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# Asian Developments in Access to Counsel: A Comparative Study

Aurora E. Bewicke\*

## I. INTRODUCTION

¶1 “Injustice anywhere is a threat to justice everywhere.”  
 ¶2 -Martin Luther King, Jr.<sup>1</sup>

¶3 The challenge of securing justice for all requires hard work, dedication, solidarity, and a  
 ¶4 great deal of optimism. It also requires many small changes in many different locations. This paper will explore some of these small (and large) changes happening on the world’s biggest continent, Asia, focused specifically on securing the criminally accused with access to legal representation. It will do so by providing a comparative study of innovations happening throughout the region, focusing on examples in Cambodia, China, India, Indonesia, Malaysia, and the Philippines. Recent projects and developments in all six countries have sought to improve the local criminal justice system. These efforts have been the result of internal progress, global movements, and cooperative exchange.

¶5 Section II below will present the backdrop to these case studies by providing a short overview of the legal development context in Asia. In Section III, the paper will introduce and analyze a variety of initiatives aimed at realizing the right to representation in the six highlighted countries. Section III will also touch upon current and potential areas for cooperative exchange between these and other nations. Following this comparative study, Section IV of this paper will then briefly explore the effects of an increasingly global criminal justice system on the region, as a whole, and, in particular, on these national legal systems. Finally, this paper will conclude that both parallel movements in access to justice across Asia as well as increasing Asian engagement in international justice support the argument for increased regional, as well as global, awareness and cooperation.

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<sup>1</sup> Martin Luther King, Jr., Letter from Birmingham Jail, in *WHY WE CAN’T WAIT* (Martin Luther King, Jr. ed., Apr. 16, 1963).

## II. BACKGROUND

¶6 Colonialism, primarily throughout the nineteenth and twentieth centuries, brought European-style legal models to countries across the Asia-Pacific, often replacing indigenous systems with transplanted Western judicial structures.<sup>2</sup> As countries regained their independence, internal debates emerged, with some advocating for the restoration of indigenous justice mechanisms, and others preferring to preserve the new models, at least in part.<sup>3</sup> At virtually the same time, however, the horrors of the World Wars brought humanity closer together in its condemnation of the grave atrocities committed in both Europe and Asia alike. Military criminal tribunals were established in Nuremberg and Tokyo to try persons responsible for these events and, for the first time, immediate executions were replaced by high profile international prosecutions.<sup>4</sup> In 1948, the Universal Declaration of Human Rights (UDHR) set forth the first “universal” rights of the accused, including the right to “all guarantees necessary for [the accused’s] defence,” and the right to a “fair and public hearing” for all defendants.<sup>5</sup> Not long after began the drafting of the International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976, affirming the right of criminal defendants worldwide to adequate legal representation.<sup>6</sup> This global legacy continued with the international criminal tribunals in Rwanda (ICTR) and the former Yugoslavia (ICTY), established through U.N. resolutions during the 1990s; the Extraordinary Chambers in the Courts of Cambodia (ECCC), commencing in 2004; and the permanent International Criminal Court (ICC), protecting due process rights for the most serious offenders.<sup>7</sup>

¶7 Yet, despite this global trend, in the twenty-first century the rights of ordinary suspects and the accused, in particular the right to counsel, remain largely unrealized. This problem is not unique to Asia. Nevertheless, a regional analysis is warranted both as a response to those that disavow the universal nature of defendants’ rights and because of the potential benefits to be gained from greater pan-Asian cooperation.

¶8 *Cultural relativism: the “Asian values” debate*

¶9 While an in-depth analysis of the so-called “Asian values” debate is beyond the scope of this paper, it is important to recognize that universal human rights standards, such as the rights of the accused, are not universally recognized. In other words, although proponents of these standards claim that they should apply equally to all people, regardless of borders, not every government permits their citizens to enjoy well-established rights under international law. For example, “[i]n the traditional Chinese criminal justice system, once a person was arrested he was

<sup>2</sup> Stanelly Yeo, *Towards A Shared Criminal Jurisprudence in the Asia-Pacific*, 2 OR. REV. INT’L L. 108, 111 (2000).

<sup>3</sup> See, e.g., Marc Galanter & Jayanth K. Krishnan, “*Bread for the Poor*”: Access to Justice and the Rights of the Needy in India, 55 HASTINGS L.J. 789, 791 (2004) (discussing the post-Independence the indigenous justice revival movements in India). See also Marie Montesano, *Current International Efforts in Cambodia: Developing A Court System to Protect Human Rights*, 11 J. L. & SOC. CHALLENGES 71, 72-94 (2009) (discussing the history of criminal law and procedure in Cambodia).

<sup>4</sup> See generally Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT’L L. 1085 (2010) (analyzing the tribunals in light of recent critiques).

<sup>5</sup> Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948), arts. 9-11 [hereinafter UDHR].

<sup>6</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 UNTS 171, arts. 9, 14-15.

<sup>7</sup> See generally Harvard Law Review, *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 1984 (2001) and Montesano, *supra* note 3 (discussing the ECCC)

considered a criminal by the public, and there were few procedural limits on periods of detention, coerced testimony, or trial.” These stigmas remain largely intact today.<sup>8</sup> Similarly, some proponents of alleged “Asian values” have even concluded that “the denial of basic civil and political rights is advantageous” to greater societal development, thus rejecting the need to comport with universal norms.<sup>9</sup>

¶10 Notwithstanding the need for all governments to balance a variety of societal concerns, relativist rhetoric is, unfortunately, a tool all-too-easily wielded “by repressive governments, bent on deflecting the heat of international scrutiny, that have feigned concern over cultural diversity and autonomy to serve their political purposes.”<sup>10</sup> Moreover, the majority of anti-universalist claims, under closer analysis, reveal themselves to be anchored illogically in the notion of imperialism as a universally-accepted evil.<sup>11</sup> Indeed, while imperialism is certainly a shameful legacy of “the West,” labeling values as Eastern or Western does nothing to improve the lives of citizens across Asia.

¶11 In response to the rising debate, Asian civil society and jurists came together to draft the Asian Human Rights Charter that has been endorsed by numerous civil society organizations and individuals.<sup>12</sup> The Asian Human Rights Charter proclaims that: “[a]uthoritarianism has in many states been raised to the level of national ideology, with the deprivation of the rights and freedoms of their citizens, which are denounced as foreign ideas inappropriate to the religious and cultural traditions of Asia. Instead there is the exhortation of spurious theories of ‘Asian Values,’ which are a thin disguise for their authoritarianism.”<sup>13</sup>

¶12 Given this reality, some academics insist that it is simply time for debate to “move beyond universalism and relativism.”<sup>14</sup> Prominent legal and Chinese scholar Randall Peerenboom contends that framing the debate in these terms “is intellectually lazy and emblematic of the arrogant and narrow-minded ethnocentrism that has led many in Asia, and elsewhere, to view

<sup>8</sup> See, e.g., Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China’s Criminal Procedure*, 34 L. & SOC. INQUIRY 911, 920 (2009).

<sup>9</sup> David S. Bloch & Thomas TerBush, *Democracy in the Cities: A New Proposal for Chinese Reform*, 33 CAL. W. INT’L L.J. 171, 178 (2003). This so-called “Lee thesis,” named after former Singaporean president Lee Kuan Yew is considered by many to be factually unsupported and is distinct from the argument that economic growth should precede democratization, which is outside the scope of this paper. See *id.*

<sup>10</sup> Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing A Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT’L L. REV. 391, 396 (2001).

<sup>11</sup> MICHAEL FREEMAN, HUMAN RIGHTS 124 (2nd ed. 2011). See also Seth R. Harris, *Asian Human Rights: Forming A Regional Covenant*, 1 ASIAN-PAC. L. & POL’Y J. 17, 16-18 (discussing other “[l]ogical [f]allacies in the [a]rgument against [u]niversal [h]uman [r]ights” in the Asian context).

<sup>12</sup> Harris, *supra* note 11, at 2-4; ASIAN HUMAN RIGHTS CHARTER, Appendix A (May 17, 1998), available at <http://material.ahrchk.net/charter/pdf/charter-final.pdf>. The preamble to the charter declares:

For long, especially during the colonial period, the peoples of Asia suffered from gross violations of their rights and freedoms. Today large sections of our people continue to be exploited and oppressed and many of our societies are torn apart by hatred and intolerance. Increasingly the people realize that peace and dignity are possible only when the equal and inalienable rights of all persons and groups are recognised and protected. They are determined to secure peace and justice for themselves and the coming generations through the struggle for human rights and freedoms. Towards that end they adopt this Charter as an affirmation of the desire and aspirations of the peoples of Asia to live in peace and dignity. *Id.* at Preamble.

<sup>13</sup> ASIAN HUMAN RIGHTS CHARTER, *supra* note 12, § 1.5.

<sup>14</sup> Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia”*, 14 IND. INT’L & COMP. L. REV. 1, 1 (2003). In fact, when a version of this paper was presented in Taiwan, Dr. Peter Van Krieken made the suggestion that it might be better to skip this section completely. Unfortunately, as this author responded to him, these issues remain highly relevant when working in Asia. Hopefully, one day this will not be the case. Dr. Peter Van Krieken, Panel C International Criminal Law at the 2011 ILA Asia-Pacific Regional Conference (May 31, 2011).

the human rights movement as the latest neo-colonial attempt to impose with missionary zeal the values, institutions, and ways of life popular in the West on the Rest.”<sup>15</sup>

¶13 This author agrees that such East versus West arguments are largely unproductive,<sup>16</sup> yet, at the same time, recognizes the legitimate concern of regional actors that one-size-fits-all development is not the answer. Rather, successful (and ethical) development and reform must combine the local and the universal.<sup>17</sup> This necessity can be derived from: (1) the need for logical consistency, (2) practical concerns, and/or (3) moral mandates. First, taking the UDHR as a basic example of universal human rights values, it would be difficult to honour the “free and equal ... dignity” of all or the “will of the people [as] the basis of authority of government” if an elite (primarily Western) minority held sole authority as to the principles, objectives, and implementation of law.<sup>18</sup> Second, practical reasons urge the modification of pre-designed mechanisms to fit various situations. As Sally Engle Merry notes, “human rights ideas are more readily adopted if they are packaged in familiar terms....”<sup>19</sup> Unless institutions or reforms consider local viewpoints, they are likely to be perceived as illegitimate, thereby creating impediments to local implementation and sustainability.<sup>20</sup> Third, many would argue that it is simply immoral to rule over others without any deference to their views and values.<sup>21</sup> Regardless of the justification, cookie-cutter reform is not the solution.

¶14 As such, many in the development movement are explicitly recognizing the need for nuanced programming that gives a voice to local actors. Generally, these development styles fall within one of three categories, which Richard Mullender terms the “top-down,” “bottom-up,” and “reflective equilibrium-based” approaches, according to the weight given to either “guiding principles” or “local sources of value, meaning, and identity.”<sup>22</sup> This latter, middle-of-the-road approach is particularly popular in the current development field, at least on paper, if not in practice.

¶15 Examples of those advocating for a “reflective equilibrium-based approach,” or variations thereof, within the legal reform movement include both Stephen Golub and Jacques deLisle. Stephen Golub argues for “legal empowerment”-styled development, which “use[s]...legal

<sup>15</sup> *Id.* at 1-2.

<sup>16</sup> Elizabeth Bruch notes:

This claim of universality of rights remains controversial within the human rights field. . . . At times, the debate between universalism and cultural relativism in human rights has been polarizing and immobilizing.

Nonetheless, universal claims retain their appeal and have undoubtedly improved the lives of many people in particular times and places.

Elizabeth M. Bruch, *Hybrid Courts: Examining Hybridity Through A Post-Colonial Lens*, 28 B.U. INT’L L.J. 1, 19-20 (2010).

<sup>17</sup> Analyzing Anna Tsing’s “re-imagine[d] [theory of] universal claims ‘not as truths or lies but as sticky engagements’ . . . [by which] [e]ngaged universals travel across difference and are charged and changed by their travels;” Bruch notes that “[s]ome would suggest that human rights work at its best—where universal rights claims are given traction at the local level by collaborative, grassroots involvement—may reflect this sort of engaged universalism.” *Id.* at 20-21. This paper aspires to present examples of such “engaged universalism.” *See id.*

<sup>18</sup> UDHR, *supra* note 5, arts. 1, 21.

<sup>19</sup> SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 5 (2006).

<sup>20</sup> Abdullahi Ahmed An-Na‘im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13, 14 (1990).

<sup>21</sup> ELVIN HATCH, *CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY* (1983), *excerpted in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT 522 (Harry J. Steiner, et al, eds, Oxford University Press, 3d ed. 2007).

<sup>22</sup> Richard Mullender, *Human Rights: Universalism and Cultural Relativism*, 6 CRITICAL REV. INT’L SOC. & POL. PHIL. 70, 71-72, 82 (2003).

services and related development activities to increase disadvantaged populations' control over their lives."<sup>23</sup> He continues:

This alternative paradigm, a manifestation of community-driven and rights-based development, is grounded in grassroots needs and activities but can translate community-level work into impact on national laws and institutions. It prioritizes civil society support because it is typically the best route to strengthening the legal capacities and power of the poor. But legal empowerment engages government wherever possible and does not preclude important roles for dedicated officials and ministries. It also addresses a central reality that R[ule] O[f] L[aw] orthodoxy overlooks: In many developing countries, laws benefiting the poor exist on paper but not in practice unless the poor or their allies push for the laws' enforcement.<sup>24</sup>

¶16 Similarly, commenting on U.S.-led legal reform initiatives, Jacques deLisle has noted that “U.S. programs to provide legal assistance and efforts to propagate U.S. legal models seem to fare better when they respond to what relevant groups in recipient countries see as their needs, and when they work reasonably closely with key institutions and elites in recipient countries.”<sup>25</sup>

¶17 Abstractly, these reform theories are equally applicable to the contexts of Africa, Eastern Europe, or the Americas. Here, however, this paper will concentrate on how reform efforts function and might function in Asia.

¶18 This paper seeks to provide practical tools for legal development in Asia that transcend divisive “Western values” discourse by providing examples of Asian-based reform, and then by demonstrating that Asian-states' increasing participation in, *inter alia*, international criminal law evidences the applicability of international standards of criminal justice to local criminal justice systems across Asia.<sup>26</sup> Specifically, the next section of this paper will present a range of reform methods being employed across Asia to guarantee individuals with better access to effective representation.

### III. INTERNAL PROGRESS AND COOPERATIVE EXCHANGE: COUNTRY CASE STUDIES

¶19 Current judicial reform efforts in Asia range from grassroots movements to government-led legislation overhauls, from individual attorneys making speeches in a courtroom to internationally-funded legal development programming. This section will survey innovations in

<sup>23</sup> Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, 3 (Carnegie Endowment for Int'l Peace, Working Paper No. 41, 2003).

<sup>24</sup> *Id.*

<sup>25</sup> Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 256 (1999). The Asian Human Rights Charter endorses the view that both international and domestic actors have a responsibility towards the protection of rights in Asia:

The responsibility for the protection of rights is both international and domestic. The international community has agreed upon norms and institutions that should govern the practice of human rights. The peoples of Asia support international measures for the protection of rights. State sovereignty cannot be used as an excuse to evade international norms or ignore international institutions. The claim of state sovereignty is justified only when a state fully protects the rights of its citizens.

ASIAN HUMAN RIGHTS CHARTER, *supra* note 12, § 2.5.

<sup>26</sup> While this paper will be primarily limited to a discussion of reform initiatives designed to help realize criminal defendants' right to counsel, many of the innovations could be equally employed in the promotion of other rights.

Cambodia, China, India, Indonesia, Malaysia, and the Philippines. In doing so, it will highlight ways in which local actors and international institutions have worked together to solve problems stemming from capacity deficits and address “hearts and minds” problems, including winning over local bureaucrats and prison officials. It will then briefly present pan-Asian cooperation that is already taking place and opportunities to increase such cooperation. Finally, it will offer a comparative analysis of these developments and how they might be shared.

### A. Cambodia

¶20 In 2010, the Cambodian government expressed its commitment to the belief “that all human rights are universal, indivisible, interdependent and interrelated, and that democracy and human rights should be built through these principles.”<sup>27</sup> As a caveat, however, it noted “realities,” such as “the destruction of all social fabrics...with the loss of qualifications and devaluation of human capital through the Khmer Rouge regime”...and that “the assessment of Cambodia’s human rights should take [these realities] into account.”<sup>28</sup> Indeed, the Khmer Rouge regime resulted in the devastation of Cambodia’s legal system, which included the burning of legal texts and the use of courthouses as centers of torture. Surviving legal professionals fled the country, and even twenty years after the end of the atrocities, the number of trained legal professionals remains grossly inadequate.<sup>29</sup>

¶21 Consequently, lengthy pretrial detentions, abuse of detainees, and lack of legal representation are all common problems in Cambodia.<sup>30</sup> Although the law requires detainees to have access to representation for detentions exceeding 24 hours, Cambodian government officials state that this cannot always be realized.<sup>31</sup> The primary reason these prisoners are not provided counsel is the above-mentioned “critical shortage of trained lawyers.”<sup>32</sup> As of 2009, the country reported to have only 751 lawyers in total.<sup>33</sup> Therefore, despite the legal mandate that indigent defendants are to be provided with free representation, even beyond the 24 hours most accused must either represent themselves or obtain help from non-governmental organizations (NGOs).<sup>34</sup>

¶22 Furthermore, statistics from the U.S. Department of State indicate that in 2010 one in ten Cambodian pretrial detainees were held in custody for longer than the statutory 6-18 months allowable under the national criminal procedure code.<sup>35</sup> Not only is it difficult for indigent

<sup>27</sup> U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Cambodia*, 3 § 6, U.N. Doc A/HRC/13/4 (Jan. 4, 2010).

<sup>28</sup> *Id.*

<sup>29</sup> *Cambodia*, INTERNATIONAL BRIDGES TO JUSTICE, <http://www.ibj.org/our-work/asia/cambodia/> (last visited Apr. 19, 2011) [hereinafter IBJ Cambodia].

<sup>30</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, *Country Reports on Human Rights Practices: Cambodia 7-10* (2010), available at <http://www.state.gov/documents/organization/160086.pdf> [hereinafter Bureau of Democracy Cambodia].

<sup>31</sup> *Id.* at 9-10.

<sup>32</sup> *Id.* at 10-11.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 7. The Asian Human Rights Commission outlines several types of unlawful detentions happening in Cambodia: (1) “detention orders are not extended when they have expired”; (2) “[p]ersons are detained longer than the maximum time limits for pre-trial detentions”; (3) “[i]ndividuals are kept in pretrial detention longer than the maximum prison term for the charged offense”; (4) “[j]uvenile prisoners charged with misdemeanors are held in pretrial detention for more than half of the minimum sentence set by the law for the offense”; (5) [u]pon the closing order terminating the investigation period, the trial does not start within the prescribed four months upon which the charged person is supposed to be released automatically, and yet the person is maintained in prison.”; (6) “[e]ven if

detainees to obtain counsel, but bail opportunities for those without access to counsel are particularly slim.<sup>36</sup> It is said that “[s]ometimes suspects who have no legal representation are simply forgotten.”<sup>37</sup> Those “forgotten” face brutal conditions, with detainees “[s]ometimes...shackled for several months” in addition to other forms of torture and severe overcrowding.<sup>38</sup>

¶23 In 2005, in order to address these problems, the local non-profit NGO Legal Aid of Cambodia began expanding and strengthening its NGO-led legal aid outreach. The organization, with international support, has held trainings and rights awareness campaigns, gathered judicial stakeholders for roundtables, and organized the direct provision of legal aid especially targeting those provinces where not a single defense lawyer was present.<sup>39</sup> Legal Aid of Cambodia has further been the recipient of practical institutional support, including instruction on proposal writing and reporting mechanisms, as well as the donation of technical items such as computers.<sup>40</sup> These skills and resources have enabled local actors to create more sustainable change.

### B. People’s Republic of China

¶24 As in Cambodia, China went through its own unique periods of turmoil during which many, if not most, legal professionals were persecuted and sent out to the countryside for reeducation.<sup>41</sup> The revolutions of the early communist era eventually came to a close, and after the passing of Chairman Mao, debate ensued. The result has been the steady rebuilding of the rule of law.<sup>42</sup> The contemporary era of criminal defense in China did not really begin, however, until 1996, with revisions to the Criminal Procedure Code “announc[ing] a radical change in the relationship between the court, the legal profession, and the procuracy.”<sup>43</sup> That same year, China established a legal aid system to improve access to counsel for its citizens.<sup>44</sup> Within ten years almost every province, municipality, and county in the country had its own legal aid center.<sup>45</sup> Many of these centers, however, are not adequately equipped; many are not even able to provide

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the trial starts within four months, the court can issue interlocutory orders authorizing further investigation, circumventing the four-month requirement contained in [the law]”; and (7) lengthy detention based on misapplication of the law by prosecutors and courts. ASIAN HUMAN RIGHTS COMMISSION, *The State of Human Rights in Cambodia in 2010*, AHRC-SPR-003-2010, at 6-7 (2010) [hereinafter Asian Human Rights Commission Cambodia].

<sup>36</sup> Bureau of Democracy Cambodia, *supra* note 30, at 9.

<sup>37</sup> Asian Human Rights Commission Cambodia, *supra* note 35, at 6.

<sup>38</sup> *Id.* at 3-9.

<sup>39</sup> IBJ Cambodia, *supra* note 29.

<sup>40</sup> *Id.* International Bridges to Justice (IBJ) who have partnered with Legal Aid Cambodia, have also opened their own offices to provide direct legal aid to a further six provinces. Much of this was made possible by one individual. In 2007, the former Director of Legal Aid Cambodia, Ouk Vandeth, became IBJ’s first fellow. Mr. Vandeth has worked tirelessly to promote legal aid, including drafting funding proposals that made the opening of three offices possible. These offices are staffed with IBJ-sponsored local attorneys who, in addition to representing indigent clients, promote rights awareness campaigns in the local villages, hold “street law” campaigns to provide free legal advice to community members, conduct regular prison visits, and work together with local NGOs as well as government organs to institutionalize the role of defense counsel in the system. *Id.*

<sup>41</sup> RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD TULE OF LAW* 45 (Cambridge Univ. Press 2002).

<sup>42</sup> *Id.* at 56-7.

<sup>43</sup> *Id.* at 160.

<sup>44</sup> Jennifer Smith & Michael Gompers, *Realizing Justice: The Development of Fair Trial Rights in China*, 2 CHINESE L. & POL’Y REV. 108, 116 (2007).

<sup>45</sup> *Id.* at 116-17.

lawyers.<sup>46</sup> Other centers often avoid criminal cases in favor of less stigmatized civil suits.<sup>47</sup> Moreover, with the newness of the criminal justice system in general, it is difficult for lawyers to find legal mentors from whom they can study effective advocacy skills.

¶25 In addition to capacity deficiencies, many other obstacles still exist, one of the greatest being the perception of the role of a defense attorney. “[I]n spite of judges being advised to give defence lawyers a fair hearing, negative attitudes towards criminal lawyers still prevail and a lawyer who represents his client too vigorously risks court detention.”<sup>48</sup> Sociologists Sida Liu and Terence C. Halliday trace this attitude back to China’s traditional system, “[r]einforced by the Communist ideals of subordinating all procedural fetters to the goal of creating a new society,” and argue that “this long and deep tradition of substantive justice still significantly shapes the legal ideologies of many criminal law enforcement officers, judges, citizens, and even some lawyers.”<sup>49</sup> In terms of the practical situation, this takes shape in the “‘Three Difficulties’ (*san nan*) and ‘Big Stick 306’ (306 *da bang*)” within which the *san nan* correlate to “lawyers’ difficulties in (1) meeting the criminal suspect, (2) gathering access to the procuracy’s case files, and (3) collecting evidence and cross-examining witnesses at trial.”<sup>50</sup> The *da bang* refers to articles in Criminal Law and Criminal Procedural law that are used against lawyers, often under the pretext that they have “conspired with defendants to commit perjury or to give false testimony.”<sup>51</sup>

¶26 Recognizing that reform of China’s legal system, as elsewhere, is more than purely an issue of capacity-building, any sustainable reform must succeed in realigning perceptions among all stakeholders, including defendants, judges, police, academics, prosecutors, lawyers, and citizens. As Michael William Dowdle noted in 2000, upon critiquing the first wave of foreign-driven reform reaching China, “legal development is not simply a process of ‘getting the rules right’ . . . [but rather,] it is a process whereby society and its various institutions come to learn, or discover, what particular legal rules and practices ‘mean’ in the larger context of that society’s unique, local understandings, and concerns.”<sup>52</sup> Practically, this translates into the need to synthesize grassroots efforts and indigenous Chinese paradigms with universal standards in a way that takes into account the multi-faceted nature of its society.<sup>53</sup> In development theory, this would be the closest to Mullender’s “reflective equilibrium-based approach,”<sup>54</sup> and, according to Dowdle, this can be simply labeled as “pragmatic.”<sup>55</sup> He notes that while “[r]educive developmental strategies tend to focus primarily on training. . . [p]ragmatic strategies, by contrast, need to focus much more on discourse.”<sup>56</sup>

<sup>46</sup> *Id.* at 117.

<sup>47</sup> *Id.*

<sup>48</sup> Amanda Whitfort, *The Chinese Criminal Defence System: A Comparative Study of a System in Reform*, 35 HONG KONG L. J. 695, 711 (2005). Sida Liu and Terence C. Halliday similarly note that “empirical research in China finds that criminal defense lawyers complain vociferously about their conditions of practice. Most notably, they maintain that the CPL does not permit them to mount adequate defenses of detainees and defendants.” Liu & Halliday, *supra* note 8, at 912 (internal citations omitted).

<sup>49</sup> Liu & Halliday, *supra* note 8, at 920.

<sup>50</sup> *Id.* at 921.

<sup>51</sup> *Id.*

<sup>52</sup> Michael William Dowdle, *Preserving Indigenous Paradigms in An Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China*, 24 FORDHAM INT’L L.J. S56, S73 (2000).

<sup>53</sup> *See id.*

<sup>54</sup> Mullender, *supra* note 22, at 71-2.

<sup>55</sup> Dowdle, *supra* note 52, at S74.

<sup>56</sup> *Id.*

¶27 One practical way in which foreign organizations and local actors are working to improve the infrastructure is through joint trainings. For example, two American criminal defense attorneys, Michael R. Smith and Russell Stetler, traveled to China in 2003 to share their experiences with legal aid lawyers. When they returned to the U.S., they wrote about these trainings in some detail. They observed that the atmosphere of these trainings demonstrated hope for future pan-Asian cooperation utilizing Chinese lawyers who could share their skills elsewhere in the region:

The daily small group work ranged from immediate application of new techniques like writing motions to a visioning exercise led by [International Bridges to Justice Founder] Karen Tse that asked the participants to imagine Legal Aid of China in the year 2020. One group of Chinese public defenders improvised a skit where a reporter was interviewing them in the year 2020. They described a practice which built on much of the substantive material covered in the training program, along with dramatic changes in the rights of the accused. The reporter then asked what they would do if, in the year 2020, they were retiring tomorrow. The response was immediate: they imagined going to other developing countries in their retirement to train new public defenders in other parts of the world!<sup>57</sup>

¶28 Pilot projects are a second reform method popular in China. For example, the NGO International Bridges to Justice (IBJ) initiated a project in which Sichuan University clinical law students were trained to represent accused juveniles as paralegals. Under Chinese law, although paralegals are not formally allowed to represent clients, defendants may be represented by a “friend.” While these “friends” do not normally have full access to the court file, during IBJ’s pilot project the “particular court ha[d] gone so far as to allow the students to view the entire file even though their status [was] just the ‘friend’ of the defendant.”<sup>58</sup> Although this style of representation cannot compare with having the full representation of counsel, it is far better than no representation at all. Similarly, from 2008 through 2010, another of these initiatives involved juvenile record sealing and expungement pilot projects in Shandong Province. Other similar model reform projects in the same province experimented with non-custodial sentences for juveniles and the use of social investigation reports to help young defendants obtain lighter sentences based on mitigating factors.<sup>59</sup> At the end of these projects in January 2011, participants and academics gathered in Beijing to discuss both the highlights of the projects as well as the problems faced.<sup>60</sup>

¶29 Finally, rights-awareness campaigns, informing citizens of their right and ability to access a lawyer, are also used to improve the rule of law in China.<sup>61</sup> Attorney Leslie Rosenberg described her experience working on a rights campaign in 2008:

[T]he 2008 poster was simple. It instructed the audience—juveniles and their families and communities in selected cities around China—to “ask for a lawyer”

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<sup>57</sup> *Id.*

<sup>58</sup> James Park Taylor, *Bringing Law Clinics to China*, 34 MONT. LAW. 22, 23 (2009).

<sup>59</sup> Sanjeewa Liyanage, Press Release: IBJ Hosts Juvenile Conference in Beijing, INTERNATIONAL BRIDGES TO JUSTICE (Mar. 6, 2011), <http://blog.ibj.org/2011/03/06/ibj-hosts-juvenile-justice-conference-in-beijing/>.

<sup>60</sup> *Id.*

<sup>61</sup> See Michael R. Smith & Russell Stetler, *China’s New Public Defenders*, 28-APR CHAMPION 16, 16 (2004).

if detained or arrested. The poster explained when and why to ask for a lawyer and what a lawyer should do for a client. The poster did not focus on an entitlement to a right (a nontraditional concept in China) such as the right to a lawyer, but instead on action and implementation—on the ability and need for a juvenile to implement this right to be represented.<sup>62</sup>

By also engaging citizens in reform efforts, sustainability is fostered by encouraging individuals and communities to become part of the solution.

### C. India

¶30 Another global giant, India, faces its own challenges in guaranteeing its citizens access to counsel. Unlike China's largely inquisitorial system, the Indian criminal justice system is influenced by English common law. Within this structure, defendants' rights are protected by China's Constitution, the Criminal Procedure Code of 1973, and the Indian Evidence Act of 1872, governing suspects' pre-trial rights.<sup>63</sup> While "there is no specifically enumerated constitutional right to legal aid for an accused person,"<sup>64</sup> Indian courts have given legal effect to constitutional commitments implicating the right to legal aid.<sup>65</sup>

¶31 Corresponding with these developments, the government enacted The Legal Services Authority Act in 1987 "to effectuate the constitutional mandates enshrined under Articles 14 and 39-A of the Constitution."<sup>66</sup> The Act's objective is to provide "access to justice for all" so that justice is not denied to citizens "by reason of economic or other disabilities."<sup>67</sup> The National Legal Services Authority (NALSA) was subsequently established to serve as a statutory body for implementing and monitoring legal aid programs throughout the country.<sup>68</sup> The legal aid programs adopted by NALSA include promoting legal literacy, setting up legal aid clinics in universities and law colleges, paralegal training, and holding legal aid and dispute resolution trainings.<sup>69</sup>

<sup>62</sup> Leslie J. Rosenberg, *The Globalization of Justice: My Experience as A Volunteer Public Defender in China*, 33-NOV CHAMPION 44, 49 (2009).

<sup>63</sup> INDIA CONST.; CODE CRIM. PROC. (1973) (India); The Indian Evidence Act, No. 1 of 1872, INDIA CODE (1993), available at <http://indiacode.nic.in>.

<sup>64</sup> Vidhan Maheshwari, Right to Bail as a Constitutional Right (Apr. 22, 2008) (unpublished B.A. LLB thesis, National Law Institute University, Bhopal), available at <http://www.lawyersclubindia.com/articles/RIGHT-TO-BAIL-AND-RIGHT-TO-FREE-LEGAL-AID-8211--101.asp>.

<sup>65</sup> See INDIA CONST. arts. 14, 21, 38, 39. In addition to the Constitution, Section 304 of the Criminal Procedure Code imposes an obligation on the courts to provide legal aid at the expense of the state to accused persons with no sufficient means and finances to engage an advocate. Kriti Madan & Swapti Gupta, *Legal Aid in India*, LEGAL SERVICE INDIA (Oct. 29, 2008), <http://www.legalserviceindia.com/article/l261-Legal-Aid.html> in Sheela Barse v. State of Maharashtra (1988) 1 S.C.R. 210 (India), available at <http://www.cscsarchive.org:8081/MediaArchive/medialaw.nsf/%28docid%29/F189008680136C31E5256AC700322FD5>. The Supreme Court held that legal assistance to indigent accused whose life or personal liberty are in jeopardy is, in fact, constitutionally mandated. See INDIA CONST. arts. 14, 21. Similarly, in *Sukhdas v. Union Territory of Arunachal Pradesh* (1986) 1 S.C.R. 590 (India), the Court noted that situations in which accused persons are unrepresented by a lawyer and not informed of their rights are contrary to the Constitution. Ishan Viyas, *Working of Statute of Legal Aid in India*, LEGAL SERVICE INDIA (Oct. 10, 2007), <http://www.legalserviceindia.com/article/l55-Working-of-Statute-of-Legal-Aid-in-India.html>.

<sup>66</sup> Viyas, *supra* note 65.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

¶32 Given these developments, India's efforts to strengthen its legal aid framework are promising, yet the current situation is far from ideal. For example, while indigent pretrial defendants in theory have the right to legal aid, "in practice access to competent counsel often [is] limited, especially for the poor, and the overburdened justice system usually result[s] in major delays in court cases."<sup>70</sup> The statistics are appalling. For example, in 2008 it was reported that India's court system was "saddled with a gargantuan backlog of 29.2 million cases."<sup>71</sup> This failure to realize defendant's right to counsel has been attributed, among other things, to a lack of rights awareness among both detainees and judicial officials, compounded by high illiteracy rates, as well as judicial corruption.<sup>72</sup> Sadly, while lingering in custody, pretrial detainees are held in detention facilities under "frequently life threatening" conditions resulting in approximately 300 custodial deaths per year.<sup>73</sup>

¶33 One solution to deal with both this backlog and deficit of legal aid lawyers has been the use of indigenous *Lok Adalats* (people's courts).<sup>74</sup> As early as the 1970s, the Expert Committee on Legal Aid proposed using a form of this traditional court for the provision of legal aid.<sup>75</sup> Advocates for these quasi-courts, "see them not as a species of court reform but as a species of legal aid, one particularly suited to the poor, oppressed, and female."<sup>76</sup> It is said that "[l]ike judicially inspired public interest law, the theme is bountiful caring for the weak, but the movement is centered not around eminent judges and prominent lawyers, but district judges, social workers and local advocates."<sup>77</sup> In criminal matters, these bodies are used only for minor cases.<sup>78</sup> Criticisms of the *lok adalats* include their class bias. Marc Galanter and Jayanth K. Krishnan explain: "[w]hile proponents of Lok Adalats stress their participatory character, it is clear that the form of participation envisaged for poor claimants or defendants is reception of the guidance of their betters."<sup>79</sup> Nevertheless, this example demonstrates another avenue for exploring legal reform solutions tailored to the particular context, namely traditional mechanisms or modified traditional mechanisms.

¶34 Another project in India aims at filling gaps in legal aid by providing detainees with rights education and empowering these prisoners to educate fellow detainees.<sup>80</sup> Attorney Bijaya Chanda, who grew up in Calcutta and has spent the bulk of the past 15 years working with the West Bengal NGO MASUM, is seeking to educate both prisoners and other legal stakeholders

<sup>70</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDIA 19 (2010), available at <http://www.state.gov/documents/organization/160058.pdf> [hereinafter Bureau of Democracy India].

<sup>71</sup> Neeta Lal, *Huge Case Backlog Clogs India's Courts*, ASIA TIMES ONLINE (June 28, 2008), [http://www.atimes.com/atimes/South\\_Asia/JF28Df02.html](http://www.atimes.com/atimes/South_Asia/JF28Df02.html).

<sup>72</sup> *Id.*; Biography of Bijaya Chanda, 2010 Asia JusticeMakers Fellow, INT'L BRIDGES TO JUSTICE, <http://justicemakers.ibj.org/fellows/bijaya-chanda/> (last visited Nov. 12, 2011) [hereinafter Biography of Bijaya Chanda].

<sup>73</sup> Bureau of Democracy India, *supra* note 70, at 10.

<sup>74</sup> Galanter & Krishnan, *supra* note 3, at 791.

<sup>75</sup> *Id.* at 793-94.

<sup>76</sup> *Id.* at 799.

<sup>77</sup> *Id.* at 799.

<sup>78</sup> *Id.* at 822-25.

<sup>79</sup> *Id.* at 801.

<sup>80</sup> An additional solution to capacity building is the direct training of judges and defense attorneys working in India's state courts. In the first criminal defense training on a national scale, in 2008, the Delhi Legal Services Authority joined forces with IBJ to teach practical defense skills and discuss plans to strengthen the rule of law in India. Among the participants were four Supreme Court Justices, 16 judges from India's High Court and 134 criminal defense lawyers hailing from 26 out of the 28 Indian States. *2008 Annual Report*, INT'L BRIDGES TO JUSTICE, available at [http://www.ibj.org/uploads/2010/2008\\_IBJ\\_annual\\_report.pdf](http://www.ibj.org/uploads/2010/2008_IBJ_annual_report.pdf).

on their rights under the constitution. After “regularly witness[ing] detainees being denied legal protections and early access to a lawyer, enduring physical and emotional torture,” Chanda devised a plan to “mobiliz[e] and train[] a team of 15 skilled local lawyers to educate underprivileged remand prisoners...to demand their basic legal rights.”<sup>81</sup> The idea is to encourage both defendants and their families to seek legal aid, while at the same time educating local justice officials on the need to “uphold the legal protections of the accused.”<sup>82</sup> After released, it is hoped that these defendants will help continue this jailhouse education initiative.

¶35 So far, Chanda’s project is delivering trainings to detainees in five pre-detention facilities and has already recruited two volunteers who previously spent time in prison to help educate others.<sup>83</sup> In addition to direct training sessions with the prisoners, Chanda is working with the local NGO APORIA to create posters that are targeted towards illiterate prisoners, directly engaging detainees to help in the design process.<sup>84</sup> The program has been well received in the local area, winning over the “hearts and minds” of the community, including among prison officials.<sup>85</sup> Between January and February 2011, 992 prisoners received Chanda’s trainings.<sup>86</sup> By March 2011, three of these detainees, who had been previously languishing in detention without access to counsel, had received both direct legal aid and had been released on bail.<sup>87</sup> Other detainees were not granted bail, but now have representation.<sup>88</sup> In addition, the project is raising awareness within local civil society. Chanda was recently invited to present her experience at a local university, which afterwards expressed its desire to become engaged in improving the criminal justice system.<sup>89</sup> Chanda’s future goals for the project include gaining the participation of more local academics and bar associations to expand the model.<sup>90</sup>

#### D. Indonesia

¶36 As with Cambodia, China, and India, internationally supported and locally driven projects have been the cornerstone of legal reform in Indonesia, designed to solve problems within a particular context. Under law, all Indonesian defendants have the right to counsel free of charge for capital cases or cases where the statutory penalty is 15 years or longer, and “destitute” defendants should be provided counsel for charges carrying penalties of five years or more.<sup>91</sup> Reports suggest, however, that “defendants typically appear unrepresented by legal counsel in court.”<sup>92</sup>

<sup>81</sup> Biography of Bijaya Chanda, *supra* note 72.

<sup>82</sup> *Id.*

<sup>83</sup> *Indian JusticeMaker Builds Partnerships to Help Make Her Vision a Reality*, INT’L BRIDGES TO JUSTICE (Jan. 20, 2011), <http://justicemakers.ibj.org/2011/01/indian-justicemaker-builds-partnerships-to-help-make-her-vision-a-reality/>.

<sup>84</sup> *Id.*

<sup>85</sup> Bijaya Chanda, *Legal Empowerment of Under Trial Prisoners in Sub-Jails: Interim Narrative Report* (Jan. 3, 2011) (on file with author).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDONESIA 10, 12 (2010), *available at* <http://www.state.gov/documents/organization/160460.pdf> [hereinafter Bureau of Democracy Indonesia].

<sup>92</sup> Robert R. Strang, “*More Adversarial, but not Completely Adversarial*”: *Reformasi of the Indonesian Criminal Procedure Code*, 32 *FORDHAM INT’L L.J.* 188, 200 n.74 (2008) (citing U.N. Human Rights Council, Working Group

¶37 The Asian Human Rights Commission has noted that “[t]he overarching obstacle to any form of rule of law in Indonesia, and indeed in wider Asia, is the ever-expanding vacuum between the norms and standards embodied in international conventions, and those put into practice at the domestic legislative level.”<sup>93</sup> U.N. investigations have found that, despite Indonesia being a signatory to several human rights instruments, “in many instances the authorities did not grant bail, frequently prevented access to defense counsel during investigations, and limited or prevented access to legal assistance from voluntary legal defense organizations.”<sup>94</sup>

¶38 Attorney Ajeng Larasati, began her struggle to improve her country’s system while working for a local community legal aid organization, Lembaga Bantuan Hukum Masyarakat.<sup>95</sup> Despite her daily work counseling clients on their legal rights, including the right to representation, “she quickly noticed a debilitating lack of motivation and hope underlying these conversations,” and, further, a lack of the supposed guarantees provided under Indonesia’s law.<sup>96</sup> Larasati began recruiting worldwide interns to tackle the problem, hosting talks with both government officials and other organizations, organizing community rights awareness campaigns, and conducting case advocacy.<sup>97</sup> It seemed to Larasati that the primary issue was a lack of rights education among defendants, and a lack of motivation to demand those rights stemming from an unsupportive legal system.<sup>98</sup>

¶39 Larasati’s project, called *tamping*, is aiming to train convicted prisoners with authorization to work within the facility to empower pre-trial accused held at the same detention center.<sup>99</sup> Her trainings are designed both to educate the accused of their rights and to “motivate them to exercise these protections” with the help of those already serving their sentences and with the help of psychologists.<sup>100</sup> It is hoped that detainees will be more receptive to *tamping* than other educators because they have already been through the process themselves.<sup>101</sup> Larasati has now begun the implementation phase of this project. Although she has faced bureaucratic hurdles and a certain amount of cultural resistance, she has not been dissuaded.<sup>102</sup> To date, the detainees have received general counseling sessions, although the *tamping* trainings-of-trainers have not yet commenced. One of the challenges will be to recruit suitable *tamping* educators, who will be in custody long enough to have impact and are motivated to participate in the project.<sup>103</sup>

¶40 An even newer project has been started by Attorney Alex Argo Hernowo, a former Legal Aid Foundation volunteer who also works at Lembaga Bantuan Hukum Masyarakat in

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on the Universal Periodic Review, *Summary: Indonesia*, ¶ 14, U.N. Doc A/ HRC/WG.6/1/[IDN]/3 (Apr. 2008)).

<sup>93</sup> ASIAN HUMAN RIGHTS COMMISSION, *Indonesia: The Human Rights Situation in 2006*, 3 (2006) [hereinafter Asian Human Rights Commission Indonesia].

<sup>94</sup> Bureau of Democracy Indonesia, *supra* note 91, at 10.

<sup>95</sup> *Ajeng Larasati*, INTERNATIONAL BRIDGES TO JUSTICE, <http://justicemakers.ibj.org/fellows/ajeng-larasati> (last visited Apr. 19, 2011) [hereinafter *Ajeng Larasati*].

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Mkurban, *Ajeng Larasati Spreads Rights Awareness in Indonesian Detention Centers*, INTERNATIONAL BRIDGES TO JUSTICE (Jul. 9, 2010), <http://justicemakers.ibj.org/2010/07/justicemaker-ajeng-larasati-spreads-rights-awareness-in-indonesian-detention-centers>.

<sup>100</sup> See *Ajeng Larasati*, *supra* note 95.

<sup>101</sup> See Mkurban, *supra* note 99.

<sup>102</sup> Thalusa, *JusticeMakers Inspire Each Other via Skype*, INTERNATIONAL BRIDGES TO JUSTICE (Dec. 2, 2010), <http://justicemakers.ibj.org/2010/12/justicemakers-inspire-each-other-via-skype>.

<sup>103</sup> Ajeng Larasati, *Access to Justice for Detainees, A Community Legal Empowerment Approach: Interim Report* (Dec. 28, 2010) (on file with author).

Indonesia's capital, Jakarta.<sup>104</sup> His program specifically focuses on criminal defendants with HIV/AIDS, who face even greater discrimination in the justice system than others similarly situated.<sup>105</sup> As with other accused, these defendants lack basic knowledge of their legal rights, and even legal aid attorneys themselves are not always prepared to represent them.<sup>106</sup> Hernowo's project will include community rights awareness campaigns as well as community education. He will also train community members to become "quasi-paralegals" in their areas. Finally, Hernowo will directly provide legal aid to defendants with HIV/AIDS.<sup>107</sup>

¶41 In January 2011, Hernowo gathered members of the HIV-positive community to discuss problems facing this population and to agree on a strategic plan. The attendees at the roundtable discussion were trained in basic criminal defense principles and divided into teams. In February, these "quasi-paralegals" then went out into various areas of Jakarta to hold rights awareness informational sessions and offer advice.<sup>108</sup> Hernowo reported that his program has been well received and that in the coming months new "quasi-paralegals" will be trained in aspects of criminal defense along with basic knowledge of both employment and health law.<sup>109</sup>

### *E. Malaysia*

¶42 As with other countries, realizing the right to representation for accused in Malaysia faces implementation hurdles. Malaysia is a former British territory, and as such its judicial system, like India's, is based on English common law.<sup>110</sup> Similar to the country situations described above, Malaysian law contains numerous protections for the rights of the accused, including the right to free legal assistance for defendants charged with serious crimes.<sup>111</sup> Suspects can only be held for 24 hours without charge, subject to a possible extension of two weeks upon the approval of a magistrate.<sup>112</sup> While this requirement is fortunately generally met, there is evidence that some police engage in a practice where they release and re-arrest to circumvent this rule.<sup>113</sup> Furthermore, when in custody, despite the mandate that detainees' families should be informed of their arrest and that detainees should be informed of their right to legal counsel of choice, police often neglect to do so because they want to "prevent interference in ongoing investigations" and have a mindset of "arrest first, investigate later."<sup>114</sup> In addition, while bail is generally an option, those who are not granted bail may linger in custody for lengthy periods awaiting trial in a system suffering from severe backlogs.<sup>115</sup>

¶43 This problem can be particularly grave for juvenile defendants from poor families. Children's families are not always informed of the arrest, and even those who are informed

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<sup>104</sup>Alex Argo Hernowo, INTERNATIONAL BRIDGES TO JUSTICE, <http://justicemakers.ibj.org/fellows/alex-argo-hernowo/> (last visited Apr. 19, 2011).

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

<sup>108</sup>Alex Argo Hernowo, *Status Update* (Spring 2011) (on file with author).

<sup>109</sup>*Id.*

<sup>110</sup>BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, *Country Reports on Human Rights Practices: Malaysia*, (2010), <http://www.state.gov/documents/organization/160468.pdf> [hereinafter Bureau of Democracy Malaysia].

<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*

cannot always raise the money for bail.<sup>116</sup> Consequently, children can be held for up to a year in pre-trial custody, even for minor offenses, which has a negative impact on their education and future careers.<sup>117</sup>

¶44 Attorney Yasmeen Shariff decided to pilot a project that would tackle this problem from an institutional level. A lawyer with over 25 years of experience and a senior partner in a local law firm, Shariff works to promote alternatives to incarceration for juvenile defendants through her program, utilizing mediation techniques, family, and community service. Having served on child protection councils and as an advisory member to the Malaysian Women’s Ministry, Shariff was also one of the first lawyers to directly interact with juveniles being held in Malaysia’s detention centers.<sup>118</sup> Based in part on findings from her interviews with juvenile detainees, the government began establishing legal aid clinics in prisons and working to improve arrest conditions for under-age offenders.

¶45 Now, Shariff is looking to develop the juvenile criminal defense system further by institutionalizing diversion programs, which are aimed at rehabilitation and will involve families of defendants and victims.<sup>119</sup> Her project envisions working with government officials to implement these ideas, starting in Kuala Lumpur.<sup>120</sup> She is also researching similar programs throughout Asia as part of this project.<sup>121</sup> Because this project is relatively new, it is not yet possible to analyze the results.

¶46 Another project, “Kempen PerlembagaanKu” or the “MyConstitution Campaign,” was initiated by the Constitutional Law Committee, which operates under the Bar Council of Malaysia. A self-described “committee of lawyers, students, academics, members of the media, members of non-governmental organizations and Malaysians from all walks of life,” this campaign “was formed to address and promote understanding of the Malaysian Federal Constitution and the concept of constitutionalism.”<sup>122</sup> As part of this movement, the committee produces what it calls “Rakyat Guides,” which are booklets outlining rights in a simplified form. In addition, the committee has produced advertisements and a range of rights awareness activities including public discussions, lectures, and media events strategically utilizing popular social networking tools such as Facebook and Twitter.<sup>123</sup> At the end of March 2011, the group sponsored a free “Rock 4 Rights 2011” festival—a “12-hour non-stop concert and carnival”—with 18 bands, performance arts events, a film, and a flea market to help Malaysians learn more about their rights.<sup>124</sup>

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<sup>116</sup> *Yasmeen Shariff*, INTERNATIONAL BRIDGES TO JUSTICE, <http://justicemakers.ibj.org/fellows/yasmeen-shariff/> (last visited Apr. 13, 2011).

<sup>117</sup> *Id.*

<sup>118</sup> Interview by Gowri Janakiraman with Yasmeen Shariff, INT’L BRIDGES TO JUSTICE (Apr. 22, 2011) [hereinafter *Yasmeen Shariff interview*].

<sup>119</sup> *Id.*

<sup>120</sup> *Yasmeen Shariff*, *supra* note 116.

<sup>121</sup> Yasmin Shariff interview *supra* note 118.

<sup>122</sup> *About Us*, KEMPEN PERLEMBAGAANKU, <http://www.perlembagaanku.com/about/#more-2> (follow “about us” hyperlink) (last visited Apr. 19, 2011).

<sup>123</sup> *Id.*

<sup>124</sup> *Rock 4 Rights 2011*, KEMPEN PERLEMBAGAANKU, <http://www.perlembagaanku.com/2011/03/rock-4-rights-2011/> (last visited April 19, 2011).

### F. *The Philippines*

¶47 The final country study, the Philippines, similarly illustrates the challenges facing legal reform in Asia—and a number of inspirational innovations. In the Philippines, access to justice for the poor and marginalized is guaranteed by its constitution.<sup>125</sup> Specifically, the Constitution declares that “the State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty” as one of the State policies given the highest priority.<sup>126</sup> Furthermore, the Constitution’s Bill of Rights aims to ensure that “[f]ree access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.”<sup>127</sup> Both the government and NGOs implement this mandate.<sup>128</sup>

¶48 The Public Attorney’s Office (PAO) serves as the sole government agency for providing legal aid to indigent parties.<sup>129</sup> Such parties are meant to be represented, free of charge, in all civil, administrative, and criminal matters.<sup>130</sup> While the PAO has worked continuously to provide adequate and affordable access to justice for its clients, limited resources, heavy caseloads,<sup>131</sup> and corruption in the courts have increasingly hindered its services.<sup>132</sup> Moreover, legal representation of individuals involved in criminal matters remains a significant concern, as the number of pending criminal cases handled by the PAO has risen over time.<sup>133</sup>

¶49 In response to the challenges faced by the PAO, the Philippine Supreme Court instituted a number of reforms.<sup>134</sup> In 2001, the Court adopted a judicial reform program known as the Action Program for Judicial Reform (APJR).<sup>135</sup> This program prioritized reforms to improve the efficiency and delivery of legal aid services to disadvantaged persons.<sup>136</sup> In particular, the APJR sought changes in judicial systems and procedures, legal education, institutional processes, resource generation strategies, and access to justice for the poor.<sup>137</sup> More recently, in 2009 the Court issued a rule requiring all practicing lawyers to render a minimum of sixty hours of free legal assistance to indigent litigants in a year.<sup>138</sup>

¶50 At the same time, NGOs committed to empowering poor and marginalized Filipinos have steadily emerged to help meet legal needs.<sup>139</sup> In the area of criminal defense, for example, the creation of paralegal classes has served as a form of legal empowerment utilized by certain

<sup>125</sup> Eliza B. Yu, *Enhancing Access to Justice by the Poor: An Assessment of the Public Attorney’s Office*, LAWYERS REV., June 30, 2006, at 6.

<sup>126</sup> See CONST. (1987), Art. II, sec. 9, (Phil.).

<sup>127</sup> CONST. (1987), Art. III, sec. 11, (Phil.).

<sup>128</sup> Yu, *supra* note 125, at 6.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> SUPREME COURT OF THE PHILIPPINES, 2003 ASSESSMENT OF THE PUBLIC ATTORNEY’S OFFICE, at 7 (2004) (The number of civil and criminal cases handled by the PAO grew from approximately 169,205 in 1992 to 408,145 in 2001); Yu, *supra* note 125, at 9 (noting that in 2004, public attorneys had an average caseload of 363.732 criminal cases and 37.70 civil cases).

<sup>132</sup> *Id.* at 4.

<sup>133</sup> *Id.* at 22 (The average number of pending criminal cases of the PAO rose from 120 in 2000 to 153 in 2002).

<sup>134</sup> See *id.* at 18.

<sup>135</sup> *Id.* at 3-4.

<sup>136</sup> *Id.* at 3-4.

<sup>137</sup> *Id.* at 4; ALTERNATIVE LAW GROUPS, FROM THE GRASSROOTS: THE JUSTICE REFORM AGENDA OF THE POOR AND MARGINALIZED 8 (2004) [hereinafter *Alternative Law Groups*].

<sup>138</sup> Proposed Rule on Mandatory Legal Aid Service For Practicing Lawyers BM No. 2012, § 5 (Jan. 27, 2009).

<sup>139</sup> See *Alternative Law Groups*, *supra* note 137, at 8.

organizations to provide legal education and legal representation to indigent accused.<sup>140</sup> Groups engaging in the paralegal approach to justice services provide basic training in law to laypeople who in turn assist their respective communities to remedy breaches of fundamental rights and freedoms.<sup>141</sup>

¶51 One such project is aimed at helping farmers, who are often falsely accused of crimes, obtain access to justice. Across the Philippines, reforms in the agrarian sector by the government have been met with resistance from landowners and elite land claimants.<sup>142</sup> Agrarian farmers asserting their land rights have suffered injustice as a result, being forced to confront arbitrary filings of criminal charges and the consequent issuance of arrest warrants.<sup>143</sup> Facing constant harassment and intimidation, farmers are charged with crimes ranging from qualified theft to malicious mischief to trespassing.<sup>144</sup> A number of factors influence this problem, including outdated laws, minimal access to legal services, complicit participation of the authorities in the landowners' harassment, and the alienation of farmers from the legal process.<sup>145</sup>

¶52 Rosselyn Jae de la Cruz, a Philippine lawyer, is working to address these issues by establishing a paralegal training class for local women in Bondoc Peninsula, Quezon.<sup>146</sup> This initiative, which came on the heels of the government's Comprehensive Agrarian Reform Extension with Reforms Law (CARPER) in 2009, provides these women with the necessary skills to monitor cases filed in court, gather evidence, write affidavits, and help farmers navigate the legal process.<sup>147</sup> There are no formal criteria in selecting a paralegal; the individual must have the capacity to understand strategies and processes of the law and displays a willingness to learn.<sup>148</sup>

¶53 Under the module implemented by de la Cruz, the female paralegal takes a four-day course covering basics on criminal procedure, the court system, and rights of the accused upon arrest.<sup>149</sup> In addition, she learns the steps to take in the event of an arrest through a warrant, such as asking to see the warrant of arrest, obtaining the name of the arresting officer, contacting a lawyer, and refraining from signing anything that is not clearly explained.<sup>150</sup> The paralegal is also educated on certain provisions of CARPER, particularly those that mandate an automatic referral system to the Department of Agrarian Reform (DAR) upon an allegation that the case is agrarian in nature and one of the parties is a farmer, farm worker, or tenant.<sup>151</sup> Overall, the female paralegal uses the skills and knowledge she has developed in the field of the law and the legal system to help her community address its legal problems.<sup>152</sup>

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<sup>140</sup> See Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, 31 YALE J. INT'L L. 427, 428 (2006).

<sup>141</sup> *Id.* at 429.

<sup>142</sup> See *Criminalization of Agrarian Reform in Bondoc* (on file with author).

<sup>143</sup> *Id.*

<sup>144</sup> *Criminalization of Agrarian Reform in Bondoc*, *supra* note 142 (as of October 2009, the number of cases pending in the municipalities of San Francisco, San Andres, San Narciso, and Mulanay, Bondoc Peninsula have totaled 282, while the total recommended bail for all recorded cases amount to P14,198,000 as of March 2008).

<sup>145</sup> *Id.*

<sup>146</sup> Telephone Interview with Rosselynn Jae de la Cruz, Legal Consultant, AKBAYAN Citizens Action Party (Feb. 7, 2011).

<sup>147</sup> *Id.*

<sup>148</sup> English Version JusticeMakers Module (on file with author).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Criminalization of Agrarian Reform in Bondoc*, *supra* note 142.

<sup>152</sup> English Version JusticeMakers Module, *supra* note 149.

¶154 As a result of de la Cruz's efforts, twenty women in six communities throughout Quezon province are receiving paralegal training.<sup>153</sup> Moreover, courses have expanded to four communities in Iloilo, while other organizations operating in Isabela, Negros, and Tarlac have also adopted the module.<sup>154</sup> Yet despite these advancements, de la Cruz notes that continued dialogue between representatives of the agrarian community and the relevant government agencies must take place to further enhance access to justice by the rural poor.<sup>155</sup>

¶155 Along with implementing the initiatives to combat legal issues surrounding the agrarian community, another Philippine-based organization is focusing its attention on the injustices faced by prison inmates in city jails.<sup>156</sup> The Humanitarian Legal Assistance Foundation, Inc. (HLAF) works with inmates to improve conditions in prisons as well as the country's penal system.<sup>157</sup> According to Rommel Alim Abitria, HLAF's Executive Director, the vast majority of prisoners in city jails are unaware of their rights and have no knowledge of the procedures of the criminal justice system.<sup>158</sup> Due to clogged court dockets, there are significant delays in hearing proceedings as well as in the preparation and issuance of judgments and release orders.<sup>159</sup> Consequently, inmates are unnecessarily detained for long periods of time, leading to severe overcrowding in prisons.<sup>160</sup>

¶156 To help address these issues, HLAF has established a technical assistance program that employs selected prison inmates as paralegal coordinators.<sup>161</sup> Coordinators perform a variety of functions for their fellow inmates, namely informing them of their rights, assisting in case management, and providing counseling.<sup>162</sup> Coordinators also conduct trainings for inmates on criminal procedure, rights of the accused, and other pertinent laws.<sup>163</sup>

¶157 HLAF's Paralegal Coordinators Program begins with the selection of the paralegal coordinator.<sup>164</sup> First, the coordinator must be at least a high school graduate.<sup>165</sup> He or she must also be charismatic and respected by his or her co-inmates, regardless of gang affiliation.<sup>166</sup> Further, these coordinators must be inmates who will remain in jail for a long period of time.<sup>167</sup> Up to two paralegal coordinators are chosen to operate in each cell, with the assistance of a Bureau of Jail Management and Penology (BJMP) officer.<sup>168</sup>

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<sup>153</sup> Telephone Interview with Rosselynn Jae de la Cruz, *supra* note 146.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See *Empowerment*, HUMANITARIAN LEGAL ASSISTANCE FOUNDATION, [http://primary.hlafphil.org/index.php?option=com\\_content&view=article&id=6&Itemid=55](http://primary.hlafphil.org/index.php?option=com_content&view=article&id=6&Itemid=55) (last visited Apr. 27, 2011).

<sup>157</sup> *Id.*

<sup>158</sup> Interview with Rommel Alim Abitria, Executive Director, Humanitarian Legal Assistance Found, Inc., in Manila, Phil. (Feb. 10, 2011).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Paralegal Coordinators Program*, HUMANITARIAN LEGAL ASSISTANCE FOUNDATION, [http://primary.hlafphil.org/index.php?option=com\\_content&view=article&id=38&Itemid=62](http://primary.hlafphil.org/index.php?option=com_content&view=article&id=38&Itemid=62) (last visited Apr. 27, 2011).

<sup>163</sup> *Id.*

<sup>164</sup> Interview with Rommel Alim Abitria, *supra* note 158.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Paralegal Coordinators Program*, *supra* note 162.

<sup>168</sup> *Id.*

¶58 Upon selection, candidates for paralegal coordinators take part in a training program that lasts approximately six months.<sup>169</sup> The HLAJF training module covers aspects on criminal law, special penal laws, criminal procedure, and modes of release.<sup>170</sup> Candidates are also trained on how to prepare a simple affidavit.<sup>171</sup> They then work with detainees under direct supervision.<sup>172</sup>

¶59 The impact of the Paralegal Coordinators Program on prison inmates has been immediate.<sup>173</sup> In 2004, for instance, HLAJF facilitated the release of 69 inmates.<sup>174</sup> This number rose to 218 in 2006, and 1,391 in 2009.<sup>175</sup> Given the success of the program, paralegal coordinators have expanded to nine jails throughout Metro Manila.<sup>176</sup> Moving forward, HLAJF hopes to garner support from BJMP officers and wardens across all prisons and advocate for change in the area of juvenile justice.<sup>177</sup>

### G. Comparative lessons

¶60 The above case studies were presented according to the country within which the innovations are taking place, yet they could have also been arranged by the nature of the problem they seek to solve or the style of solution they illustrate. In fact, a wider application of these lessons would require an analysis along the lines of the latter categorization.

#### 1. Understanding the problem

¶61 One of the keys to constructive legal development is not only understanding what the problem is, which requires a detailed needs assessment, but also understanding the root of the problem. Generally, the problems faced above either stem from a lack of capacity or are of the “hearts and minds” variety. Capacity deficits—whether due to post-conflict destruction, post-colonial rebuilding, or any other cause—include a lack of professionals, a lack of adequately trained professionals, a lack of financial resources to provide services, a general lack of access to information, or the structural inability to fill implementation gaps between enacted laws and actual performance.

¶62 For example, in the Cambodian context, the low attorney-to-defendant ratio makes providing all defendants with adequate representation virtually impossible. When this is combined with the fact that the attorneys that are available may not be trained in criminal defense skills, the problem is compounded. Similarly, if there are no funds available to compensate attorneys for providing indigent defense, then regardless of the number of qualified professionals, defendants will remain without counsel. Equally, even compensated attorneys may

<sup>169</sup> Interview with Rommel Alim Abitria, *supra* note 158.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *HLAF 2004 Report*, HUMANITARIAN LEGAL ASSISTANCE FOUNDATION, [http://primary.hlafphil.org/index.php?option=com\\_content&view=article&id=31&Itemid=52](http://primary.hlafphil.org/index.php?option=com_content&view=article&id=31&Itemid=52) (last visited Sept. 22, 2011).

<sup>175</sup> *HLAF 2006 Report*, HUMANITARIAN LEGAL ASSISTANCE FOUNDATION, [http://primary.hlafphil.org/index.php?option=com\\_content&view=article&id=33&Itemid=50](http://primary.hlafphil.org/index.php?option=com_content&view=article&id=33&Itemid=50) (last visited Sept. 22, 2011); *HLAF 2009 Report*, Humanitarian Legal Assistance Foundation, [http://primary.hlafphil.org/index.php?option=com\\_content&view=article&id=58&Itemid=82](http://primary.hlafphil.org/index.php?option=com_content&view=article&id=58&Itemid=82) (last visited Sept. 22, 2011).

<sup>176</sup> Interview with Rommel Alim Abitria, *supra* note 158.

<sup>177</sup> *Id.*

not be able to provide a proper defense without access to a law library for research or a computer for typing briefs. Moreover, as in Indonesia, a lack of rights awareness will often mean that defendants who could have received legal aid upon request will go unrepresented due to the simple fact that they did not know they had to fill out the application. Additionally, where there is a lack of structural capacity, legal aid requests may go unanswered because detention center officials have no formal connection with the legal aid office or no process in place to facilitate the accused's request.

¶63 Problems that fall under the “hearts and minds” category are also diverse. Without belief in the rights of the accused, legislators will not enact rights-protecting laws, judicial officers will not enforce the laws that are enacted, police and prosecutors will not facilitate defendants in accessing any existing legal aid, lawyers will fail to advocate for their clients due to a lack of motivation or willingness to learn new skills, and citizens when arrested will not feel empowered to claim their lawful rights. Every country situation provided in this section demonstrated both categories of problems, although to differing degrees and manifested in different ways. Their solutions equally differed, according to the nature of the problem and the realities of their present system.

## 2. Capacity building

¶64 Solutions to capacity deficits presented in this paper included skills training for legal professionals, the use of paralegals or quasi-paralegals to cover representation gaps, the direct provision of infrastructure such as computers or manpower, fundraising to fill financial needs, research projects to pinpoint problems and solutions, and the rediscovery of traditional mechanisms to rebuild the justice system. In order for these solutions to create sustainable change, it is necessary that local actors are utilized in the process so that they can continue to provide services, by representing clients for example, and so that they can replicate the process across a wider geographic area. This is in addition to the practical or moral need to work with local actors based on their unique knowledge of their own situation, their personal investment in their community, and the legitimacy they provide. This is not merely a consideration of foreign versus national actors, but also something that should be analyzed when using urban professionals in rural areas or majority ethnic individuals in minority communities. One example is the use of prisoners to train other prisoners, employing commonalities to build relationships.

¶65 While sustainability is key, some of these solutions are meant to be temporary measures, such as the use of paralegals, quasi-paralegals, and community members to offer legal advice, as it is hoped that local legal aid systems will eventually provide all defendants with their right to full representation. Nevertheless, programs such as the jailhouse quasi-paralegal initiatives in India, the Philippines, and soon Indonesia, have proved beneficial. Other programs described present variations on this theme, such as the student “friend” representation in China and the education of community members in several countries.

## 3. Changing “hearts and minds”

¶66 Changing “hearts and minds” requires an equally ambitious set of solutions, more challenging than filling in capacity deficits. Some of the methods employed in the above case studies included rights campaigns to raise citizen and community awareness surrounding criminal justice issues; facilitating discussions that bring judicial stakeholders together to better

understand the need for reform and the societal benefits of rights-protection; lawyer roundtables to build solidarity and sustain motivation among defense attorneys working in the field; pilot projects to provide the unconvinced with positive examples; and access to examples from other districts, countries, or regions to allow stakeholders to engage in their own comparative analysis. These days, the changing of “hearts and minds” is taking place through new mediums, such as through the use of Facebook and Twitter in Malaysia. At the same time, it is important that it is not a foreign vision being directly transplanted into the local system. Rather, it should be a vision of the people that incorporates the best of their local society that they share with others to create a common goal.

#### *H. Cooperative exchange*

¶67 The successes of the innovations described in the six country studies above provide hope for the future of criminal justice systems across Asia. In reframing these innovations according to root problems and tested solutions, it becomes apparent that while each situation is unique, there are common problems across the region, and indeed throughout the world. This suggests the possibility of common solutions, if properly tailored by local stakeholders to meet local particularities. By sharing best (and worse) practices, as well as new ideas, governments, NGOs, and grassroots actors can construct new and better ways to address the particular challenges they face.

¶68 Fortunately, there is both a desire and a willingness among many for increased pan-Asian cooperation, in the fields of both human rights generally and criminal justice specifically. For example, calls for greater cooperation have been echoed by Asian governments appearing before the U.N. Human Rights Council’s Universal Periodic Review mechanism. At the recent review of India’s human rights situation, China praised India’s human rights achievements and welcomed the further sharing of experiences as a fellow “developing country...faced with many similar challenges.”<sup>178</sup> Countries including China, Thailand, and Vietnam, similarly praised or encouraged Malaysia for its efforts in enhancing human rights standards, and in areas such as education and poverty reduction, China, Vietnam, Myanmar, Bangladesh, Laos, and the Philippines all suggested that Malaysia share its strategies with other countries.<sup>179</sup>

¶69 Likewise, although it is in its nascent stages and has limited country-group participation, the Association of South East Asian Nations (ASEAN) Charter establishing an official ASEAN Human Rights Body was signed in 2007 by the ten Asian countries that form ASEAN.<sup>180</sup> It certainly remains to be seen if it will be an effective tool for the regional promotion of rights in Asia, but nevertheless, related forums such the periodic meetings of the ASEAN Intergovernmental Commission on Human Rights (AICHR)<sup>181</sup> and the Working Group for an ASEAN Human Rights Mechanism represent an additional opportunity for exchange.<sup>182</sup>

<sup>178</sup> U.N. Human Rights Council, 8th Sess., *Report of the Working Group on the Universal Periodic Review: India*, U.N. Doc. A/HRC/8/26, ¶33 (May 23, 2008) (particularly emphasizing the human rights of women and children).

<sup>179</sup> U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malaysia* 21-8 U.N. Doc A/HRC/11/30 (Oct. 5, 2009).

<sup>180</sup> Andrea Durbach, Catherine Renshaw & Andrew Burns, ‘*A Tongue but No Teeth?*’: *The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region*, 31 SYDNEY L. REV. 211, 212 (2009).

<sup>181</sup> See *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN), <http://www.unhcr.org/refworld/docid/4a6d87f22.html> (last visited Sept. 22, 2011).

<sup>182</sup> See, e.g., Press Release of the Fifth ASEAN Intergovernmental Commission on Human Rights, Working Group for an ASEAN Human Rights Mechanism, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN),

Promisingly, the Terms of Reference of the AICHR lists, as one of its six “purposes,” that it is formed “[t]o *enhance regional cooperation* with a view to complementing national and international efforts on the promotion and protection of human rights.”<sup>183</sup>

¶70 As Andrea Durbach, Catherine Renshaw, and Andrew Byrnes note, “[t]he creation of regional networks for the protection and promotion of human rights... offers a contrasting approach to the traditional, top-down dissemination of international human rights principles to national (domestic) systems of government.”<sup>184</sup> Stanley Yeo has called, specifically, for greater harmonization of Asian criminal justice and offers strategies to actualize this idea, including: (1) “organizing a series of conferences that focus on selected issues of criminal law”; (2) offering “[u]niversity courses on comparative criminal law”; (3) “teacher and student exchanges among the universities in the region”; and (4) establishing “centers... for the study, research and dissemination about the criminal laws of the Asia-Pacific.”<sup>185</sup> While pan-Asian justice might not be the ideal way to address all local situations, the strategies Yeo offers nevertheless represent effective tools to facilitate greater cooperation.

¶71 Governments across Asia have publicly declared their desire to learn from other States in the region and the ten ASEAN countries have taken the first step towards a regional court. Similarly, lawyers participating in development initiatives, such as those highlighted in China, indicated their eagerness to travel abroad and share what they have learned. With the internet, information sharing is increasingly fast, easy, and inexpensive. Regional trainings and conferences are similarly more economical for many since they do not have to travel all the way to Europe, Africa, or the Americas. Commonalities, both real and perceived, can be used to build bridges and forge new partnerships. In the era of globalization, building solidarity and finding inspiration are not defined by borders. In fact, it is virtually impossible to cut off the flow of outside influence in our times.

¶72 Furthermore, greater pan-Asian cooperation may also provide an additional solution to “hearts and minds”-style problems. As mentioned in the Background section of this paper, the “Asian values” debate does not seem to be disappearing anytime soon. As long as national governments continue to use this divisive label, local governments will be hesitant to promote many of the universal values that are necessary to ensure the rights of the accused and work more closely with the international organizations that are able to provide much-needed resources. By promoting regional initiatives instead, local actors are able to move beyond this rather tired discourse, and start realizing positive change. At the same time, this inter-regional cooperation itself can help to underscore the commonality, in Asia and elsewhere, of the problems at hand and help discover new potential solutions for building better criminal justice systems.

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<http://www.aseanhrmech.org/news/fifth-asean-intergov-commission.htm> (last visited Sept. 22, 2011) (discussing the establishing of a five year work plan during their meeting in April 2011). For further reading on the future ASEAN Human Rights body, its potentials, likely shortcomings, and proposed alternatives, see Hao Duy Phan, *A Blueprint for A Southeast Court of Human Rights*, 10 ASIAN-PAC. L. & POL’Y J. 384 (2009).

<sup>183</sup> Terms of Reference, *supra* note 181, ¶ 1.5 (emphasis added).

<sup>184</sup> Durbach, *supra* note 180, at 229.

<sup>185</sup> Stanley Yeo, *Towards A Shared Criminal Jurisprudence in the Asia-Pacific*, 2 OR. REV. INT’L L. 108, 115 (2000).

IV. THE EFFECTS OF AN INCREASINGLY INTERNATIONALIZED CRIMINAL JUSTICE SYSTEM ON THESE NATIONAL LEGAL SYSTEMS

¶73 It is certainly not only Asian countries that are looking beyond their borders in search of a more just world, and justice no longer exists only at the national level. The Tokyo Tribunal, ICTY, ECCC, and the ICC have all been a part of an increasingly internationalized criminal justice system. Moreover, despite the tendencies, mentioned above, of some Asian governments to dismiss “universal-values” as being Western, Asian States’ participation in both human rights treaties and international criminal courts and tribunals, which guarantee, *inter alia*, a defendant’s right to adequate representation, sends a message both at home and abroad, that rights in this context are not limited by East-West dichotomies. This section will very briefly explore Asian States’ participation in these international *fora*, and how they relate to the rights of their domestic accused.

A. *Tokyo Tribunal*

¶74 The birth of the international criminal justice system is thought to be the post-World War II tribunals at Tokyo and Nuremberg. While not as thoroughly analyzed as its German counterpart, the International Military Tribunal for the Far East in Tokyo, which opened in 1946, was one of the first international attempts to use the courts to adjudicate post-conflict horrors.<sup>186</sup> Three of the eleven judges at Tokyo came from countries analyzed in the case studies presented in Section III, Major General Mei Ju-ao of China, the Honorable Radhabinod Pal of India, and Colonel Delfin Jaranilla of the Philippines.<sup>187</sup>

¶75 While it is tempting to argue that Tokyo exemplifies a truly “Asian” influence over the birth of international criminal law—or even that it represents a model starting-point for international criminal justice standards that could then be locally or regionally incorporated—the facts tell otherwise. First, “[t]he contemporaneous legal coverage of the trial was remarkably thin, with only a score of articles, mostly short laudatory pieces written by prosecutors, appearing in English-language law journals.”<sup>188</sup> Therefore, it is difficult to maintain that the Tokyo Tribunal had much influence over regional court systems. Moreover, the tribunal has not escaped the withering criticisms of its European twin. As Kirsten Sellars describes, “Tokyo was the very blackest of courtroom dramas, with an abundance of somber lessons for jurists as well as for politicians and historians.”<sup>189</sup> Nevertheless, these lessons learned would help shape the future of a more just system.

B. *Early involvement: ICTY*

¶76 The ICTY was established in 1993 by the U.N. Security Council Resolution to try perpetrators associated with the atrocities committed in the Balkans during the disintegration of the former Yugoslavia.<sup>190</sup> Endeavoring to avoid the failings of its Tokyo and Nuremberg predecessors, Article 21(4)(b) of the ICTY Statute incorporated the now three-decades old rights

<sup>186</sup> Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT’L L. 1085, 1092 (2010).

<sup>187</sup> C. Peter Chan, *Tokyo Trial and Other Trials Against Japan*, WORLD WAR II DATABASE, [http://ww2db.com/battle\\_spec.php?battle\\_id=221](http://ww2db.com/battle_spec.php?battle_id=221) (last visited Sept. 22, 2011).

<sup>188</sup> Sellars, *supra* note 186, at 1093.

<sup>189</sup> *Id.* at 1102.

<sup>190</sup> Harvard Law Review, *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 1984 (2001).

of the accused embodied in the ICCPR.<sup>191</sup> Under these provisions, defendants are, among other things, assured the right to communicate with counsel and indigent defendants have the right to counsel free of charge.<sup>192</sup>

¶77 Despite its location in Europe, Asian States were not absent from the ICTY process. Beyond establishing the U.N. Resolution itself, Asian judges served from the start, participating in the drafting of the very jurisprudence that has since formed the basis of international criminal law. Among the former permanent judges of the ICTY are the Honorable Haopei Li of China, who served from November 17, 1993 until November 16, 1997, the Honorable Wang Tieya, also from China, who sat from November 17, 1997 through March 31, 2000, and the Honorable Judge Lal Chand Vohrah of Malaysia who presided from November 17, 1993 through November 16, 2001.<sup>193</sup> These same judges are credited with drafting the first judgments impacting defendants' rights at the ICTY.<sup>194</sup> Other judges from the region include former *ad litem* judges Amarjeet Singh of Singapore (September 6, 2001—April 5, 2002) and Chikako Taya of Japan (September 6, 2001—September 1, 2004),<sup>195</sup> as well as current judges, including O-Gon Kwon of Korea and Liu Daqun of China.<sup>196</sup>

¶78 In comparison to the Tokyo Tribunal, the ICTY was more influenced by Asian legal concepts; in return, it helped to legitimize claims of international/universal due process values that should, then, be applicable to defendants in Asia. If Asian States and judges agree that these rights should be upheld for suspected war criminals in Europe, it is difficult to deny citizens in their own countries the same guarantees.

### C. ICC Membership

¶79 Seventeen Asian States are already members of the International Criminal Court (ICC),<sup>197</sup> and other countries continue to send sizeable delegations to the Assembly of States Parties to the ICC. The current president of the court is Korean,<sup>198</sup> and two of the first 18 judges came from Asian States.<sup>199</sup> In fact, despite its negative vote, the Chinese delegation was “actively involved in the negotiations that led to the adoption of the Rome Statute.”<sup>200</sup> This included delegation members participating on the Drafting and Credentials Committees.<sup>201</sup>

¶80 Still, “the number of States within the Asia-Pacific region that have thus far ratified the Rome Statute, or have indicated that they are taking practical measures aimed towards

<sup>191</sup> Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. INT'L HUM. RTS. 1, 12-24 (2009).

<sup>192</sup> *Id.* at 24-28 (2009).

<sup>193</sup> *Former Judges*, ICTY, <http://www.icty.org/sid/10572> (last visited Sept. 22, 2011).

<sup>194</sup> See, e.g., Harvard Law Review, *supra* note 7, at 1986-87 (relating Lal Chand Vohrah's opinion on witness testimony).

<sup>195</sup> *Former Judges*, *supra* note 193.

<sup>196</sup> *The Judges*, ICTY, <http://www.icty.org/sid/151> (last visited Apr. 25, 2011).

<sup>197</sup> The ICC websites lists Asian States Parties as follows: Afghanistan, Bangladesh, Cambodia, Cook Islands, Cyprus, Fiji, Japan, Jordan, Maldives, Marshall Islands, Mongolia, Nauru, Philippines, Republic of Korea, Samoa, Tajikistan, Timor-Leste. *States Parties: Asian States*, ICC, <http://www.icc-cpi.int/Menu/ASP/States+Parties/Asian%20States> (last visited Sept. 22, 2011).

<sup>198</sup> Judge Sang-Hyun SONG (Republic of Korea), President, ICC, [http://www.icc-cpi.int/menu/icc/structure%20of%20the%20court/presidency/the%20president/judge%20sang\\_hyun%20song%20\\_republic%20of%20korea\\_\\_%20president?lan=en-GB](http://www.icc-cpi.int/menu/icc/structure%20of%20the%20court/presidency/the%20president/judge%20sang_hyun%20song%20_republic%20of%20korea__%20president?lan=en-GB) (last visited Sept. 22, 2011).

<sup>199</sup> Steven Freeland, *Towards Universal Justice—Why Countries in the Asia-Pacific Region Should Embrace the International Criminal Court*, 5 N.Z. J. PUB. & INT'L L. 49, 53 (2007).

<sup>200</sup> Bing Bing Jia, *China and the International Criminal Court: The Current Situation*, 10 S.Y.B.I.L. 87, 87 (2006).

<sup>201</sup> *Id.* at 88.

ratification in the near future, is relatively low when compared to the European, African and American regions.”<sup>202</sup> In addition, the ICC has yet to try a case from Asia. While it can be assumed that the momentum of the ICC will eventually have a greater influence in the region, it is still relatively pre-mature to assess its impact. It may be more accurate to note the ICC as part of a larger global trend towards international criminal justice from which Asia is not completely absent.

#### D. ECCC: A hybrid approach

¶81 Perhaps the most convincing example of Asian participation in internationalized criminal justice, the ECCC is technically a hybrid court with features of both Cambodian justice and international standards.<sup>203</sup> At the behest of the Cambodian government, the U.N. formed an international expert panel to evaluate the best way to prosecute the perpetrators of the Khmer Rouge era human rights violations. Although the expert panel in 1999 recommended an *ad hoc* international criminal tribunal, not dissimilar to that of the ICTY, the Cambodian government expressed its fears that such a court would violate Cambodian sovereignty. As a result, a hybrid tribunal was proposed and then ratified in 2004.<sup>204</sup> According to its mandate, three of the five judges are Cambodian nationals.<sup>205</sup> Despite the hybrid nature, however, the rules of the ECCC ensure international due process standards, similar to those at the ICTY and ICC.<sup>206</sup>

¶82 According to Marie Montesano, “the ECCC serves as a model court system, demonstrating how the court can help protect human rights and enforce the laws that prohibit violations.”<sup>207</sup> Montesano describes how the international standards of the ECCC had a notable impact on the domestic court system.<sup>208</sup> For example, following the establishment of the ECCC, the 2006 draft of the criminal procedural code “replace[d] the... articles of the [previous domestic] code with provisions virtually identical to those of the Internal Rules of Evidence and Procedure of the ECCC.”<sup>209</sup> In addition, the “numerous training sessions for legal professionals” provided by the hybrid court are reinforcing “international standards of justice.”<sup>210</sup> Furthermore, the ECCC’s “large scale educational campaign” is teaching citizens “to utilize the court system in order to demand the protection of human rights.”<sup>211</sup>

¶83 Elizabeth M. Bruch argues: “[a]s neither fully national, nor fully international, [hybrid courts] avoid the disadvantages of each, and instead they offer the potential for increased legitimacy, domestic capacity-building, and norm dissemination because of their unique status as both international and domestic.”<sup>212</sup> It seems that the ECCC has been a tentative success in that regard, even if it remains far from perfect. In fact, hybrid courts present a further potential reform strategy for local systems. Asian countries can look to both the successes of their regional

<sup>202</sup> Freeland, *supra* note 199, at 52.

<sup>203</sup> Montesano, *supra* note 3, at 100 (discussing the history of criminal law and procedure in Cambodia).

<sup>204</sup> *Id.* at 99-100.

<sup>205</sup> Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. COMP. & INT’L L. 247, 255 (2010).

<sup>206</sup> Montesano, *supra* note 3, at 103-04.

<sup>207</sup> *Id.* at 103.

<sup>208</sup> *Id.* at 102-03.

<sup>209</sup> *Id.* at 102.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 101.

<sup>212</sup> Bruch, *supra* note 16, at 6.

and international counterparts, and combine useful elements into their own systems in a hybrid approach to justice reform.

*E. The effects of internationalized justice on local systems*

¶84 Similar to the national case studies in the previous section of this paper, examples of the rights of the accused at the international level may provide models for implementation at the local or national level. This has already happened in Cambodia, and to some extent has been happening in all six countries described, as all have witnessed improvements in access to representation post-Tokyo and post-ICCPR. Countries sending delegations to the U.N. and national judicial actors traveling abroad, or even listening to international news reports, are all either helping to build these international legal standards, being complicit in their formulation, or, at a minimum, becoming more aware of their existence.

¶85 Indeed, as mentioned previously, for States that are actively participating in the system by providing judges or lawyers, it is difficult to argue that individuals charged with war crimes abroad should be afforded greater rights protections than indigents accused within their domestic system. Even for actors that merely have knowledge of the massive movement happening at the international level to establish and ensure these due process standards, they will eventually be compelled by national actors to provide a response to why their accused do not deserve the same.

¶86 For example, while attending local, regional, and national conferences in China, this author was particularly struck by the frequent mention by Chinese judges, police, prosecutors, and lawyers, of solutions to systemic problems that they have discovered on international study tours to courts, prisons, and universities across the globe. In particular, when these examples are invoked by high level officials or respected academics, participants are attentive and engaged. It would seem, therefore, that the more interaction these same legal stakeholders have with international and hybrid courts, the more the standards of these courts will be promoted and replicated. This is particularly the case where these observers note that many of the people involved in running these systems are from their own country.

¶87 One way for interested stakeholders to help facilitate this interaction is through hosting conferences on these international courts in Asian countries. A good example of this was the October 2003 Beijing Symposium on Comparative Study of International Criminal Law and the Rome Statute, which brought together members of the ICC, high-level Chinese judicial stakeholders (including those who had been involved at the Rome conference), and various foreign experts for a three day discussion, workshop, and simulation exercise.<sup>213</sup> Specifically, during the simulation exercise 50 Chinese participants were divided into teams to play the roles of judge, prosecutor, victim, and, notably, the defense.<sup>214</sup> In doing so, these participants were asked to consider what protection the ICC procedural rules offer the accused. Experiences such as these have the potential to leave a lasting impression.

¶88 Asian participation in international justice is steadily increasing and it will not be possible to ignore its domestic implications forever. Instead, as Mark Findley suggested, it may be wiser for Asian countries to start offering the international community lessons from their own systems, which may provide new alternatives to transitional justice problems.<sup>215</sup> A strong Asian presence

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<sup>213</sup> Ling Yan, *The Beijing Symposium on the Comparative Study of International Criminal Law and the Rome Statute*, 3 CHINESE J. INT'L L. 305 (2004).

<sup>214</sup> *Id.* at 316-17.

<sup>215</sup> See generally Mark Findlay, *The Challenge for Asian Jurisdictions in the Development of International Criminal Justice*, 32 SYDNEY L. REV. 205 (2010) (exploring *inter alia* the potential for China in particular and Asian countries

in the international justice movement would ensure that Asian viewpoints were taken seriously, and, in turn, would strengthen the international system by increasing its credibility as one that enjoys truly global support.

## V. CONCLUSION

189 Access to adequate representation is an indispensable tool in ensuring rights protections and fairness for all. Realization of this right should not depend on the country in which one is born or the country in which one ends up. The checkered history of our shared planet has created borders that still shape the fate of individuals. While these ever-evolving geographic descriptions may have negative consequences for those living without guarantees, we can also build upon notions of proximity and shared cultures or histories to learn from one another. The examples provided of government reform, grassroots initiatives, and hybrid innovations are models that can provide inspiration for judicial stakeholders across Asia and beyond. In a globalizing and internationalizing criminal justice system, there are many positive opportunities for greater pan-Asian cooperation waiting to be seized.

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in general to serve as models for international transitional justice initiatives).