Issues of Concern to Developing and Transitional Countries

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Abstract

Led by moderator Frank Upham, the panelists discussed legal aid in the context of societies transitioning from one form of social order to another, and the institution-building that is required.
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MODERATOR: Frank Upham, Professor of Law, New York University Law School, New York

PANELISTS: Martin Böhmer, Director of Clinical Education, Universidad de Palermo Law School, Buenos Aires
Felix Morka, Social and Economic Rights Action Center, Nigeria
Linas Sesickas, Legal Adviser of Open Lithuania Fund
Futoshi Toyama, Legal Representative, Japan Legal Aid Association

MR. UPHAM: My name is Frank Upham. I am a Professor at New York University Law School. I think I will introduce our four panelists right now so that we will be able to go smoothly from talk to talk and conserve as much time as possible for discussion at the end. We will have the talks alphabetically, which actually also fits the unifying theme of the four talks to the extent we were able to find one this morning at breakfast. I think actually we were more successful than any of us thought we would be.

On my immediate right is Martin Böhmer, who is the Director of Clinical Education and a Professor of Law at the University of Palermo in Buenos Aires. He is also a public interest law practitioner and is involved in linking university clinical programs in the southern cone of Latin America.

On my immediate left is Felix Morka, Executive Director of the Social and Economic Rights Action Center, Lagos, Nigeria. He has been involved for a very long time protecting human rights, both from domestic pressure and from international pressure, both from transnational corporations and from transnational financial institutions.

On Martin’s right is Linas Sesickas, Legal Adviser of Open Lithuania Fund. He has worked with the United Nations Development project, and is involved also as a public interest lawyer in
a wide range of legislative activities and NGO development activities.

On my extreme right is Futoshi Toyama, Staff Attorney and a Member of the Board of the Japanese Legal Aid Association since 1991. He is a partner in Murakami and Toyama, a small firm which does commercial work as well as the kinds of activities that led him to the Board of the Japanese Legal Aid Association.

When we met this morning, transitional and developing countries had a little bit more of a definition than globalization, but it was not immediately obvious what was meant. We discovered that one thing that was certainly true for the first three speakers was the transition from authoritarian dictatorial regimes through a period of acute change into a period of institution-building.

We tried to fit Japan into the category of a developing country—or a transitional country, maybe it's transitioning from late capitalism to post-modern capitalism—but we weren't sure. Mr. Toyama and I were discussing whether it actually will take place. There certainly is a great deal of discussion now in Japan about a transition that is analogous to the other three societies; that is a transition from a society commonly believed to be bureaucratically led—a democratic society, but nonetheless a society where the bureaucrats have controlled through largely informal means rather than through law means—to a society where formal legal means, rather than the bureaucracy, would be the primary basis for social order. And in that very important way, Japan is also in transition because, just as these other three societies need to build up their legal institutions from the bar to legal education to the judiciary, Japan is in the middle of doing precisely the same thing.

I think we do have a uniting theme, and that is the theme of transition from one form of social order to another, and the institution building that is required for that.

MR. BÖHMER: Thank you, Frank, and thanks for the invitation.

As we are starting to build a systemic community of international global public interest lawyers, I have to ask for forgiveness to some of my friends here who have already heard this a couple of times.

I have to start from giving you some kind of historical back-
ground about Argentina’s legal system because that is one of the obstacles for access to justice and public interest lawyering in Argentina. As Mr. Gout has very well just put it, that obstacle is in Europe where there are two separate, different systems of law working together in the same Union. In Argentina we have those two systems working together in the same country, so that is even a worse obstacle.

In the middle of the 19th century, Argentina was trying to emerge from a very long civil war, and we needed to rebuild our state, and the idea of the elite at that moment was to borrow the most centralized parts of both the American system and the European system in order to give Buenos Aires, the new capital, the power to rule.

So they borrowed the American presidential system, the federal judiciary, judicial review in the hands of every judge, and a federal supreme court. And they borrowed civil law, the Roman Law tradition, from Europe. We have federal codes and we do not have *stare decisis*. So basically if you put these things all together, you will have a very, very centralized power in the hands of the federal government, mainly the President and, sometimes even, the judiciary. The idea was that provinces will not have the power to decide what the Constitution says, but instead the central federal government will.

This system worked well for some years, and we built a state, and Argentina was a very wealthy country for some years. Then it collapsed. And in the 1970s we started a very violent era that ended up in a very bloody dictatorship between 1976 and 1982, with between 10,000 to 30,000 people who disappeared or were abducted or tortured, with thousands of others going into exile.

In 1983 we recovered our democracy, and with democracy we started the first phase: human rights. In 1984 Argentina established a Truth Commission, which gives evidence to a prosecutor who then prosecutes the most important generals responsible for the atrocities of the past regime. This is unprecedented—a democratic government putting on trial those previous authorities responsible for the atrocities—and they were convicted and sent to jail. At the end, after some uprisings from the armed forces, this human rights policy was limited, and the new president, President Menem, pardoned those few who were in prison.
The people who were in prison in the 1980s are now back in prison because of the abduction of children, a crime that was not covered by the amnesty. As everybody knows in this hall, human rights atrocities never end. The search for truth has also not ended.

After democracy was established, a second trend started in the late 1980s. This was institutional reform and institutional building to address the lack of access to justice and legal standing for groups and the lack of some of the features that will bring back the power to the people. Since those features were not there, we needed to do something. The idea was to reform the Constitution, which was finally reformed in 1994.

This new Constitution reduced the power of the President a little, but it gave lawyers and civil society the possibility to start thinking about using the law as a way to bring changes to Argentina. The idea that the law is a way to change things was a very alien idea to Argentina’s legal tradition, because the Roman law tradition basically is committed to the will of the people expressed by their representatives. This tradition identifies the role of the court as a very mechanical one. The court should not adjudicate the law, it should not touch the law, because otherwise the judges would become tyrants.

The idea is that the will of the people should be automatically applied to the facts, and then the decision of the judge is an automatic decision without any resort to values. Judges are value-less people, as Montesquieu said, “They are only the mouth of the law.” I would say the brainless mouth of the law. This is as they should be, because otherwise, if they have their will in the adjudication process, they are betraying the will of the people.

So, if you want to do politics, you should lobby Congress. That is the way democracy is thought of within this tradition. It is a very revolutionary idea—French Revolution, I would say. That is one of the reasons why the judiciary was not the place to look for redress for rights violations; not to talk about the pitiful role of the judges and the judiciary during the dictatorships.

Therefore, with the new Constitution, we started to have ways of making the judiciary aware that they do adjudicate and that they have to be responsible for that adjudication. With the new legal standing and rules of the new Constitution, we were
able to create institutions. We created an association for civil rights, and we created a clinic within the law school.

With these two institutions, we were able to look for cases and clients. But in order to look for cases and for clients, we had to create them, meaning we had to go to the civil society organizations, even help creating them or incorporating some of them with our work. Then, when we had this client that we helped create, we used this client as a tool to litigate cases in the courts. A story of the first meeting with a network of NGOs that the Ford Foundation program was putting together: we walked into the room and said, “Well, okay, we will listen to your cases. Please form a line.”

Nobody knew what a case was. Nobody knew how they could translate their agenda into legal cases, because they never thought about the possibility of using the courts in order to achieve their agenda, to achieve their goals. So the first thing was not only to create our clients, but we did legal literacy of the society basically. We started with, very obviously, just cases in the beginning in order to legitimate ourselves, including a case against the judiciary because the court buildings didn’t have ramps.

Then we found out that it wasn’t only the judiciary that we would work on, but also we had to work on the executive and administration. We decided to do some kind of rule-making activity and lobby in Congress.

For example, one case we tried involved the executive. There was a program run by an NGO that enabled people with Downs Syndrome to work in places like McDonald’s. But when they got their social security number, they were told that that number indicated that they were working. Therefore, if their parents died, they would not be eligible to get the pensions of their parents. So the problem was that if they worked, they would lose this pension; if they didn’t work, they would not get into the workforce and be part of the community. We told the agency that the kind of adjudication they were doing and the law was the wrong and unconstitutional, because we didn’t have a case. We didn’t want to kill a father or a mother, in order to have a case. We wouldn’t go that far. So we started a dialogue with this agency and basically the agency agreed.

But as you see, the ideology of the civil law was so powerful
that the Ministry of Labor which oversees this administrative agency refused to make a general rule according to this new adjudication and basically said, "I will stop adjudicating this way when we send a new law to Congress to change the law, and I will be able to apply it once the law is changed. But I can’t do it, because that’s the job of the Congress." That is interesting, because this ideology is so pervasive.

At one point we found out that we were building an agenda of our own. We were not only helping our clients to achieve their own goals, and our clients were not only using us in order to get what they needed, but also, because we were doing only what we called public interest law cases, because we had very scarce resources and we wanted to make a big impact, what we were doing was building our own agenda. I will try to explain this.

For example, our judges don’t feel that they should be bound by precedents, not even their own, because, again, this is the civil law tradition. You have to find justice in every case; this is not a question of history. If I was wrong yesterday, I have to be right today, and the opinion of a predecessor has nothing to do with the truth. It is just history.

We had to use the press in order to let other people know that we won or that we lost and for others to know that there were other avenues. We used the press in order to make this impact since we didn’t have *stare decisis*.

We were also, with these cases, defining what this new collective legal standing meant in the new Constitution. We were also defining procedures. In the new Constitution, there was a kind of class action procedure, but it wasn’t defined; it was just stated in the Constitution.

A lot of people thought we needed a law, we needed to regulate it through a law. We said, "No, we need cases, and we are going to define that procedure through cases." And we were doing that, and the judges were very sympathetic with that.

So we were using our clients in order to achieve our goals. And that is what we started to call the Agenda of the Public Interest Law in Argentina.

Another feature of the new Constitution in Argentina is that all of the human rights international treaties were put in it, so we belong to the Inter-American Justice System. Of course, you
name the human right that you like and it is there in our Constitution. Of course, access to justice is mentioned, and we thought that this minimum tool-kit for public interest law in Latin America—maybe not that minimum as we were discussing with Ed Rekosh yesterday—should be codified, legislated, or something on the regional level in order for all of us to be able to do our job. It is a very interesting regional, or maybe international, agenda for public interest lawyers to make that minimum tool-kit a reality in our countries, maybe through cases that we could litigate in the Inter-American Court together, or through lobbying the lawyers or other international bodies. Thank you.

MR. UPHAM: Thank you, Martin. Definitely using Ed’s criteria, honorable mention, if not an award.

Felix?

MR. MORKA: Yes. Thank you, Frank.

The last time I spoke in this room was early in 1996, when I debated the Nigerian Ambassador to the United Nations, Professor Ibrahim Gambari. It was quite an occasion at a time when Nigeria was at the height of its military suppression. But I am here today under a slightly different situation.

With the inauguration of an elected civilian government and the adoption of a new federal constitution on May 29, 1999, Nigeria appears ready to turn from its past and embrace its future where democracy, respect for the rule of law, human rights, and social justice remain the cornerstone of governance.

We have had a federal constitution in Nigeria for quite a long time. Except for the Independence Constitution, which was adopted in 1960 when Nigeria gained its political independence from Britain, and the 1963 Republican Constitution, we have operated under at least two federal constitutions modeled after that of the United States, one in 1979 and then the most recent being in 1999.

Implicit in the democratic notion is respect for human rights, the rule of law, accountability, and access to justice. Access to justice mirrors the state of the rule of law in any society. Almost all national constitutions, including that of Nigeria, and several regional and international human rights instruments guarantee access to courts or their enforcement mechanisms.

That notwithstanding, you find, of course, as we have said in the last couple of days, that the vast majority of the world’s popu-
lations, especially the poor, are invariably denied access to effective remedy or even the opportunity to ventilate their grievances. While it is recognized that the courts may not be the only—or, for that matter, the most effective—theater for the resolution of disputes, the legalistic nature of the entire human rights fabric makes the court the centerpiece of the enforcement machinery.

Several regional and international human rights treaties even prescribe the local remedies. For instance, Nigeria is a signatory to the African Charter on Human and People’s Rights, which is the equivalent of an inter-American system. Not only is it a signatory to the Charter, it actually received the Charter into Nigerian law, so that the law surpasses in power any other municipal legislation in Nigeria. So to approach the African Commission, for instance, you are required to show that you have actually exhausted every local legal remedy that is available to you in Nigeria prior to getting consideration for the African Commission.

Affording individuals, communities, and groups effective access to the available legal or judicial fora is, therefore, just as important as guaranteeing those rights. Access to justice in Nigeria is heavily conditioned and limited by the legacies of thirty years of eight relentless military dictatorships which desecrated the constitution, replacing the rule of law with the rule of force, and plundered and looted the national treasury.

For example, the last dictator, Sani Abacha, is reported to have stolen probably about US$6,000,000,000 and assailed the integrity of democratic institutions. With the fusion of the executive and legislative powers in the ruling military council, decision-making processes were concentrated in the hands of a few military rulers and their civilian supporters to the exclusion and detriment of the majority of Nigeria’s over 100,000,000 population.

Although richly endowed with human and material resources, Nigeria now ranks among the twenty-five poorest countries of the world with unemployment standing at seventy percent, infant mortality at 114 per 1000 births, adult illiteracy at over forty-two percent, telephone lines at four per 1000 people, over 67,000,000 people now living below the poverty line as compared to 18,000,000 in 1980, a collapsed educational and health infrastructure, and a widening gulf between the rich and the
poor. The material conditions of existence and redressing prevailing social and economic inequalities constitute the greatest challenges facing the current civilian administration.

Litigation must be seen as more than simply a means for obtaining equal judgment, but as a powerful vehicle for educating and mobilizing affected individuals, groups, and communities around issues of concern to them, and helping to demystify the judicial process. Litigation may be used to clearly frame and define issues of concern to groups or communities and become a rallying point for collective action, so that even when the verdict is unfavorable, the consensus and the energy built around the process can be channeled to other forms of popular expression.

Economic, cultural, and social rights violations are often widespread and involve large sections of the community or the population. For example, the failure of a state like Nigeria to provide free and compulsory primary education, as guaranteed by the International Covenant on Economic, Social and Cultural Rights, would implicate a violation of the right to education of a significant section of the population, just like the forced eviction of a community without adequate notice, compensation, or resettlement would involve the violation of the right of the members of that community to adequate housing.

In transitional or authoritarian societies, litigation can be an important means of building broad support and participation in otherwise sensitive claims. Under the cloak of judicial protection, information dissemination, networking, media, and publicity may be safely undertaken. But to be effective, litigation must be undertaken as a part of a broader strategy of human rights education and community action carried through existing local networks or, where none exist, assisting to build critical links among members of the platform on their shared interests or concerns.

The affected groups or communities must see regular attendance at court proceedings as an important part of the struggle for justice. Issues in the case and highlights of hearings must be explained as simply as possible and in the appropriate language. The community should also be kept abreast of important developments through their representatives or other informal channels. Now, this is the approach which we have adopted at
the Social and Economic Rights Action Center (or "SERAC") where I work, and it has proven to be extremely rewarding and successful in our work with local communities, especially slum dwellers, on issues relating to housing, education, health, and labor in Nigeria.

SERAC's legal program is operated as an integral part of its Community Action Program. It is designed to work with and within local groups and communities to educate and mobilize them to become active participants in the defense and advancement of their rights.

For example, SERAC is championing demands for the full resettlement of the 300,000 people forcibly evicted from their homes in 1990 when Maroko, Nigeria's former largest slum community, was demolished by the military government. That event occurred on July 15, 1990. They were not consulted or given any notice, except an announcement over the radio which gave them seven days to vacate their homes, nothing else. The military government immediately ordered bulldozers and soldiers and other security forces into the community and completely wiped out that community from the face of the earth.

Ten years later, less than three percent of these people have received any form of resettlement, however inadequate. Hope for redress was rekindled and faith restored among the Maroko people through sustained education and training, community organizing, legal counseling, and litigation, empowerment, and mobilization.

The evictions were implemented in two phases. I was then the Deputy Director of Nigeria's Civil Liberties Organisation, and I made spirited efforts to actually get the courts to issue an injunction to restrain the implementation of this brutal act. Of course, the Chief Judge in the Legal State at the time was clearly in cahoots with the government and would not assign the case that I had filed to any court for adjudication, knowing fully well the urgency of the matter. Although we made oral arguments to impress on the judge the need to assign this matter, he did not. It wasn't until the demolition actually began to occur and we returned to the court that he assigned the case, by which time, of course, it was too late. That is a typical example of how the courts were used during the military system to undermine the rule of law and access to justice.
As part of our continuing work with the Maroko people, we were able to revitalize the coordinating body within the community and to help create the Maroko Women's Multipurpose Cooperative Society. We built a 300-seat information center, because the people are mostly concentrated in a part of the city where they have no access to anything. They are at least fifty kilometers away from the rest of the population, cut off from every item of social infrastructure.

So we built the information center, equipped with a television set, to enable the Maroko people to at least have access to information. We provide them daily supplies of one national newspaper. The hall is also used as a meeting point where issues affecting the community are discussed by the community. We also introduced a micro-credit program where we give soft loans to women in the community to help them again regain their lost prestige and strengthen their participation in the community's struggle for justice.

In this context, SERAC's litigation efforts seek to fully legitimize and consolidate the community's demand for resettlement. The Maroko line of cases is constructed to sharpen the focus and galvanize support on particular aspects of economic, social, and cultural rights violations within the community. We have filed *Farouk Atanda v. The Government of Lagos State*, where SERAC is actually asking the court to determine whether the housing provided as resettlement to less than three percent of evicted families is adequate and habitable.

In one particular case, a building in which an eleven-year-old girl slept collapsed and killed her. So we went to the courts to determine whether or not the government was in compliance with its obligations to guarantee adequate housing under the International Covenant on Economic, Social, and Cultural Rights, as well as the African Charter on Human and Peoples' Rights.

Secondly, in *Akilla v. The Lagos State Government*, we are also asking the court to direct the Lagos State government to provide free compulsory primary education to over 9000 pupils of eleven schools that were demolished alongside the community in 1990, again to ensure Nigeria's compliance with applicable international human rights instruments.

The bottom line is that these cases, and others that I don't have time to go into, have come to represent a crucial part of the
community's struggle for justice. This is expressed in part by their regular attendance of court proceedings in huge numbers, sending clear signals to judicial authorities of their collective determination.

Securing and sustaining local communities' attention and participation in the litigation process, however, requires patience, devotion, flexibility, and creativity on the part of the lawyer or human rights worker. Flexibility and creativity prompted SERAC to step outside of our domestic legal arena again when we challenged the World Bank in its implementation of the Lagos Drainage and Sanitation Project, which threatened the homes of over 1,200,000 people who live in about fifteen clusters of slum communities in Lagos.

Just like in the Maroko case, they were not notified, they were not consulted or given any alternative housing, and they were just asked to leave. And so we organized a very successful global campaign against the World Bank and eventually filed a Request for Inspection before the Bank's Inspection Panel on June 16, 1998, to challenge extensive economic, social, and cultural rights violations perpetrated by the World Bank in partnership with the Nigerian Government on that project. Specifically, we complained that the project had flagrantly violated the Bank's operational directives and the human rights of residents of the local host communities, who, like I said, were not consulted or given any alternative housing.

Following a visit to the project communities, the Panel concluded that it was "not satisfied that the [Project] management had fully complied with the [World Bank's] resettlement policy" insofar as it "failed to provide" resettlement and compensation for some affected people . . . .

Corruption and economic mobilization continue to undermine the capacity of many developing countries to tackle the structures which create and nurture poverty and severely limit the ability of courts to intervene on behalf of the poor and other vulnerable members of our society. Whether in an illegitimate theft of resources by corrupt world leaders, like the example I have given, or in developing transnational policies and laws which favor huge and powerful multinational corporations, lawyers contribute in no small measure to impeding access to the courts and justice.
I think that we must keep alive our sacred responsibility to promote the fundamental principles of fairness, equality, non-discrimination, participation, and self-determination. I do not know what else, but if the realization of the inherent dignity of the human person is not the goal and rational basis for every economic and development activity, I don’t know what is.

Thank you.

MR. UPHAM: Thank you, Felix.

Now Linas?

MR. SESICKAS: Thank you, Frank.

In my presentation, I primarily tried to characterize briefly the political, economic, and social context of Lithuania as well as the current free legal aid system, and also mention their legislative and institutional initiatives which are basically aimed to reform their current system or to improve it.

I am particularly delighted to speak at this conference on this particular subject. It’s not the first time that I have participated in the conferences and spoken about the access to justice in Lithuania, but it is the first time where we can really say that we already have a law on guaranteed legal aid which a colleague of mine mentioned yesterday at your representation. It is also the first time when I can say that we just recently opened our first public attorney’s office, not only in Lithuania, but in the whole region of Central and Eastern Europe.

Lithuania is a country belonging to the region of Central and Eastern Europe. It is a post-Communist country that on the 11th of March of the current year celebrated the tenth anniversary of regaining its independence. In 1988, it was one of the first countries in the region where the singing, or velvet, revolution started, which later spilled over to other Central and Eastern European countries. It resulted in a number of fundamental changes in the arena of international politics, like the dissolution of the Soviet Union, the break-up of the socialist camp and of the Cold War bipolar system of international relationships, the collapse of Communist ideology, and even, as it has been noted by well-known scholar, Francis Fukyama, “the end of history.”

The decade of freedom brought numerous substantial changes in the life of the post-Communist societies: the establishment of western-type democratic, political, constitutional re-
gimes; independent judiciaries; checks-and-balance mechanisms; the emergence and strengthening of the civil societies; the organization of public administration systems; the shift from command economies to market-driven ones; the privatization of state property; incremental foreign investments; growing numbers of private enterprises, etc. The list of changes is too long to be further quoted.

To explain this fundamental qualitative transformation, it is enough to say that all ten countries of central and eastern Europe, including Lithuania, have been officially invited in the last year to start negotiations with the European Union for formal entry. It is also important to underline that all of them are determined to expedite this multi-dimensional, far-reaching process to the extent possible.

The development of the economy in such transitional post-Communist societies like Lithuania casts a considerable part of the population aside without providing them with an adequate amount of jobs, even during the periods of growth. Moreover, structural changes in the economy have devalued the knowledge and skills of many employees which were acquired through the course of many years. Not all people manage to retrain quickly, and the state does not allocate enough resources to help them.

While opening its markets to the world provides the Lithuanian people with greater choice, it also increases the competitive pressure on the vulnerable segments of the population. Due to various reasons, certain people do not benefit from the economic progress—they are elderly, they are in non-marketable professions, they have insufficient education, they have a heavy family burden, or they are disabled.

Under the impact of declining average incomes and rising inequality, poverty emerged as a relatively new phenomenon. Being virtually absent before the transition, it rose up to thirty percent of the population in 1994. After that, the number of poor stabilized and decreased slowly, but still more than 600,000 Lithuanians live on less than US$4.00 a day. They account for sixteen percent of the total population, and this is the poverty line which international organizations, such as the World Bank or the United Nations Development Program, use for Central and Eastern Europe. This poverty level is estimated using the relative poverty line and is the main indicator of the poverty. At
least 30,000 people, or almost one percent of the Lithuanian population, live in extreme poverty.

Talking about the current status of our fears as far as their access to justice is concerned, it is necessary to underline that, for the time being, legal assistance is guaranteed by the state, especially in criminal *ex officio* defense cases. Article 31, Paragraph 6 of the Constitution of the Republic of Lithuania establishes that a person suspected of a crime and the accused are guaranteed the right to defense from the moment of their detention or the first examination and the right to have a defender. Despite the fact that the Constitution of the Republic of Lithuania guarantees the right of the defender to participate in the criminal procedure, this does not ensure the positive duty of the state to make the services of a defender accessible to certain groups of persons.

On May 14, 1993, the Republic of Lithuania signed the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), which was subsequently ratified by the Lithuanian Parliament in 1995. Article 6, Paragraph 3(c) of the European Convention guarantees the right for every person charged with a crime to defend himself or have a chosen defender defend him. If he does not have sufficient means to pay the defender, he is entitled to free legal assistance as required by justice. By this Article, the European Convention provides more rights to a person charged with a crime than the Constitution of the Republic of Lithuania by obligating the state to provide legal assistance to indigent defendants as required by justice.

Article 56 of the Criminal Procedure Code of the Republic of Lithuania established the basis for the compulsory participation of the defender. It is when the suspects or the accuseds are minors, blind, deaf, or other persons who cannot avail themselves of their right to defense due to their physical or mental disability. It is also when the suspect or the accused or the defendant does not know the language used in the proceedings.

It is in the cases where capital punishment may be imposed for the crime. It is also necessary to mention that capital punishment was abolished and replaced by life imprisonment in 1998; however, we still have this provision in the Criminal Procedure Code. It is also in the cases where there are contradictions be-
tween the legal interests of the suspects, the accused, or defendants, if at least one of them has a defender. And the last category is in the cases where the state prosecutor is participating.

As it has been noted earlier, the law of the Republic of Lithuania and the criminal procedures currently in force do not meet the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Criminal Procedure Code does not provide socially needy or indigent persons access to justice during criminal proceedings.

Currently legal aid in criminal *ex officio* mandatory defense cases is provided by private attorneys. Given the absence of the institution of plea negotiations or other dispute-settling alternatives, the processing of criminal cases is frequently rather lengthy, cumbersome, and fairly expensive. The hourly compensation established is fairly low. It constitutes approximately US$2.00 or US$3.00, depending on the services provided within the criminal process, on average.

In principle, all practicing attorneys are obliged to take *ex officio* criminal cases. The distribution of cases carried out by different offices of attorneys is very often uneven or disproportional. In other words, some attorneys receive *ex officio* criminal cases on a regular or continuous basis, while others manage to evade this responsibility quite frequently or all the time. This makes private attorneys, to a large extent, view this duty as a burden imposed by the government. Many attorneys do not even request compensation for their legal services provided in these cases.

As far as funding is concerned, I can mention that in 1999 public funds allocated to cover legal aid costs were approximately a bit less than US$750,000.

As to legal aid in civil cases, as I said earlier, a system for providing the basic civil legal services is nonexistent so far. Moreover, the Institute for Relief of Legal Expenses, which does not include the expenses of hiring a lawyer, is unable to guarantee completely the right to legal defense. Legal defense still remains inaccessible to the larger part of the society due to the difficult material situation of the indigent members of the society.

It was also mentioned in the presentation yesterday of my colleague that Article 102 of the Civil Procedure Code of the
Republic of Lithuania, which regulates the relief of the stamp duty, establishes that in the cases investigated by the court, those natural persons are relieved from the stamp duty who are, *inter alia*, recognized as socially needy in the procedure established by the government.

The only available free legal aid in civil cases is provided by human rights NGOs, like the Legal Assistance to Socially Vulnerable People Project, which is affiliated with the Lithuanian Red Cross, the Lithuanian Center for Human Rights, the Lithuanian Association for Human Rights, or legal clinics at Vilnas University Law Academy, which is the former police academy.

As far as strategies to improve access to justice are concerned, you heard yesterday about the new law on state-guaranteed legal assistance, which I can call a legislative reform. As you also heard yesterday, this law envisaged the opportunity. Actually, it classifies the legal assistance into several categories: it is the primary legal assistance which is provided through the municipal borders; it is the state-guaranteed legal aid which is provided in criminal, civil, and administrative cases; and it is also the legal assistance which is provided by the public establishment, which basically means the legal clinics of higher academic institutions or non-governmental organizations.

I can also add to the presentation of yesterday that the law envisages that this legal aid can be provided not only to the nationals of the country, but also to foreigners as well as to stateless persons.

The law on the state-guaranteed legal assistance prescribe differentiated compensation of costs related to rendering of legal assistance. The expenses of legal assistance to persons shall be covered by the state according to the level of the person's property and income, and the law establishes five levels. The first level is when the costs of legal assistance are covered 100%, the second level is when the costs are covered 95%, the third level is when the costs are covered 80%, the fourth level is 65%, and the fifth level is 50%.

Primary legal assistance shall be provided by attorneys and assistants of attorneys through the local government executive institution, which will provide information and refer persons residing in this area to an assistant of an attorney or to the attorney
for primary legal assistance. The local government executive institution shall refer for one hour primary legal counseling.

It is also envisaged in the law on state-guaranteed legal assistance that state legal assistance will be provided for persons indicated in Article 4 of the law, and eligibility for this legal assistance will depend on the status of those persons. The law mentions suspects, the accused, defendants, or convicts in criminal cases, as well as victims and suitors in criminal cases, suitors and defendants in civil cases, and claimants in administrative cases.

It is worthwhile to mention that the law is silent about the *modus operandi* of the new free legal aid system. In spite of the fact that it is said in the law that municipalities will refer indigenous people to private attorneys, it is not really clear who will administer the entire system in terms of determining the eligibility of a client, assessing in legal terms the validity of the requests, carrying out the quality control, arranging the financial payments, and ensuring financial accountability and transparency. The experiences of more advanced countries show that rendering of the state-guaranteed legal aid through the offices of the private attorneys requires more and more financial resources, which eventually makes the institutional scheme unbearably expensive.

In parallel to the government’s effort to establish a regulatory framework, an institution-building project had been launched by the National Soros Foundation, officially called the Open Lithuania Fund, jointly with the Constitutional and Legislative Policy Institute based in Budapest, aiming to establish a pilot public attorney’s office in order to effectuate or raise the quality of legal aid in criminal *ex officio* mandatory defense cases. The project primarily focuses on the imperative to improve legal aid in *ex officio* criminal mandatory defense cases. However, it also has the potential to be extended to civil and administrative cases.

If this model project is successful in terms of legal quality provided and administrative costs related, this essentially implies an opportunity to become an interesting proposal for the Lithuanian Government to consider the idea of organizing the provision of state-guaranteed legal aid in criminal, civil, and administrative cases for the offices of public attorneys throughout the country.
As said, the project of establishing a public attorney's institution seeks to ensure a more effective and better quality defense of human rights in criminal proceedings by supplementing or diversifying the current system of *ex officio* representation in criminal proceedings. The aim of the project is to prove that free mandatory legal assistance provided by the state in the form of a public attorney's institution is fairly cost-effective and of higher quality than the current system based solely on private attorneys. The experience of other states shows that being in a system of mixed legal services, the public attorney's institutions may offer good if not better services at a lower cost.

As was also mentioned yesterday, the funders of the public attorney's office are the Ministry of Justice, the Lithuanian Bar Association, and the Open Lithuania Fund. The founding agreement had been signed on the 13th of December of last year, and on the 31st of March of this year we already officially opened this institution. Two years later, the Ministry of Justice will be presented with the activities report of the public attorney's office, and this report will contain the data on the number of hours spent on cases, the number of case hours spent per one case, the administrative costs of the institution, and so on.

Detailed information should also be collected from the Ministry of Justice about the provision of legal services in criminal cases by private lawyers. I hope that this information will help to compare the pros and cons of public and private forms of legal assistance provisions and institutional mechanisms from the point of view of cost-effectiveness and the level of quality.

As noted, it is hoped that the public attorney's offices might serve as an adequate institutional alternative for the Lithuanian Government to ensure that state-guaranteed legal assistance is provided to indigenous people, as stipulated in the law on state-guaranteed legal aid. When the mentioned law is adopted and put into effect—and we hope that it will happen on January 1, 2001—the scope of legal aid provided by the public attorney's office may be broadened, which means that the state-guaranteed legal aid may be provided not only in *ex officio* criminal cases but in civil and administrative ones, too.

By concluding, I would like to quote Mr. Wiktor Osiatynski, a member of the Board of Directors of the Open Society Institute and visiting professor of the Open Society University in Bu-
dapest, who said, “Access to justice is one of the major drawbacks of the existing criminal justice system of eastern and central Europe.”

During the transition period, a mild deterioration was observed in the situations of persons in criminal proceedings, the suspects, the accused, and the defendants. The legislative institutional reform aiming to improve access to justice, coupled with the pilot project designed to establish our office of public attorneys in Lithuania, is of paramount importance for the whole region of Eastern and Central Europe. It is hoped that the positive experience acquired will give impetus to changes in the field of other countries of the region, with the help of the National Soros Foundation, COLPI, and, most importantly, national governments.

Thank you.

MR. UPHAM: Thank you, Linas.

Futoshi?

MR. TOYAMA: Thank you for the kind introduction, Mr. Upham. Thank you everybody for coming on such a beautiful Saturday morning.

Since I am obviously not a higher class of Japan Legal Aid Association personnel and not a professor of law, I will be probably more in the practical way rather than an academic or philosophical way. Today I will mainly talk about our legal system in Japan, and I will also touch on the current reform plan for the legal aid system and also for the judicial system in Japan.

Obviously Japan is a so-called industrialized or democratized country. We imported a democratic system from Germany one hundred years ago, in a pre-mature style, at that time. And fifty years ago, we introduced the modern style of democracy under the influence of the United States occupation just after World War II.

That means in Japan for more than 100 years there has been separation of powers, an independent judiciary system, and the right to access to the court. The legal aid system also started almost fifty years ago, in 1952, by the initiative of the Japanese Bar and the Japan Federation of Bar Associations. However, we have to admit that our legal aid system is still in the developing stage, and that is why I believe I have to sit here.

First of all, I would like to introduce the overview of the
Japanese legal system for your better understanding. The Japanese legal aid system has basically the following features. Number one, it covers all civil cases, happily, including criminal cases before indictment. After indictment, the Japanese court will appoint counsel for indigent people free of charge basically.

Number two, concerning civil cases, legal aid in Japan unfortunately does not mean free services. It actually is a loan without interest to cover the legal cost. We lend money to allow a client to hire his own attorney at a reduced rate. Since we employ a so-called judicare system, if a client does not have his own attorney, we recommend one who will take his case at the reduced rate. The client must repay the whole amount of money we lend him in monthly installments, which usually is around US$50 or US$100 a month. Only under very limited circumstances can a client get exemption from this repayment obligation.

Number three, concerning criminal cases before indictment and also juvenile cases, a client generally can get free services, because these services are supported and funded by the Bar Association.

Number four, in addition, we provide free legal consultation services in person at our branch offices, and on the phone as well.

Legal aid in Japan is provided solely through our organization, the Japan Legal Aid Association, which is a nonprofit, non-governmental organization. People in the lowest twenty percent income bracket, which is somewhat higher than the poverty level set by the government, are eligible to receive legal aid. It is officially said that only around one percent of the entire population is under the poverty level. It is comparatively fairly low, although perhaps the real number of poor people would be more.

We provide the following services every year. Legal representation in 10,000 civil cases, half of which are consumer bankruptcy cases and around one-third are divorce or family-related cases. We provide legal representation in 300 criminal cases before indictment, 1000 juvenile justice cases, and around 50,000 free legal consultations in person.

Our annual budget in fiscal year 1998 was around only US$34,000,000. Our main resources are obviously from our clients, because we employ a loan system; 36% of our budget is
from our clients; 20% is from donations, including donations of various private sectors and attorneys; 40% is from our national government; and 13% is from the Bar Association.

The reason why our legal aid system is still small and weak is rather difficult to explain. One reason is obviously our poor financial resources. Until ten years ago, our government gave us less than US$1,000,000 a year, which accounted for only less than US$0.01 per capita. Since our constitutional law does not provide clearly a right to have counsel in civil matters, the government did not admit its responsibility to provide legal aid to the poor in civil cases. Although the government has increased the amount of subsidies recently—it provided about US$5,000,000 last year—that amount is still small compared with other developed countries.

On Thursday, Justice Johnson criticized that the amount of government funding to Legal Aid in the United States is much smaller than that in the United Kingdom. For me the U.S. budget seems like paradise, because the government funding amounts to collectively US$600,000,000 a year. The amount per capita of the United States is perhaps fifty times more than that of Japan.

Because of our small budget, we have to employ the loan system, instead of the free provision of legal services, and it compels us to refrain from taking economically unprofitable cases, such as small claims, many kinds of consumer cases, housing cases, and custody cases, all of which are very common legal problems among poor people.

The second reason, which could be rather complicated, is the weakness of our judiciary system itself. In other words, the Japanese court system does not function very well, especially in the field of poverty law, although it might be more effective in business disputes. The size of our judiciary system is too small. For example, we have only 17,000 practicing attorneys and only 3000 judges.

The statutory legal tools for the poor people are also very limited. For example, we cannot get any kind of protective order immediately for battered women from the court in domestic violence cases. We can get the divorce only by an agreement out of court, which need not include provisions for child support. Even when the child support is decided by court order, it is very
difficult to enforce, since we do not have a governmental agency to collect the child support for the custodial parent. We do not have many cases on welfare benefits, since the government almost always wins in the court. Even if the government loses, the plaintiff cannot collect his attorney’s fee from the government under our current system.

Fortunately, our situation has changed slightly recently. Actually, I have to say Japan has been ruled and controlled not by law, not by the Parliament, and also not by the court. It is mainly ruled by the administrative section of the bureaucracy, but I think a new wind came probably from the United States again.

Several years ago, the grading companies, for example Standard & Poor’s, downgraded the main banks and the security companies of Japan severely, and it caused the closing of some of the main banks. Business people in Japan realized that control through the administrative bureaucracy will not function well in the future, so they then decided to shift the political power from the administrative division to the judges, the judiciary, and the lawyers.

As for legal aid, after long and patient talks, we succeeded in persuading the government to admit its responsibility to provide legal aid to the poor in civil cases and increase the amount of subsidies to our organization. The Ministry of Justice submitted a bill for legal aid in civil affairs just two months before, and it will become a law soon.¹

This new law says basically as follows:

Number one, the national government is responsible for providing legal aid in civil affairs to Japanese nationals and foreigners with legal status in Japan.

Number two, legal aid in civil affairs will be provided through loans. The current loan system will survive.

Number three, the bar association and lawyers shall cooperate in providing legal services.

Number four, the government must provide an adequate amount of subsidies to the Japan Legal Aid Association, which is expected to be designated by the Ministry of Justice as the only national legal aid provider.

¹ This act, the act on Legal Aid in Civil Affairs, was passed and enacted on October 2000.
Number five, the Ministry of Justice will supervise and control our organization. For example, our president, the executive officers, and board members will be appointed on approval of the Ministry of Justice. Our annual budget and business plan must be approved every year by the Ministry of Justice in advance, and the Ministry of Justice may give us administrative orders at any time in order to secure the proper service. On the last point, I am a little bit concerned about the fact that our organization loses its independence to the government in exchange for the money.

This new law does not say anything about the amount of governmental funds to be provided to us, but it is officially said that for the fiscal year 2000 around US$22,000,000 will be provided. It is four times more than that of fiscal year of 1999, and we expect more in fiscal year 2001, although the amount is still much less than other countries. It is expected that the people under the poverty level will get free services.

In addition to reforming the legal aid system, the Japanese Government launched an Advisory Committee on Judicial Reform last year. It discussed heavily, for example, the introduction of a jury and lay judge to Japan, a change in the way judges are recruited, and a reform of the exam and the law school system.

In concluding, Japan is actually just in the dawn of a new legal aid system, and perhaps still in the dawn of rule of law in its real meaning. So I have to say there is a long way to go for us, but anyway we have to go.

Thank you.