Special Feature
Legal Aid
Need for Legal Aid Law in Burma: Problems and Prospects

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I. Problem

The gross violation of human rights is a prominent concern in the current military-ruled Burma. As a direct result of these violations, hundreds of activists have fled the country in search of safer environs. Thousands of peaceful villagers have migrated to Thailand and other border countries to escape the forced labor which has brought Burma to the verge of expulsion from the august body of the International Labor Organization (ILO). Living in exile, the migrants must continue to earn a living to make both ends meet. However, most have fallen victim to the exploitation of employers who compensate them modestly, if at all, for their work. If lucky, the workers are provided with meager food and a dilapidated roof under which to live. The migrant laborers’ work conflicts with the labor laws in Thailand, as their residence and employment within the country is illegal. In addition, there are over 1 million refugees on the border, a large majority outside the camps provided. They have no entitlement of legal protection and are defenseless to arbitrary deportation practices by the Thai authorities. To cap all these miseries, they are widely exposed to disease, including HIV/AIDS. A large number among these migrants are women and children. They are often victims of the sex trade and human trafficking abroad as they have no other means of survival. Inside Burma, suppression of fundamental rights, mock trials, arbitrary detention, and imprisonment incarnations of political prisoners on suspicion are the daily features of the system enforced by the Junta. There exists a veritable atmosphere of people living in fear. There is an

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immeasurable need for human rights and development assistance in Burma. Legal aid is one of the instruments which can, to a considerable extent, offer relief and alleviate this widespread suffering.

However, in SPDC-ruled Burma, the general public is not allowed the liberty of legal aid, though it is one of the fundamental rights set forward in the Universal Declaration of Human Rights. This crucial element aims to enable the poor and underprivileged to attain equal status and objectivity under the concepts of Rule of Law, Equality Before Law, and Right to Life. The promotion of legal aid should be a principal concern of the state. In extending legal assistance to the distressed and disadvantaged, the state must cooperate with the legal community, encouraging their participation and advice in regional human rights movements. Administered properly, legal aid could act as a successful and beneficial coordinating agency for legal forum, cooperation within human rights organizations, and issues pertaining to Burma.

The model of legal aid is completely foreign to the Junta, whose notion of rule is a localized dictatorial dominance. The SPDC acts as if their despotic authority is competent to rule the country in the name of its foreign and domestic security. Similarly, the concept of justice has been demonstrably defined by the government as something that belongs to the few, the loyal, and to the powerful, while being denied to the rest. Human rights advocates are trying to refine this flawed perception of justice and fairness by creating a specialized legal aid faction whose agenda will be oriented solely towards the pursuance of justice.

The Junta’s criminal justice system is unsound at all levels. In the pre-trial stage, there are instances where enforcement authorities refuse to record occurrences of crime. In the situation when a crime is correctly documented, the investigation is often faulty or purposely weakened. Corruption erodes the system when the process of criminal trial begins. The judiciary does not play a role of independence and fairness, and suspects remain in custody while offenders may be released upon bail. Two laws, Judicial Law 5/2000 and Attorney General’s Law 1/2001, were passed by the SPDC to handle conflicts such as these, but no provisions were made for legal aid. There has not been any law or act passed by the government for legal aid services, and there exists no legal aid institution run by either state or private enterprise. There are nearly 2500 political prisoners who have been convicted on various draconian laws after standing trial with no mechanism of defense.

Within the past 5 years, hundreds of Shan (ethnic) girls have been gang raped by military officers periodically entering the villages. Legal aid is
not available for the victims, allowing the offenders to stand trial without prosecution. Essentially, the military officers have committed a brutal series of crimes without prosecution or punishment. Conversely, when members of civil society are tried, punishment for those indicted for political offenses is entirely different, and usually more rigid, than crimes with similar degrees of disobedience. In addition, their defense lawyers are frequently faced with threats and intimidation for agreeing to represent the case. The government has invalidated licenses of over 50 lawyers for representing citizens accused of political offenses, and prohibited professional associations of lawyers.

In this context, legal aid leadership can hardly play an effective role. There is no channel for public opinion or media intervention, and there exists no human rights mechanism to monitor the fairness and legitimacy of the judiciary. The only semblance of legal aid is a legacy of the colonial rule, which introduced Common Law into Burma’s first legal system. Since this time, the earlier benchmarks of legal procedure have been eroded by a number of special laws, orders, decrees and notifications erected by illegitimate methods within the government. Under the “G circular” law of 1949, paragraph 4 to 7 of the Courts Manual, as well as the Criminal Procedure Code in murder cases, the state appoints a lawyer for the accused if the individual is unable to do so themselves. However, this is not universal for all cases. Depending on the nature of the disobedience, the state does may or may not actually abide by their earlier precedents in providing lawyers for the poor. Frequently, cases are conducted subjectively in which the accused must stand trial without defense. The Attorney General Law and the rules framed there under are supposed to be the main focus of legal aid in Burma. By no stretch of the imagination can the provision in civil cases be classified as legal aid. Order 33 of the Civil Procedure Code of reads, “subject to the provisions of this Order any suit may be instituted without payment of the court fee prescribed by law for the plaintiff is a pauper, that is to say, if his property is not above 100 kyats.” The amount was subsequently amended. Section 340 of the Criminal Procedure Code reads, “any person accused of an offense before a criminal court, or against whom proceedings are instituted are under discord in any such court, may of right be defended by a pleader.” The Judicial law 2000 section 2 (g) also provides for legal aid in murder cases. Altogether we have a situation where legal aid is practically absent. Engaging a lawyer for the accused in death sentences is not considered “legal aid” (rather, a legal right) in other countries. The meager provision of legal aid in Burma is a mockery of justice. It is therefore good that there is a strong case for enactment of a comprehensive legal aid law, which is practical, purposeful, and result-oriented.
Utilizing international edicts such as the Legal Aid Act and the Legal Services Act, legislative bodies in most developed countries provide legal aid for their poor and disadvantaged populations. The widespread nature of this right has caused its application to become a universal feature of the modern legal system. Admittedly, society has become divided without borders while the gulf between the affluent and the poor has progressively increased. Due to the economic effects of inflation as well as the concentration of wealth within a few hands, the cost of litigation services has skyrocketed beyond the reach of the significant majority.

II. Concept: Access to Justice

“All are equal before law.” “All must have equal opportunities.” However, “access to justice” in practice is found to be full of barriers. Poverty defeats these noble principles, and the right to equal protection of the laws can be viewed on paper only. Hundreds of victims relinquish their legal rights simply because they cannot afford to contract the services required to represent them in court. This is perhaps the only forum where redress can be legally obtained. In the absence of judgement and punishment, similar offenses will continue to plague underprivileged communities and the continuous pattern will be reinforced. The problem is a perpetual one which will continue unless conscious action is taken to break the cycle of injustice. Though a solid framework exists for legal aid reforms and the administration of justice, the reality of its implementation is weak in the absence of a bridge for conciliation. The execution of a sound legal aid program is a pipe dream with the current imbalance of power in the state. Military Intelligence and police are threatened by the prospect of an empowered civil society. Prevented legal aid services are almost nonexistent in Burma. Remedial legal aid is only available in court cases which involve death sentences. For those detained under the State Protection Law of 1973, that is the Preventive Detention Law is inconceivable as it has been “legally” taken out of the jurisdiction of court.

III. Historical Perspective:

The military regime began by illegally seizing power in 1962 and overthrowing the seated constitutional ruler. The military coup consolidated its power through the widespread suppression of nearly all fundamental human rights within society. There was no rule of law and the judiciary was forced to act under the influence of military intimidation. Many trials ended without defense lawyers to represent the accused in the case.

The 1972-88 period was similarly bleak. The sham BSPP constitution
was forced upon the entire country and the notion of “people's autonomy” was constructed on the same lines as many communist countries of the time. The concepts of open and closed justice were given a new meaning so that preservation of the state was paramount and societal structures became dysfunctional. Any dissent towards the SLORC regime was unthinkable, and would be avenged. Not ironically, without the business of the general public, the independent legal profession quickly eroded.

The Junta's eyes were opened by the revolutionary events of 8-8-88. The suddenness and enormity of the student uprising startled the government, as did the participation of hundreds of professionals within the legal arena. In fear and defense, SLORC developed a metaphorical allergy to their own laws, as the licenses of 52 lawyers were immediately invalidated. The more vocal and experienced lawyers organizing their colleagues in the democracy protest were jailed without trial. An institution arose in which lawyers could not operate within their field, leaving legal aid in the context of a pipe dream. In lieu of various other violations of human rights, the right to access of justice was also denied.

To the people in Burma, having lived under oppression and injustice for half a century, “equality” in the social and legal spheres has become insignificant. “Equality” and “equal protection” fail to achieve results in the face of socioeconomic disparities. Right to legal aid, fundamental to life and justice before the law, is a basic human right that should have no boundaries. Provision of legal aid raises a person's importance to a level equivalent to his adversary in court, allowing for fairness and objectivity despite the individual’s financial or social status in society. This perspective portrays the reality that society has not recognized the importance of legal aid in to fairness and democracy. The concept has been in infancy for centuries because of society’s reliance on the state. Civil society needs to become conscious of the fact that it is them, rather than the state, that has hold of the steering wheel.

IV. International Instruments of Relating Legal Aid:

The concept of legal righteousness can be traced from the Bill of Rights, to the League of Nations, up to the United Nations. Equality before law finds a place in almost all written constitutions, influencing the emergence of international guidelines for the principle. Expressions of this capacity are particularly frequent in the Universal Declaration of Human Rights. Article 7 of the Declaration provides, “All are equal before the law and are entitled, without any discrimination, to equal protection of the law.” This statute reverberates throughout the entire document, and
within The International Covenant on Civil and Political Rights (ICCPR). Under these rulings, international activity in the context of legal aid became prevalent.

**England**
The Magna Carta, Paragraph 14: The Ruscliffe committee enacts The Poor Person’s Procedure, articulating the principles for equality under the law. Legal aid advice rises to prominence in 1949. Legal aid laws were enacted in 1974.

**USA**
The 6th amendment of the American Constitution provides, “In all criminal prosecution, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” In the 44th amendment, section 1 expresses that “No state shall deny to any person within its jurisdiction the equal protection of the law.”
The Supreme Court of the United States affirms the right to counsel in the Due Process Clause. In 1964, the first Criminal Justice Act is passed. The Economic Opportunity Act follows in the same year, ensuring unrestricted activity for legal aid advisors.

**Canada**
Legal Aid Act was passed in 1967.

**France**
The Amending Act of 1971 outlines the procedure for legal aid. The system is defined in 1975. Legal aid began its administration within civil society.

**Germany**
The 1977 Code of Civil Procedure introduces the process of the legal aid program that is to be governed by the court. Legal insurance becomes prevalent.

**Japan**
Working closely with local Bar agencies, the Japan Legal Aid Association was established in 1952.

**India**
Predating India’s independence, the land is ruled under colonialist Common Law. Legal aid is confined to section 340 of the Criminal Procedure Code, which states that only in capital cases should legal aid be provided. In 1923 the law is amended, giving a suspect in custody the right to communicate with a legal advisor. This freedom is also added to sec-
tion 40 in the Prison Act. After gaining independence, article 32(5) of the Indian constitution declares legal aid a fundamental right. Further affirmation comes in 1977 in the form of article 39A, elaborating on the newly established liberty. Ten years later, these developments are organized under the Legal Services Authority Act, an amalgamation of earlier precedents regarding legal aid. The Act offers concise guidelines under which legal aid must be dispensed.

Burma

The state of Burma has been without a constitution for the past 50 years. After the military coup in 1962, the dictatorship reverted back to the days before the state's independence, when colonial law ruled the land. During this time, criminal cases were heard by a jury, regardless of whether or not the accused had legal representation, or if the offense carried the death penalty. The SPDC's Attorney General Law of 2001 was a feeble attempt to establish legal aid, allowing the accused to be defended by legal counsel. However, the law is framed and inconsistent, and needs continued improvement if it is to be effectively followed and enforced. In Notification 1/2001, chapter 6, section (j), legal aid is available, but only to children and others facing the death penalty. Under rule 82, a lawyer must continue their assigned case until a verdict is reached. Violation of this law will be considered criminal misconduct. Despite these shortcomings, the Attorney General Law has been compared with legal aid acts existing in other countries. The need is not to eliminate the Attorney General Law, as it still has the potential to be of value. The provision of legal aid needs to be affirmed through an independent legal aid act. Failure to take significant action on this issue will only confirm that the Office of Attorney General is a tool of the military junta, designed only to secure the regime's power.

VI. Implementation:

Given the apathy of the Burmese state towards effective legal aid, civil society needs to assume responsibility for developing methods of reform. Though somewhat complex, system of court, rules of evidence, and the former idea are necessary for the proper administration of justice. Lawyers must be engaged to assure the smooth implementation of these aspects. The financial burden of the legal fees must be overlooked, as lawyers are a necessary channel for development.

The definition of legal aid should be broadened for the defense of violations that carry jail sentences. A provision for requisitioning services for every member of the bar must be established. The legal profession must share responsibilities for the administration of the new reforms, and the
Bar Council and Association should take immediate measures so that legal services can be rendered on a voluntary basis.

Governments are held responsible for the implementing the right of access to justice among less fortunate populations. Invariably, issues related to the contents and scope of this right have been raised as a scapegoat for the responsibility. In the context of these obstacles, legal aid will act as the primary policy instrument in providing access to justice. In order for this concept to become a universal institution, laws must remain in effect despite governmental opposition. In addition, several legal aid mandates must be considered:

1. A fundamental requirement is a working constitution. It provides fundamental rights to all citizens. Legal aid must be included as a fundamental right.

2. Section 304 in the CRPC needs amendment; all criminal cases excepting summary trials, are to be eligible for legal aid assistance.

3. In addition, legal service needs to be extended. Aid must be provided not just before the trial, but also during and after the investigation.

4. In all compoundable cases, conciliation has to be inserted into the law.

5. The civil procedure code has to be amended so that the definition of a “pauper” can be broadened.

6. Law should dictate that legal aid agencies are to be autonomous and not susceptible to government influence.

7. Income tax quotas must be amended. Donations for legal aid will be tax free, and advocates who render services will be given tax redemptions.

8. The Bar Council Act needs an amendment to include legal aid.

9. The L.L.B syllabus should be amended to include legal aid study.

10. Senior advocates must continue to appear in cases covered by legal aid.
The need among civil society is to immediately call a national conference on legal aid and undertake a survey of the legal aid facilities. Predictably, the picture that will emerge from the survey will reveal limited coverage and little progress, as demonstrated in the above diagram. These findings are logical, considering the government’s constricting policies. Social work institutions that are trained to work on such programs are non-existent. The “Society Registration Act,” which is said to protect civil society, has been abrogated and replaced with draconian laws in which the operation of private agencies is not permissible. Burma has an abundance of legal expertise in these sectors, though the professionals representing this quality continue to be muffled by the government.

**Prospects:**

Fundamentally, legal aid is a political problem for the Junta. Under the pressure of the International community, the ruling Junta entered into a dialogue with opposition leader Daw Aung San Suu Kyi. But for obvious reasons it has scuttled the process. For the equality of the under-represented and the virtue of legal justice, the prospect of legal aid will become brighter if there is a political settlement. Pending this outcome, it is inevitable that the Junta will be pressured to enact a legal aid law forthwith.

**Endnotes**

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