* for the United Kingdom, $ 30 *per capita* for Canada, and $ 15 *per capita* for the United States.[236]

Methods of delivering legal aid services

A holistic approach requires a contribution to legal aid services by both the public and private sectors. South Africa has experimented using both sectors to provide legal services for the poor in criminal and civil cases. The results have indicated that no single method can be used to achieve effective and efficient delivery of legal aid services and that the most successful outcomes have been achieved by using a mixed model. The South African experience followed an evolutionary approach to legal aid delivery that went from *pro bono* to judicare to salaried lawyers. Best international practice indicates that whichever approach is used the bulk of the budget for legal aid work must be provided by the state.

The following methods will be discussed in the light of the South African experience: (i) *pro bono* legal aid work (ii) state-funded judicare, *ex officio* or referrals to private lawyers; (iii) state-funded public defenders; (iv) state-funded interns in rural law firms; (v) state-funded law clinics; (vi) state-funded justice centres; (vii) state-funded impact litigation; (viii) state-funded cooperation agreements; (ix) public interest law firms; (x) university legal aid clinics; (xi) street law-type clinics; and (xii) paralegal advice offices.

---

235) Legal Aid Board Report on Activities (1996) A5.

236) Estimates by the present writer based on figures presented by colleagues in the United Kingdom, Canada and the United States.

State-funded justice centres

It is axiomatic that the most effective legal aid service models for consumers are those that provide them with a 'one stop shop' instead of being continually referred to different agencies. A number of developing countries have legal aid schemes that include aspects of a 'one stop shop'. However, none of their services are as comprehensive as those provided by the South African 'justice centres'.

The Board has set up a network of fifty-eight justice centres and forty one satellite offices[237] that provide a 'one-stop' service for legal aid clients. The satellite offices are much smaller than the regular justice centres and service the rural towns, sometimes using a circuit system. The justice centres in the larger cities also have high court units - thirteen throughout the country.[238] The justice centres and satellite offices cover most of the regional and district courts and all the high courts in the country and areas not covered by a Board office are serviced using judicare[239] or pursuant to cooperative agreements.

Depending on their location and the demands of the local legal environment, the justice centres employ a variety of legal and paralegal professional staff. These vary from larger justice centres where there are qualified attorneys and advocates employed as principals, public defenders, law intern public defenders, paralegals, and administrative staff to satellite offices that have a much smaller core staff component. Candidate attorney interns are required to do both civil and criminal work in the district courts,[230] while professional assistants (interns who have qualified to appear in court) appear in the regional courts and intern supervisors appear in the high courts (if the attorneys have an LLB or more than three years' experience) and the regional courts. Paralegals assist with the initial screening of clients, and administrative assistants and clerks provide the necessary administrative back-up. Judicare is used only where the justice centre cannot handle a case because of a conflict of interest or lack of capacity.[241]

237) Legal Aid Board Annual Report 2006-2007 (2008) p. 21.
238) Legal Aid Board (2005) p. 2.
239) Legal Aid Board Annual Report 2003–2004 (2005) p. 2.
240) District courts can impose fines of up to South African Rand 100,000 (less than USD 16,666) and imprisonment for up to three years (Magistrates' Courts Act 32 of 1944).
241) Legal Aid Guide, Annexure O, para 1.2.

The justice centres have become the main delivery system of both criminal and civil legal aid by the Board. Already during the year 2002-3 the justice centres were addressing fifty-three percent of all new legal aid matters, and by 2003-4 this had increased to seventy-eight percent.[242] Notably, of the 236,282 new matters handled by the justice centres during 2003-4, only 27,280, or twelve percent, were non-criminal cases.[243] Likewise in 2006-2007, of the 314,084 new cases handled by the justice centres, 34,394 or eleven percent was civil.[244] The Board now estimates that it defends sixty to seventy-five percent of all criminal cases in the district courts, seventy to eighty percent of all criminal cases in the regional courts, and ninety percent of all criminal cases in the high courts.244 The Board hopes to establish a benchmark ratio of seventy percent criminal and thirty percent civil cases in the justice centres.[246]

In the Board's 2005 report, the chairman described the value of the justice centres as follows:

The implementation of the justice centre model was a monumental step in the right direction for the Legal Aid Board and the delivery of legal aid, in general, to those sections of our society who have been rendered vulnerable through the vagaries of poverty and unemployment. This in-house method has given the Board and executive management the requisite control over the finances of the organization. We are now able to plan and budget as well as to manage expenditure against budget on a proactive basis. We are also now able to respond to contingency situations appropriately. The days of *ad hoc* management and a growing contingent liability are safely behind us.[247]

Justice centres provide a full range of legal and paralegal services to indigent clients. They work well in the larger cities and towns, but not in the rural areas where there is insufficient work to justify the expense of setting up a fully fledged legal aid office. In such circumstances, another model, such as contractual agreements between the legal aid body and rural law

242) Legal Aid Board Annual Report 2003–2004 (2005) p. 19.
243) Legal Aid Board Annual Report 2003–2004 (2005) p. 20.
244) Legal Aid Board Annual Report 2006-2007 (2008),p. 24.
245) Legal Aid Board Annual Report 2006-2007 (2008), p. 11.
246) Vidhu Vedalankar, CEO, Legal Aid Board, 'Legal Aid in South Africa' (unpublished paper, October 13, 2003) p. 8.
247) Justice Dunstan Mlambo, Chairman, Legal Aid Board (2005), p. 3.

firms, public interest law firms, university law clinics and paralegal advice offices may be more feasible.

Principles that emerge

In South Africa justice centres provide a full legal service to clients and operate like comprehensive law firms.

Justice centres provide a 'one stop service' that prevents legal aid clients being sent from one agency to another when seeking legal assistance.

Justice centres are significantly cheaper than the judicare system where large numbers of cases are involved and once the initial start up costs have been met.[248]

A combination of justice centres and satellite offices can provide extensive coverage of legal aid in a country.

In rural areas where it does not justify establishing satellite offices it may be necessary to enter into cooperation agreements with paralegal advice offices or rural law firms.

Pro bono legal aid work

Pro bono legal aid work has been part of the tradition of the legal profession in many countries. However, although *pro bono* work may supplement state-funded legal aid services it should not be regarded as a substitute for legal aid schemes that pay for the services of lawyers. For instance in the United Kingdom, the United States of America, and France *pro bono* work has been done for many years. In developing countries like South Africa there has been a tradition of lawyers doing some *pro bono* work,[249] but this has not been mandatory. Recently, the Cape Law Society in South Africa has made it compulsory for its members to do *pro bono* work. Kenya has made *pro bono* work compulsory for members of the legal profession who require evidence of such work to renew their practice certificates, while in Nigeria a reform plan has proposed making *pro bono* work a prerequisite for appointment as Senior Counsel.

---

248) See McQuoid-Mason 'The Delivery of Civil Legal Aid Services' (2000) 24 Fordham International Law Journal (Symposium), pp. 126 - 127.

249) GW Cook 'A History of Legal Aid in South Africa' in Faculty of Law, University of Natal Legal Aid in South Africa (1974), p. 28.

Attempts to provide effective legal aid services based exclusively on *pro bono* work by the profession and bar associations do not seem to be viable. In 1962 the South African government attempted to set up a national legal aid scheme based on *pro bono* work by attorneys and advocates by negotiating with the profession to provide free legal services to persons referred to them by local legal aid committees that were to be established at every lower court.[250] The system never worked because it was not properly advertised, there was too much red tape, and probably also because members of the profession were not paid for their services.[251]

Although *pro bono* schemes may encourage public service by legal practitioners, experience shows that *pro bono* clients often do not receive the same level of service as paying clients, and many lawyers are reluctant to take on *pro bono* cases. In some jurisdictions where *pro bono* work is mandatory, some lawyers may 'buy out' the time that they would be required to devote to such work - unless there are rules against it.[252] In several countries in Central and Eastern Europe and the former Soviet Union, where the payment for *ex officio* or judicare work is very low or the schemes run out of state-provided funding, lawyers sometimes find themselves effectively providing *pro bono* work in respect of criminal legal aid cases.[253]

Principles that emerge

Pro bono clients do not usually receive as effective a service as clients who are paid for by a salaried lawyer or judicare legal aid system.

Pro bono work by lawyers should be regarded as an adjunct to, not a substitute for, a properly functioning legal aid scheme that pays lawyers for their services – albeit at a reduced rate.

Pro bono work alone can never be used as the sole means of providing legal aid services to the poor and protecting and promoting human rights in a country.

---

250) Cook 'History of Legal Aid in South Africa' in Legal Aid in South Africa at pp. 31-32.
251) PH Gross Legal Aid and its Management (1976), pp. 176 -177.
252) For example, as sometimes happens in the United States (Johnson Jr 'Equal Access to Justice' (2000) 24 Fordham International Law Journal (Symposium), p. 83).
253) In many instances the paperwork involved in obtaining payment under the ex officio system is too bureaucratic and lawyers simply do not claim the low fees due to them.

In countries where lawyers are required to renew their licences annually, pro bono work can be required as a precondition for the renewal of such licences.

State-funded judicare, ex officio or referrals to private lawyers

Referrals to private lawyers are probably the most common method of providing legal aid in many countries. Judicare is used extensively in the United Kingdom[254] and in the majority of cases in the Netherlands.[255] Up until recently judicare was the main form of delivery of legal aid services in South Africa. As has been mentioned, judicare has also been used in Central and Eastern Europe and the former Soviet Union where it takes the form of *ex officio* work in criminal cases. Under the judicare system private lawyers who render legal aid services in accordance with the legal aid body's rules are paid for their services at fixed tariffs. A variation of the judicare scheme is 'contracting out' where the legal aid body contracts with a law firm, a local bar association, a non-governmental organization, or even private lawyers to do certain numbers of cases for a fixed fee.[256]

The introduction of the new constitution[257] in South Africa, and its mandatory provisions concerning legal aid at state expense for indigent accused persons,[258] led to the country's Legal Aid Board abandoning judicare as the main method of delivery of legal aid services. The huge increase in the number of criminal defences required meant that the Board became notionally bankrupt and had to revise its strategies concerning the delivery of legal aid services. The judicare system worked when the number of cases was comparatively small and the Legal Aid Board had the resources to handle them administratively. However, once the Board could no longer keep pace with the demands of practitioners for payment within a reasonable period of time the referral system broke down.[259]

---

254) See generally, Roger Smith 'Appendix' to 'Promoting Access to Justice in Central and Eastern Europe' in Public Interest Law Initiative, Interights, the Bulgarian Helsinki Committee and the Polish Helsinki Foundation for Human Rights Access to Justice in Central and Eastern Europe: A Source Book (2003) p. 74.

255) Peter van Biggelaar 'The System of Legal Aid in the Netherlands' in Public Interest Law Initiative, Interights, the Bulgarian Helsinki Committee and the Polish Helsinki Foundation for Human Rights Access to Justice in Central and Eastern Europe: A Source Book (2003) 89 at p. 92.

256) Rekosh et al 'Access to Justice' in Access to Justice in Central and Eastern Europe at p. 21.

257) The Constitution of the Republic of South Africa Act 108 of 1996.

258) Section 35 of the constitution.

259) McQuoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (2000) 24 Fordham International Law Journal (Symposium), p. 121.

As a result of pilot projects testing the cost of public defenders and law clinic public defender interns the Board decided to opt for a predominantly salaried lawyer model involving justice centres.[260] Judicare is only used as a subsidiary method of delivery in areas where there are no justice centres or the latter cannot handle cases for logistical or ethical reasons,[261] or because the justice centres do not have adequately specialized lawyers. In respect of human rights matters they are referred to the 'impact litigation' division of the Legal Aid Board or to specialist public interest firms like the Legal Resources Centre. Where judicare is used for human rights cases the lawyers involved should be specialists in human rights matters.

Studies in South Africa and elsewhere have shown that the judicare model is considerably more expensive than the salaried lawyer scheme. The experience in the United Kingdom and South Africa is that if judicare is to be retained as part of the legal aid system it is best to use the contracting out approach where the annual fees paid to participating partners is capped. This is now the core component of the England and Wales legal aid scheme.[262] In South Africa contractual cooperation agreements have been entered into with public interest law firms[263] and university law clinics.[264]

Principles that emerge

The South African experience is that judicare can be used where there is not a significant demand for lawyers' services or as an adjunct to a salaried lawyer legal aid scheme.

Judicare is not cost-effective for legal aid systems where there are large numbers of legal aid clients.

It is not possible to accurately budget for judicare programmes unless case loads are contracted out at fixed fees.

---

260) See below para 2.6.

261) McQuoid-Mason 'The Delivery of Civil Legal Aid Services' (2000) 24 Fordham International Law Journal (Symposium), pp.121 - 22.

262) See generally, Smith 'Appendix' to 'Promoting Access to Justice in Central and Eastern Europe' in Access to Justice in Central and Eastern Europe: A Source Book (2003) p. 74.

263) See below para 2.9.

264) See below para 2.10.

For judicare to work effectively in the protection and promotion of human rights the judicare lawyers should be specialists in human rights law or employed in organizations like public interest law firms.

State-funded public defenders

Public defender programmes involving the employment of salaried lawyers paid from state funds probably originated in the United States of America. There are very few large scale public defender programmes in developing countries outside of South Africa - although salaried lawyers are provided for in a number of countries,[265] and pilot projects have been operating in countries like Lithuania and Mongolia funded by the Open Society Justice Initiative. The Lithuanian Public Attorney Office was the first salaried lawyer legal aid office to be set up in Eastern Europe.[266]

In South Africa in 1990, after consultations with a variety of lawyer associations, academics and NGOs, the Legal Aid Board persuaded the Minister of Justice to authorize a state-funded pilot public defender project and to provide R 2.5million (about USD 625,000 at the time) to enable the Board to employ legally qualified persons to represent indigent accused. A pilot public defender office was opened in Johannesburg and approved for a two year period.[267] At the time it was estimated that each public defender would be able to deal with approximately 200 district court criminal cases a year, and this was subsequently confirmed.[268] The project was extended in 1995 and it was then estimated that the average cost of a judicare criminal case was R 822 (about $ 103), the average cost of a public defender criminal case R 555 (about $ 69),[269] and the average cost of a state-funded law clinic case even less. As a result of the proven success of the pilot project a permanent public defender office was established. Since then public defenders, together with law intern public defenders, have been integrated into the Board's justice centres,[270] and undertake both criminal and civil cases.

---

265) For example, Nigeria where the Legal Aid Council employs a small number of salaried lawyers.

266) See Rekosh et al 'Access to Justice' in Access to Justice in Central and Eastern Europe at p. 35; also www.osf.lt.

267) Legal Aid Board Annual Report 1991/92 pp. 32-3.

268) D. J. McQuoid-Mason 'Public Defenders and Alternative Service' (1991) 4 SACJ pp. 267 270.

269) Legal Aid Board Annual Report 1995/96 (1997) p. 27.

270) See generally, McQuoid-Mason 'Lessons from South Africa' (2005) 26 Obiter at pp. 221-222.

Israel established a public defender scheme in 1995 that employs private attorneys as public defenders supervised by in-house public defender attorneys to provide legal aid in criminal cases.[271] In 1998 a pilot public defender programme was introduced in Scotland and it was estimated that each salaried lawyer would handle about 500 cases a year.[272] The first pilot Lithuanian public defender office was established in 2000.[273]

Principles that emerge

Public defender models are considerably cheaper than the judicare system.[274]

Countries that mainly use the judicare model should consider introducing partial public defender schemes where the courts deal with substantial numbers of criminal cases.

The South African experience has shown that a mixed system of judicare, public defenders and intern public defenders can be established for reasonable per capita expenditure on legal aid by the state, assuming that expenditure per capita of just over $1 per annum can be regarded as modest.

It is possible to introduce cost effective public defender offices in cities where there are large numbers of legal aid clients.

State-funded legal aid interns in rural law firms

In countries where law graduates have to do internships, under the supervision of qualified lawyers, it is sometimes possible for national legal aid schemes to enter into contracts with private law firms in rural areas to employ state-funded interns as legal aid lawyers. This is a cost-effective way

271) Moshe Hacohen 'Israel's Office of Public Defender: Lessons from the Past, Plans for the Future' in in Public Interest Law Initiative, Interights, the Bulgarian Helsinki Committee and the Polish Helsinki Foundation for Human Rights Access to Justice in Central and Eastern Europe: A Source Book (2003) 125, at 129.

272) See Rekosh et al 'Access to Justice' in Access to Justice in Central and Eastern Europe at p. 22.

273) Ibid at pp. 37-38.

274) For instance, in South Africa, Canada and the United States of America (cf. Vessala Terzieva 'Financing Legal Aid: Comparative Perspective' in Public Interest Law Initiative, Interights, the Bulgarian Helsinki Committee and the Polish Helsinki Foundation for Human Rights Access to Justice in Central and Eastern Europe: A Source Book (2003) 46 at pp. 47-48).

of extending legal aid to indigent people in rural areas. This model was tested in South Africa in 1995, when the Legal Aid Board in partnership with Lawyers for Human Rights (an NGO), established a pilot project in which private attorneys in selected rural towns were given funding by the Board to employ intern law graduates as candidate attorneys to do legal aid work. The participating law firms were assisted in the payment of the salary of the candidate attorneys by the Board. Lawyers for Human Rights identified suitable attorneys and monitored the progress of the project. The candidate attorneys handled at least 10 new legal aid matters a month for the Board and performed community service one day a week.[275] The project proved highly successful. Not only did it expand legal aid services in rural areas, but it also helped to overcome the shortage of internship places for formerly disadvantaged black South Africans and enabled them to work in the areas where they lived.[276] The model was not continued after the Board set up satellite public defender offices to service rural areas.

Principles that emerge

Where recent law graduates are required to serve internships with law firms they can be placed in rural law firms to undertake legal aid work in districts where there are no national legal aid offices.

It is much cheaper to supplement the salaries of law interns in rural law firms than to establish branch offices of the national legal aid scheme in areas where there is a limited demand for legal aid services.[277]

Recent law graduates who are required to serve internships with qualified lawyers can make an invaluable contribution to legal aid services in countries such as those in Central and Eastern Europe and Africa that require law graduates to do an internship, and where there is a shortage of internship places (e.g. Poland, Slovakia and South Africa).[278]

State-funded law clinics

As has been mentioned above, developing countries that require university law graduates to undertake a period of internship or vocational training

275) See generally, McQuoid-Mason 'Lessons from South Africa' (2005) 26 Obiter at p. 222.
276) Legal Aid Board Annual Report 1995/96 (1996) p. 24.
277) Legal Aid Board Annual Report 1996/7 (1999) p. 21.
278) See generally, Rekosh et al 'Access to Justice' in Access to Justice in Central and Eastern Europe at p. 31.

may use the interns to supplement state-funded legal aid schemes. South Africa was probably one of the first developing countries in the world to consider using law graduate interns as public defenders on a substantial scale. In South Africa law clinics funded by the Legal Aid Board were established to employ supervised law graduate interns as public defenders in the district criminal courts and to do a limited number of civil cases. The clinics have proved to be an efficient and cost effective method of delivering legal aid services for the Board.

The state-funded law clinics also provide practical legal training and access to the legal profession for aspiring young lawyers who are often faced with a shortage of places for internships - particularly those from disadvantaged backgrounds. There may be scope for similar programmes in Eastern and Central European countries that require internships for admission to legal practice or some other form of community service by university graduates. This has been suggested for Nigeria,[279] and a pilot project has been established, funded by the Open Society Justice Initiative, to use the law graduates in the Nigerian National Youth Service Corps as public defenders.

In countries where internships are required it is usually necessary to get cooperation from the legal profession and the Ministry of Justice to bring about the necessary legislative changes to introduce an intern public defender programme. For example, in 1993 the South African Attorneys Act[280] was amended to allow candidate attorneys with the necessary legal qualifications to do their internship by undertaking community service rather than serving articles in an attorney's office.[281] Community service may be done at law clinics accredited by provincial law societies, including clinics funded by the Legal Aid Board. The clinics are required to employ a principal (an attorney with sufficient practical experience), to supervise law graduates in the community service programme. The candidate attorneys appear in the district courts and the principals in the regional and high courts. Interns who have been articled for more than a year may also appear in the regional courts. Candidate attorney interns may be employed

279) It was suggested that Nigerian law graduates in the National Youth Service Corps programme could be seconded to the Legal Aid Council to assist as public defenders (David McQuoid-Mason 'Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council' (2003) 47 Journal of African Law pp. 107-116).

280) Act 53 of 1979.

281) Act 115 of 1993, section 2.

to do community service at a maximum ratio of ten interns to one supervising attorney.

In South Africa the intern public defender programme began with a pilot project in 1994 that involved partnerships between the Legal Aid Board and five university law clinics. The project was subsequently expanded to 22 university and other law clinics. All the state-funded law clinics, except a few, have been separated from the universities and incorporated into the Board's justice centres.[282]

Principles that emerge

In countries requiring law graduates to undergo internships in law firms before admission to practice, such interns can play a valuable role by providing legal aid services as public defenders in district courts.

The use of state-funded law intern public defender programmes means that legal services can be expanded at a reasonable cost to indigent members of the public.

State-funded internship programmes provide places for interns who may otherwise not be able to gain access to the legal profession, as occurs in some Central and East European countries and South Africa.
State-funded internship programmes not only provide practical training for young law graduates but also enable them to provide community service.

If state-funded interns are properly trained and supervised, their standard of service will be equal to that of qualified lawyers, or privately employed legal interns, because of their specialized knowledge - particularly in the field of criminal law.[283]

282) McQuoid-Mason 'Lessons from South Africa' (2005) 26 Obiter at p. 224. See below para 2.6.

283) See McQuoid-Mason 'Lessons from South Africa' (2005) 26 Obiter at p. 225.

Impact litigation

In 2001, the Board set up a special impact litigation fund[284] designed 'to uphold the rights entrenched in the Constitution of South Africa.'[285] Certain conditions apply to the fund and include 'a reasonable chance of success where a positive outcome will set a precedent that will benefit South Africa's indigent population.'[286] For example, during 2002–3, the Board dealt with cases involving deaths resulting from the collapse of a soccer stadium, the alleged poisoning of underground water that impacted the health and livelihood of neighbouring communities, as well as the poisoning of residents by smoke originating in a fire that emitted very high levels of sulphur dioxide.[287]

Where the Board does not have the capacity to engage in impact litigation, it will refer the matter to a cooperation partner, specialist lawyers on a judicare basis, or to law firms that have the necessary expertise.

Principles that emerge

Impact litigation can play a major role in assisting large numbers of marginalized or poor people to bring civil actions to promote and protect their human rights.

It is more economical for a legal aid body to bring an impact litigation case for large numbers of poor people than for it to engage in numerous individual actions on their behalf.

Where the impact litigation division of a national legal aid body cannot bring the action in-house because of lack of expertise or other resources the case can be referred to a cooperation partner.

Cooperation agreements

The *Legal Aid Guide* defines a cooperation agreement as '[a]n agreement entered into between the Board and another party, not being an individual le-

284) Legal Aid Board, Annual Report 2001 (2002) p. 4.

285) Legal Aid Board Annual Report 2002 (2003) p. 17.

286) Legal Aid Board Annual Report 2002 (2003) p. 17. Also see: 'While individually expensive, these matters have the potential to establish precedents that will benefit many more persons than those who are parties to the initial litigation' (Legal Aid Board Annual Report 2001 (2002), p. 6).

287) Legal Aid Board Annual Report 2002 (2003) p. 17.

gal practitioner or a group/firm/company of legal practitioners. This is for the purposes of rendering legal services to indigent persons.'[288] The Board has entered into a number of cooperation agreements with public interest law firms, independently funded law clinics, and paralegal advice offices, most of which cover civil cases. Stringent requirements are provided for co-operation agreements - for example, the organization must have 'a proven track record in public interest law and effective community services.'[289]

Cooperation agreements are entered into with legal service providers 'who either have an established infrastructure in a region where the Board has no presence or who specialize in matters identified by the Board as priorities for service delivery.'[290] The service 'must be provided to the poor at a cost less than judicare and, at no charge, to those who cannot afford the services in accordance with the means test which must always be conducted.'[291]

The majority of cases handled by the justice centres are done in-house, but when a centre is unable to handle a case, it may be referred to a service provider that has a cooperation agreement with the Board or, in some cases; it may be referred on a judicare basis.[292] The cooperation agreement programme has provided the Board with a cost-effective way of delivering legal aid services in areas where it does not have a presence. It has also given the Board greater exposure in those areas and has played an important role in expanding access to justice in previously disadvantaged communities.[293]During 2006-7, the Board had cooperation agreements with six independent university law clinics and three with non-governmental organizations.[294] During the same period, the cooperation partners undertook 5,468 new cases, (most of them civil), or 1.5% of the total number of criminal and non-criminal cases handled by the Board.[295]

288) Legal Aid Guide chapter 1 para 1 definitions.
289) Legal Aid Board Annual Report 2001 (2002) p. 11: 'Full disclosure of all funding and activities is also required, as is submission of audited balance sheets each year and if necessary, a financial audit by the Board and the Auditor-General.'
290) Ibid.
291) Ibid.
292) Legal Aid Guide Annexure O para. 1.2.
293) Legal Aid Board Annual Report 2002 (2003), p. 17.
294) Legal Aid Board Annual Report 2006-2007 (2008) p. 24.
295) Ibid.

Principles that emerge

Where the national legal aid body does not have a presence in a particular region, or is faced with a conflict of interest, or where the national legal aid offices do not have the necessary expertise, a cooperation agreement may be entered into with a partner such as a public interest law firm, a university law clinic or a paralegal advice office that specializes in such matters.

Cooperation partners should have a proven track record of successfully dealing with the types of cases referred to them by the national legal aid body.

The cost of cases referred to cooperation partners should be less than what it would cost to refer such cases to a judicare lawyer.

Public interest law firms

As has been mentioned, cooperation agreements are an economical way of providing legal services to the poor. Public interest law firms can play an important role in promoting and advancing the human rights of indigent people - particularly in respect of matters affecting large numbers of people.[296] Public interest law firms are found in many developing countries in the Americas,[297] Asia,[298] the Middle East,[299] Eastern Europe[300] and Africa.[301]

In Hungary the Legal Defence Bureau for National and Ethnic Minorities (NEKI) and the European Roma Rights Centre have done useful work in advancing the rights of ethnic minorities. In Africa, the Legal Assistance Centre in Namibia, the Constitutional Rights Project and the Social and

296) See generally the National Association for the Advancement of Colored People and the Legal Defense Fund Public Interest Law Around the World (1992).

297) See Hugo Fruhling 'From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America' in Ford Foundation Many Roads to Justice (2000) p. 55.

298) See for example, Stephen Golub 'From the Village to the University: Legal Activism in Bangladesh' in Ford Foundation Many Roads to Justice (2000) 127; Stephen Golub 'Participatory Justice in the Philippines' in Ford Foundation Many Roads to Justice (2000) p. 197.

299) Helen Hershkoff and Aubrey McCutcheon 'Public Interest Litigation: An International Perspective' in Ford Foundation Many Roads to Justice (2000) pp. 289-292.

300) Hershkoff and McCutcheon 'Public Interest Litigation' in Many Roads to Justice at pp. 293-294.

301) See Stephen Golub 'Battling Apartheid, Building a New South Africa' in Ford Foundation Many Roads to Justice (2000) p. 19.

Economic Rights Action Centre (SERAC) in Nigeria, and the Legal Resources Centre in South Africa, have all played an invaluable role in providing access to justice for marginalized people in their respective countries.[302] Similar work has been done by the Legal Resources Foundations in Zimbabwe and Zambia.

The Legal Resources Centre (LRC) in South Africa was established in 1979, [303] and in the 29 years of its existence the LRC has assisted millions of disadvantaged South Africans either as individuals or as groups or communities who faced common problems. It has played a major role in providing legal services to the poor in human rights cases that were not funded by the Legal Aid Board during the apartheid era. In recent time it has played a major role in assisting marginalized groups in South Africa to access the socio-economic rights enshrined in the constitution.[304]

Under apartheid the LRC used litigation and the threat of litigation to assert the human rights of thousands of disadvantaged South Africans in many different areas of the law. It also formed cooperative links with numerous advice centres staffed by paralegals.[305] After the 1994 elections the LRC reassessed its position and began to focus on constitutional rights, like access to justice, gender equality, children's rights, the enforcement of socio-economic rights such as health care, education, housing and water, and a constitutional reform programme. The land, housing and development programme includes rural and urban restitution and redistribution of land, urban and rural land tenure security, housing, land law reform and urban and rural land development. An important part of the LRC programme is the training of paralegals and lawyers from disadvantaged communities. It employs 12 to 15 young law graduates each year and trains interns from elsewhere in Africa and the developing world.[306] The LRC charges no fees and receives no state funds. It is financed by the Legal Resources Trust

302) Hershkoff and McCutcheon 'Public Interest Litigation' in Many Roads to Justice at pp. 289-294.

303) At present there are six centres that are located in Johannesburg, Cape Town, Port Elizabeth, Grahamstown, Durban and Pretoria (Legal Resources Centre Annual Report (1996) p. 25).

304) Constitution of the Republic of South Africa Act 108 of 1996 ss 26 and 27, (e.g. housing, food, water, health and social security).

305) Legal Resources Centre Annual Report (1996) p. 9.

306) Legal Resources Centre Annual Report (1998) p. 4; cf. McQuoid-Mason 'The Delivery of Civil Legal Aid' (2000) 24 Fordham International Law Journal (Symposium), p. 128), Legal Resources Centre Annual Report (1998) p. 7).

which receives money from overseas and local donors. The LRC, together with the Association of University Legal Aid Institutions (AULAI), has taken the lead in encouraging the Legal Aid Board to enter into cooperation agreements with independently funded organizations to extend legal aid services to previously marginalized parts of the country.[307]

Many public interest law firms receive support from the leading lawyers in their countries as well as the judiciary and often enjoy a high national and international reputation. Especially in India is the concept vibrant and the word 'public interest litigation' has acquired a whole new dimension in the Indian context.[308]

Principles that emerge

Public interest law firms play a valuable role in assisting large numbers of poor and vulnerable people to promote and protect their human rights by bringing strategic impact litigation on their behalf.

Public interest law firms usually have highly professional staff and receive funding from foreign and local donors - rather than from the state.
Public interest law firms are ideal cooperation partners for national legal aid bodies and can play a complementary role where the national body does not have a presence in a particular region, or is faced with a conflict of interest, or where the national legal aid offices do not have the necessary expertise.

307) See generally McQuoid-Mason 'The Delivery of Civil Legal Aid' (2000) 24 Fordham International Law Journal (Symposium), pp. 127- 128.
308) See generally, Muralidhar Law, Poverty and Legal Aid at pp. 229 - 237.

University legal aid clinics

University and law school legal aid clinics can be found throughout the world[309] in Africa,[310] the Americas,[311] Central Asia,[312] South Asia,[313] South East Asia,[314] the Caribbean,[315] Western Europe,[316] Central and Eastern Europe,[317] and the South Pacific and Australasia.[318] University law clinics usually supply free legal advice to indigent persons under the supervision of qualified staff members who are legal practitioners. Most university law clinics either require law students to work in a university law clinic or assign the students to an outside partnership organization where they can provide legal services under supervision.[319]

The concept of modern independently funded university law clinics developed in the United States in the late 1960s when the Council on Legal Education for Professional Responsibility (CLEPR) was established with fi-

309) For a general description of how the law clinic concept has spread throughout the world, see Aubrey McCutcheon 'University Legal Aid Clinics: A Growing International Presence with Manifold Benefits' in Ford Foundation Many Roads to Justice (2000) p. 267.

310) For instance, in South Africa, Zimbabwe, Botswana, Namibia, Lesotho, Mozambique, Kenya, Ethiopia, Rwanda, Sierra Leone and Nigeria.

311) For instance, in the United States, Canada, Mexico, Argentina, Chile, Peru, Brazil and Guyana.

312) For instance, in China, Mongolia, Kazakhstan and Kyrgyzstan.

313) For instance, in India, Sri Lanka, Nepal and Bangladesh. In India law clinics have been creatively used by involving them in the *lok adalats* or 'people's courts' where the law students assist with the functioning of such courts during week-ends or public holidays. The *lok adalats* try to settle disputes sent to them by the courts for resolution by negotiation, arbitration or conciliation. The law students do all the preparatory work of interviewing the parties in order to obtain a negotiated settlement, but if this does not work the parties attend the lok adalat presided over by a panel consisting of a district court judge or magistrate, a lawyer and a social worker. The proceedings are conducted informally and the parties, (and their lawyers if they are represented), appear before the panel in an attempt to reach a solution (Nomita Aggarwal Handbook on Lok Adalat in India (1991) p. 1. In some states the lok adalats are organized by the state Legal Aid Boards, while in others they are coordinated by para-legal organizations or even the courts (Aggarwal Handbook on *Lok Adalat* pp. 3 - 7. See also Muralidhar Law, Poverty and Legal Aid at pp. 121 - 122).

314) For instance, in the Philippines, Indonesia and Cambodia.

315) For instance, in Jamaica, Trinidad and Tobago, Guyana and the Bahamas.

316) For instance, the United Kingdom.

317) For instance, in Poland, Slovakia, the Czech Republic, Hungary and Russia.

318) For instance, Australia and Vanuatu.

319) D. J. McQuoid-Mason 'The Organization, Administration and Funding of Legal Aid Clinics in South Africa' (1986) 1 NULSR pp. 189 - 193.

nancial support from the Ford Foundation.[320] Modern forms of law clinics were established in developing countries in Africa during the 1970s, for example, in Ethiopia, Uganda, Tanzania, South Africa, and Zimbabwe. Those in South Africa were developed during the early 1970s and have continued to grow from strength to strength.[321] They have acted as an important adjunct to the national legal aid scheme. Law clinics developed rapidly in Eastern and Central Europe during the mid-1990s and in South East Asia during the new millennium.

Nearly all 21 law faculties and law schools at universities in South Africa operate law clinics independent of the state-funded law clinics.[322] The clinics employ directors who are practising attorneys or advocates. If the director is a practising attorney, the clinic will be accredited by the local law society and candidate attorneys may be employed as legal interns doing community service for admission purposes. Funding for law clinics is provided by university authorities or outside donors or combinations of both. The Attorneys Fidelity Fund[323] subsidises accredited legal aid clinics by providing funds to enable them to employ a practitioner (attorney or advocate) to manage the clinic.[324] The Association of University Legal Aid Institutions (AULAI) has set up the AULAI Trust with an endowment from the Ford

320) William Pincus 'Legal Clinics in the Law Schools' in Faculty of Law, University of Natal Legal Aid in South Africa (1974) p. 123. Earlier models had existed in countries like the United States and Chile during the 1920s and 1930s (cf. McCutcheon 'University Legal Aid Clinics' in Many Roads to Justice at p. 268), but CLEPR gave the impetus to the modern model that fully integrates legal aid work into the law school curriculum.

321) D. J. McQuoid-Mason An Outline of Legal Aid in South Africa (1981) pp. 139 - 140). For a discussion of the South African clinics see also article by Seehaam Samaai in this volume.

322) D. J. McQuoid-Mason 'The Role of Legal Aid Clinics in Assisting Victims of Crime' in W. J. Schurink, Ina Snyman, W. F. Krugel and Laetitia Slabbert (eds) Victimization: Nature and Trends (1992) p. 559 n 1.

323) The Attorneys Fidelity Fund is a fund that has accumulated out of the interest paid on monies held in attorneys' trust accounts. It is used to compensate members of the public who have suffered loss as result of fraud by practicing attorneys, but also makes money available for legal education. The Fidelity Fund is similar to IOLTA (Interest on Lawyers' Trust Accounts) programme that is in place in Australia, Canada, New Zealand and the United States. However, while IOLTA programmes directly fund legal aid the Fidelity Fund only supports legal education and accredited university legal aid clinics as it believes that legal aid should be funded by the state (cf. Rekosh et al 'Access to Justice' in Access to Justice in Central and Eastern Europe at p. 32).

324) D. J. McQuoid-Mason 'The Organisation, Administration and Funding of Legal Aid Clinics' (1986) 1 NULSR at p. 193.

Foundation to strengthen the funding of the clinics.[325] The AULAI Trust has recently been encouraging law faculties and law schools to gradually include the funding of the clinics in their university budgets. Poland and Nigeria have set up organizations based on the AULAI model. In South Africa the AULAI represents the university law clinics on the Legal Aid Board.

The South African law clinics provide free legal services to the needy and use the Legal Aid Board's means test as a flexible guideline. Qualified law clinic staff represents clients in the lower and high courts in both criminal and civil matters. Approximately 3,000 law graduates are produced annually by South African law schools.[326] It has been calculated that if each final year law student were only to do 10 criminal cases a year in the district courts, mainly during the summer and winter vacations, annually this could provide criminal defences for 30,000 accused persons.[327]

University law clinics in Africa, and in developing countries elsewhere, can play a valuable role in supplementing the work of national legal aid bodies, and in advancing the promotion and protection of human rights. National legal aid schemes can enter into partnership agreements with university law clinics to compensate them for providing legal aid services for poor people that cannot be reached by the national body. Law clinics can also be contracted to provide back-up legal services to clusters of paralegal advice offices, as occurs in South Africa. Such contractual agreements also help to make law clinics more financially viable.

> More than 25 years ago the role that law clinics can play in Africa was described as follows:

'The well-supervised use of law students will significantly ease the limitations under which most of the legal aid programmes in Africa now have to work; it is only through student programmes that there is any possibility

325) Stephen Golub 'Battling Apartheid, Building a New South Africa' in Ford Foundation Many Roads to Justice at p. 38.

326) Cf. Nic Swart Entry into the Profession: What about Articles? (1994) 1 (unpublished memorandum for the Law Society of South Africa).

327) Minister of Justice and Department of Justice Enhancing Access to Justice through Legal Aid: Position Paper for National Legal Aid Forum (unpublished) (15-17 January 1998) p. 25.

in the near future for legal services becoming widely available to the poor'.[328]

> The above statement applies equally today - not only to Africa - but also to many other developing countries that do not have developed state-funded legal aid schemes.

Principles that emerge

The role played by university law clinics in supplementing the services of national legal aid bodies, particularly in respect of promoting and protecting human rights of the poor, should be recognized and acknowledged by national legal aid schemes.
Unless university law clinics are mainstreamed into their university budgets, or the budget of the national legal aid body, their financial position remains precarious as they have to rely on local or foreign donor money.
National legal aid bodies can support university law clinics financially by entering into cooperation agreements with them.

Street law-type clinics
Street law refers to how the law affects the person on the street. Street law programmes are legal literacy programmes that usually educate ordinary people, school children and prisoners about law, human rights and democracy. Street law explains how the law affects people in their daily lives, when they need the services of lawyers and where they can obtain assistance - particularly if people are very poor and cannot afford to employ lawyers.[329]

---

328) F. Reyntjens in F. A. Zemans (ed) Perspectives on Legal Aid (1979) p. 36. The statement is still true today. The value of using properly supervised law students to deliver legal services has also been recognized as fulfilling the requirement of a constitutional right to counsel by the United States Supreme Court which stated: 'Law students can be looked to make a significant contribution, qualitatively and quantitatively, to the representation of the poor in many areas': Argersinger vs Hamlyn S Ct 2006 (1979). See generally McQuoid-Mason 'The Delivery of Civil Legal Aid' (2000) 24 Fordham International Law Journal (Symposium)

329) D. J. McQuoid-Mason 'Reducing Violence in South Africa through Street Law Education of Citizens' in Gerd Ferdinand Kirchoff, Ester Kozovski and Hans Joachim Schneider (eds) International Debates of Victimology (1994) pp. 347 - 348.

Street law-type clinics and legal literacy programmes exist in a number of countries around the world. They are to be found in South Asia,[330] South East Asia,[331] Central Asia,[332] Western Europe,[333] Central and Eastern Europe,[334] North America,[335] Latin America,[336] the Caribbean[337] and Africa.[338] Street law specific clinics probably exist in their most developed form in the United States of America where they were established in the early 1970s. By the mid-1980s street law programmes based on the American model had been established in South Africa, and after the mid-1990s, in South Asia, Central Asia, Central and Eastern Europe, Latin America, the Caribbean and elsewhere in Africa. Since the millennium they have been established in Western Europe, South East Asia,338 and the Middle East. Earlier forms of legal literacy programmes have been in existence in developing countries such as the Philippines for many years.[340]

Unless people are aware of their legal rights they will not know that they have the right to apply for legal aid. Accordingly, legal literacy programmes play a very important role in complementing legal services for the poor. One of the best known law-related education programmes in South Africa is the street law project which is based on the American programme developed at Georgetown University in the early 1970s.[341]

The South African Street law project is a preventive legal education programme that provides people with an understanding of how the legal system works, and how it may be utilized to safeguard the interests of people 'on the street'.[342] Street law students at the universities are taught how to use

330) For instance, in India and Bangladesh.
331) For instance, in the Philippines, Cambodia, Malaysia and Indonesia.
332) For instance, in China, Kazakhstan, Kyrgyzstan and Mongolia.
333) For instance, in England and Wales.
334) For instance, in Poland, Hungary, Slovakia, Russia, Moldova and the Czech Republic.
335) For instance, in the United States.
336) For instance, in Chile.
337) For instance, in Haiti.
338) For instance, in South Africa, Kenya, Uganda, Nigeria and Ghana.
339) For example, in Cambodia. However, similar programmes have existed in the Philippines for many years.
340) See Stephen Golub 'Non-lawyers as Legal Resources for their Communities' in Ford Foundation Many Roads to Justice (2000) 299 at pp. 303 - 304.
341) S. Golub 'Non-lawyers as Legal Resources for their Communities' in Many Roads to Justice p. 299.
342) D. J. McQuoid-Mason 'Reducing Violence in South Africa through Street Law Education of Citizens' in Gerd Ferdinand Kirchoff, Ester Kozovski and Hans Joachim Schneider (eds) International Debates of Victimology (1994) pp. 347 - 348.

interactive learning methods when teaching school children, prisoners and ordinary people about the law. The programme has been conducted in hundreds of high schools throughout South Africa and involves a combination of training law students and guidance teachers from the schools to use a street law student text for the pupils and a teacher's manual for teachers. Guidance teachers and law students participating in the programme are trained to use the learner's text[343]and educator's manual[344] in a classroom situation.

The South African Street law book is user-friendly and deals with a wide variety of subjects, including a general introduction to South African law and the legal system, criminal law and juvenile justice, consumer law, family law, socio-economic rights and labour law.[345] The book uses student-centred teaching techniques and involves students in role-playing, opinion polls, critical thinking and mock trials. The programme together with its offshoot, Democracy for All, runs at nine universities in South Africa. Democracy for All is run nationally and is linked to the book entitled *Democracy for All*.[346] The latter is aimed at providing human rights and democracy education for school children and community organizations throughout South Africa. The Street law project has also produced a training manual on *HIV/AIDS, the Law and Human Rights*.[347]

A wide variety of Street law-type books and materials have been produced in countries such as Belarus, Croatia, the Czech Republic, Estonia, Kazakhstan, Kyrgyzstan, Latvia, Macedonia, Moldova, Mongolia, Russia, Slovakia, Ukraine and Uzbekistan.[348]

In the United States the street law programmes have attracted some state-funding because they appear to have assisted in reducing the crime rate

---

343) David McQuoid-Mason, Lloyd Lotz, Lindi Coetzee, Usha Jivan, Sibonile Khoza and Tammy Cohen Street Law: Practical Law for South African Students 2ed (2004).

344) David McQuoid-Mason, Lloyd Lotz, Lindi Coetzee, Usha Jivan, Sibonile Khoza and Tammy Cohen Street Law: Practical Law for South African Students: Educator's Manual 2. ed (2005).

345) See generally, McQuoid-Mason et al Street Law: Practical Law for South African Students.

346) David McQuoid-Mason, Mandla Mchunu, Karthy Govender, Edward L O'Brien and Mary Curd Larkin Democracy for All: Education Towards a Democratic Culture (1994), together with an Instructor's Manual.

347) Centre for Socio-Legal Studies HIV/AIDS, the Law and Human Rights (2003).

348) David McQuoid-Mason 'Preface' in David McQuoid-Mason et al Street Law: Practical Law for South African Students at viii.

amongst juveniles and to encourage young people to become more responsible citizens.

Principles that emerge

It is necessary for ordinary people to know their rights before they can enforce them.

Street law programmes educate people about their legal and human rights and provide practical advice on how they can enforce such rights.
Legal literacy and public awareness are important components of any national legal aid scheme.

The important role played by university street law programmes in educating the public about the law and human rights should be recognized and acknowledged by national legal aid bodies.

Unless university street law programmes are mainstreamed into their university budgets, or the budget of the national legal aid body, their financial position remains precarious as they have to rely on local or foreign donor money.

National legal aid bodies can support university street law programmes financially by entering into cooperation agreements with them to conduct legal literacy and human rights workshops.

Paralegal advice offices
Paralegal advice offices exist in many different forms in developed and developing countries throughout the world[349] in Africa,[350] the Americas,[351] Central Asia,[352] South Asia,[353] South East Asia,[354] the Caribbean,[355] Western Europe,[356] Central and Eastern Europe,[357] and the South Pacific and Austral-

349) Cf. Stephen Golub 'Nonlawyers as Legal Resources for Their Communities' in Ford Foundation Many Roads to Justice (2000) p. 267.
350) For instance, in South Africa, Zimbabwe, Botswana, Namibia, Lesotho, Mozambique, Kenya, Ethiopia, Rwanda, Sierra Leone and Nigeria.
351) For instance, in Canada, Mexico, Argentina, Chile, Peru, Brazil and Guyana.
352) For instance, in China, Mongolia, Kazakhstan and Kyrgyzstan.
353) For instance, in India, Sri Lanka, Nepal and Bangladesh. .
354) For instance, in the Philippines, Malaysia, Indonesia and Cambodia.
355) For instance, in Jamaica, Trinidad and Tobago, Guyana and the Bahamas.
356) For instance, the United Kingdom.
357) For instance, in Poland, Slovakia, the Czech Republic, Hungary and Russia.

asia.[358] In many countries they are called citizen's advice bureaus or offices. In some organizations paralegals are paid professionals, while in others they are unpaid volunteers.[359] Paralegal advice offices use a variety of approaches - some work closely with lawyers while others act completely independently of the legal profession. What they usually have in common, however, is that they interface directly at grass-roots level with the communities they serve. As a result they provide a valuable link between their communities and the providers of legal aid services.

South Africa has a large number of organizations involved in paralegal advice work. Paralegals provide access to justice by educating the public about their legal rights, as well as providing them with advice. In South Africa the training of paralegal staff varies from formal training offered by Lawyers for Human Rights, and the Community Law and Rural Development Centre in Durban, leading to diploma courses, to mainly practical experience which is obtained 'on the job'. Some of the more sophisticated advice offices are linked to organizations such as the Legal Resources Centre, Lawyers for Human Rights and the Community Law and Rural Development Centre, Durban, while others rely on free services provided by legal practitioners in private practice. Most advice offices offer mainly legal advice which very often resolves the problem. Many of them have built up expertise in particular areas e.g. pensions, unemployment insurance, unfair dismissals etc. Where the advice office cannot solve the problem the party concerned is usually directed to the Legal Aid Board's offices or to a sympathetic law firm. Paralegals are also being included in the Board's new justice centres and cooperative agreements. A National Paralegal Institute (NPLI) has been set up to assist the more than 350 paralegal advice offices in the country with training and fund-raising. It is also investigating paralegal accreditation certification procedures. The NPLI works closely with the Association of University Legal Aid Institutions (AULAI) by providing clusters of advice offices that are supported by the law clinics at the different universities.[360] Some paralegal offices concentrate on urban areas, while others focus on rural areas. Paralegal advice offices are particularly useful in rural areas. A good example of a rural paralegal advice office is the Community Law and Rural Development Centre (CLRDC) in Durban that was

358) For instance, Australia and Vanuatu.

359) See generally Stephen Golub 'Non-lawyers as Legal Resources for their Communities' in Ford Foundation Many Roads to Justice at pp. 301 - 306.

360) See generally McQuoid-Mason 'The Delivery of Civil Legal Aid' (2000) 24 Fordham International Law Journal (Symposium), pp.131– 133.

established at the University of Natal in 1989 to set up a network of rural paralegal advice offices and to do law-related education. It served a rural population of about one million living in the provinces of KwaZulu-Natal and the Eastern Cape and promoted the attainment and maintenance of democracy through development of a rights-based culture in which all levels of government were expected to honour their obligations and be accountable to their citizens. At one stage the CLRDC supervised 56 rural paralegal advice offices in communities that were governed by customary law and ruled by tribal authorities who had no formal training and were expected to administer communities and issues of traditional customary law in a manner that may conflict with 'Western law' and the new constitution.[361] Services are provided at various levels ranging from advice only to providing full legal aid services. For example, the Community Law and Rural Development Centre (CLRDC) in South Africa has helped rural communities to establish paralegal committees to select community residents for training as paralegal advisers and educators. The paralegals underwent two full-time two month programmes on law-related topics, including customary law and human rights, after which they did one year practical training in their communities under the supervision of the CLRDC staff. At the end of the course the successful candidates were issued with a diploma by the Faculty of Law, University of Natal, Durban. Other paralegal university certificate courses are run at Rhodes University, Johannesburg University and Potchefstroom University. The CLRDC also provided continuing legal education for paralegals who had already completed the programme. Apart from giving advice the paralegals were required to conduct law-related workshops in their communities. In 2000 paralegals conducted 2,160 such workshops.[362] In the past the CLRDC has managed clusters of paralegal advice offices that were provided with legal support by the university law clinics in partnership with the Legal Aid Board. The CLRDC programme was used as a model for rural areas in Sierra Leone and could be a useful model for developing countries with comparatively large rural populations.[363]

---

361) Community Law and Rural Development Centre Annual Report for the Financial Year 1 January to 31 December 2000 (2001) p. 10.

362) Community Law and Rural Development Centre Annual Report for the Financial Year 1 January to 31 December 2000 (2001) p. 10.) Community Law and Rural Development Centre Annual Report 2000 p. 24.

363) Paul James-Allen 'Accessing Justice in Rural Sierra Leone - A Civil Society Response' Justice Initiatives (February 2004) pp. 57 - 59. See generally, McQuoid-Mason 'Lessons from South Africa' (2005) 26 Obiter pp. 231 - 232.

Paralegal advice offices are often located where communities make their first contact with the law and play a valuable role in providing legal advice and referring potential litigants to lawyer-based services. Ideally paralegal advice offices should be funded by the state[364] and integrated into the national legal aid scheme.[365] This can be done by national legal aid bodies entering into cooperation agreements with paralegal advice offices to provide preliminary legal advice and assistance at the grassroots level. In South Africa the paralegals are represented on the Legal Aid Board.

Principles that emerge

– Paralegals are often the first line of contact between communities and lawyers or the legal aid system and play an important role in educating communities about the law and human rights.

– Paralegal offices should be incorporated into national legal aid schemes because they play a valuable role in referring clients to legal aid offices and lawyers, especially in rural areas.

– In countries with traditional tribal authorities paralegals can be used not only to advise and educate communities about the law and human rights, but also to educate traditional leaders about their rights and responsibilities in a modern democratic state.

– National legal aid bodies can support paralegal advice offices financially by entering into cooperation agreements with them.

Conclusions

It is clear that for a successful legal aid delivery programme, particularly one that promotes and protects human rights, a holistic approach should be used - with the state-funded legal aid body taking the lead. The South African experience using a holistic approach leads to the following conclusions:[366]

---

364) This is the model being piloted for Mongolia where the paralegals will be personnel from the regional governors' legal offices.

365) See McQuoid-Mason 'The Delivery of Civil Legal Aid' (2000) 24 Fordham International Law Journal (Symposium) pp. 135- 36.

366) These are similar to the conclusions reached in McQuoid-Mason 'Lessons from South Africa' (2005) 26 Obiter pp. 232-233.

There is a place for pro bono work by lawyers to supplement legal aid services - but such work should not relieve the state of its duty to provide its citizens with legal services by lawyers who are paid for their services.

The judicare or ex officio approach, supplemented by pro bono work, may be used to deliver legal aid services where there are not overwhelming numbers of case. In cities and towns where significant numbers of state-funded criminal defences are required it may be more cost-effective to employ salaried lawyers as public defenders.

A mixed system using both judicare and salaried lawyers is probably the most effective way of delivering legal aid services. Where it is feasible, national legal aid bodies should try to provide legal aid litigants with 'one stop shops' like the South African justice centres.

A fairly sophisticated legal aid system, requiring modest per capita expenditure on legal aid by the state, can be used by modifying the public defender model to include law graduates in state-funded law clinics and rural law firms.

In countries where there is a shortage of legal aid lawyers and financial resources law students should be seen as a potentially valuable and inexpensive resource available to assist national legal aid schemes.

National legal aid bodies or Ministries of Justice should enter into cooperation agreements to provide legal aid services with university law clinics, paralegal advice offices, and other independent providers of legal services, such as non-governmental public interest law firms.

National legal aid structures or Ministries of Justice should work closely with street law-type clinics and paralegal advice offices that make people aware of their legal rights - particularly with paralegal offices - as they are often the first point of contact for people who need legal advice.

National legal aid bodies or Ministries of Justice should also enter into cooperation agreements with university law clinics, non-governmental public interest law firms, and private law firms to provide back-up support for clusters of paralegal offices.

REDEFINING ACCESS TO JUSTICE: INFORMAL JUSTICE MECHANISMS AND ALTERNATIVE DISPUTE RESOLUTION

Elinor Wanyama Chemonges

Introduction

Access to justice is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts (UNDP, 2004). While discussing the topic of Redefining Access to Justice - Informal Justice Mechanisms and Alternative Dispute Resolution (ADR), the focus of discussion for formal justice in this paper will have an inclination to the criminal justice system in Uganda while the informal justice mechanisms will mainly focus on the innovations that have been used in the Paralegal Advisory Services programme.

While there have been many criminal justice reforms in Uganda, they have mainly focused on strengthening the supply side[367]. The Paralegal Advisory Services programme on the other hand has focussed on innovations to strengthen the demand side of the criminal justice system[368] with a view to making the two sides active players and partners in facilitating access to justice for the majority of Ugandans.

Access to justice

Access to justice can be conceived as both a means and an end. As a means, it is conceived as an efficient method of enabling users of the justice system to benefit from the end product - justice. Access to justice as an end can be conceived as the protection of one's right to justice through ease of access when need arises.

In broader terms therefore, access to justice refers to the efficient and effective functioning and performance of the justice institutions and their staff and their capacity to protect the rights of all stakeholders both on the demand and supply sides of justice; and to dispense justice in accordance with the rule of law. It encompasses a number of aspects including:

367) Refers to the institutions and processes charged with the administration of justice.
368) Refers to the end users of the criminal justice system.

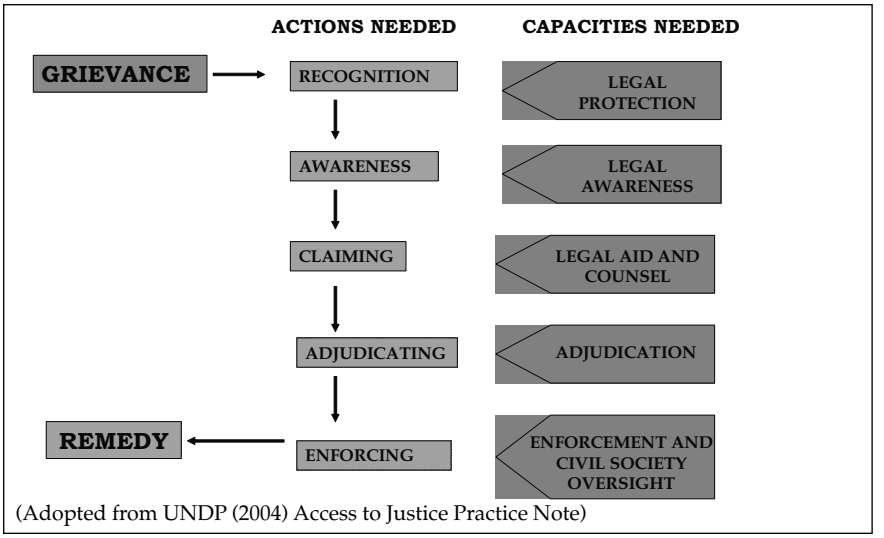
- Physical access to the justice institutions
- Access to and affordability of administrators/dispensers of justice by both complainants/victims and suspects i.e. those in conflict with the law
- Equitable access for all vulnerable groups e.g. women, juveniles, the poor, elderly, terminally ill etc.
- Access to legal aid services

This concurs with Hammergren's (2004) definition of access to justice as;

'The ability to use justice institutions to resolve ordinary conflicts, protest abuses and as a means to claiming other constitutionally guaranteed services and goods which is typically depicted as a basic right of all citizens'.[369]

UNDP (2004)[370] further stresses that access to justice is much more than improving an individual's access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.

According to a human rights-based approach to development, the following figure 1 outlines the fundamental elements of access to justice.



(Adopted from UNDP (2004) Access to Justice Practice Note)

369) Hammergren (2004) Access to Justice: Reflections on the Concept, the Theory and its Application to Latin America's Judicial Reforms.
370) UNDP (2004) Access to Justice: Practice Note.

Following the analysis above, the promotion of access to justice may require various types of support.

Table 1
Types of support to facilitate access to justice

Legal protection Provision of legal standing in formal or traditional law - or both - involves the development of capacities to ensure that the rights of disadvantaged people are recognized within the scope of justice systems, thus giving entitlement to remedies through either formal or traditional mechanisms. Legal protection determines the legal basis for all other support areas on access to justice. Legal protection of disadvantaged groups can be enhanced through: (a) Ratification of treaties and their implementation in the domestic law; (b) implementation of constitutional law; (c) national legislation; (d) implementation of rules and regulations and administrative orders; and (e) traditional and customary law.	- Parliament - Ministries of Foreign Affairs - International/regional fora - Ministries of Law and Justice, police forces - National Human Rights Commissions - Law Reform/Legislative Commissions - Legal drafting cells of relevant ministries - Local officials involved in legal drafting - Judges, particularly of courts whose decisions are binding on lower courts or, under the law, are able to influence courts in other jurisdictions - Traditional Councils - Community leaders (chiefs, religious leaders) - CSOs, especially those involved in legal research, legal advocacy and monitoring.
Legal awareness Development of capacities and effective dissemination of information that would help disadvantaged people understand the following: (a) their right to seek redress through the justice system; (b) the various officials and institutions entrusted to protect their ac-	- Ministry of Justice - Ministry of Education/higher education, schools and universities - National Human Rights Institutions (Human Rights Commissions and Ombudsman Offices) - Legal aid providers - Quasi-judicial bodies (human

cess to justice; and (c) the steps involved in starting legal procedures. UNDP's service line on access to information provides an opportunity to develop capacities and strategies to promote legal awareness.	rights, anti-corruption, and electoral commissions) - Local government bodies - Non-governmental institutions (e.g. NGOs, Bar associations, universities, communities) - Labour unions
Legal aid and counsel Development of the capacities (from technical expertise to representation) that people need to enable them to initiate and pursue justice procedures. Legal aid and counsel can involve professional lawyers (as in the case of public defence systems and *pro bono* representation), laypersons with legal knowledge (paralegals), or both (as in 'alternative lawyering' and 'developmental legal aid').	- Public Attorneys - Court system (e.g. to deal with court fees) - Local governments - Police and the prison system - Non-governmental organizations (NGOs) Bar associations - Law clinics (often linked to university faculties of law) - Ministries of Justice and state-funded legal aid programmes
Adjudication Development of capacities to determine the most adequate type of redress or compensation. Means of adjudication can be regulated by formal law, as in the case of courts and other quasi-judicial and administrative bodies, or by traditional legal systems.	- Courts - National human rights institutions (Human Rights Commissions and Ombudsman Offices) - Alternative dispute resolution mechanisms: these can be attached to the court system, or be administrative bodies (such as land and labour boards) - Traditional and indigenous ADR

Enforcement	
Development of capacities for enforcing orders, decisions and settlements emerging from formal or traditional adjudication. It is critical to support the capacities to enforce civil court decisions and to institute reasonable appeal procedures against arbitrary actions or rulings.	- Prosecution - Formal institutions (police and prisons) - Administrative enforcement - Traditional systems of enforcement.
Civil society and parliamentary oversight	
Development of civil society's watchdog and monitoring capacities, so that it can strengthen overall accountability within the justice system.	- NGOs working on monitoring and advocacy - Media - Parliamentary select and permanent committees

(Adopted from UNDP (2004) Access to Justice Practice Note)

The status of access to justice in Uganda

Problem analysis

Uganda continues to foster an enabling environment to facilitate access to justice. The criminal justice system reforms in Uganda in the past ten years have focused on strengthening of the supply side. This has taken two forms firstly through institutional development and secondly ensuring a greater coherence and consistency of policy within the broad framework of national development objectives. However, as the process evolves, there still remains an active denial of access that puts to risk the successes of targeted reforms. The challenge with the aforementioned reform thrust is that it ignores the users of the criminal justice agencies hence an absence of an institutionalized voice from the demand side. As a result, the range, quality and volume of justice available to the poor are low. This is manifested in increasing delays, case backlogs, and unwarranted congestion in detention centres and prisons.

Congestion of the criminal justice system

Access to justice, especially for the justice system users who lack the financial resources required to interface with the system, remains a challenge. Caught within the system are largely the poor, who comprise the majority

of petty offenders, with no money to meet bail conditions or access legal services. Petty offenders' detention is solely to ensure their appearance in court during the trial. A considerable number of them, arrested on suspicion of committing petty crimes, languish in jails. Due to court congestion, many remain in jail for a much longer period than the maximum punishment under the law for the crime committed.

The manifestation of congestion within the system at both the entry and exit points[371] in the criminal justice system, in many ways blurs the interrelationships in the judicial process involving the movement of case files within the system. The remand population presently stands at 58% of the entire prison population. Committals on pre-trial detention comprise 53% of the capital offenders in prison. Intervals of scheduled high court sessions to try capital offenders are irregular in most jurisdictions. All male prisons hold numbers beyond the facility capacity. The system clogs appear as well within the prosecution and adjudication functions that require decongestion.

Case file congestion

Behind the police and prison scenes lie large backlogs of cases within the prosecution service and courts of law that affect both the fairness and efficiency of the criminal justice system. Lengthy periods on remand connote inefficiency on part of the criminal justice system in terms of speed, cost, fairness and access. By the close of year 2005, criminal cases brought forward in 2006 stood at 36,527 out of a total of 76,329 criminal matters[372]. The prison still reports durations of over one year in pre-trial detention for capital cases for over 56% of its population[373] This delay in the disposition of cases is a natural consequence of a heavily congested system - with no deliberate strategy to stem the flow of cases into the system, simultaneously weed out unfounded cases and ensure timely disposition of credible cases. System embedded practices for instance session cause-listing[374] for all capital cases irrespective of complexity; committal practices by prosecution among others have been raised as some of the factors hampering the timely disposition of cases.

371) Uganda Police Force Detention Cells and Uganda Prisons Service prisons respectively.
372) High Court of Uganda data centre 27 October 2006.
373) Uganda Prisoner Census 2005.
374) Meaning a system where a list of cases is set for hearing within a particular time frame.

The criminal justice system is also congested by unfounded cases. A considerable number of cases in the criminal justice system at the various points of investigation, arrest, prosecution, trial and disposition are unfounded, unnecessary or unjustified. This has resulted in overcrowding of the system.

Widespread delays also present both opportunities for corrupt practices and the perception of corruption. These have in many instances shaped the response of users to the system. More suspects are more likely to enter a plea of 'not guilty' to exploit perceived inadequacies in the criminal justice system. Where there is a likelihood of timely disposal of cases, suspects are more likely to enter a plea of guilty.

Crisis at the level of practice

Another challenge impeding access to justice is closing the gap between policy and practice. Presently there is an active denial of access through practices of late appearance in courts, lost files and incomplete investigations, lack of information of court processes and schedules among others. In particular, the backlog of cases is to a large extent due to continuous adjournments and delays at all stages of the criminal justice process. Files for committals are archived in magistrates' courts instead of being forwarded to the High Court, cause-listing is not influenced by the first in, first out principle, nulle prosequis are signed and not forwarded to the relevant officers, witnesses do not turn up because they are not contacted, lawyers and prosecutors are badly prepared and the accused is not brought to court because of lack of transportation are examples of some of the more frequent challenges encountered.

It is therefore evidently clear that solely supply side solutions may not entirely solve the challenges and much remains to be done using innovations within and out of the criminal justice institutions. A major challenge therefore remains in crafting mechanisms to address the specific ways in which criminal justice remains inaccessible to the users and to find innovative ways of integrating alternative dispute resolution to stem the flow of cases to the formal justice system.

Crisis in demand side participation in the CJS

Empowering the criminal justice institutions assumes the presence of an equally empowered accused person. In September 2005, 20% of the prisoners had no formal education at all and 49.9% of the entire prisoner population had basic primary education. Not only accused persons are intim-

idated by the system - witnesses and victims are too. Many users lack the requisite information and assistance, or feel that they are inadequate and inexperienced to interface with the CJ system unaided. The flow of information between the public and the criminal justice institutions is thus adversely affected. This is compounded by inability to access legal services that creates an uneven playing field that works against the interests of the accused person, witnesses and victims of crime.

Analysis of steps towards improving access to justice in Uganda

Physical access

There has been progress in infrastructural developments as part of geographical de-concentration of justice, law and order sector (JLOS) institutions through construction of courts, police stations and Directorate of Public Prosecution chambers. The aim was to limit distances to be travelled to access services by both the stakeholders on the demand and supply sides of justice.

Beyond improving physical representation of JLOS institutions geographically, there have been efforts to improve the ratios of distribution of JLOS personnel to the population, while taking crime trends into consideration. There was a prioritized and phased recruitment of staff to achieve ideal ratios in the long term, and to increase access through faster case investigation, prosecution and adjudication.

Existing gaps

Physical access to JLOS institutions and improved staff ratios though necessary, they alone, can not be sufficient to ensure effective access to functioning institutions such as courts.

The importance of other factors, such as gender or cultural barriers needs to be assessed and addressed in a culturally acceptable and more holistic community approach. This highlights the place for alternative dispute resolution mechanisms and their need to be innovatively integrated into the formal justice system.

This, however, needs to be addressed with caution as Hammergren (2004) observes that, expanded access has other potential costs. One disadvantage of making access too easy is that it discourages the development of alternative, non-judicial means for resolving or even avoiding conflicts. For ex-

ample, where every minor squabble among neighbours can get a court hearing, there may be less inclination to tolerate differences.

Equitable access
With emphasis on access to justice for women and children, the major obstacles have for long been with regard to equality before the law for both women and juveniles. These groups have been vulnerable on grounds of discrimination and lack of specialized services to attend to their needs in addition to limited probation and welfare staff to address juvenile and family welfare cases.

Local council courts were created to specifically address the above concerns, improvements in legislations have been effected such as the Children Act, (Cap 59, 1997) and others are still under consideration such as the Domestic Relations Law. Family and children's courts have been established; increase in probation and welfare officers and establishment of separate detention cells for juveniles.

Existing gaps
Although women and juveniles have been rightly identified as vulnerable groups with regard to access to justice, the vast majority - the poor - are not specifically addressed. The reality is that the vast majority of Ugandans lives below the poverty line and as such can not afford the cost of access to justice. Low access to justice has been correlated to poverty.
There are few lawyers to service the growing population and they are by far too expensive to be afforded by the majority of Ugandans who get into conflict with the law. In this regard therefore, criminal justice presently remains inaccessible to most Ugandans. Increasing delays, backlogs, which still hamper access to justice especially for court users, is largely due to lack of financial resources required to interface with the system.

This therefore calls for innovations to provide free legal services to the poor or to inasmuch as possible use alternative dispute resolution mechanisms which do not need the services of lawyers. This will help to divert minor cases from the formal justice systems hence reducing the case load.

Reform of criminal laws

Uganda has engaged in law reform to promote rule of law, increase respect for human rights and improve quality of justice. The key areas for law reform have been:

- Sentencing and prosecution reform - by producing sentencing and prosecution guidelines
- Reform of criminal trial procedures
- Decriminalization of petty offences
- Compliance with the 1995 constitution
- Simplification of laws for the public e.g. the Penal Code

Reducing the case backlog

A number of initiatives have been implemented as a means of reducing the case backlog in all the criminal justice institutions. These include among others:

- Lowering the costs of the administration of justice
- Increasing the jurisdiction of lower courts in order to handle more cases at less cost
- Training of local council courts to adjudicate cases fairly
- The effect of these were intended to be an increased case clearance rate for High Court and Court of Appeal, thus reducing backlog and delays in delivery of justice
- The reduction of time spent on remand, which in turn reduces the cost of feeding those on remand, while releasing them to become productive in society. The establishment of performance standards for completion of cases has reduced the remand period from five for capital cases to two years
- Case backlog project
- Arrangement of extra high court sessions geared to reducing the backlog
- Chain linked initiative

This brings together relevant agencies to exchange information and identify the bottle necks and resources required to reduce the backlog and address the challenges

The place of informal justice mechanisms and alternative dispute resolution forums in access to justice

Informal justice mechanisms

These are traditional/cultural means of resolving conflicts/disputes in the community without recourse to the formal justice system. Traditional justice systems tend to be restorative rather than punitive in nature. The most important elements of informal justice mechanisms are; trust, a voluntary process, truth, compensation and restoration. The voluntary nature is linked to the desire to avoid negative consequences that may result from unresolved disputes. Traditional justice is described as collective and transparent processes that once took place in open community courts, with specific roles for elders and representatives of royal clans according to offence committed. These traditional community open courts have been taken over in the present day local council courts under the administration of elected local leaders acting on behalf of the state. However, traditional justice practices continue to be pursued by elders in order to restore relations within the community. It is important to note that cultural leaders do not view traditional justice to be above the law, but rather complementary to it.

The use of informal justice mechanisms and alternative dispute resolution in access to justice calls for the involvement of non-lawyers in dispensing justice. UNDP (2004) advises that in designing interventions for access to justice, non-lawyers should be involved in design and delivery of community education programmes. Experience indicates that social scientists, community organizers, teachers, religious leaders and others with non-legal specialty skills can make substantial contributions to public awareness of the law, their rights and other legal remedies they are entitled to.

It is also crucial to recognize the importance of the formal and informal institutions that comprise the justice sector. Creating a sustainable environment with equal access to justice requires working with different types of institutions and with various actors such as: the police, the courts, prosecutors, social workers, prison officials, community leaders, paralegals, traditional councils and other local arbitrators; and taking account of the linkages between them.

Some cases which end up in the criminal justice systems are of a nature that could be easily resolved out of formal justice system using alternative dispute resolution mechanisms. In so doing, only worthy cases would be left

in the formal justice system hence reducing the caseload and enabling the worthy cases to be expeditiously attended to.

In Uganda informal adjudication mechanisms (e.g. local council courts)[375] are recognized by formal law. Their operations are consistent with the rule of law and respect for the human rights of all groups in society. The operations of both formal and informal justice systems are complementary. In this respect there is no discrimination on the basis of sex or any other status by informal justice forums; and remedies imposed by informal justice forums are consistent with relevant constitutional and legal provisions.

The local council courts are more accessible to poor and disadvantaged people and have the potential to provide speedy, affordable and meaningful remedies to the poor and disadvantaged. But they are not always effective and do not necessarily result in justice.

There are also traditional mechanisms of settling disputes through local chiefs/traditional leaders who preside over the local traditional courts. In some societies, the disadvantaged and other marginalized groups prefer the traditional justice system over the formal one. Traditional justice systems are preferred for their conciliatory approach and a perception that they preserve social cohesion and accommodate cultural freedom. Formal institutions, on the other hand, are seen to be remote, alien and intimidating. Worse still, formal institutions, such as the police, are sometimes viewed with distrust or fear. In such societies, traditional and customary systems usually resolve 90 per cent of conflicts. This is very prominently relevant in the war torn region of northern Uganda where the formal justice system has been effectively destroyed.

It is important to note, however, that traditional justice systems are not always consistent with human rights norms. They tend to reflect prevailing power relationships that not only perpetuate biases in terms of gender, age, religion or ethnicity, but also lack the integrity and moral authority to provide due process or appropriate penalties.

375) Local council courts are community courts administered by community leaders with no legal background but who have received basic training to handle petty cases.

Informal justice mechanisms and the Paralegal Advisory Services (PAS) - the case of Uganda

The Paralegal Advisory Services (PAS) is an innovative programme that aims at improving access to justice for poor persons in conflict with the law through provision of legal aid services to poor persons in conflict with the law using non-lawyers i.e. paralegals and social workers. Paralegals and social workers help to expedite access to justice for the poor through the criminal justice system by working in places of detention including police, prisons and remand homes as well as courts. They provide basic legal advice; follow up cases in the criminal justice institutions and link the suspects and remand prisoners to their families and community members for the required assistance.

The programme also aims at stemming the flow of unfounded cases into the criminal justice system by facilitating the process for accused persons detained in police cells to identify means of addressing key issues at the entrance to the criminal justice system with the possibility of diverting cases of petty offenders from the criminal justice system through alternate dispute resolution.

The link between Paralegal Advisory Services and the formal justice system

PAS interventions focus on engaging the justice system to self reflect, identify and fill practice gaps, promote the codification of good procedures into practice and draw on law and policy to develop and ensure compliance with practice directions. PAS addresses this through a heightened focus on practice change through civic engagement and advocacy. Emphasis is placed on the identification of practice gaps, modifying practices to be in tandem with the spirit of access to justice and motivating for the issuance of practice directions at institutional levels.

The focus of PAS is geared towards aiding users to wade through the system and enhancing their visibility in the criminal justice system. By so doing, user fears are assuaged and confidence increased; there is also encouragement of greater synergy and increase in the flow of information from the public to the formal justice system. The paralegals provide greater information and moderate user expectations of what criminal justice can deliver.

In addition to chain linking the demand and supply sides of the criminal justice system, the PAS programme has given a human face to the administration of justice and the criminal justice procedures. Reforms in the criminal justice system made little attempt at empowering indigent users of the criminal justice institutions but PAS has made the criminal justice process user-friendly, thus reducing the distance between the poor and the law.

The way forward

In view of the fact that the JLOS investment plan has as one of its objectives being, 'To enhance access to justice for all, particularly the poor, and the marginalized'; and the donor commitment to fund legal aid service provision through innovations by both formal and informal mechanisms of access to justice, Uganda can seize the opportunity and make tremendous strides in improving and redefining access to justice.
This is in line with the quest by UNDP with regard to access to justice, to empower the poor and disadvantaged to seek remedies for injustice, strengthening linkages between formal and informal structures, and countering biases inherent in both systems to provide access to justice for those who would otherwise be excluded.

The Paralegal Advisory Services programme provides a unique opportunity of linking the demand and supply sides of criminal justice while providing for the integration of alternative dispute resolution mechanisms as a means of stemming the flow of petty and unfounded cases into the formal justice system.

The complementary nature of the informal justice system and the informal dispute mechanisms in Uganda if further harnessed and encouraged can go a long way in making access to justice a reality especially for the poor. Hence together, the formal and informal approaches of access to justice can make a difference through integration for complementary purposes, making both more responsive and more effective in meeting the needs of justice for all - especially the poor and marginalized.

THE CHALLENGES OF FOSTERING A HUMAN RIGHTS CULTURE AND BEST PRACTICES IN THE PROVISION OF LEGAL AID SERVICES: THE ZAMBIAN SITUATION

Paul Mulenga

Introduction

With the dawning of the era of human rights over the last century or so, few people will deny that the criminal justice system is an important measure of a society's civilization.

However, advocacy or advancement of the promotion and protection of human rights in the context of criminal proceedings raises several important questions vis-à-vis:

– What are the human rights, which it is important to protect within the criminal procedure?[376]

– Who are entitled to these human rights?

– When and how should these human rights be protected?

– To what extent should the human rights of the person appearing before the courts of law, be protected, when other important interests of society are under attack and in possible conflict with the interests of persons subject to the criminal justice system?

– Whose duty or function is it to ensure that these rights are protected?

It is an undeniable fact that the administration of criminal justice has an impact on the extent to which human rights are respected and protected within the context of human rights. This paper seeks to suggest answers to the questions above and asses how legal aid providers in Zambia are responding to the contemporary challenge of incorporating the respect and

376) Alfred Chanda, Police Powers and the Rights of Suspects and Criminal Defendants in Zambia, LRF paralegal Training manual (1998-2002).

protection of human rights in the provision of legal aid services in particular and in the criminal justice system in general. It is within this same context that the paper will further examine the best practices already adopted by some legal aid providers in Zambia in an effort to foster and promote a culture of respect and protection of human rights in the provision of legal aid services.

The paper is divided into two parts. The first part introduces the Legal Resources Foundation (Zambia) as one of the legal aid providers in Zambia[377] in an effort to foster and promote a culture of respect for and protection of human rights in the provision of legal aid services. The second part discusses the human rights relevant to criminal proceedings and highlights the most ignored or abused human rights in Zambia and best practices. A brief conclusion follows at the end.

The Legal Resources Foundation - Zambia

The Legal Resources Foundation (LRF) is a non-governmental organization providing legal aid to indigent and vulnerable members of the Zambian society as well as promoting human rights through advocacy and litigation in the public interest. It functions in areas which directly affect the disadvantaged in society in relation to violation of their fundamental human rights and freedoms.

Over the last decade, the LRF has continuously striven to adopt strategies and interventions aimed at ensuring access to justice for all especially for low-income citizens. It has set up offices or legal advice centres in all the nine provinces or regions of the country.

In a developing country like Zambia, poverty levels are estimated at well over 70% of the population of 10 million inhabitants, and therefore there is little doubt that the great majority of citizens especially in rural communities cannot afford access to justice given the economic and often prohibitive legal fees to hire private lawyers.

The Legal Resources Foundation through its law firm, Legal Resources Chambers has done and continues to do a tremendous job in supplement-

377) The Legal Resources Foundation (Zambia) (LRF) was founded in 1991 to promote and protect human rights through the provision of legal aid to indigent persons. Legal Resources Foundation - strategic plan 2006-2008 p. 3.

ing the efforts and role of the Legal Aid Department of the Government of the Republic of Zambia in the provision of legal aid.[378]

The Legal Resources Foundation's objectives are:

– To define, promote and create a human rights culture in Zambia.

– To campaign for recognition, respect and protection of human rights and other related values necessary for the creation and sustainability of an enduring democracy.

– To carry out educational programmes and other activities aimed at promoting people's awareness of their fundamental human rights and other related rights.

– To find common ground with and to work alongside other national and international groups, organizations, activists and persons who share a similar concern for and interest in human rights.

– To lobby government to take practical steps to adopt international human rights standards and norms domestically.

– To work towards the evolution of a jurisprudence of human rights case law through providing free legal representation to persons whose rights are violated.

- To campaign for law reform and transform institutions in accordance with democratic principles.

Relevant rights to criminal proceedings and possible points of intervention by legal aid providers and best practices

The following rights are guaranteed to an accused in the constitution of Zambia as well as in international human rights instruments on civil and political rights to which Zambia is a party:

378) The Legal Aid Department, now called the Directorate of Legal Aid is a government funded legal aid scheme providing legal aid to indigents especially criminal offenders at the High Court level. In all these objectives, the Legal Resources Foundation endeavours to ensure access to justice for the indigent members of the Zambian society.

– The right to be presumed innocent until proven or having pleaded guilty.

– To be informed as soon as reasonably practicable, in a language that he or she understands and in detail, of the nature of the charge.

– To appear in a public trial before an independent and impartial court of law within a reasonable time after having been charged.

– To be given adequate time and facilities for the preparation of his or her defence.

– To be afforded facilities to examine in person or by his or her legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

– To be permitted to have the assistance of an interpreter without payment if he or she cannot understand the language used at the court hearing.

– To be represented by a legal practitioner of his or her choice, and where it is required in the interest of justice to be provided with legal representation at the expense of the state, and to be informed of these rights.

– Not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed.

– Not to be tried for a criminal offence if he can demonstrate he has been pardoned for that offence.
– Not to be compelled to give evidence at the trial.

– Not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted.

– To have recourse by way of appeal or review to a higher court than the court of first instance.

– To be sentenced within a reasonable time after conviction.

– As soon as it is reasonably possible, but not later than twenty-four hours after detention, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he shall be released.

– Save in exceptional circumstances, to be segregated from convicted persons and to be subjected to separate treatment appropriate to his or her status as an unconvicted person; and

– To be released from detention, with or without bail unless the interests of justice require otherwise.[379]

The foregoing rights may further be divided into three broad categories, namely:

– Pre-trial rights.

– Trial rights

– Post-trial rights.

I now turn to look at each category of rights in greater detail.

Pre-trial stage rights

The essence of the procedural protections at pre-trial stage is the equality of arms between the defendant and prosecution, as in most cases the criminal defendant is poor and has little or no education.[380] In fact Professor Adedokun Adeyenmi, commenting on the importance of pre-trial procedural protection observed that this is the most critical stage for securing the rights of a suspect in the criminal process, because the justice or injustice in the case can be settled at this stage by virtue of the nature of the statement the suspect is able to make or which is extracted from him.[381]

379) Constitution of Zambia, Article 18; International Covenant on Civil and Political Rights (ICCPR) 1966, Articles 9, 14 and 15.

380) Chanda, op. cit.

381) Adedokun A. Adeyemi, 'A Demand-Side Perspective on Legal Aid: What Services Do People Need? - The Nigerian Situation. Text paper delivered at the International Conference on Legal Aid in Criminal Justice; The Role of Lawyers, Non-lawyers and other Service Providers in Africa, held in Lilongwe, Malawi, 22-24 November 2004.

Right to liberty and security

Article 13 of the Constitution of Zambia guarantees the right to personal liberty. It provides that no one shall be deprived of his personal liberty expect as may be authorized by law in a number of specified instances. Thus, a person may be apprehended upon reasonable suspicion of having committed or being about to commit a criminal offence under the law in force in Zambia.

If the person to be arrested forcibly resists, the police should use only force reasonably necessary to carry out the arrest.

However, in practice this proviso to the right to liberty and security of the person is routinely violated by police officers. It is not uncommon to see police officers assaulting suspects in public even when such suspects are not resisting arrest. It is also quite common to see police officers unlawfully shooting at fleeing suspects. This occurs even where, the suspect is suspected of having committed a minor offence.[382] Article 12 (3) (b) of the Constitution creates an exception to the fundamental principle of the right not to be deprived of life in a situation where a person dies 'as a result of force reasonably justifiable in the circumstances' in order to effect a lawful or to prevent the escape of a lawfully detained person. In practice, however, the police have repeatedly abused this provision and used it as a justification for kill suspects and innocent people virtually at will.

A police officer when arresting a person must inform that person in a language that that person understands of the reason why he is being arrested, unless the person, for example by making violent resistance prevents such information from being given.[383] The reason for this requirement is to afford the person arrested an opportunity to show good cause why he should not be arrested. If the person arrested is not informed of the reason for his arrest but is nevertheless seized, the policeman may be liable for false imprisonment.

According to the law in Zambia,[384] a person arrested without a warrant must be brought before an appropriate competent court within twenty four hours or as soon as is reasonably practicable. If he is not tried within a rea-

382) Lawyers under the Legal Resources Foundation have assisted several litigants to seek compensation from the state for these abuses and violations.

383) Article 13 (2) of the Constitution of Zambia.

384) Section 33, Criminal Procedure Code of Zambia.

sonable time, he must be released either unconditionally or upon reasonable conditions.

What obtains on the ground, however, is that suspects are detained or held in police custody, for long periods on end without being charged or brought before the court. The common excuse is often lack of transport to take suspects to court coupled with the fact that magistrate courts, especially in rural areas, maybe too far away from the police stations.

Often suspects are detained at undisclosed centres and neither relatives nor friends of the suspects are notified. Suspects spend several days, even weeks in detention without knowing the basis of their incarceration. It is also not uncommon to hear that the police upon failing to locate or apprehend a suspect have resorted to arrest or detain the immediate family members or friends of the suspect in order to compel the suspect to give himself up to the police. Police have no power to detain a person for questioning unless he be arrested in respect of a criminal charge and informed of the reasons therefore. Unfortunately, abuses still abound in Zambia.

The Zambia police have over the years developed a practice or tendency to take anyone they feel like in custody without any reasonable basis, a practice euphemistically referred to as assisting the police with their inquiries[385]

Such detention usually lasts for several days or weeks. A person detained in this way can force the police either to arrest him or release him especially where his family or friends know where he is, they can move for his release on habeas corpus. However, many a time, the police would not willingly disclose the exact whereabouts of the detainee making it difficult to secure their release.

The right to remain silent and freedom from torture, inhuman or degrading punishment or treatment

The police in Zambia are entitled to question any person, including persons who may become suspects, in order to determine whether there is reasonable ground to suspect person or persons of complicity. However, the persons questioned are under no duty to answer, still less to attend at a police station. The police are not empowered to use force to extract statements

385) Chanda, op. cit.

from a suspect or a defendant. Article 15 of the Constitution of Zambia prohibits torture and other inhuman or degrading forms of punishment or treatment.[386] This right has no exceptions and as such torture of suspects is not allowed under any circumstances. A person who is tortured can sue the state for compensation.[387] It is also prohibited under international law.[388]

It therefore follows that confessions or statements procured by torture, threats or promises by a person in authority are excluded in evidence. Unfortunately in the vast majority of cases in Zambia, lawyers are not present during this crucial stage of interrogations and the suspect is left at the complete mercy of the police who are invariably eager to secure a conviction at all costs.

Where such a confession or statement is shown to have been obtained under duress, the magistrate has no choice but to reject it as such a confession is not reliable.

Freedom from unlawful search and seizure

Article 17 (1) of the Constitution of Zambia provides that except with his or her own consent no person shall be subjected to the search of his person or his property or entry by others on his premises.

This is meant to protect the sanctity of the home, as the right to privacy is one of the most important fundamental rights in any civilized society.[389]

It includes the right not to be subjected to searches on one's person, home or property; or seizure of private possessions; or interference with private communications, including mail and all forms of telecommunications.[390]

However, sections 22 and 23 of the Criminal Procedure Code of Zambia, empowers the police to search a person and to stop, search and detain any

386) The High Court of Zambia has abolished corporal punishment which is a form of inhuman or degrading punishment in the case of John Banda vs The People HPA/6/1998 (unreported).

387) Article 28 of the Constitution of Zambia gives locus standi to any Zambian to seek a remedy if rights guaranteed under the constitution have been or are likely to be violated by a specified measure. One of the remedies one can seek is compensation for the infringement of a guaranteed right.

388) The Convention against Torture; Article 7, International Covenant on Civil and Political Rights.

389) Alfred W. Chanda, 'The Role of Lower Courts in the Domestic Implementation of Human Rights' Zambia Law Journal Vol. 23 (2001), pp. 1-18.

390) Ibid.

vessel, vehicle or aircraft upon which anything suspected to be stolen or unlawfully obtained may be found and may seize such articles.

Further, section 15 of the Zambia Police Act[391] empowers the police to carry out any search for the purposes of investigating a crime as long as the police officer concerned is of or above the rank of sub-inspector.

The police should obtain a search warrant from a magistrate before proceeding with the search. The warrant can only be issued when a police officer swears on oath that he has reasonable grounds for suspecting that whatever he is looking for may be in the named place, building, vessel, or carriage.[392]

However, this provision, like several other provisions creating exceptions to fundamental human rights is routinely abused by the police officers and to some extent by the courts who may be called upon to scrutinize whether such grounds for the search exist.

Often times warrants are issued and signed by magistrates without carefully considering whether the evidence given by the police justifies a search and ascertain whether or not there are reasonable grounds for the application.

Another area that causes concern is the treatment of evidence obtained from an illegal search or involuntary confession. For instance, where the accused under duress or after being subjected to torture, informs the police where stolen goods or weapons used in the commission of a crime are hidden, and thereby inculpates himself in the crime of which he is accused, there appears to be a conflict between the desire to protect the accused person from unfair investigation and the interests of society in the conviction of those against whom there is reliable evidence of guilt.[393]

In Zambia, this conflict is resolved in favour of society. In the Zambian case of *Liswaniso* v *The People*,[394] the Supreme Court held that illegally obtained evidence was admissible as long as it was relevant to the issues before the court. This unfortunate legal position from the country's highest court has

391) Chapter 133 of the Laws of Zambia.
392) Section 118 of the Criminal Procedure Code.
393) Chanda, op. cit p. 19.
394) (1976) Z.R 277.

given the police and other law enforcement officers the incentive to continue torturing suspects because they know that even if the court will throw out an involuntary confession any evidence obtained as a result of the said confession or illegal search will be admissible.

This is in contrast with the approach adopted by the courts in the United States of America, the approach of which is to be commended. The US Supreme Court in the cases of Mapp v Ohio and Miranda v Arizona[395] has held that all illegally obtained evidence is inadmissible regardless of its relevance to the issue before the court. This includes evidence from an illegal search and seizure, physical evidence and statements of the accused taken in violation of the suspect's rights. The aim of this exclusionary rule is to remove the incentive and motive for violating suspects' rights.[396]

Right to a speedy trial before an impartial and independent court of law or tribunal
Anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released.[397]

The old cliché that justice delayed is justice denied cannot be overemphasized in the context of the criminal justice system. In Zambia delays in the justice delivery system are endemic. Some cases drag on for years and adjournments can be granted on the slightest pretext leading to mountainous backlogs of cases. Delays in the justice delivery system amount to a serious abuse of the human rights of suspects and other persons who are required to appear before the courts of law.

The immediate consequence is high congestion, compounded further by a lack of means to transport arrestees and accused persons to court when their cases are listed for hearing. Most, if not all Zambian state prisons, police cells and detention centres are overcrowded with cases where a cell which was designed for twenty inmates accommodates over a hundred inmates.

In some cases, inmates spend time in pre-trial detention which is more than the maximum imprisonment period fixed for the alleged offence by law.

395) 367 US 643 (1961) and 384 US 436 (1966).
396) Chanda A.W, op. cit. p. 9.
397) African Union: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (xxx) 247.

Consequently, it is not uncommon for detainees to get lost and forgotten in the judicial system[398] and to spend months or years in jail or remand. Among these suffering masses are the vulnerable groups like women, women with babies and/or pregnant women, juveniles and the elderly and terminally ill persons.

The predicament which the inmates find themselves in is compounded by poor diet and poor or non-existent sanitary conditions. It is no secret that prisons harbour serious health hazards such as T.B, pneumonia, Scabies and many other diseases which do not only put the lives of the detainees in great peril but also pose a serious health risk to the prison attendants and the wider community. A number of inmates die unnecessarily in this way because of multiple infections and poor conditions of detention.

The very few with the means to retain lawyers or who are represented by government lawyers through the Legal Aid Department may get bail or a prompt trial, but the vast majority suffers and waits indefinitely for the day they would appear in court. Ordinarily the legal services of private lawyers are inaccessible and unaffordable to the inmates the bulk of whom are from the very poor and most disadvantaged groups in society.

The right to be presumed innocent until proven guilty

The mere fact that a person has been charged with a criminal offence does not mean that he or she is guilty of the offence charged. The various rights guaranteed to the accused are aimed at ensuring that an innocent person is not imprisoned.

The Human Rights Committee[399] in its General Comment no. 13 has noted that the presumption of innocence is fundamental to the protection of human rights. No guilt can be presumed until the charge has been proven beyond reasonable doubt.[400]

---

398) In the case Masse Moses Muzito Lungu and Others vs The Attorney General 1997/HP/2994 (unreported), the High Court set at liberty over 20 inmates who had been detained for varying periods including one inmate who had not been brought before court for trial for a period of 3 years. They were released after the LRF made a habeas corpus application on their behalf, challenging their prolonged detention without trial.

399) The Human Rights Committee is an eighteen member body of experts set up to monitor implementation by states parties of their obligations under the International Covenant on Civil and Political Rights.

400) Ibid.

It follows directly from the cardinal principle that the defendant is presumed to be innocent until he or she is proven guilty that he / she should not be subject to unnecessary pre-trial deprivation of his freedom of movement and liberty or be placed in remand unless there are very strong arguments as to why custody should be maintained in the particular circumstances of the case. To this end therefore, a proper bail system is a prime element in the protection of the rights of accused persons.

Under section 123 of the Criminal Procedure Code of Zambia, it is provided that when any person is arrested or detained or appears before a subordinate court, the High Court or the Supreme Court, he may at any time while he is in custody, or at any stage of the proceedings, before such court, be admitted to bail upon proving a surety or sureties sufficient, in the opinion of the police officer concerned or the court, to secure his appearance or release upon his own recognisance if such officer or court thinks fit. Section 126 of the same Act stipulates that the amount of bail shall not be excessive. In other words, bail must be set at such a level as to ensure the attendance of an accused person at trial and to prevent flight from the jurisdiction. However, the position in Zambia is that bail cannot be granted to any person charged with:

– Murder, treason or any offence carrying a possible mandatory capital penalty,
– Treason or treason felony
– Aggravated robbery or
– Theft of motor vehicle[401]

In practice, however, many accused persons (invariably with no legal representation) are denied police bonds or bail as a result of the court fixing bail at a figure beyond the accused person's financial means.

The right to legal counsel

The accused person has the right to choose his or her counsel freely. As observed earlier, this right applies from the time the person is first apprehended, arrested, charged and/or detained. It is in the early stages of one's contact with the criminal justice system that one is likely to suffer the great-

401) Initially, theft of a motor vehicle was not among non-bailable offences, it was included recently by an amendment to the Penal Code.

est injustice and abuse of rights and it may difficult or impossible to undo an injustice suffered at this early stage of a criminal proceedings if the arrestee is unrepresented. Thus legal representation ought to be in place not only at the trial stage but also at the pre-trial stage of the criminal justice administration.

In Zambia, the right to counsel and legal aid has been elevated to the level of a constitutional right for an indigent citizen facing criminal charges in the High Court or who appeals there from.[402]

This right is also recognized by various international and African instruments for example, the International Covenant on Civil and Political Rights,[403] Body of Principles for the Protection of All persons under any Form of Detention or Imprisonment (1988)[404] and the African Charter on Human and Peoples' Rights.

Unfortunately, at the pre-trial stage there is practically no guaranteed legal representation or legal aid, as the Legal Aid Department only assigns lawyers to represent accused persons in the High Court and/or the Supreme Court. So defendants are not always represented by government lawyers in the subordinate (magistrate) courts yet it is the magistrate courts which handle the bulk of criminal trials before they go to the High Court on appeal, review or confirmation of sentences.[405] Although the High Court of Zambia has unlimited original jurisdiction, in practice it deals only with the most serious offences such as murder, treason, armed, robbery, aggravated robbery and infanticide among others. Even these cases are handled by magistrates in the preliminary stages before they are referred to the High Court. It is at these preliminary stages that a defendant needs access to a lawyer before proceeding to the next stages given that most magistrates who preside over these cases are not professionally trained.[406]

The right to counsel is regarded as one of the most important rights in the justice delivery system because legal representation is regarded as the best

---

402) Constitution of Zambia, Article 18.

403) These instruments are not binding on Zambia courts, they are only persuasive. They only become binding upon domestication through an act of parliament.

404) Ibid.

405) High Court of Zambia Act, Chapter 27 of the Laws of Zambia.

406) There are two types of magistrates in Zambia; professionally trained magistrates and lay magistrates who are not professionally qualified but undergo some training in substantive law and procedure.

means of legal defence against infringements of human rights and fundamental freedoms. And as indicated above, this right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.[407]

The major obstacle to the realization of this right in Zambia is the inaccessibility of legal services of lawyers.

The Law Association of Zambia (LAZ) has only just about 500 qualified lawyers meant to serve a population of over 10 million people. Lawyers are therefore too few to render adequate legal aid to needy persons. Aside from being few almost all the lawyers are urban based.[408] For example, the Western Province has 2 lawyers who are based in the provincial capital Mongu, the Southern Province has about 9 lawyers all based in Livingstone the provincial capital while Luapula Province has 1 lawyer and the Northern Province has no lawyer.

Consequently, the services of lawyers are relatively inaccessible to the majority of the rural poor who constitute a larger percentage of the population. Of the few that are willing to render legal aid, most lack knowledge and the requisite skills in contemporary and innovative approaches in rendering legal aid and still many more lack basic training in human rights law and practices.

Yet it is true that:

"Equal access to law for rich and poor alike is essential to the maintenance of the rule of law. It is, therefore essential to provide adequate legal advice and representation to all those threatened as to their life, property or reputation who are not able to pay for it".[409]

The above resolution, does not only recognize the financial barrier as a central impediment to access to justice and ultimately the enjoyment of human

407) Adeyemi A. A., op. cit. p. 8.

408) Lawyers earn their money through legal fees and prefer to be in urban centre as there are more economic activities.

409) Resolution of the International Commission of Jurists Conference on the Rule of Law in a Free Society, held at New Delhi, India 1959 p. 14.

rights in the criminal justice system, but it also challenges the legal profession and the state to ensure that the citizens' rights to due process and fair hearing are not dependent upon size or depth of his or her pocket.[410]

Possible points of intervention and best practices at pre-trial stage

Right to liberty and security

To protect this right, the Legal Resources Foundation in Zambia has embarked on education to sensitize police officers on the rights of suspects. There is a monthly newsletter, which specifically targets the police and other law enforcement agencies and highlights human rights abuses.

Further, the Legal Resources Foundation, through its regional offices, does take up cases of assault, allegation of torture, and instances of domestic violence. It also represents spouses and families of victims who die either in police custody or are unlawfully killed through gunshots.[411] The Foundation through its newsletter tries to expose these violations as well as to put pressure on the relevant authorities to prosecute the perpetrators.

For suspects who are detained or held in police custody for long periods, the Legal Resources Foundation has set up a Prisons and Police Cells Visitation Programme. Under this programme, a paralegal officer and a lawyer are assigned to regularly visit prisons and police cells within a province to identify cases of abuse and inmates who may need legal assistance in terms of police bond/bail, contact with relatives, follow up with the prosecution on delayed cases, applications for habeas corpus and possible legal representation at trial.

The right to remain silent and freedom from torture, inhuman or degrading punishment or treatment

Increased publicity about the work and activities of the Legal Resources Foundation has meant that paralegals and lawyers of the Foundation are informed soon after the arrest by friends and relations of detainees and inmates such that nowadays it is possible, in most cases, for a lawyer or a paralegal to be present at the police station when a statement is being or about to be recorded from a suspect.

410) Adeyemi A. A., op.cit. p. 2.

411) Currently there are about 5 such cases in court in the Southern Region being handled by the Legal Resources Foundation.

With regard to the right against torture and inhuman or degrading punishment the Human Rights Committee of the Law Association of Zambia,[412] successfully challenged the constitutionality of corporal punishment in the case of *John Banda v The People*.[413] In that case, the High Court held that corporal punishment constituted inhuman and degrading punishment and declared the provisions in the penal code allowing corporal punishment, unconstitutional.

Freedom from unlawful search and seizure

On the issue of the admissibility of illegally obtained evidence many Zambian lawyers, including lawyers from Legal Resources Foundation, are of the opinion that the decision in the Zambian case of *Liswaniso v The People*[414] is not good law and that it is high time it was challenged to prevent the police and other law enforcement agencies to resort to torture of suspects in order to obtain evidence.

The right to a speedy trial

To avoid delays in concluding cases, courts in Zambia, have now generally adopted a system called 'court-driven process' whereby the court manages the case and ensures that meaningful progress is made within a reasonable time. Courts are now reluctant to grant unnecessary adjournments and it is not uncommon nowadays for courts to order lawyers to proceed with cases where lawyers seem not serious. In other instances, for example when lawyers are taking longer than necessary to make progress, the courts are dismissing or striking out such cases on their own motion.

To reduce congestion in prison and to assist persons who are inappropriately detained, Legal Resources Foundation Prisons Visitation Programme strives to identify inmates who may be assisted with bail applications and those who could be released through habeas corpus applications. Foreigners detained in Zambia prisons are normally free to leave back to their countries of origin after paying fines or serving jail terms for illegal entry or any other offence under the laws of Zambia.

412) The Human Rights Committee is one of several committees established under the Law Association of Zambia (LAZ) for the advancement of human rights.

413) HPA/6/1998 (unreported).

414) (1976) Z.R 277.

However, many have problems in raising money for transport as well as getting in touch with their relatives, friends and their embassies. This gap is normally bridged by the intervention of paralegals under the Prisons Programme who act as a link or 'go-between' between the inmates on one hand and the relatives, friends and embassies on the other to facilitate the release of such persons.

A number of inmates have been identified in the last 5 years who were either lost or completely forgotten in the judicial system. For some, lawyers from Legal Resources Foundation secured their release through habeas corpus. In the latest case in Northern Zambia, a man who was illegally and unreasonably detained in prison for over 10 years was released by means of constitutional bail.[415]

For others, through the Prisons Programme, paralegals and lawyers are able to liaise with prosecuting authorities to have suspects and remandees brought to court. However, the services of the Legal Resources Foundation are not in every district of the country[416]. The services of lawyers and paralegals under the Foundation are only obtained in areas which have offices or which are visited.

The right to be presumed innocent until proven guilty

In cases where bail has been put too high or beyond the means of the accused, lawyers can apply to have the bail conditions varied. Where bail is unreasonably denied by a lower court, an appeal can be lodged to the higher court for bail pending trial or pending appeal.

The right to counsel/lawyer

Owing to the pro-activeness of the Legal Resources Foundation Prisons and Police Cells Visitation Programme, representation in the preliminary stages is slowly becoming a reality. Paralegals are able to detect and identify at the earliest stage persons in need of legal assistance and this information is quickly passed on to lawyers. And conversely, due to the wide publicity of

415) *John Chishimba Mutale v The People* 2 To/09/05 (unreported). Constitutional bail is granted by the High Court in deserving cases where there has been unreasonable delay to bring the detainee to trial not withstanding that the accused might have been charged with an unbailable offence.

416) The Legal Resources Foundation (Zambia) has not yet set up offices in all the districts in the country.

the LRF Prisons Programme, persons in conflict with the law would themselves send messages through relatives and friends to the Legal Resource Foundation requesting for legal assistance.

With regard to inaccessibility of lawyers, the Legal Resources Foundation strives to offer legal aid to the needy in the 9 provinces of the country. The foundation has nine salaried lawyers who are either stationed at a provincial centre or who make regularly visits to the provinces and who take up cases free of charge on behalf of persons who cannot afford to hire a lawyer.

Trial stage rights

Upon conclusion of the pre-trial stages, the parties proceed to the trial stage. Trial stage rights are just as important as pre-trial rights given that most of the rights in the criminal justice system are applicable throughout the criminal process.

At trial stage there are three basic principles of criminal procedural due process.

That the defendant shall be presumed innocent until proven guilty.

That the burden of proving the guilt of the defendant falls upon the prosecution and

That the standard of proof is beyond a reasonable doubt.

The right to counsel/attorney
As pointed out earlier, the right to an attorney is very crucial in the criminal justice system to the extent that a criminal defendant ought to have counsel at all stages of the criminal process to prevent potential abuses of human rights.

In Zambia, the system adopted at trial is the adversary system where the two opposing sides, i.e. prosecution and defence, are pitted against each other with each party trying to convince the court of the merits of their case and the demerits of the opponent's case.

In the Zambian legal system, an accused person, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.

Article 18 (2) of the constitution provides that a defendant shall be permitted to defend himself before the court in person, or at his own expense, by a legal representative of his own choice.

Legal aid is mandated for all offences triable in the High Court, such as murder, aggravated robbery and treason.

However, as observed earlier, most defendants in the criminal justice system in Zambia appear before magistrate courts where legal aid is not available and the defendants, most of whom are poor, cannot afford to hire a lawyer.

The Legal Aid Department[417] is not very effective because it is grossly underfunded and understaffed. Its staff is overworked and demoralized because of poor conditions of service.[420]

Even where legal aid is offered it often comes too late, usually after the accused has been in custody for several months. It is not uncommon for lawyers from the Directorate of Legal Aid to be seen obtaining instructions from their clients within court premises because the lawyer had had no prior contact with the accused person and he is meeting or knowing the client a few hours before trial starts. This is most unsatisfactory as a lawyer needs to get involved right from the time of arrest to get full instructions, prepare arguments, organize witness and prepare the defendant for trial most of whom are first offenders so that a defendant is professionally and effectively represented. The absence of a lawyer at the interrogation of the accused encourages mistreatment of the accused by the police. It also leads to frequent and unnecessary adjournments by the lawyer as he would not have had enough time to prepare for the case.

The right to defend oneself

Article 18(2) of the constitution requires that the accused be given adequate time and facilities for the preparation of his defence. In practice however, this requirement is rarely met.

417) The Directorate of Legal Aid.

418) In early 2006, all government lawyers went on strike for over a fortnight demanding increased salaries, allowances and better working conditions. This led to a serious disruption and delay in court cases.

There is not enough time or time at all for the defendant or his legal representative to prepare a proper and effective defence even where the evidence of the state is not so strong.[419] In almost all cases the defence merely reacts to the prosecution witnesses and offers the testimony of the accused without calling in any potential witnesses for the accused persons. There is simply no time or facilities (or resources) for the lawyer or the accused person to conduct independent questioning of the witnesses, visits to the scene of the crime, photographs, exhibits, identification parades, ballistic reports, and alibi, character or expert witnesses.

Most of the accused persons are ignorant about the legal process and are poor people who cannot afford to pay for such services. In worst cases, such where they are made aware of these irregularities and procedural requirement, most inmates would decline legal aid and prefer to proceed to trial ready or not and regardless of whether they are convicted or not considering the long periods of time they spend in detention without trial. Most would prefer the case to proceed without proper due process to avoid adjournments.[420] This way, they are sure that sooner than later they would know their fate.

The right to examine and cross-examine witnesses

The right of the defendant to examine the witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to the prosecution is guaranteed under the Zambian Constitution.[421]

Witnesses are not permitted to tell their own spontaneous story largely because there are so many rules of evidence about what may or may not be said. The question and answer method of examination produces an orderly and coherent story devoid of inadmissible evidence.[422]

---

419) In some instances accused persons end up admitting a lesser charge so that they are convicted and sentenced faster to avoid delays. This is not withstanding the fact that, had the lawyer had ample time to prepare for the case, the case could have proceeded to trial and probably the accused would have been acquitted.

420) For a lawyer to effectively prepare a case for a client he is meeting for the first time, an adjournment to allow him prepare for the case is inevitable.

421) Article 18.

422) Chanda, op. cit. p. 23.

However, it may not produce the whole truth. In Zambia, witnesses' statements are normally taken by the police or other law enforcement agencies and they, in good faith tend to produce statements containing only those facts relevant to and in favour of the prosecution. The policeman's knowledge of the facts may give an impression of certainty when in fact there is uncertainty.

Cross-examination, on the other hand, described as "the greatest legal engine ever invented for the discovery of truth" if used wisely and skilfully, can well detect these uncertainties and get the truth.

Unfortunately most accused persons who are not schooled in the skills and techniques of effective cross-examination prefer to remain silent during their turn to cross-examine for fear of incriminating themselves.

The privilege against self-incrimination (the right to silence)
The law in theory requires the prosecution to prove their case without recourse to the accused who may not be obliged to answer questions. The privilege against self-incrimination encompasses the right to refuse to answer questions put by the police, the right not to go into the witness box and give evidence on oath and the right to make an unsworn statement from the dock which is not then subject to cross-examination.[423]

Article 18 (7) of the constitution provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial.

The right to speedy and public trial
The criminal justice system operates on the premise that justice delayed is justice denied. Article 13 (3) of the constitution requires that any person arrested or charged with an offence should be tried by an impartial court without undue delay.

Unfortunately, not all criminal defendants get a speedy trial in Zambia. This is because in many cases there are long delays between the time that an accused is first brought to court and the final judgement.

According to the African Union Principles and Guidelines on the Right to Fair Trial And Legal Assistance in Africa:

423) Ibid.

"The right to a trial without undue delay means the right to a trial which produces a final judgement and, if appropriate a sentence without undue delay"[424]

And according to a study conducted by Annie Gutierrez of the USA, the longest delays are caused by the repeated requests for adjournments by the prosecutors with the accused present, on the ground that they had not yet received the Director of Public Prosecution Certificate of Instruction for the summon trial in the High Court.[425] In over 50% of the cases, the Certificate was filed within four months but in the other 50% cases, the Certificate was not filed for close to two years. In most cases magistrates do not hold preliminary inquiries[426] but simply adjourn until the Certificate is received. These delays in the trials of the accused persons undermine the rule of law and their right to a speedy trial.

Points of intervention and best practices at trial stages

The right to counsel

The Legal Resources Foundation seeks to provide legal aid services to as many indigent defendants as possible, even to defendants appearing before magistrates courts. However, because lawyers under the Legal Resources Foundation are few and cannot appear in every court for every defendant only a few people are being assisted in this way.

It is hoped that with the engagement of more lawyers in the Foundation more criminal cases will be taken up at trial stage in magistrate courts.

To improve on the quality of representation, the paralegal programme under the Legal Resources Foundation has embarked on prisons and detention centre visitations to identify persons in need of legal aid at the earliest stage. In this way, paralegals are able to have contact with the accused persons, get statements and take down names of possible defence witnesses.

---

424) DOC/05/(xxx)247.

425) Article 56 of the Constitution of Zambia puts the Director of Public Prosecutions (DPP) in charge of all criminal prosecutions in the country. The DPP has power to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed.

426) A preliminary inquiry is held by a magistrate to determine whether the evidence brought before it supports the offence before referring the case to the High Court.

This vital information is then passed over to a supervising lawyer who assesses the merits and/or demerits of the case and informs the accused person whether or not and how far he or she would be legally assisted. The involvement of paralegals at an early stage ensures that lawyers will not have to obtain instructions from defendants at the last minute. This in fact affords the lawyer ample and prior contact with the prospective clients and goes a long way in adequate preparation of the defence case before trial.

The right to defend oneself

With the paralegal programme now fully established under the Legal Resources Foundation, problems of sufficient time and facilities to prepare the defence are being lessened in cases where defendants are being represented by lawyers from the Legal Resources Foundation.

LRF paralegals are trained in such a way that they are able to interview prospective clients about the nature of their cases, identity legal issues and possible defences, and often manage to get in touch with potential defence witnesses.

As a result of this groundwork, a lawyer has sufficient time to conduct pretrial briefings with the accused person and all his witnesses and/or relatives present. This ensures that a good case is made up for the defence way before the case is called up for trial. Relatives are important in case of bail because courts normally ask for sureties or cash bail.

Paralegals do not only interview inmates and identify or locate possible defence witnesses they also conduct educational programmes in prisons where they educate inmates about their human rights in the criminal justice process. They also explain in simple terms how the legal process works in criminal trials.

The right to examine and cross-examine witnesses

While legal aid provided to defendants by the LRF goes a long way in ensuring that examination and cross-examination of witnesses is done in a skilful and professional manner for maximum effect, there still remain constraints of distance and logistics to visit crime scenes, conveying witnesses to court and securing exhibits.

The right to silence (the privilege against self-incrimination)
The Zambian courts have set a good precedent in defence of this right or freedom as was exemplified in the case of Thomas Mumba v The People.[427] In this case the applicant was charged with corrupt practices by a public officer, contrary to section 25 (1) of the Corrupt Practices Act. Section 53 (1) of the act reads:

"An accused person charged with an offence under part IV shall not, in his defence be allowed to make an unsworn statement, but may give evidence on oath or affirmation from the witness box."

The applicant argued that section 53 (1) was unconstitutional as it conflicted with article 20 (7) of the One Party Constitution, because the section compelled the accused, if he elected to say something in his defence to give evidence whereas article 20(7) of the constitution stated that a criminal defendant should not be compelled to give evidence. The High Court sustained this argument and declared that section 53(1) of the Corrupt Practices Act was unconstitutional and therefore null and void.

The right to a speedy and public trial
The LRF's intervention through the paralegal programme in conjunction with its lawyers in provincial centres has helped a number of inmates receive speedy trials.

When information about a delayed case is passed to lawyers, lawyers would then ask prosecutors to call up the case. If the state hesitates lawyers would then ask the court to dismiss the case. This has made prosecutors take court cases seriously and ensure that cases are not unnecessarily delayed. Another case in which a speedy trial may be achieved for the benefit of a client is the process of habeas corpus application. Often times when the police became aware of the process, they will act fast to bring the case to court to avoid the defendant being set free if it is shown that there is no legal basis for his or her detention.

427) HNR/488/1984.

Post-trial rights

The right to counsel/lawyer
As indicated elsewhere, this right is and ought to be applicable at all stages of the criminal process including the post-trial stage.

Again in practice many convicted persons may not receive legal advice or representation after trial and are left to fend for themselves. Often times convicts who receive jail terms end up serving more time in jail than stated in the sentence because of ignorance and lack of advice on the computation of dates. And further most convicts do not know the difference between hard labour and simple imprisonment once they are in prison.

The right to appeal
According to the African Union Principles and Guidelines on the Right to A fair Trial and Legal Assistance in Africa:

"Every one convicted in a criminal proceeding shall have the right to the review of his conviction and sentence by a higher tribunal".

This is to ensure that any error that may have been made by the court may be corrected by a superior court. The accused must be informed of his rights of appeal to the High Court by the subordinate court at the conclusion of the trial.[428]

Although the courts do inform the convicted persons of their rights of appeal, most of the convicts are ignorant about the law and do not know the principles of sentencing. They do not know how to frame grounds of appeal or argue points of law on appeal. Unless the judge they are appealing before uses his or her judicial discretion to take time to check the record of proceedings as to whether they support the conviction or sentence, most appeals are dismissed or thrown out for lack of merit.

The end result is that there are prisoners in jail who are not supposed to be there for lack of knowledge or legal representation and still others who serve harsh and onerous punishments, which they do not deserve.

428) Ibid.

Points of intervention and best practices at post trial stage

The right to counsel/lawyer
The Legal Resources Foundation's Prison Programme ensures that legal aid is availed to convicts even at post-trial stage.

Paralegals pick up complaints form dissatisfied inmates and pass them over to lawyers who study them together with court records and offer free legal advice to inmates. Sometimes paralegals are able to check prison records to find out which inmates have overstayed or are being unlawfully detained.

The right to appeal
Through its legal laid programme, the Legal Resources Foundation has managed to represent several inmates around the country at appeals stage. Most had their sentences reduced after mitigation and others have been acquitted.
The lawyers normally prepare the grounds of appeals on behalf of convicted prisoners and argue their cases.

New developments in the provision of legal aid in Zambia

The government run Legal Aid Department underwent some major changes around the year 2005 when the Legal Aid Amendment Act No. 19 of 2005 was enacted.

This piece of legislation placed the mandate of the provision of legal aid under the newly constituted Legal Aid Board.

The establishment of the Legal Aid Board to replace the Legal Aid Department has brought some remarkable changes in the way legal aid service are being provided in the Country although the implementation of the specific programmes and activities of the newly established Legal Aid Board started in earnest much later.
Among the noticeable changes was the recruitment of more lawyers and establishment of offices to be manned by a lawyer in all the nine provinces of the country.

This undoubtedly is an important step towards making legal aid services available to the people who need it most especially in rural and peri-urban areas.

By sections 3 (C) (1) of the Legal Aid (Amendment Act) No. 19 of 2005; the functions of the Board shall be to:

– Administer and manage the Legal Aid Fund

– Facilitate the representation of persons granted legal aid under the act.

– Assign practitioners to persons granted legal aid under the act

– Advise the minister on policies relating to the provision of legal aid and implement government policies relating to the same, and

– Undertake such other activities relating to the provision of legal aid and which are conducive or incidental to the performance of its functions under the act.

However, it is too early to assess the overall impact or success of the operations of the Legal Aid Board in providing access to justice to the majority of the indigent members of society as the transformation from the Legal Aid Department to the Legal Aid Board is still unfolding.

Conclusion

This paper has endeavoured to demonstrate that legal aid providers have a significant role to play in the protection and promotion of human rights in the provision of legal services. It is common knowledge that most of the human rights violation occur in the criminal process.

The challenge is thus for the lawyers, paralegals, police, prosecutors, magistrates and judges to carry the final responsibility for ensuring the observances of human rights. The law in Zambia attempts to redress the imbalance that exists between the accused and the state. But while a system can provide checks on unreasonable use of power and authority, it is the responsibility of those who at various stages of the criminal process have to make critical decisions to ensure that the fundamental human rights and freedoms of suspects in the criminal justice system are not violated.

AN ASSESSMENT OF COURT-APPOINTED LEGAL REPRESENTATION IN INDONESIA IN LIGHT OF INDONESIA'S INTERNATIONAL LEGAL OBLIGATIONS

Uli Parulian Sihombing

Abstract

Article 56, paragraph 1 of the Indonesian Penal Procedural Code provides that in order to be eligible for the assistance of a court-appointed attorney, a person must be accused of a crime that could carry the death sentence or a minimum of five years imprisonment on conviction.

This article will explore how the existing Indonesia law on legal aid and the Indonesian Courts interpret the phrase 'in the interests of justice' when determining whether or not an accused person should have a court-appointed attorney. The article proceeds to compare existing Indonesian law with relevant provisions from the International Covenant on Civil and Political Rights to which Indonesia is a party, with reference to the jurisprudence of the Human Rights Committee and the European Court of Human Rights.

Introduction

Free legal assistance is an essential service for facilitating access to justice for those persons who cannot afford to engage a lawyer. Legal aid is needed both in criminal and civil cases. During 2006, the Indonesian non-governmental organization Jakarta Legal Aid Institute (LBH Jakarta) provided legal assistance to some 10,015 members of the public, in both criminal and civil proceedings[429].

Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR) in 2005. The process of harmonizing Indonesia's laws and regulations with the Covenant is, however, far from complete. State parties to the Covenant have an obligation to ensure harmonization of domestic law with the provision of the Covenant - without such harmonization, the legal guarantees in the Convention will be illusory for citizens of that state in practice. Article 14(3)(d) of the ICCPR requires state parties to the convention,

429) The Jakarta Legal Aid Office, 2006 Annual Report, 1 (2006).

hereunder Indonesia, to provide a court-appointed lawyer, where the interests of justice so require, to persons who do not have the means to pay for legal representation themselves.

Legal aid is by no means a new phenomenon in Indonesia. It was first introduced during the period of Dutch colonial rule. The 1918 Penal Procedure Code was the first law to include provision for the grant of legal aid to indigent defendants charged with the most serious of crimes[430]. The colonial Penal Procedure Code was 'inherited' by the Republic of Indonesia at independence and the provision for grant of legal aid to defendants charged with the most serious crimes remains intact in the procedure code to this day.

This provision is unsatisfactory in that there are many instances where poor people who are charged with less serious crimes, or who are parties to civil proceedings, also need legal assistance in order to access justice in practice. Where the accused is a juvenile or has reduced mental capacity, there is a compelling case for their being provided with legal assistance irrespective of the seriousness of the case. Similarly, adults of full capacity should also be able to have the benefit of legal counsel in complex matters where it is beyond the capacity of a non-legally trained person to represent him/herself effectively.

Given the limited circumstances in which the state provides free legal representation in Indonesia, there is an important role for non-governmental organizations (NGOs) in providing legal services to the poor. A number of organizations in Indonesia provide legal aid, albeit with limited resources. There are more than 200 million people living in Indonesia, and only 16,000 registered lawyers, according to statistics provided by the Indonesian Bar Association.[431] Under such circumstances, NGOs have a vital role to play, particularly in rural or remote areas of the country where lawyers are not present.

Given the shortage of lawyers in the country and the limited resources of NGOs who are providing legal aid, it is arguable that Indonesia is currently

430) The Ideas of Legal Aid: Toward Structural Legal Aid 8 (Abdul Hakim Garuda Nusantara et. al. eds., (1981).

431) Available at: http://www.peradi.or.id/in/detail.viewer.php?catid=0ec779f0f61ecd748922b01af48e03ce&cgyid=c980253e8d2fdcd8e8601ae113fa151a last accessed in March 2009.

unable to fulfil its obligations under the ICCPR. Be that as it may, the limited scope of the legal aid provision in the Penal Procedure Code, which is restricted to the most serious crimes and which only provides for legal representation at the trial, also arguably falls short of the international legal standards. An accused person has a right to legal representation not only at the trial, but also at the time of arrest, during the criminal investigation phase, and while they are awaiting the trial.

Indonesian court jurisprudence and existing Indonesian regulations on legal aid

In this section, I will first explore the extent to which Indonesian courts take into account 'the interests of justice' in determining whether or not a poor accused person should be appointed a legal representative, then how legal aid is defined in existing Indonesian regulations and in writing by legal scholars.

Several scholars and practicing lawyers have attempted to define legal aid in the Indonesian context. The distinguished Indonesian lawyer and academic Mulya Lubis has argued that a distinction should be made between legal assistance and legal aid. Legal assistance is a broad concept, encompassing all forms of free legal services irrespective of whether the beneficiary has the means to hire a lawyer or not. Legal aid is a narrower concept. In Indonesian law, legal aid can only be provided to those persons who cannot afford to pay for their own legal representative.[432]

Other scholars have argued that there are three different concepts of legal aid, as follows:

The traditional concept of legal aid
According to the traditional point of view, legal aid is something that is granted to poor criminal defendants on an individual basis. The legal aid beneficiary is essentially a passive recipient of a charitable act on the part of the legal service provider. Under this traditional concept, legal aid is seen neither as an obligation of the state nor a right of the citizen.

432) T. Mulya Lubis, Legal Aid and Structural Poverty, pp. 2-3 (Jakarta, 1996).

Constitutional concept of legal aid

The objectives of the constitutional concept of legal aid are broader than the traditional concept. Legal aid is not limited to specific case-related assistance rendered to a poor accused person during pre-trial detention or at the trial, but also includes dissemination of information to the beneficiary about the law, about legal institutions, and about his or her constitutional and human rights. The constitutional concept of legal aid does not see legal aid as being restricted to criminal law. Individuals or groups of individuals, including those engaged in civil proceedings in which their constitutional or human rights are being considered, may also be afforded legal aid.

Structural legal aid

The concept of structural legal aid comes originally from sociology. The concept emerged from discussions amongst sociologists regarding the nature of structural poverty and the ways in which it could be overcome. The notion of structural poverty includes the notion that poverty is not simply a matter of bad fortune. Poverty continues to exist at least in part due to policies of the state which have the effect of maintaining or even worsening the economic status of the poor. Structural legal aid seeks to break structural poverty by empowering poor people, through the provision of free legal services, to understand and to seek fulfilment of their rights through legal mechanisms. In this concept of legal aid, a legal aid lawyer does not just represent a client in court, but also participates in legal education, awareness raising and campaigning in the community.[433]

Legal scholars in Indonesia have argued that the right to legal aid should be enshrined in the constitution. Furthermore, there is a need for a specific law on legal aid, where the means for determining eligibility and the mechanisms for the delivery of legal services are set out.[434]

In the view of the author, legal aid should not be understood narrowly as the provision of legal representation to poor persons in very serious criminal cases, but should also encompass less serious criminal cases, as well as civil and administrative proceedings. Furthermore, the concept of legal aid should be understood broadly as encompassing not only legal representa-

433) Abdul Hakim Garuda Nusantara, Legal Politics in Indonesia 110-112 (1988).

434) Frans Hendra Winarta, The Constitutional Right of the Poor to Obtain Legal Aid in National Development Program iii (2007).

tion but also legal education and community awareness raising on constitutional and human rights.

At present, legal aid is addressed in Indonesian legislation in the following three statutes:

Article 22 of the Advocate Act (Act number 18/2003), which obliges lawyers to provide free legal assistance to those who are unable to afford legal representation in court;

Article 18(4) of the Human Rights Act (Act number 39/1999), which states that accused persons have the right to receive legal assistance from the outset of pre-trial detention until they have been found guilty by the final judgement of an independent and impartial tribunal. (Note that this act only refers to the appointment of legal advocates by the court in criminal cases); and

Article 37 of the Judicial Power Act (Act number 4/2004), which recognizes a right to legal aid in both criminal and civil cases;

The ICCPR was incorporated into Indonesian domestic law in 2005, following the entry into force of Act 12 of 2005. Article 14(3)(d) of the ICCPR states that everyone charged with a criminal offence shall be entitled to the following minimum rights during the trial process:

'…to be tried in his presence, and to defend him or herself in person or through legal assistance of his own choosing; to be informed, if she or he does not have a legal assistance, of this right; to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he or she does not have any sufficient means to pay for it.'

As stated above, article 56(1) of the Indonesian Criminal Procedure Code provides that in order to be eligible for the assistance of a court-appointed attorney, a person must be accused of a crime that could carry the death sentence or at least five years imprisonment on conviction. A comparison of this provision with article 14(3)(d) of the ICCPR shows that the code uses another means (severity of the sentence on conviction for the offence) than that set out in the ICCPR (any case where the interests of justice so require) to determine eligibility for legal aid.

The Judicial Power Act, the Human Rights Act, and the Law on Advocates all follow what the code says regarding the grant of a court-appointed lawyer. The Human Rights Act even includes a provision that the right to legal aid is subject to limitation; i.e. that an accused person's right to counsel could be limited based on reasonable grounds such as protection of the rights and freedoms of others, the national interest or the public interest.

In 2004, the Constitutional Court ruled in the case of *Tongat & Others* vs *Indonesia* that access to justice is a constitutional right.[435] The right was said to derive from the rule of law principle enshrined in article 1(3) of the Third Amendment to the 1945 Constitution. The applicant in the case, who worked for a legal clinic at a private university, had been refused leave to represent an indigent criminal defendant because article 31 of the Advocate Law prohibits persons who do not have a current bar license to represent defendants in criminal proceedings. The court declared that this article was excessive, and had the effect of preventing, or at least restricting, access to justice in such a manner that might result in a violation of the accused person's right to a fair trial.

Drawing on the judgement of the British High Court in the case of *R* v *Lord of Chancellor ex p. Witham*[436], the court held that the right of access to justice was inherent in the nature of the rule of law, and was necessary in order to fulfil the requirements of the right to fair trial. As such, the right to legal aid could not be limited in an unreasonable manner such as the restriction contained in the Advocate Law. This decision has important implications for the work of community legal aid organizations, since there are very few practicing lawyers working in remote areas of the country. The decision makes it possible for lay defenders working for or engaged by the legal aid organization to represent defendants in court in situations where they would otherwise be without any form of legal representation.

The role of NGOs in providing free legal assistance

In this section, I will explore the role of Indonesian NGOs in providing free legal assistance to the poor: their areas of focus, the obstacles that they face, and the resources they have at their disposal.

435) Constitutional Court, Tongat & Others vs Indonesia, application no.006/PUU-II/2004, at p. 56.
436) High Court, *R vs Lord Chancellor*, *ex p Witham* [1998] QB 575.

There are a number of Indonesian NGOs providing free legal assistance or conducting research on access to justice in Indonesia. Among the more prominent organizations are the Indonesian Legal Aid Foundation (YLBHI), the Indonesian Legal Aid & Human Rights Association (PBHI), Women's Association for Justice (LBH Apik), and the Civil Society Group for Court Monitoring (MaPPI). YLBHI and LBH Apik are legal service providers and MaPPI is a legal research organization.

MaPPI has conducted research demonstrating that a number of defendants who meet the requirements in the Penal Procedure Code for grant of a court-appointed attorney do not actually receive legal aid in practice.[437] The research shows that even the restrictive provision in the Code, which falls short of the standards of the ICCPR, is not being implemented consistently in practice.

YLBHI is the oldest and arguably the leading legal aid organization operating in Indonesia. The organization provides free legal aid to those who cannot afford an attorney and seeks to apply the concept of 'structural legal aid', as described in section 2 above. YLBHI focuses on four principal themes in its work: the right to fair trial, protection for human rights defenders, reform of existing laws so as to facilitate improved access to justice for Indonesian people, and advocacy for implementation of economic, social, and cultural rights.[438]

There are 14 YLBHI branch offices across Indonesia. As an example of the types and frequency of cases being handled, the top ten types of cases handled by YLBHI's office in Semarang, Java, during 2005 were as follows:

437) MaPPI, Legal Aid Research in 2003, available at www.pemantauperadilan.com/detil.php?id=184&type=kolom (last visited in February 2007).

438) YLBHI, The 2006 Annual Report: The Work Of Government To Enforce And Fulfill Human Rights (2006) available at www.ylbhi.r.id/index.php?cx=3y=1&op=29 (last visited in May 2007).

Ranking of case types by frequency	Type of case	Number of cases handled
1	Civil	32 (26.98 % of total)
2	Criminal	30 (23.80 %)
3	Labour	17 (9.25 %)
4	Marriage	14 (9.52 %)
5	Housing	10 (7.93 %)
6	Land	9 (7.14 %)
7	Migrant Workers	3 (2.48 %)
8	Domestic Violence	3 (1.56 %)
9	Women Rights	3 (2.38 %)
10	Consumer protection	2 (1.58 %)
11	Education	1 (0.79 %)

The Indonesian Legal Aid and Human Rights Organization (PBHI) seeks actively to apply a human rights based approach in its legal aid activities. This includes, among other things, taking on cases of alleged human rights violations and campaigning on human rights in order to increase awareness amongst the general population. PBHI's vision is an Indonesia where human rights are ensured and respected and there is an end to impunity. PBHI has branches in several cities of Indonesia including in Medan, North Sumatra province, and Makassar, South Sulawesi province.[439]

Women's Association for Justice (LBH Apik) has established several branch offices in Indonesia, including in Jakarta and Yogjakarta. LBH Apik focuses on providing free legal assistance to marginalized woman and campaigning for women rights. The organization has actively campaigned on the issue of domestic violence and on drawing awareness to the existence of structural poverty affecting women in traditional cultures dominated by patriarchal systems. Victims of domestic violence are often reluctant to submit complaints to police stations because they believe the complaint will take a long time to process and will leave them in a state of ongoing uncertainty, with no protection against possible further attacks.[440]

439) PBHI, PBHI's vision and mission, available at www.pbhi.or.id/profil.php (last visited in February 2007).

440) LBH Apik, The 2005 Annual Report (2005), available at www.lbhapik.or.id/catahu%202006.htm (last visited in February 2007).

Organizations such as LBH Apik have realized that legal aid is needed not only by the poor, but also by members of marginalized groups, such as women, children, and people with mental health disabilities. Litigating human rights cases before the court is one means by which legal aid NGOs can raise public awareness of an issue. This has been demonstrated through the work of PBHI, YLBHI, and LBH Apik.

Another aspect of legal aid services provision in Indonesia has been the establishment, starting in the 1970's, of legal clinics in various Indonesian universities, where law students, under the supervision of their teachers, provide free legal assistance for the poor. Legal clinics are not only a means by which a greater number of people can access legal services; they are also an excellent training ground for the practicing lawyers of the future.[441]

Gap analysis between existing Indonesian law and international standards

In this section, I will explore the compatibility of the Indonesian legal framework for legal aid with the article 14 of the ICCPR, the jurisprudence of the Human Rights Committee and the jurisprudence of the European Court of Human Rights.

Article 14(3)(d) of the ICCPR sets out two pre-conditions for the grant of a state-appointed legal representative. For the first, the defendant must lack the means to pay for an attorney him/herself. For the second, the matter must be one where the 'the interests of justice…require' that a legal representative be appointed. While the ICCPR does not contain a definition of what constitutes 'the interests of justice', the phrase has been considered in the jurisprudence of the Human Rights Committee.

In the cases of *P. Taylor vs Jamaica*[442] and *Pinto vs Trinidad & Tobago*[443], the Human Rights Committee held that defendants in cases involving the death penalty have a right to legal representation at all stages of the proceedings. Where the defendant cannot afford to retain an attorney, the state must provide one.[444]

---

441) Indonesian Islamic University in Yogjakarta, The Profiles of Legal Clinics 9-31 (2006).
442) HRC Communication no. 707/1996, 18 July 1997, para. 8.2.
443) HRC Communication no. 232/1987, adopted 22 July 1990, para. 12.5.
444) Dato Param Cumaraswamy and Manfred Nowak, Background Paper of 9th Informal Asia-Europe (ASEM) Meeting: Human Rights in Criminal Justice Systems, at p. 43 (2009).

According to the Human Rights Committee 'the gravity of the offence is important in deciding whether counsel should be assigned 'in the interest of justice' as is the existence of some objective chance of success at the appeals stage'.[445]

In a number of cases, the Human Rights Committee has held that the obligation of the state is not met simply by providing a defendant with legal representation; such representation must also be effective in practice.[446]

Article 6(3)(c) of the European Convention on Human Rights (ECHR) is the corresponding provision to article 14(3)(d) of the ICCPR regarding the appointment of a lawyer by the court to an indigent criminal defendant. The first condition in article 6(3)(c) is lack of means to pay for a lawyer, the second an assessment of whether in the circumstances of the case the interests of justice so require. As regards the first condition, it is important that the level of proof required from a defendant that she/he lacks resources not be set too high. As regards the second condition, the European Court has adopted a broad approach to the interpretation of the interests of justice. In assessing whether this condition has been met, it is necessary to consider a) the complexity of the case, b) the ability of the defendant to present the case adequately without assistance, and c) the seriousness of any possible sanction or deprivation of liberty that may be imposed on conviction.[447]

In the case of *Artico* v *Italy*[448], the European Court stated that a court-appointed lawyer must provide effective legal aid representation not merely theoretically and illusory. This decision can be contrasted with the subsequent case of *Kamasiski vs Austria*[449], where the court observed that the state cannot be responsible for every shortcoming on the part of the lawyer appointed for legal aid purposes, unless such effective legal aid representation is manifest. Concrete cases of ineffective legal aid representation may entail ineffective legal aid representation where a court-appointed lawyer withdraws of the appeal without consultation in a death penalty case or lawyer's absence in witness examination.[450]

---

445) HRC General Comment no. 32 on article 14 of the ICCPR, at para. 38.
446) Pratt, Morgan v. Jamaica; case no.A/44/40 at 222, & OF v. Norway; case no.158/1983.
447) Keir Stammer, European Human Rights Law (The Human Rights Act 1998 and The European Convention On Human Rights) (1999) at pp. 268-269.
448) European Court of Human Rights Application No. 6679/74, judgement of 13 May 1980.
449) European Court of Human Rights Application No. 9783/82, judgement of 23 November 1989.
450) Dato Param Cumaraswamy and Manfred Nowak, supra at 43.

Article 56(1) of the Indonesian Criminal Procedure Code is a very narrow construction of 'the interests of justice,' where the only test applied by the Court is the potential severity of sentence on conviction. As revealed in the MaPPI research described above, even if an accused person meets the requirements of article 56(1), they cannot be certain of being granted an attorney.

Similarly, a 2004 Amnesty International report claimed that many detainees during the civil war in Aceh did not have access to legal representation. Even for those that did, the representation was often ineffective.[451]

Conclusion

In order to meet the standards of the ICCPR, the Penal Procedure Code must be amended so that eligibility for legal representation is not limited to an assessment of examination of the seriousness of the sentence that could be applied on conviction. The code must also flag the obligation to provide an unrepresented defendant with effective legal counsel in cases 'where the interests of justice so require'.

In assessing whether a person should be granted a court-appointed attorney, Indonesian courts should take into account a) the complexity of the case, b) the ability of the defendant to present his/her case without assistance, and c) whether or not the person would be likely to receive a custodial sentence on conviction. (a much more generous standard than that contained in the existing Penal Procedure Code).

This final criterion is also relevant to court hearings to determine whether the custody of a detainee should be extended, or whether an accused person should be remanded in pre-trial detention pending trial. In both instances, the detainee's liberty is at stake: in such circumstances, they should have the benefit of legal counsel to represent their interests.

451) Indonesia New Military Operation: Old Patterns of Human Rights Abuses in Aceh, at p. 19.

LEGAL AID IN CIVIL CASES IN RUSSIA

Anton Burkov

Introduction

The paper concerns two issues of rendering legal aid to citizens. Firstly, the right to legal aid within the legislation and judicial practice of the Russian Federation and practice of the European Court of Human Rights. Secondly, the working methods of human rights defenders in respect of rendering legal assistance to citizens in cases where the right to legal aid does not apply in domestic law or practice: in particular, efforts being made to draw the attention of Russian courts to decisions of the European Court of Human Rights, and, in so doing, to further implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russia.

Legal aid in civil cases as a right under Russian law

The large majority of Russian citizens lack effective access to legal services. Only a minority have heard of the possibility to obtain legal aid from civil practice counsels. Those who have actually attempted to obtain legal aid have discovered that this 'possibility' is often illusory in practice. The problems are two-fold: firstly, many lawyers are not willing to provide pro bono services, and secondly, the relevant legislation has the effect of obstructing, rather than facilitating, citizens' access to lawyers.

The Law on "Advocate Activity and Advocacy in the Russian Federation"[452] guarantees free legal aid for Russian citizens and their family members who fall within one of the eligibility categories set out in Article 26, which states as follows:

'1. Legal aid to citizens of the Russian Federation whose families' income per capita is lower than a subsistence minimum set in the subject (regions) of the Russian Federation under the federal legislation as well as to single citizens of the Russian Federation whose incomes are lower than a value specified, shall be rendered free of charge in the following cases:

452) Federal Law No. 63-FZ of 31.05.2002.

1) to plaintiffs - in respect of cases concerning alimony payment, compensation for harm inflicted by the death, maiming, or other labour-related injury;

2) to veterans of the Great Patriotic War - in respect of any non-commercial matter;

3) to citizens of the Russian Federation - when preparing applications for pension or other social service benefits;

4) to citizens of the Russian Federation who are victims of political repression - in respect of matters connected with rehabilitation'.

Unfortunately, the law does not stipulate sources of funding for pro bono services rendered by a lawyer to those categories of persons eligible to receive legal aid. As a consequence, indigent citizens are in practice denied the possibility of enjoying the right to legal aid that they have under Russian law.

While article 26(2) of the law contains a list of the documentary materials required for citizens of the Russian Federation to obtain legal aid, the procedures for their submission are to be found in other Russian laws and regulations, including regulations adopted locally.

For example, the law of Sverdlovsk region of 22.12.2003, entitled 'List of Documents Required for Obtaining Free Legal Aid on the Territory of the Sverdlovsk Region by Certain Categories of Citizens of the Russian Federation and Procedure of Their Submission' provides[453] that plaintiffs in cases in courts of first instance regarding alimony payment, compensation for harm inflicted by the death of a wage-earner, or for injury or other health condition related to employment, shall submit 'the decision by the judge of the court of first instance on initiation of a civil case in the court of first instance'.

What does this provision mean in practice? In order to obtain legal aid a citizen shall prepare a lawsuit in such a way that it is eligible for consideration by court. Those who are familiar with the Russian court system will know that courts often refuse to accept cases, or find reason to strike out a

453) At article 3(2).

case on contrived grounds. Without the assistance of an attorney, it is unlikely that an applicant will be able to prepare an application that meets the eligibility requirements. An applicant can challenge a court's decision on admissibility by appealing to a higher court. Here, a litigant will also need a lawyer, but as is evident from the provisions of the Legal Aid Law in force in Sverdlovsk, it is not possible to obtain legal assistance free of charge. Of course, if a person can read the law and correctly follow the required procedures, he or she will not need a legal representative! But in almost all cases, an unrepresented applicant will find that their application is ruled inadmissible by the judge or court assistant, with the advice: 'we are unable to assist you in preparing your application: go to a lawyer.' In practice therefore, access to justice and the right to legal aid, which are guaranteed by law, are in reality illusory and unobtainable.

A provision of the Sverdlovsk Legal Aid Law, which was creating obstacles for justice to be achieved, was considered by the Charter Court of Sverdlovsk region on 19 October 2004. The interests of the female applicant were represented not by an advocate but by representatives of the human rights organization Sutyajnik.[454] The court found that article 3(2) of the law contravened articles 20(1)(B) and 63 of the Charter of the Sverdlovsk Region, since it infringed upon the right of poor citizens to obtain legal aid at the pre-trial stage of criminal proceedings, and as such restricted indigent citizens' access to justice.[455]

The court stated that the word 'plaintiff', which comes from civil procedure law, must be determined by that body of law and not by legislation adopted by a regional parliament. The regional parliament may not legislate on how an applicant acquires the status of a plaintiff, since this would be an encroachment on the competence of the federal legislator, the State Duma of the Russian Federation.

Furthermore, the courts do not deliver a document called 'the decision by the judge of the court of first instance on initiation of civil case in the court of first instance'. The courts deliver decisions on 'admissibility of the law

454 The full title of the organization is the Urals Centre for Constitutional and International Human Rights Protection of the Non-Governmental Organization Sutyajnik. More details about the organization can be found at http://www.sutyajnik.ru.

455) Court decision accessible at: http://www.sutyajnik.ru/rus/cases/judgements/ust_sud/shavchuk_v_obldumi_26_10_04.htm.

suit for consideration'. Moreover, under the federal legislation plaintiffs are only given copies of decisions on admissibility. So pursuant to the law of the Sverdlovsk region the plaintiffs seeking legal aid shall submit to an advocate the *original of a non-existing court decision*.

As a consequence of the Sverdlovsk Charter Court judgement, 'the decision by the judge of the court of first instance on initiation of civil case in the court of first instance' has now been removed from the list of documents required by indigent plaintiffs in Sverdlovsk region in order to obtain legal aid. As such, they may now approach an advocate and ask for assistance in preparing a lawsuit.

The former procedure for obtaining legal aid, whereby very few applicants for legal aid were ever successful, was advantageous for both those advocates who did not wish to provide legal aid services and for the regional authorities: The advocates were rarely required to provide legal aid and did not need to obtain reimbursement for their expenses from the regional administration, and the authorities would very rarely be required to pay compensation.

The Russian Experiment with legal aid in civil cases

In 2005, the Government of Russia approved the Regulation 'On Conducting Experiment Concerning Creation of State System of Rendering Free Legal Aid to Poor Citizens' (the Regulation).[456] By virtue of the Regulation, legal bureaus were established in 10 regions of the country in 2006. The function of the bureaus is to provide legal aid to poor citizens in civil and criminal cases.

Under the regulation, only those citizens whose per capita income is lower than the minimum subsistence level set by the region of the Federation in which they are living are eligible to receive legal aid. For example, in the third quarter of 2005, the minimum subsistence level for an able-bodied citizen in the Sverdlovsk region was set at 3,060 rubles (just over 100 USD). Thus, only those Sverdlovsk residents whose income is lower than 3,060 rubles would be eligible to receive legal aid.

People who meet the eligibility requirements can obtain oral or written ad-

456) The document is available for download at www.sutyajnik.ru/rus/cases/law/bespl_ur_pom.htm.

vice on any legal matter at the bureaus. The bureaus can also assist clients in drafting legal documents, in making complaints and petitions, and can provide legal representation in civil proceedings and represent citizens' interests in local government bodies and local associations. Nevertheless, the bureau system has a number of serious shortcomings:

The regulation provides that bureaus may enter into legal service provision contracts with private law firms, either on a one-off basis or as part of a general service contract. Bureaus cannot enter into contracts with lawyers attached to human rights organizations, even though the law does not require that a person be an advocate in order to provide legal advice, to draft legal documents or to participate in civil proceedings. Thus, human rights organizations, and the lawyers working for them, are excluded from the operation of the regulation.

A further problem with the regulation, rendering it in effect inoperative, is the amount of remuneration provided to those lawyers who take on legal aid cases. The fee payable is within the discretion of the bureau, but must not be less than ? and not more than ? of the minimum daily wage. In 2007, these figures were 200 and 400 roubles respectively. By comparison, a lawyer in private practice could charge as much as 5000 roubles simply for familiarizing him/herself with the case. Given this disparity, it is not surprising that very few private firms are willing to take on work on behalf of the bureau. Since lawyers from human rights organizations are ineligible to enter into service contracts with the bureau, the consequence is that almost no bureau legal aid clients can obtain legal representation in practice.

Nevertheless, the regulation remains in force - in late 2008 it was extended again for a further one-year period.[457]

Legal aid in civil cases as a right under the European Convention on Human Rights

The inability of legal aid clients to obtain legal representation in practice is in conflict with Russia's international obligations under the European Con-

457) For further analysis of the Russian Federation's State legal aid bureau experiment, please refer to the author's radio interview 'On conducting experiment concerning creation of state system of rendering free legal aid to poor citizens', broadcast on Radio Liberty on 29 August, 2005.
www.sutyajnik.ru/rus/library/interview/2005/o_provedenii_eksperimenta.htm.

vention on Human Rights (the Convention), which Russia acceded to in 1996.

Even if an indigent applicant has formal access to a court, s/he will be unable to present her/his case properly and effectively if s/he cannot obtain legal representation. The federal law 'On Advocate Activity and Advocacy in the Russian Federation' contains an exhaustive list of those categories of persons and types of cases in which free legal counsel may be provided. However, it is obvious that legal aid is also needed by other categories of citizens or in other types of cases that are not listed in the 'Advocate Activity and Advocacy' law.

By way of example, a female applicant M, 58 years of age without any legal education, had no choice but to represent herself in a complicated case in the Arbitration Court involving incorporation of and membership in a commercial organization. A team of three lawyers and two company advisors represented the respondent in the case, a corporation.

In the interpretation of the European Court of Human Rights, it constitutes a violation of the Convention if a person cannot afford to engage a lawyer and is therefore unable to exercise effectively her/his right of access to justice. In the case of *Airey v Ireland*[458] the court held that the respondent had an obligation in the interests of justice to facilitate legal representation for the applicant in a divorce matter in which she was one of the parties, due to the complexity of the facts and the emotionally charged nature of the proceedings.

In the case of *Steel and Morris vs United Kingdom,* the European Court held that legal aid should have been provided in an extremely complicated civil case where one party was unable to pay for legal representation while the other was a commercial organization with the ability to hire an entire legal team.[459]

Based on the existing European case law, let us consider indigent applicant M's case, which is now on appeal to the European Court of Human Rights, in detail:

458) Airey v Ireland, Application No. 6289/73, judgement of 9 October 1979.

459) Steel and Morris vs UK, Application No. 68416/01, judgement of 15 February 2005 para50.

A factually and legally complex matter

The case involves the restructuring of a legal entity and the determination of the extent of participation of the plaintiff in the legal entity. It is an extremely complicated matter due to the number of procedural and substantive laws addressing this issue and the lack of clarity as to how they should be applied in practice. Since the disintegration of the former USSR, the law on Legal Persons and Entrepreneurial Activity has been subject to major revisions and in 2002, a new Arbitration Procedural Code was adopted.

The case of M commenced in a Court of General Jurisdiction, which at the time had the authority to receive the application, but following the adoption of the new Arbitration Procedural Code in 2002, it was transferred to the Court of Arbitration. When the case was transferred, almost three years had elapsed since the application was filed. In the course of the proceedings, there were five court sessions in the Court of General Jurisdiction and 36 in the Arbitration Court. Where disputes regarding legal entities come before the court, the parties almost invariably have legal representation. In this case, three lawyers and two company advisors represented the respondent. The parties had filed over 1000 individual documents with the court.

High cost of advocates' services in arbitration cases.

Applicant M could not afford to pay for the services of an advocate to represent her in the proceedings. According to information published in the article 'Lawful Millions'[460], Russian lawyers do not yet match their foreign counterparts in terms of numbers of clients, but they certainly do with respect to income generated. Fees for conducting an arbitration case can range from 10,000 to 50,000 US dollars. In the case of M, given the complexity of the matter and the fact that over 40 court sessions were convened during the proceedings, the cost of engaging a lawyer could have been in excess of 40,000 USD.

Applicant's income was insufficient for her to pay for counsel

The applicant could not afford to pay for the services of counsel due to her comparatively low income. The average monthly salary in Russia in 2006 was 3,000 roubles (a little more than 100 USD). In addition to the costs of

460) Forbes Magazine, January 2006, at p. 63.

engaging a lawyer, the applicant, having filed the application, was obliged to pay for court expenses at all stages of the proceedings. Furthermore, the applicant was required to pay a state duty, which she could not afford, and she had therefore petitioned to the court for a delay in making the payment.

Pursuant to Article 26, 'Rendering free legal aid to citizens of the Russian Federation,' of the 2002 Law 'On Advocate Activity and Advocacy in the Russian Federation' the applicant was not eligible for free legal representation. There is no discretion available in the application of article 26, irrespectively of the complexity of the case in question. .

Being unable to pay for legal counsel, the applicant could not find a lawyer willing to represent her in court. Given that the respondent in the case had a team of three lawyers and that the case involved complicated legal issues, it is arguable that the failure to provide the applicant with legal aid amounted to a restriction of her right of access to justice, in contravention of article 6(1) of the European Convention.

The applicant was not capable of representing herself in the proceedings

The applicant was a physical education teacher, with no legal training or experience. She had a strong emotional involvement in the case, because she had devoted most of her working life to the activities of the legal entity until its recent reorganization, and this made it more difficult for her to represent herself in the proceedings. The stress of the court sessions and of responding to the submissions of the respondent's legal team, and the presence of the senior representatives of the company, including the company director, resulted in her suffering a nervous breakdown. She lost the case, but has filed an application with the European Court, which is currently pending.[461]

Activities of human rights defenders to provide legal aid to citizens in cases where they are not eligible for state-funded legal assistance

Entry of the Russian Federation into the Council of Europe and obligation to apply the Convention within the frameworks of the national legal system

461) More information on the case of Mikhailova vs Russia is available on the site of the NGO 'Sutyajnik': http://www.sutyajnik.ru/cases/46.html

On February 28, 1996, the Russian Federation was admitted into membership of the Council of Europe, even though its national law was not (and is still not) in compliance with the mandatory requirements for member states. A 1994 report prepared by a group of eminent lawyers for the Parliamentary Assembly of the Council of Europe came to the conclusion that the legal order of the Russian Federation was not in compliance with the standards of the Council of Europe as expressed in its statute and developed by the institutions of the European Convention for the Protection of Human Rights[462]. A 1996 memorandum prepared by the Legal Department of the Russian Ministry of Foreign Affairs of the Russian Federation, just prior to the country's accession to the organization, reached the same conclusion.[463]

Consequences of Russia's accession

Russia's accession to the Council of Europe under such circumstances is troubling because, inter alia, 'given Russia's lack of experience in protecting human rights at the level of municipal law, it is likely that a great many violations of European human rights law will be committed there, and that they will not be remedied domestically.'[464]

Quality of the application of the Convention in Russian courts

Pursuant to article 1 of the European Convention, the Russian Federation has assumed an obligation to provide anybody under its jurisdiction with rights and freedoms determined in section 1 of the Convention. When analysing the court practice, one gets the impression that in Russia this obligation is generally understood as acknowledgement by the Russian authorities of the powers of the European Court to consider applications claiming violations of the provisions of the convention committed by the Russian Federation. In other words, there is a tendency in Russia to view

462) Council of Europe, Parliamentary Assembly, Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards prepared by Rudolf Bernhardt, Stefan Trechsel, Albert Weitzel, and Felix Ermacora, 7 October 1994. 15:7 Human Rights Law Journal (1994) p. 287; ???. ??: M. Janis, Russia and the 'Legality' of Strasbourg Law. European Journal of International Law (1997) p. 93.

463) European Court of Human Rights and Protection for Freedom of Speech in Russia: precedents, analysis, recommendations / under editorship of G. V. Vinokourov, A.G. Richter, V.V. Chernyshev. Institute of Informational Law, 2004 - V. 2 - (Journalism and Law; Issue 43) Electronic source: www.medialaw.ru/ articlelO/7/2.htm.

464) See M. Janis, Russia and the 'Legality' of Strasbourg Law at p. 98.

ratification of the convention as the recognition of the right of Russian citizens to 'write to Strasbourg', as a panacea for all woes[465], but without there being any clear connection with the judgements of the court and Russian law and judicial practice. This is in conflict with the basic idea of international human rights law, which is that human rights 'begin at home.'[466]

What this means in practice is that Russian judges are unwilling to apply the Convention in their judgements. Of 3,911 court decisions of the Supreme Court of the Russian Federation as of September 2004, only 12 mentioned the Convention: in 8 cases the Supreme Court made an assessment of whether one or more acts of a party to the proceedings were in contravention of the Convention, and in 4 cases the court made reference to submissions by the parties citing the Convention, but did not proceed to make its own evaluation of the provisions in question. Even in those 8 cases where the court has directly applied the Convention, the court erred in its judgement by failing to consider the European Court's case law when interpreting the content of the Convention.

For example, in one case the Supreme Court applied article 14 of the Convention as an independent article, without reference to the European Court's case law or to other, related, provisions of the Convention. The practice of the Supreme Court in applying the Convention is generally unsatisfactory. This conclusion is made based on an analysis undertaken by the author of the practice of the Supreme Court during September 2002, looking at decisions of the court of first instance, the court of cassation (appeal), and the extraordinary appeal instance *(nazdor)*. The situation is just as bad if not worse as regards subordinate courts and courts of arbitration. The only bright spots are in the practice of the Constitutional Court and in the judgements of some judges of the federal district courts.[467]

---

465) See A. V. Demeneva, European Court: Panacea From All Woes? Judicial Protection of Citizens' Rights in its Best Forms: Materials of scientific practical conference, under editorship of A.L. Burkov – Yekaterinburg, Publishing House of the Urals University, 2003, p. 36. Available also at www.sutyajnik.ru/rus/library/sborniki/sud_zaschita.pdf.

466) K. Boyle Application of International Obligations in the Field of Human Rights at National Level: Course of lectures on 'International Law for Protection of Human Rights' under Essex University Master's programme 2003–2004 (unpublished).

467) For more detail in Russian see Application of the European Convention on Human Rights in Russian Courts / under editorship of A. L. Burkov - Yekaterinburg: Urals University Press, 2006, p. 264 (International Human Rights Protection; Issue 6), www.sutyajnik.ru/rus/library/sborniki/echr6 and in English Anton Burkov, Impact of the European Convention for the Protection of Human Rights and Fundamental www.sutyajnik.ru/rus/library/sborniki/ibidem

The situation in relation to domestic application of the Convention by the Supreme Court did not change noticeably after 10 October 2003, the date of the promulgation of the Regulation No. 5 of 10 October 2003, 'On the Application by Courts of General Jurisdiction of the Generally Recognized Principles and Norms of International Law and the International Treaties of the Russian Federation'[468] (the 2003 Regulation) by the Plenum of the Supreme Court. As in the case of the first period under scrutiny, the author, using data from the Supreme Court's website,[469] analysed the jurisprudence of the Supreme Court in civil cases as a court of first instance, second instance and extraordinary appeal instance. The overall number of judgements under scrutiny within the study period, 1 August 2004 to 20 December 2007, was 3,723.

The approach taken by the Supreme Court to the application of the Convention following the promulgation of the 2003 Regulation can be characterized as follows:

1) As was the case prior to the 2003 Regulation, there are very few references to the Convention to be found in the court's judgements. Only 32 out of 3,723 judgements during the period under examination refer to the Convention. Of course, it would not be relevant for the court to refer to the Convention in every decision. Many of the cases considered by the court are not related to human rights law. But in making an assessment as to what percentage of cases one might expect that the Supreme Court would take the Convention into account, one must bear in mind the court's jurisdiction.

As a court of first instance, the Supreme Court functions in a similar way to the Constitutional Court, which conducts judicial review of government actions. Under article 27 of the Civil Procedure Code, the Supreme Court most often considers applications (*zaiavleniia*) by physical or legal persons against acts of state organs, such as the President of the Russian Federation, the Houses of the Federal Assembly (parliament), the Government of the Russian Federation, or other federal authorities, where such authorities are alleged to have violated 'rights and freedoms and legal interests of these citizens and organizations'. The Supreme Court also considers cases of dissolution of political parties and Russian

468) Bulleten' Verkhovnogo Suda Rossiiskoi Federatsii 12 (2003).
469) www.supcourt.ru.

or international non-governmental organizations. As a court of second instance, the Supreme Court considers *inter alia* appeals against judgements delivered by courts of regions of the Russian Federation concerning normative acts of regional state organs (ref. article 26 of the Civil Procedure Code). In cases where one of the parties is a private or legal person and the other is a state organ, the Convention is particularly likely to be relevant.

The Supreme Court, as a court of cassation and extraordinary instance, reviews lower courts' decisions from the point of view of whether fair trial guarantees have been respected (that is, whether or not there has been a violation of procedural norms). Taking this into account, it is submitted that 32 instances of application of the Convention out of 3,723 cases do not suggest that there has been any significant application of the convention by the Supreme Court. The situation is even worse when one examines individual cases and observes how reluctant the court is to take into account the case law of the European Court where the Convention clearly did apply.

2) Only in those cases where a national court actually refers to the jurisprudence of the European Court is it possible to say that the court has genuinely applied the Convention in reaching judgement. So let us look at those 32 instances where the Supreme Court mentioned the Convention to see whether the Supreme Court also considered the case law of the European Court, and if so, to what extent. There are a small number of cases post-promulgation of the 2003 Regulation where the Supreme Court referred to the European case law. In six out of 32 of the judgements mentioned above, one can find a discussion in the Supreme Court judgement not only of provisions of the Convention but also of the way in which these have been interpreted by Strasbourg. Six cases out 3,723 judgements examined are not very many, but it is still a positive development, given that there are no considerations of Euroepan case-law at all in the pre-2003 judgements.

But this is only a start. The Supreme Court clearly needs to be much more active in its consideration of the European Convention, as interpreted by the judgements of the European Court, if the Convention is to be incorporated into domestic judicial practice.

It is in this judicial setting that human rights lawyers in Russia are seeking to present submissions based on the provisions of the Convention and the

case law of the European Court. The following paragraphs of this article describe the experiences of one Russian non-governmental organization, 'Sutyajnik', in providing legal aid in matters for which there was no existing legal jurisprudence in Russia.

The Urals Centre for Constitutional and International Human Rights Protection of the NGO 'Sutyajnik' has been attempting to solve the problem of the non-application of the convention by Russian Courts by carrying out strategic litigation. The litigation conducted by Sutyajnik has two goals: firstly, to secure the application by Russian Courts of the principles of the Convention as interpreted by the European Court in Strasbourg; and secondly, to educate Russian judges, lawyers, and human rights defenders on how to apply the international guarantees in individual cases.

When Sutyasjnik first commenced operations in 1996, none of the organization's lawyers, not to mention Russian lawyers in general, was familiar with the Convention or how to apply it in Russian law and practice. European human rights law was not taught in law faculties, and there were no Russian-language textbooks or guides on the Convention, its interpretation or application. The only way to learn about the Convention was through self-tuition. One of the first steps taken by Sutyasjnik and human rights activists in the Urals region was to start a campaign for legal education on the Convention, which gained the support and involvement of experts from the Commission of Human Rights of the Council of Europe, the London-based organization *Interights*, and the Human Rights Centre at the University of Essex, UK.

As mentioned above, Sutyajnik has sought to promote the application of the Convention in Russia by filing lawsuits on behalf of legal aid clients in a variety of different Russian courts. In each lawsuit undertaken, Sutyajnik prepared a case memorandum which included a section devoted to relevant provisions of the Convention and case-law form the European Court.

Monitoring of court decisions made by Russian courts has shown that the main reasons for non-application of the Convention are a) lack of awareness on the part of judges and lawyers of the Convention; b) lack of experience on the part of judges in applying international law in domestic court judgements. As the Convention becomes better known in the legal community, judges are likely to refer to it more often in their judgements, even

if in a rather primitive manner, which over time could have a positive impact.[470]

In addition to strategic litigation, Sutyajnik has been carrying out a number of other activities aimed at promoting the standards of the European Convention:

1) Training seminars for lawyers, government employees, non-governmental organizations, trade unions and law students;

2) Publishing articles in newspapers and legal journals;

3) Publishing brochures and books for distribution among judges, lawyers, public officials and members of the public;

4) Hosting press conferences, round-table discussions on new judgements of the European Court, particularly on those cases involving the Russian Federation;

5) Participating in conferences and seminars;

6) Development of a special website, 'We learn about the European Convention,'[471] designed for use by school students and members of the public. Visitors to this website can access information on the convention, on the case-law of the European Court, on relevant Russian laws and on decisions on Russian Courts where the convention has been applied; and

7) Advising and assisting clients in preparing and filing applications with the European Court.

The quality of legal education in Russia, particularly as regards international law, is generally unsatisfactory. Many judges in the Commonwealth

---

470) For more details in Russian see Application of the European Convention on Human Rights in Russian Courts, under editorship of A. L. Burkov - Yekaterinburg: Urals University Press, 2006 p. 264 (International Human Rights Protection; Issue 6), www.sutyajnik.ru/rus/library/sborniki/echr6 and in English Anton Burkov, Impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms on Russian Law (Stuttgart: ibidem-Verlag, 2007), www.sutyajnik.ru/rus/library/sborniki/ibidem

471) www.sutyajnik.ru/rus/echr/school.

of Independent States were educated and formed their systems of values during the Soviet era. In many CIS countries, international law and human rights law are not included in the basic programme of legal education and practical training for lawyers and judges. According to the representative of the Russian Federation in the European Court of Human Rights 'education courses read in our higher education establishments either have no information on the European Court at all or they have it in insufficient quantity.'[472] Knowledge of the field of international law is rarely assessed in bar or judiciary entry examinations.

Textbooks and manuals for studying and applying the convention are not readily available, and even those that do exist are often of poor academic quality. One exception is the series of publications on international protection of human rights prepared by the Urals Centre for Constitutional and International Protection of Human Rights.[473]

Conclusion

As demonstrated by a review of recent judicial practice, current Russian legislation and practice on legal aid in civil cases is not flexible enough to meet the requirements of the European Convention on Human Rights. At the present time, these gaps in legal aid accessibility are being filled by human rights organizations offering free legal services and legal awareness programmes. The ongoing work of human rights and community legal services organizations, encompassing not only legal advice and representation but also legal education and dissemination of information about the standards of the Convention and the judgements of the European Court, is essential if Russian advocates and judges are to refer more frequently to the case-law of the court in their submission and judgements, or if the principles of the Convention, still so unfamiliar to Russian citizens, are to be fully incorporated into Russian law and judicial practice.

472) P. A. Laptev, Legal Positions of the European Court of Human Rights and Penitential Reform of the Russian Federation, 4 Human Rights 2006, p. 12.

473) http://sutyajnik.ru/rus/library/sborniki/echr6/

THE PROMOTION OF ACCESS TO JUSTICE BY UNIVERSITY LAW CLINICS IN SOUTH AFRICA

Seehaam Samaai

Introduction

Access to justice in South Africa remains a fundamental need of citizens, without which they cannot fully enjoy their rights.[474] Although it is the duty of the State to ensure that its citizens enjoy their rights to access justice[475], in South Africa access to justice for the poor is provided in a number of different ways:[476]

Legal Aid South Africa (previously Legal Aid Board)[477]

The Legal Aid South Africa is an autonomous body established by the Legal Aid Act (Act 22 of 1969) and the Legal Aid Act (Act 20 of 1969). The objective of Legal Aid South Africa is to render or make available legal representation to indigent persons at state expense as contemplated in the Constitution of the Republic of South Africa (Act 108 of 1996), which affords every citizen access to justice.[478]

Legal Aid South Africa provides a mixed legal services delivery system through justice centres[479], cooperation agreements[480] and judicare[481]. For the period 2005 85% of the matters were handled by the in house attorneys of the justice centres, 13% by judicare and 3% by cooperation partners (law

474) Sarkin J (1993) 'Current Developments' 18 *SAJHR* 639.
475) Sarkin J 1993 639.
476) Sarkin J 1993:630.
477) See www.legal-aid.co.za.
478) See www.legal-aid.co.za accessed 7/07/2009.
479) These are centres set up in areas and it employs attorneys, paralegals and candidate attorneys. There are currently 59 offices throughout the country and they concentrate predominantly in criminal matters. From its 2005 annual report 84% of all legal matters of the Board were handled by the Justice Centre.
480) To extend the provision of legal services to all areas, the Legal Aid Board forms cooperation agreements with other legal services institutions like law clinics and public interest law firms in various specialist areas. 3% of the Legal Aid Board matters were delivered by the cooperation partners. See 2005 Annual Report of the Legal Aid Board.
481) According to the 2005 Annual Report 13% of the legal matters were handled by private practitioners who were paid by the Legal Aid Board to handle the matter.

clinics).[482] In 2008 89% was provided by justice centres, 10% judicare partners and 1% by the cooperation partners.[483]

There are currently 59 justice centres in South Africa and they concentrate predominantly in criminal matters.[484] From its 2005 annual report the Legal Aid Board spent 13% of their budget on civil legal aid assisting approximately 43,000 persons.[485] Since 2005 the Legal Aid Board has maintained a 10% margin of providing civil legal aid due to capacity constraints.[486]

Pro Bono services by private lawyers and advocates

Many private attorneys provide free legal services to indigent persons. In terms of the Cape Law Society Rules it is compulsory for all attorneys to provide 24 hours of pro bono services. These services are provided through accredited structures. Law firms falling within the Cape Law Society jurisdiction receives instructions via these structures to assist with legal matters.

Public interest law firms

These are institutions who apply for law clinic status to their respective law society so as to provide and represent legal services to indigent persons and they are not state funded and are non-profit organizations. They receive funding via donors to provide a legal service within a general or specific focal area. These institutions are *inter alia* Women Legal Centre[487], Lawyers for Human Rights[488], Legal Resources Centre[489], Aids Law Project[490], and Centre for Rural Legal Studies[491].

---

482) See 2005/2006 Annual Report of Legal Aid Board at page 15 accessed 7/07/2009 at www.legal-aid.co.za.

483) See 2005/2006 Annual Report of Legal Aid Board at page 10 accessed 7/07/2009 at www.legal-aid.co.za.

484) See 2007/2008 Annual Report of the Legal Aid Board at page 19 accessed 7/07/2009 at www.legal.ad.co.za.

485) See 2007/2008 Annual Report of Legal Aid Board at page 13 accessed 7/07/2009 at www.legal-aid.co.za.

486) See 2007/2008 Annual Report.

487) See Women Legal Centre website at www.wlce.org.za.

488) See Lawyers for Human Rights website at www.lhr.org.za.

489) See Legal Resources Centre website at www.lrc.org.za.

490) See Aids Law Project website at www.alp.org.za.

491) See Centre for Rural Legal Studies website at www.crls.org.za.

Community based paralegal advice offices

Community based paralegal offices have a long history in South Africa. They were set up by community structures in response to the political and human rights persecutions of the apartheid state. These offices were always the first point of entry for many political detainee's and community members seeking legal assistance. Advice offices continue to play a significant role in providing access to justice to the poor and marginalized in areas where there are no direct legal services. They are based in the communities in provide paralegal services to indigent persons. Post 1994 many of these advice offices formed a uniform structure called the National Community Based Paralegal Association (NCBPA) to lobby on their behalf. This organization although politically might still have a presence in some provinces do not have the resources and capacity to provide a centralized support network to these advice offices. Many of these advice offices which were associated to the NCBPA entered into cooperation agreements with law clinics forming part of the access to justice clusters and they operate more on a regional level.

There are also a range of other networks of community based paralegal associations providing support to paralegal advice office i.e. Community Law and Rural Development Centre who has a network of 36 paralegal advice offices in Kwazulu Natal[492], Ithembalabantu Community Resource Centres[493], Social Assistance Trust, Black Sash etc. These organizations and their networks of paralegal advice offices formed a National Alliance for the Development of Community Based Organizations (NADCAO) with the aim of promoting the interests of community based paralegal offices and facilitate and expand access to social justice by the poor in South Africa through voice and knowledge sharing, support and development, and resource mobilization.[494]

492) Information accessed from National Alliance for the Development of Community Advice Offices (NADCAO) website www.nadcao.org.za. The organization provides paralegal training, human rights and democracy education, provision of legal services, facilitation of community tailor-made development projects.

493) Ithembalabantu is a non-profit and a membership-based network of Community Resource Centers or Advice Offices that was established in September 2004. See www.nadcao.org.za for further information.

494) Information accessed on the NADCAO website (www.nadcao.org.za) on 7/09/2009.

Non- governmental organizations
There are many organizations that assist poor and marginalized communities with legal advice on social security, housing/land and other human rights related legal matters. Organizations who provide a form of paralegal as well as advocacy support are *inter alia* Black Sash Trust[495], Women on Farms[496], etc.

Legal insurance schemes
These are entities who charge clients a premium for legal assistance. They are not law firms or law clinics and they cannot represent these clients. Many banks are also offering a legal advice service at a fixed monthly rate.

Independently- funded university based law clinics
University law clinics or legal aid clinics are offices staffed by law students under the supervision of qualified lawyers. They provide free legal services to indigent members of the community. In 1986 the law clinics formed an association called the Association of Legal Aid Institutions (AULAI) to promote the interests of law clinics in South Africa. It is a formally constituted organization, which functions as a lobbying and representative body for all South African law clinics. In recent years it has extended its relationships into Africa and other international jurisdictions. Further reading on the various law clinics and its organizational structure can be accessed from the AULAI website.[497]

Legal aid is one of the main vehicles of the poor in accessing their basic human rights and in spite of the increase of capacity of Legal Aid South Africa and the formation of justice centres, access to civil legal aid remains a challenge to the Legal Aid Board South Africa notwithstanding their commitment to spend 15% percent of their annual budget on civil legal aid.[498]

The provision of access to justice in civil legal aid thus remains the prerogative of civil society which includes public interest law firms, law clinics, paralegal advice offices and various non-governmental organizations within a shrinking pool of funding.

---

495) See Black Sash website at www.blacksash.org.za.
496) See Women on Farms Project at www.wfp.org.za.
497) See www.aulai.org.za.
498) De Klerk W, (2005) 'University Law Clinics in South Africa' 122(4) *SALJ* 940, 94.

This article will not concentrate on all of these initiatives but rather focus on the contribution of university law clinics (law clinics) in the promotion of access to justice and the methods these law clinics employ to facilitate the delivery of legal aid services to the poor and marginalized in civil related legal matters. It explores the historical role of law clinics in providing access to justice and identifies the various challenges which law clinics face in increasing access to justice for the poor. It highlights the positive initiatives undertaken by various law clinics which enhance access to justice and it examines the future role of law clinics in light of the gradual but positive expansions of the Legal Aid South Africa in the provision of access to justice to indigent persons and the needs of a transforming profession.

Although this article focuses primarily on South African law clinics the writer is confident that that many readers will be able to identify with our issues and therefore make this article on law clinics interesting for all.

Background[499]

University law clinics or legal aid clinics (law clinics) are offices staffed by clinicians who are attorneys/advocates who supervise law students, candidate attorneys and law students. These law clinics provide free legal services to indigent members of the community. In a developing country such as South Africa where there are vast economic and social differences between the rich and the poor and where the majority of the population do not have access to proper legal services, law clinics take the form of legal aid clinics and deal predominantly with poverty-related legal issues.

Law clinics and in a sense clinical legal education emerged in South Africa primarily at the insistence and as a result of the initiatives taken by law students during a time when there was a need for grass-roots legal representation by indigent persons who faced police brutality, forced removals, detention without trial and breaches of fundamental human rights.[500]

499) Information obtained from the Association of University of Law Institutes submission to the Attorneys Fidelity Fund on the 'Impact of the withdrawal of AFF funding to Law clinics' (2006) drafted by F. Haupt and S. Samaai. A copy may be accessed from the Secretary of AULAI see www.aulai.org.za.

500) De Klerk 2005: 940.

In the 1970's, committed and enthusiastic law students, who wished to contribute some service to disenfranchised communities, established 'legal aid clinics'.[501] The 'clinic' was unstructured at that time and the focus was primarily access to justice. Clinics then known as legal aid clinics were initially founded, managed and staffed by students on a voluntary basis with no or very little supervision from faculty and only some ad hoc involvement of practitioners.[502]

The first South African university legal aid clinic was established in September 1971 at the University of Cape Town.[503] At the University of Witwatersrand an 'off-campus' clinic was set up at the beginning of 1973.[504] In 1973 a 'Legal Aid in South Africa' conference was held which was sponsored by the Ford Foundation and it was attended by representatives of universities, government, the profession and the Legal Aid South Africa and thereafter more clinics were established.[505]

Clinics were started at the University of Natal in Durban in 1973 and in Pietermaritzburg in 1974. This was followed by Port Elizabeth (1974), Stellenbosch and Western Cape (1975), Durban Westville and Zululand (1978), Rhodes (1979) and Pretoria (1980) and the remaining universities all founded clinics in the 80's.[506] The establishment of these clinics was a response to the unmet need for legal services from the marginalized indigent.[507]

During this period students and the professionals attached to the clinics took their faculties to task and demanded a more functional, problem solving and service orientated approach to legal education. Despite resistance (some which still exists to this day) the curriculum was gradually adapted to make provision for more skills training, values and the teaching of law in social context.

---

501) McQuoid-Mason D 2004) Access to Justice and the role of law schools in developing countries: some lessons learned.
502) See McQuoid-Mason D 2004:34.
503) See McQuoid -Mason D 2004:34.
504) See McQuoid-Mason D 2004:34.
505) See McQuoid-Mason D 2004:34.
506) See McQuoid-Mason D 2004:34.
507) See McQuoid-Mason D 2004:34.

The strength of clinical movement in South Africa was thus borne out of the need for access to justice by the disadvantaged and poor communities. Law clinics became an effective tool within the legal profession to fight injustice, as it provided a network where the interests of public interest lawyers, law students, candidates from disadvantaged backgrounds and the poor converged in one place.[508] Many clinics operated in places where there was a need for legal representation as state legal aid was absent.

In the early 1990's various clinics obtained formal law clinic accreditation and this allowed clinics to have candidate attorneys often from the ranks of the previously disadvantaged. Clinics started operating as fully-fledged law firms under strict guidelines prescribed by the Law Society.[509]

With the advent of our democracy and the country's move towards a rights-based constitutional dispensation, clinics recognized the need to provide access to justice to poor and marginalized communities, who have historically been denied access to legal aid, as the Legal Aid South Africa did not have the capacity, infrastructure or resources to service the increased legal aid referrals. During this time Legal Aid South Africa (previously named Legal Aid Board) was 'increasingly' relying on law clinics as alternative vehicles for the provision of access to justice'.[510]

To further promote access to justice, law clinics started various networks with paralegal networks so as to provide a better qualitative service to indigent communities. Clinics became more focused in its legal services provision and various co-operation agreements were entered into with donors.

Donor funding was obtained to fund the various legal units of law clinics and to build capacity to improve access to justice.[511]

As the access to justice component of the law clinics grew, the law clinics human-rights related projects serviced more indigent persons and many clinics became specialized in their field of operation and specialist law clinics were established. law clinics contributed significantly towards access to

508) Sarkin 2002: 634.

509) See Bodenstein J 2005 'Access to Legal Aid in Rural South Africa' Obiter 312. The Attorneys Act 1993 was amended to allow candidate attorneys to do community services at accredited law clinics.

510) De Klerk 2005:940.

511) De Klerk 2005: 941.

justice through these specialist clinics, however, it was at the expense of clinical legal education and teaching.

Many universities do not fund the access to justice component of the law clinics and many law clinics have to source funding from different sources and in particular external donors. Although the legal services component of law clinics became more formalized, funding became a major issue as donors over the years became more stringent in its funding requirements. Law clinics are now also competing for funding against other public interest law firms. Law clinics receive funds *inter alia* from their respective faculties, grants from international donors, AULAI Trust, and Attorneys Fidelity Fund of the Law Society of South Africa.[512]

Further with the restructuring of Legal Aid South and their increase of resources and capacity to provide legal services to the poor and marginalized, it became important for law clinics to redefine it role in providing access to justice in light of these challenges.

There are currently 19 university based law clinics in South Africa[513] which provide access to professional legal services to a large part of the country who through their various community networks and satellite offices provide free legal services and access to justice to the poor and marginalized communities in urban and rural areas.

Provision of free legal services by law clinics

General and specialist law clinics

Law clinics started off as advice and referral offices and gradually developed into general law practices which engage in a variety of cases, restricted only by the limitations placed on them by various law societies and the profile of their clients. These law clinics operate either from premises

512) For further reading see Bodenstein 2005:316.

513) I.e. University of South Africa, Witwatersrand Law Clinic, Johannesburg Law Clinic, Pretoria Law Clinic, Free State Law Clinic, Rhodes Law Clinic, Fort Hare Legal Aid Clinic, Walters Sisulu Law Clinic, Nelson Mandela University Law Clinic, Fort Hare Law Clinic, UKZN Howard College Law Clinic, , UKZN Pietermaritzburg Law Clinic, Limpopo Law Clinic, Venda Law Clinic, University of Potchefstroom Law Clinic (CCLD), University of Potchefstroom Mafikeng Campus Law Clinic, University Western Cape Law Clinic, University of Cape Town Law Clinic, University Stellenbosch Law Clinic. For further information see http://www.aulai.org.za. Before the University mergers there were 21 University based law clinics.

provided for by the university or satellite offices in nearby communities. Clients seeking legal assistance make an appointment and are interviewed either by the law clinic students under the direct supervision of a qualified attorney or by the respective professional staff member. In general these law clinics provide legal services in an area of law broadly classified as 'poverty law',[514] typically consisting of matters such as Legal Aid South Africa our disputes, consumer complaints, housing issues, access to social services, maintenance and family law matters, debt- related matters and criminal matters.

Many law clinics have also evolved from this general model into more specialized clinics which concentrates more on the needs of the previously disadvantaged groups like women, children, people living with HIV/AIDS, the landless, farm workers, refugees, etc. Law clinics became specialist within their various fields of operation and established specialist legal units.[515]

These specialist clinics receive funding from international as well as national donors and will in all probability continue to receive donor funds as they provide a specialist service to indigent communities.

Satellite offices

Law clinics are always looking for innovative and efficient ways to provide broader access to justice to rural poor communities in South Africa. This exploration has resulted in a partnership with community advice offices. Law clinics identified community advice offices and resource centres in peri-urban and rural areas where they could provide legal services. Law clinics recognized that any intervention aimed at providing quality and cost effective legal services to indigent and marginalized communities in rural and remote areas in South Africa must of necessity rely upon a network of skilled paralegal caseworkers.

The many benefits include the fact that paralegals attend to a range of matters, which, whilst requiring legal intervention, do not necessarily require the intervention of an attorney, or will only require such intervention at a later date. They have a locally based presence and contact point at which services can be readily accessed by beneficiaries when the need arises.

514) McQuoid –Mason 1982 An outline of legal aid in South Africa Durban Butterworth 139.
515) See Bodenstein 2005:312.

Community based paralegals are able to provide efficient legal service provision across a vast geographical area with limited resources. They can determine and be sensitive to local community dynamics and issues. This assists in ensuring targeted legal service interventions.

As part of the clinical legal education program, law clinics introduced a client outreach program, where students visit community based advice offices in communities to interact, interview and take instructions from clients in the environment in which they live. In this way students are able to experience and analyse legal problems in their social, political, economic and cultural context.

Formation of Access to Justice Clusters

To avoid the duplication of services and resources and to provide focussed quality legal and paralegal services, the AULAI Trust[516] with various National Community Based Paralegal Association advice offices formed access to justice clusters within different provinces. These clusters were formed due to an urgent and direct need for the provision of legal services to indigent persons and communities within defined and specific focal areas. These cluster networks promote access to justice and legal services to the poor and marginalized through the co ordination of the services and activities of the various partners in an integrated and sustainable way so that individuals as well as communities may access their various rights.

Since 2003, five Access to Justice clusters have been established to initiate a legal services network for indigent communities to access their rights. Although each cluster operates slightly differently from each other, their focus is providing legal services to indigent rural communities and the education and training of paralegals in various areas of law so that they can better assist the communities in which they are located.

---

516) IT mechanisms, structures and extensive experience in facilitating the work of law clinics. It employs an external financial management company to assist with financial administration and management of donor funding for the benefit of the individual funders and law clinics. Leading law professors and clinicians serve as trustees and freely give of their time and expertise to ensure that the objectives of the trust are fulfilled. is distinct from the Aulai Trust is distinct legal entity from the Association of Legal Aid Institutions (AULAI). The AULAI Trust is a non-profit organization, was established in 1998 to support and promote institutions committed to the provision of legal aid services to poor and marginalized parts of South African society. It is registered as provided for by law and has appropriate

These Access to Justice clusters are located in the Western Cape, Eastern Cape, North West, Mpumalanga and Limpopo Provinces. The major stakeholders in the Access to Justice Cluster project are the AULAI Trust, university law clinics and paralegal advice offices.

A cluster is a co-operative body of law clinics, paralegal advice offices justice centres, private practitioners and/or other organizations, structured, formally and jointly managed by representatives of all the participants/stakeholders, with the aim of providing access to justice and paralegal services to poor and marginalized people in rural and remote areas, informal settlements and squatter camps, supported through funders or through the state legal aid system or other governmental bodies.[517]

Decision makers and implementers within the clusters are the stakeholders within a particular cluster and they form the management and implementation committee of that cluster.

In addition to the access to justice clusters, law clinics are also involved in specialist land clusters in the Eastern Cape Province, Mpumulanga, North West and Kwazulu Natal. These land clusters, although striving for access to justice for all, have specialized focuses on land rights.

Case study on how 'clustering' of legal services are benefiting the poor and marginalized in areas within the Western Cape

The Cape Human Rights Cluster (CHRC) was originally established in March 2001 by the University of the Western Cape Legal Aid Clinic (UWC Legal Aid) and the National Association of Community Based Paralegal Association (NCBPA) as a back-up legal services project and the only area of operation was the Metro region. In 2003 the coordination of the CHRC was taken over by UWC Legal Aid Clinic and the CHRC extended its area of operation to the rural areas of Boland and West Coast regions of the Western Cape. Cooperation Agreements were also signed with the University of Stellenbosch and Cape Town Legal Aid Clinics and more than 20 advice offices were being serviced by the extended legal teams. The CHRC via the Law Clinics provided training to advice offices in Referral & file management systems, Organizational,

517) Accessed from the AULAI Trust Agreement with Cape Human Rights Cluster, dated 1 January 2009.

Project and Financial Systems management, Local Economic Development and they were advised to draft business plans and to register as non-profit organizations. The Aulai Trust via International Commission of Jurist - Sweden funding, funded advice offices that were registered as non profit organizations and who implemented the CHRC requirements for organizational systems. These offices referred cases to the Law Clinics and they conducted regular circuits to these offices. The CHRC identified various access to justice role players who could strengthen the CHRC operations, avoid duplication of services, identify how capacity could be increased and how funding could be diversified to benefit all the partners of the CHRC in a sustainable manner.

In 2003, the Cape law Society made it compulsory for Attorneys in the Western Cape to provide 24 hour minimum pro-bono services. To monitor the actual service the Law Society, requested that community organizations & institutions obtain accreditation to 'host' a practitioner/s so that they may carry out their pro bono service. In 2004 the Law Society approached the Western Cape Law clinics and the CHRC requested that 10 'funded' offices be included in the process. The paralegal offices attached to the CHRC all received initial accreditation by the Law Society as part of the Joint Venture Agreement. However, they could also obtain individual accreditation. A big corporate law firm entered into a cooperation agreement with Mitchelsplain Advice office. Various other law firms have assisted the Law Clinics with pro bono services. One of the ways of obtaining sustainable legal services to indigent communities is to link advice offices with private law firms. The CHRC and its partners have also initiated funding for advice offices from various state departments and state funded organizations. In 2007 the Micro Finance Regulatory Council (currently the National Credit Regulator) entered into cooperation with US and UWC Legal Aid Clinics and the advice offices attached to these Clinics were given case-by-case funding for debt-counselling cases handled by them. The Legal Aid South Africa entered into cooperation agreements with US and UWC Legal Aid Clinic via a CHRC funding proposal and the Western Cape Provincial Government Consumer office funds various advice offices. Law Clinics and Advice offices also receive funding from national and international donors. The aim of the Cluster is to diversify the access to justice resources and capacity within advice office and law clinics. Originally the CHRC's aim of clustering was to produce a model of access to justice

with arrange of legal service stakeholders in the Western Cape Province. The CHRC have become a cooperative body of university law clinics, paralegal advice offices, justice centres, private practitioners and/or other organizations, structured, formally and jointly managed by representatives of all the participants/stakeholders, with the aim of providing access to justice and legal services to poor and marginalized people in rural and remote areas.

To further stabilize the legal services provision provided by the law clinics, law clinics concentrated on strengthening their specialist units and entered into cooperation agreements with the Legal Aid South Africa.

Cooperation agreements with the Legal Aid South Africa

By the end of 2002 the Legal Aid South Africa realized that it would not be able to achieve its desired objectives by 2005, which compelled it again to enter into cooperation agreements with Law Clinics among other non-governmental organizations. The basis of the new cooperation agreement with the Legal Aid South Africa was significantly different from the previous cooperation relationship, where clinics took over the role of the Legal Aid South Africa in providing access to justice.

The current cooperation agreements with the Legal Aid South Africa provide additional capacity to Legal Aid South Africa and it supplements Legal Aid South Africa's activities so that they may fulfil their constitutional mandate towards the poor and marginalized communities.

Legal Aid South Africa provides additional financial resources to the Clinic to appoint additional capacity in the specialist unit and many attorneys of the specialist units of law clinics have been taken over by the Legal Aid South Africa so as to enhance their own capacity.

In terms of the Legal Aid South Africa's 2007/2008 annual report they entered into 6 Cooperation Agreements with Law Clinics in South Africa i.e. Wits Law Clinic, UWC Legal Aid Clinic, University of Pretoria, University of Stellenbosch, Mpumalanga Land Legal Cluster (Northwest Law Clinics) and University of Fort Hare. The number of cooperation agreements with the Law Clinics has decreased since 2005.[518]

518) See 2005, 2006, 2007 and 2008 Annual Reports of Legal Aid South Africa.

In the 2005/2006 period the Cooperation Partners opened 6,000 (2%) of the total number of new matters which were 340,244.[519] In the 2006/2007, the Cooperation partners opened 1.5% (5,468) of the total number of new matters (358,883)[520].

In terms of the 2007/2008 period the Cooperation Partners contribute 1% (4,075) towards the total number of new opened cases which totalled 396,068[521]. Most of these matters handled by the Law Clinics are civil related matters. Although the numbers might seem small in comparison to the total number of cases opened by Legal Aid South Africa, the Cooperation Partners contribution remains significant if one compares it to the total number of civil related matters opened over the same periods[522]. Most human rights related matters are civil in nature i.e. eviction and land /housing disputes, family law matters (divorces, domestic violence, maintenance), access to social grants, access to education, refugee rights matters, etc.

Pro bono structures

The private sector also plays an important role in the provision of free legal services to indigent persons. Many law firms have either adopted pro bono servicing of indigent clients as part of their social cooperate investment strategies and some have even partnered with law clinics and other non-governmental legal service providers.

Within the Western Cape Province, the Provincial Law Society structure has made pro bono work compulsory[523]. A private law firm receives instructions from accredited structures to handle legal matters. Certain Law Clinics in the Western Cape Province have applied for accreditation by the Cape Law Society as a referral structure.

---

519) See 2005/2006 Annual report of Legal Aid South Africa www.legal-aid.co.za at 27.

520) See 2006/2007 Annual report of Legal Aid South Africa www.legal-aid.co.za at 24.

521) See 2007/2008 Annual report of Legal Aid South Africa www.legal-aid.co.za at 24.

522) In 2005/2006 period 32,920 civil matters were opened of the total number of 303,126. In 2006/2007 period 41,016 civil matters were opened and in the 2007/200 period 32577 were opened. This averaged between 10% -15% of total number of civil matters. Legal Aid South Africa opens matters per case and this does not take into account the number of persons actually assisted by the Cooperation Partner. Many of Law Clinics handles public interest matters which impacts on the lives of many persons. Example of these type of matters or land/and housing related eviction matters.

523) See Rule 21 of the Cape Law Society Rules at www.capelawsoc.law.za.

Matters are referred to these private law firms and they handle the matter on behalf of the referral structure or the case is handled jointly so that specialist expertise can be transferred between the organizations. This partnership frees the law clinic from the current legal services demand and allows it to concentrate on its specialist teaching and its legal units.[524]

Many of the law clinics have also entered into relationships with advocates who render free legal services on a rotational basis. Many of the high court and various public interest cases handled by the specialist units of law clinics require specialist legal intervention by counsel which can be very costly. These partnerships thus reduce the financial expenses of law clinics significantly and it allows it to take on specialist public interest cases.

Law clinics role in transforming the legal profession

Clusters and specialist legal clinics will remain a feature of the Law Clinics and it will for the time being remain a driving force of access to legal services to indigent communities as the need for free legal services will in all likelihood not decrease in the near future.

However, it has become increasingly important for Law Clinics to redefine how it contributes towards access to justice as the Legal Aid South Africa have strengthened its capacity in the provision of access to justice and there are range of organizations providing legal representation to indigent communities.

Law Clinics have various roles which include the provision of practical training to law students and this role remains unique to Law Clinics. This objective has taken the back-seat in many law clinics primarily due to the history of law clinics and the access to justice needs of the communities. It has become increasingly important that practical legal training (Clinical Legal Education) within a social justice setting take centre stage within the future activities of Clinics as its role within the transformation of our legal profession cannot be over-emphasized.

524) De Klerk 2005: 21.

Judge Navsa has indicated:

'There is a growing perception that, in spite of South Africa's having one of the best constitutions in the world, its legal practitioners are losing there social consciences. Whereas the Constitution has created many opportunities for the use of law to promote social justice and democracy, there are probably fewer lawyers practicing in this area than was the case under apartheid. We must return to tan ethos that existed at a time when lawyers were resisting and fighting apartheid. There was a sense of mission and of moral duty.'[525]

If one takes into account the words of the honourable judge, the teaching of law within the context of social justice is something which all law students should be exposed to.[526] Law Clinics play an important role in this regard as it exposes students to the social realities of South Africa. It further exposes law students on the verge of entry into the profession on 'how to use the legal rules to make social justice attainable to the person on the street'[527]

Transformation within the profession requires a change of mind set amongst lawyers by creating an awareness of social justice and Law Clinics play an important role in promoting this legal culture in law students by teaching social justice.

Law Clinics contribute towards teaching law students through its clinical legal education programmes and at its core encompass experiential learning which will ultimately benefit the legal profession. It requires students to engage in community service through its specialist legal units, clusters and cooperation agreements which contributes towards their social consciences and it provides a much needed free legal service to indigent communities, which are currently not being catered for by the Legal Aid South Africa in respect of civil legal aid.

525) Whittle B. 'Legal Aid Tariff Increase on the Cards' March 2001 De Rebus 15 at www.derebus.org.za. Also See Sarkin 2002: 638.
526) De Klerk 2005: 943.
527) De Klerk 2005: 944.

Conclusion

Although Law Clinics in South Africa face various resource, capacity and funding issues they will continue to play a significant role in the provision of legal services to the poor and marginalised and in the transformation of the profession.

Within our transformative society it has become increasingly important for Law Clinics to develop the skills of law students so that they ultimately provide a better and more effective legal service which can only benefit the legal profession and the community at large. De Klerk[528] highlights that Law Clinics new role in South Africa is to promote change in the prevailing legal culture by teaching social justice, promoting access to the profession and to make the profession more accessible to the public and this we submit will be through Clusters, specialist clinics, cooperation agreements and various pro bono initiatives.

528) De Klerk 2005: 942.

Leo Battad
Leo Battad is a member and former national education officer of the Free Legal Assistance Group (FLAG), and founding chair and member of the Street Children Development Center (SDC), Inc. She is currently Assistant Professor and Director of the Office of Legal Aid at the College of Law, University of the Philippines, Quezon City, Philippines.

Anton Burkov
Dr Anton Burkov studied law in the Russian Federation and in the United Kingdom. He holds a PhD in law (2009) from the University of Cambridge and a Masters in Law from the University of Essex (2004). He is currently staff attorney at the Urals Centre for Constitutional and International Human Rights Protection, Yekaterinburg, Russian Federation. He is the author of 'The Impact of the European Convention on Human Rights on Russian Law' (Stuttgart, Ibidem Publishing, 2007), contributed a chapter to the book 'The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe', edited by Ralf Alleweldt, Frank Emmert, Leonard Hammer and Isabel Marcus (Eleven International Publishing, Utrecht, 2009), and has published numerous articles in Russian and English-language journals.

Elinor Chemonges
Elinor Wanyama Chemonges, a Rhodes Scholar, holds a MSc. in Social Studies and Social Research from Oxford University and B.A Social Work and Social Administration from Makerere University. She has 10 years experience as a social work lecturer at Makerere University in Uganda. In October 2005 she was appointed as a National Coordinator for the Paralegal Advisory Services Programme - A programme that seeks to promote the involvement of non lawyers in the criminal justice system to help deal with some of the bottle necks and challenges facing the system from a social work perspective.

Paul Dalton
Paul Dalton is Senior Legal Advisor, Access to Justice at Danish Institute for Human Rights (DIHR), with current consultancy and project activities in China, Vietnam, Kazakhstan, and the Russian Federation. Since joining the Institute in 2004, he has worked with justice sector, law enforcement and human rights agencies and organizations in a large number of countries in Africa, Eastern Europe, the Middle East and South-East Asia. He has had extensive involvement in Vietnam, working with several Government

Ministries, universities and other academic institutions. He is the project manager for an ongoing cooperation with the Vietnam Police Force on the UNCAT and other international standards on protection of detainees and procedural safeguards during criminal investigations and in pretrial detention.

Wang Fang
Wang Fang graduated from China University of Political Science and Law in 2005, and has since that time been working as a lawyer and research director at Beijing Zhicheng Migrant Workers' Legal Aid and Research Center (the former name is Beijing Legal Aid Office for Migrant Workers). Besides providing free legal consultations to migrant workers, representing them in labor arbitration and courts, she undertakes empirical analyses of some of the cases dealt with by the Center and uses the results of her research to make targeted policy recommendations. She has written and published several books and reports on migrant workers' rights protection.

Thomas Geraghty
Thomas F. Geraghty is Professor of Law, Associate Dean for Clinical Education, and Director of the Bluhm Legal Clinic of the Northwestern University School of Law in Chicago, Illinois, U.S.A. Professor Geraghty maintains an active caseload at the Bluhm Legal Clinic, concentrating primarily in criminal and juvenile defense, death penalty appeals, child-centered projects dealing with the representation of children and juvenile court reform. During the last 10 years, Professor Geraghty has worked in Ghana, Tanzania, Uganda, Malawi, and Thailand on research projects with law students involving juvenile justice, the legal problems of street children, the status of children orphaned by HIV/AIDS, women in the legal profession, and freedom of the press. Professor Geraghty has also been involved in training African lawyers in trial advocacy skills in cooperation with the National Institute for Trial Advocacy.

Huang Jinrong
Huang Jinrong received his PhD in 2004 in the Graduate School of the Chinese Academy of Social Sciences (CASS). He had worked in Law School of Zhejiang University as lecturer teaching Jurisprudence (1999-2004) and has since 2004 been an Associate Researcher at the Institute of Law of CASS. His research area is human rights law and jurisprudence. He is also working as a part time public interest lawyer in Beijing Dongfang Public Interest and Legal Aid Law Firm, a legal NGO in China.

Bruno Kalemba
Bruno Kalemba is Chief Legal Aid Advocate within the Legal Aid Department, Ministry of Justice and Constitutional Affairs, Blantyre, Malawi.

David McQuoid Mason
David McQuoid Mason, B Comm (Natal) LLB (Natal) LLM (London) PhD (Natal), is a Professor of Law at the Centre for Socio-Studies, University of KwaZulu-Natal, Durban; a Director of the South African Street Law programme; and President of the Commonwealth Legal Education Association. He was Dean of the Law School at the former University of Natal, for 13 years. Professor McQuoid-Mason has published over 100 articles in law journals, 30 chapters in books and 12 books. He has delivered over 130 papers at national conferences and over 80 at international conferences. On 10 December 2004 he was awarded a Special Mention by UNESCO for his work in human rights education.

Paul Mulenga
Paul Mulenga is a Human Rights Activists and Lawyer working for the Zambian legal aid organization Legal Resources Foundation since 1999. His work involves receiving instructions and complaints of human rights abuses from indigent members of society, drafting and preparing court documents, visiting prisons and other detention centres and representing people whose rights have been violated in courts of law. He is currently pursuing a Masters of Laws degree programme at the University of Zambia.

Simon Rice
Simon Rice is Associate Professor and Director of Law Reform and Social Justice at the College of Law, Australian National University. He has practised extensively in poverty law in community legal centres, particularly anti-discrimination law, has trained and advised a wide range of businesses, agencies and NGOs, and has consulted to NGOs on organisational management and strategic planning. Simon Rice is co-author of the books Retreat from Injustice: Human Rights Law in Australia, The Federation Press, Sydney, 2004, and International Human Rights Law, Oxford University Press, Melbourne, 2010.

Seehaam Samaai
Seehaam Samaai is a practicing attorney of the High Court of South Africa, a human rights lawyer and Senior Lecturer at the University of the Western Cape. She has an LLM in Constitutional Litigation. She is also the Di-

rector of the University of the Western Cape Legal Aid Clinic who provides free legal services to indigent and marginalized persons in the Western Cape Province, South Africa, clinical legal education to final year law students, practical training to candidate attorneys from disadvantaged communities on the verge of entering the profession and back up legal services to paralegal advices offices in poor and rural communities. She is currently president of the Association of University Legal Aid Institutions which promotes the interests of University based law clinics and the Chairperson of the Board of Lawyers for Human Rights a human rights and public interest law firm in South Africa.

Uli Sihombing
Uli Sihombing holds a Bachelor in Law from University of Sudirman Purwokerto and a Masters of Law in Human Rights form the Central European University, Budapest. Between 1997 and 2003 he worked as a public interest lawyer at LBH Jakarta. During the period 2003-2006 he was Director of the Jakarta Legal Aid Institute and since 2007 he has been the Director of the Indonesian Legal Resource Center, also based in Jakarta.

Adam Stapleton
Adam Stapleton is visiting professor in the Center for International Human Rights at Northwestern University School of Law in Chicago, USA. Between 1985 and 1993 he practiced as a criminal Barrister in London. Thereafter he worked as a human rights officer for the United Nations in Cambodia, South Africa and Rwanda before moving to Malawi in 1995 where, until 2007, he advised Penal Reform International and acted as an independent consultant in the field of criminal justice and penal reform.

Hatla Thelle
Hatla Thelle is senior researcher at the Danish Institute for Human Rights. She has a Ph.D. in history and Chinese Studies from University of Copenhagen, Denmark and taught modern Chinese history at the University from 1980 to 1999. She has researched on social rights and managed programmes in China since 1997.

1. The Kyiv Declaration on the Right to Legal Aid, 2007

The Kyiv Declaration on the Right to Legal Aid

Conference on the Protection and Promotion of Human Rights through Provision of Legal Services Best Practices from Africa, Asia and Eastern Europe

Kyiv, Ukraine, 27-30 March 2007

115 delegates from twenty-five countries, among them Government representatives, legal aid practitioners, academics, and representatives from human rights, legal advocacy, and legal and justice sector reform organisations, met in Kyiv, Ukraine, between 27-30 March, 2007, to discuss and identify best practices in the protection and promotion of human rights through the provision of legal services. The Kyiv Declaration on the Right to Legal Aid, set forth below, was adopted by consensus at the conclusion of the conference, with a request that it be forwarded to national governments, to legal aid bodies and organisations, public and private, at national level, and to relevant national and multilateral bodies engaged in developing or implementing policies and programmes addressing legal aid, access to justice and rule of law.

Preamble

Recalling that governments have the primary responsibility to recognise and give effect to international human rights standards;

Recognising that many governments fall short of these standards;

Bearing in mind that access to justice in criminal, civil, administrative and other fields of law depends on the recognition of and compliance with international human rights standards;

Noting that in many countries the government and law enforcement agencies are feared and mistrusted;

Recognising that people in the legal systems of many states are denied access to justice and are ignorant about their human and legal rights and procedures;

Considering that a legal aid system is a public good that is the common property of all members of society, that the promise of justice for all can only be realised when its rules and operation are understandable and accessible to all, and that the provision of legal aid is a vital element in this regard;

Aware that the provision of legal aid will promote access to justice;

Noting that legal aid achieves societal benefits including the elimination of unnecessary detention, speedy processing of cases, fair and impartial trials and dispute resolution, the reduction of prison populations, the lowering of appeal rates, decreased reliance on a range of social services, the advancement of social and economic rights, and greater social harmony;

Understanding that legal aid encompasses the provision to a person, group or community, by or at the instigation of state or non-state actors, of legal information, education, advice, assistance, representation and advocacy and mechanisms for alternative dispute resolution;

Mindful of the UN Basic Principles on the Role of Lawyers;

Welcoming the practical measures to realise access to justice through the provision of legal aid that have been taken in many countries;

Respecting governments' need to ration and allocate available resources according to need, and that each country has its own capabilities and needs when consideration is given to what kind of legal aid systems to employ;

Noting the growing incidence of partnerships among governments, nongovernmental organisations, civil society organisations, business corporations and the international community in developing legal aid programs;

Observing that in many countries there are not enough lawyers, resources and mechanisms to provide the legal aid services required to ensure access to justice;

Acknowledging that traditional and community-based alternatives to formal legal processes have the potential to resolve disputes without acrimony, to restore social cohesion within the community, and to develop self-reliance within communities;

The Participants of the Conference on the Protection and Promotion of Human Rights through Provision of Legal Services – Best Practices from Africa, Asia and Eastern Europe, Kyiv, Ukraine 27-30 March 2007, hereby declare the importance of:

1. Recognising and supporting the right to legal aid in the justice system

Legal aid is a right and governments are obliged to implement sustainable, quality controlled, legal aid programs that deliver legal aid services without discrimination to all people in their jurisdictions, subject only to a transparent and reviewable assessment of need, and with special attention to women and vulnerable groups, such as indigent people, children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, asylum seekers, refugees, internally displaced persons, stateless persons, foreign nationals, prisoners, and other persons
deprived of their liberty.

2. Providing legal aid at all stages of the justice process

A legal aid program must include legal advice and assistance at all stages of the criminal, civil and administrative process.

3. Sensitising all government officials

Governments are obliged to make public officials aware of the crucial role that legal aid plays in both ensuring access to justice and achieving desirable societal goals, and to educate and train them in procedures necessary to ensure that the right to legal aid is provided at all stages of criminal, civil and administrative proceedings.

4. Viewing legal aid as one means of ensuring a justice system that is accessible and available to all

Governments are obliged to ensure that legal information is available regarding administrative, civil and criminal matters and to this end public servants are obliged to inform and explain substantive and procedural aspects of legal matters to all members of the public.

5. Cooperating with other stakeholders and the public

Governments should establish cooperative arrangements with a wide range of stakeholders – such as non-governmental organisations, community-based organisations, religious and non-religious charitable organisations, professional bodies and associations and academic institutions – and ensure effective public participation in the formulation of legal aid policies, programs and legislation.

6. Recognising the right to redress for violations of human rights

Legal aid should be available to all people without discrimination who seek legal redress for violation of their human rights, including for violations by any organ of state.

7. Recognising the role of non-formal means of conflict resolution

Governments and all stakeholders should recognise the significance of traditional and community-based alternatives to formal legal processes, and should provide support for such mechanisms provided that they conform to human rights norms.

8. Diversifying legal aid delivery systems

Governments should consider a variety of service delivery options such as government funded public defender offices, judicare programmes, justice centres, law clinics, as well as partnerships with civil society and faith-based organisations.

9. Diversifying legal aid service providers

Governments should consider appropriate alternatives to the use of lawyers through the provision of complementary legal and related services by non-lawyers such as lay advocates, law students, paralegals, legal assistants, and other service providers.

10. Encouraging pro-bono provision of legal aid by lawyers

Support for and involvement in the provision of legal aid should be recognised as an important duty of the legal profession which should, through the organised bar and law schools, provide moral, ethical, professional and logistical support to those providing legal aid, especially through pro-bono legal aid services. Governments should promote an enabling environment for private practitioners to provide pro-bono services and ensure competitive rates of remuneration.

11. Guaranteeing sustainability of legal aid

Governments should make appropriate fiscal, budgetary and operational arrangements for a sustainable legal aid program, including for the provision of a broad range of legal aid services, establishment of infrastructure, an independent, cost-effective, professional and quality driven case management system, and with the ability to satisfy the needs of the community in the long term.

12. Promoting legal literacy through legal education and advocacy

Governments should ensure that human rights education and legal literacy programmes are conducted in educational institutions and in non-formal sectors of society, particularly for vulnerable groups such as children, young people, and the urban and rural poor. Governments are encouraged to ensure that human rights and legal documents are translated and made widely available. International and regional bodies are encouraged to make available human rights documentation in relevant languages.

13. Ensuring access to justice in programmes of assistance to justice systems in developing and transitional countries

Governments and multilateral donors should ensure that programmes of assistance to justice systems in developing and transitional countries include the provision of legal aid information and other measures to further access to justice, particularly among the poor and vulnerable, in a sustainable way.

14. Guaranteeing a secure environment for the provision of legal aid

Governments should ensure that there is an enabling environment for the provision of legal aid services, including protection for lawyers and all other service providers from harassment, intimidation and other threats to their safety and security.

2. The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa

Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa

Lilongwe, Malawi, November 22-24, 2004

128 delegates from 26 countries including 21 African countries met between 22-24 November 2004 in Lilongwe, Malawi, to discuss legal aid services in the criminal justice systems in Africa. Ministers of State, judges, lawyers, prison commissioners, academics, international, regional, and national non-governmental organizations attended the conference. The three days of deliberations produced the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (set forth below), which was adopted by consensus at the closure of the Conference with the request that it be forwarded to national governments, the African Union Commission on Human and Peoples' Rights, the African Union Commission, and the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok in April, 2005, and publicized to national and regional legal aid networks.

Preamble
Bearing in mind that access to justice depends on the enforcement of rights to due process, to a fair hearing, and to legal representation;

Recognising that the vast majority of people affected by the criminal justice system are poor and have no resources with which to protect their rights;

Further recognising that the vast majority of ordinary people in Africa, especially in post-conflict societies where there is no functioning criminal justice system, do not have access to legal aid or to the courts and that the principle of equal legal representation and access to the resources and protections of the criminal justice system simply does not exist as it applies to the vast majority of persons affected by the criminal justice system;

Noting that legal advice and assistance in police stations and prisons are absent. Noting also that many thousands of suspects and prisoners are detained for lengthy periods of time in over-crowded police cells and in inhumane conditions in overcrowded prisons;

Further noting that prolonged incarceration of suspects and prisoners without providing access to legal aid or to the courts violates basic principles of international law and human rights, and that legal aid to suspects and prisoners has the potential to reduce the length of time suspects are held in police stations, congestion in the courts, and prison populations, thereby improving conditions of confinement and reducing the costs of criminal justice administration and incarceration;

Recalling the Resolution of the African Charter of Fundamental Rights of Prisoners adopted by the African Regional Preparatory Meeting for the Eleventh United Nations Congress on Crime Prevention and Criminal Justice held at Addis Ababa,

Ethiopia in March, 2004 and its recommendations for its adoption by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok, Thailand in April, 2005;

Mindful that the challenge of providing legal aid and assistance to ordinary people will require the participation of a variety of legal services providers and partnerships with a range of stakeholders and require the creation of innovative legal aid mechanisms;

Noting the Kampala Declaration on Prison Conditions 1996, the Kadoma Declaration on Community Service Orders in Africa 1997, the Abuja Declaration on Alternatives to Imprisonment 2002 and the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa 2002; and mindful that similar measures are needed with respect to the provision of legal aid to prisoners;

Noting with satisfaction the resolutions passed by the African Commission on Human and Peoples' Rights (notably: the Resolution on the Right of Recourse and Fair Trial 1992, the Resolution on the Right to a Fair Trial and Legal Assistance in Africa 1999) and, in particular, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2001;

Commending the practical steps that have been taken to implement these standards through the activities of the African Commission on Human and Peoples' Rights and its Special Rapporteur on Prisons and Conditions of Detention;

Commending also the Recommendation of the African Regional Preparatory Meeting held at Addis Ababa in March 2004 that the African Region should prepare and present an African Common Position to the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok, Thailand in April, 2005, and that the African Union Commission has agreed to prepare and present that Common Position to the Congress;

Welcoming the practical measures that have been taken by the governments and legal aid establishments in African countries to apply these standards in their national jurisdictions; while emphasizing that notwithstanding these measures, there are still considerable shortcomings in the provision of legal aid to ordinary people, which are aggravated by shortages of personnel and resources;

Noting with satisfaction the growing openness of governments to forging partnerships with non-governmental organizations, civil society, and the international community in developing legal aid programs for ordinary people that will enable increasing numbers of people in Africa, especially in rural areas, to have access to justice;

Commending also the recommendations of the African Regional Preparatory Meeting for the Eleventh United Nations Conference for the introduction and strengthening of restorative justice in the criminal justice system;

The participants of the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa, held in Lilongwe, Malawi, between 22 and 24 November 2004, hereby declare the importance of:

1. **Recognising and supporting the right to legal aid in criminal justice**
   All governments have the primary responsibility to recognise and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system. As part of this responsibility, governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in so doing empower them to access justice. Legal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.

2. **Sensitizing all criminal justice stakeholders**
   Government officials, including police and prison administrators, judges, lawyers, and prosecutors, should be made aware of the crucial role that legal aid plays in the development and maintenance of a just and fair criminal justice system. Since those in control of government criminal justice agencies control access to detainees and to prisoners, they should ensure that the right to legal aid is fully implemented. Government officials are encouraged to allow legal aid to be provided at police stations, in pre-trial detention facilities, in courts, and in prisons. Governments should also sensitize criminal justice system administrators to the societal benefits of providing effective legal aid and the use of alternatives to imprisonment. These benefits include elimination of unnecessary detention, speedy processing of cases, fair and impartial trials, and the reduction of prison populations.

3. **Providing legal aid at all stages of the criminal justice process**
   A legal aid program should include legal assistance at all stages of the criminal process including investigation, arrest, pre-trial detention, bail hearings, trials, appeals, and other proceedings brought to ensure that human rights are protected. Suspects, accused persons, and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. A person subject to criminal proceedings should never be prevented from securing legal aid and should always be granted the right to see and consult with a lawyer, accredited para-legal, or legal assistant. Governments should ensure that legal aid programs provide special attention to persons who are detained without charge, or beyond the expiration of their sentences, or who have been held in detention or in prison without access to the courts. Special attention should be given to women and other vulnerable groups, such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, refugees, internally displaced persons, and foreign nationals.

4. **Recognising the right to redress for violations of human rights**
   Human rights are enforced when government officials know that they will be held accountable for violations of the law and of basic human rights. Persons who are abused or injured by law enforcement officials, or who are not afforded proper recognition of their human rights, should have access to the courts and legal representation to redress their injuries and grievances. Governments should provide legal aid to persons who seek compensation for injuries suffered

as the result of misconduct by officials and employees of criminal justice systems. This does not exclude other stakeholders from providing legal aid in such cases.

5. **Recognising the role of non-formal means of conflict resolution**
Traditional and community-based alternatives to formal criminal processes have the potential to resolve disputes without acrimony and to restore social cohesion within the community. These mechanisms also have the potential to reduce reliance upon the police to enforce the law, to reduce congestion in the courts, and to reduce the reliance upon incarceration as a means of resolving conflict based upon alleged criminal activity. All stakeholders should recognise the significance of such diversionary measures to the administration of a community-based, victim-oriented criminal justice system and should provide support for such mechanisms provided that they conform to human rights norms.

6. **Diversifying legal aid delivery systems**
Each country has different capabilities and needs when consideration is given to what kind of legal aid systems to employ. In carrying out its responsibility to provide equitable access to justice for poor and vulnerable people, there are a variety of service delivery options that can be considered. These include government funded public defender offices, judicare programmes, justice centres, law clinics - as well as partnerships with civil society and faith-based organizations. Whatever options are chosen, they should be structured and funded in a way that preserves their independence and commitment to those populations most in need. Appropriate coordinating mechanisms should be established.

7. **Diversifying legal aid service providers**
It has all too often been observed that there are not enough lawyers in African countries to provide the legal aid services required by the hundreds of thousands of persons who are affected by criminal justice systems. It is also widely recognised that the only feasible way of delivering effective legal aid to the maximum number of persons is to rely on non-lawyers, including law students, paralegals, and legal assistants. These paralegals and legal assistants can provide access to the justice system for persons subjected to it, assist criminal defendants, and provide knowledge and training to those affected by the system that will enable rights to be effectively asserted. An effective legal aid system should employ complementary legal and law-related services by paralegals and legal assistants.

8. **Encouraging pro-bono provision of legal aid by lawyers**
It is universally recognised that lawyers are officers of the court and have a duty to see that justice systems operate fairly and equitably. By involving a broad spectrum of the private bar in the provision of legal aid, such services will be recognised as an important duty of the legal profession. The organized bar should provide substantial moral, professional and logistical support to those providing legal aid. Where a bar association, licensing agency, or government has the option of making pro-bono provision of legal aid mandatory, this step should be taken. In countries in which a mandatory pro-bono requirement cannot be imposed, members of the legal profession should be strongly encouraged to provide pro-bono legal aid services.

9. **Guaranteeing sustainability of legal aid**
   Legal aid services in many African countries are donor funded and may be terminated at any time. For this reason, there is need for sustainability. Sustainability includes: funding, the provision of professional services, establishment of infrastructure, and the ability to satisfy the needs of the relevant community in the long term. Appropriate government, private sector and other funding, and community ownership arrangements should be established in order to ensure sustainability of legal aid in every country.

10. **Encouraging legal literacy**
    Ignorance about the law, human rights, and the criminal justice system is a major problem in many African countries. People who do not know their legal rights are unable to enforce them and are subject to abuse in the criminal justice system. Governments should ensure that human rights education and legal literacy programmes are conducted in educational institutions and in non-formal sectors of society, particularly for vulnerable groups such as children, young people, women, and the urban and rural poor.

3. Resolution 100(XXX) 06 of the African Commission on Human and People's Rights Resolution on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System, 2006

The African Commission on Human and Peoples' Rights meeting at its 40th Ordinary Session, held in Banjul, The Gambia, from 15 - 29 November 2006;

Recalling its mandate under Article 45(b) of the African Charter on Human and Peoples' Rights (the Charter) "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation";

Recalling Articles 7 and 26 of the Charter, which guarantee the right to a fair trial and legal counsel before independent courts;

Recalling its Resolution on the *Right to Recourse and Fair Trial*, adopted at its 11 th Ordinary Session in Tunis, Tunisia in 1992;

Recalling further its resolution on the *Respect and Strengthening of the Independence of the Judiciary*, adopted at its 19 th Ordinary Session in Ouagadougou, Burkina Faso in 1996;

Recognising its resolution on the *Right to Fair Trial and Legal Assistance in Africa*, adopted at its 26 th Ordinary Session in Rwanda in 1999;

Recalling the *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*, adopted in 2001;

Concerned with the continued lack of legal aid in most parts of Africa and its adverse impact on the right to access to justice in Africa;

SUPPORTS the *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* **,** adopted by the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers, Lilongwe , Malawi , November 2004;

URGES all stakeholders to make every effort to make these declarations widely known in Africa and invites State Parties to the Charter to take into account the principles in the Declaration when formulating policies and domestic legislation;

APPEALS to Member States to take all necessary measures in order to uphold their obligations under the Charter and other international instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* providing for the right to fair trial and access to justice;

CALLS on Members States to extend their full collaboration with the mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa in monitoring prisons and conditions of detention in Africa.

Done in Banjul , The Gambia, 29 November 2006

4. Republic of Uganda Statutory Instrument, 70/2004, *The Advocates (Student Practice) Regulations*

STATUTORY INSTRUMENTS.
2004 No. 70.

The Advocates (Student Practice) Regulations, 2004.
(under section 11(6) of the Advocates Act, Cap 267).

IN EXERCISE of the powers conferred on the Law Council by section 11(6) of the Advocates Act, these Regulations are made this 26th day of August, 2004.

1. These Regulations may be cited as the Advocates (Student Practice) Regulations, 2004.

2. In these Regulations-

"advocate" means a person whose name is entered on the roll of advocates;

"academic year" means the duration of a post graduate training or course at a post graduate school of institution to acquire professional skill and experience for purposes of enrolment;

"court" means a magistrate's court or other subordinate court and includes a Family and Children Court;

"post graduate law school or institution" means the Law Development Centre, Kampala or other institution approved by the Law Council;

"recognised university" means a university recognised by the Law Council;

"student" means a post graduate law student who has duly enrolled for a post graduate bar course in a post graduate law school or institution;

"supervising lawyer" means an advocate possessing a valid practising certificate who has been approved by the head of a post graduate law school or institution to carry out the supervisory role under these Regulations;

3. (1) A student shall, in order to make an appearance in court under these Regulations-

(a) be a holder of a bachelor of laws degree from a university in Uganda or from a recognised university outside Uganda;

(b) have substantially attended the first term at a post graduate law school or institution;

(c) be certified by the head of the post graduate law school or institution as being of good character and of competent legal ability, and to be adequately trained to perform as a legal intern by a post graduate law school or institution;

(d) be introduced to the court in which he or she is appearing, by the supervising lawyer;

(e) certify in writing that he or she has read and is familiar with the rules of professional conduct governing advocates.

(2) A student who satisfies the conditions specified in sub-regulation (1) may, under the supervision of a supervising lawyer, appear in court on behalf of a client and may engage in other activities on behalf of a client as provided in these Regulations.

(3) A student may appear in court on behalf of a client only if the client indicates in writing that he or she consents to the appearance.

4. A magistrate before whom a student is appearing may determine the extent of the student's participation in the proceedings.

5. The certification of a student by the head of the post graduate law school or institution referred to in regulation 3*(c)* –

(a) shall be filed with the Chief Registrar and, unless withdrawn, shall remain in effect until the expiration of the academic year of the post graduate law school or institution except where it is extended, in deserving cases, upon the recommendation of the head of the law school or institution;

(b) may be withdrawn, at any time, by the head of the post graduate law school or institution, by issuing a notice to that effect to the Chief Registrar; and the notice need not state the reasons for withdrawal;

(c) may be terminated by the court at any time or by the Chief Registrar upon the recommendation of the court before which the student is appearing.

6. (1) A student may engage in the following activities-

(a) prepare pleadings and other documents to be filed in any matter in which the student is eligible to appear; except that the pleadings or documents must be signed by the supervising lawyer; and

(b) prepare briefs, abstracts and other documents to be signed by the supervising lawyer.

7. A student shall neither ask for nor receive any compensation or remuneration of any kind for his or her services under these Regulations.

8. (1) A person qualifies to be appointed a supervising lawyer under these Regulations if he or she-

(a) is an advocate of good standing;

(b) is in possession of a valid practicing certificate and;

(c) is approved by the head of the post graduate law school or institution in which the student is enrolled.

(2) A supervising lawyer shall-

(a) assume personal professional responsibility for the guidance of the student in any work undertaken by the student and for supervising the quality of the student's work;

(b) assist the student in his or her preparation to the extent the supervising lawyer considers necessary;

(c) assist and counsel the student in activities which the student is permitted to engage in by these Regulations and review the activities with the student to the extent required for a proper practical guidance of the student; and

(d) supplement the oral and written work of the student as necessary to ensure proper representation of the client.

(3) A supervising lawyer who fails to properly supervise a student may be charged with professional negligence.

9. A student under these Regulations is subject to the same disciplinary procedures as an advocate under the Advocates Act.

JUSTICE J.W.N TSEKOOKO,
Chairperson, Law Council.