CHAPTER VII

PROPOSALS FOR REMEDY

It has been established that the rate of criminal arrest appeals lying from the lower courts in Kuala Lumpur to the High Court is low. Comparative studies have also been made of the positions of the Public Prosecutor and the accused in these appeals. Though it is generally true that in the appellate courts the contest is an equal one - the learned Public Prosecutor well matched by counsels who represent the majority of the appellants, the crucial stage really lies in the court of first instance. It is submitted that the lack of appeals is traceable to proceedings in the lower courts. If an accused "has given up" in the lower court, a natural consequence would be a non-consideration of an appeal, which to his mind would connote similar proceedings and hence similar results. The importance of the contest in the lower courts is evident from the fact that 87.33% of the legally represented appellants in appeals against conviction and sentence also had counsels in the lower courts. Similarly 90% and 93.75% of the legally respondents in appeals against inadequacy of sentence and acquittals respectively claim of the same. The only discrepancy is that only 25.30% of 70.45% legally represented appellants in appeals against sentence were legally represented in the lower courts.

Having noted thus far the importance of the contest in the lower court, it seems appropriate to pause and consider the level of

representation in the lower courts. From the prison statistics, 93.90% of the men prisoners interviewed were unrepresented. Though this figure is by no means conclusive, it suggests that the majority of the accused is caught in an unequal contest, pitted against the more superior opponent in the Public Prosecutor.

Flowing from the above, if proposals are to be made, they must pertain to the interests of the accused. The Public Prosecutor is well secured in his understanding of the law and requires no proposals to improve his already sound position. Proposals to be effective must always be directed at the root cause which in this instance is poverty and its associated ignorance of the law. "It has been an age-long complaint that the cost of the law prevents the poor man from getting justice."[1] 84% of the prisoners interviewed who were not represented in the lower court attributed their "plight" to lack of means. Yet it is beyond the scope of this study to go into proposals of alleviating poverty. This problem is best left to bodies competent to deal with it. Recognising that legal representation is in many ways a cure to the sickness of ignorance, the main proposals in this chapter are directed at making this "facility" available to all accused persons.

Legal representation can be obtained from two sources: the legal service or legal aid. For obvious reasons, the first source is closed to the accused for whom the following proposals are made. The only other possible venue must be the Legal Aid Bureau. The importance of legal aid cum costs is seen in England from the outcome of the Summary Jurisdiction (Appeals) Act, 1933. Before the passing of this Act, an

---

[1] R.M. Jackson, The Machinery of Justice, Fifth Edition, Cambridge, A University Press, 1967, p.338.

appeal to the Quarter Sessions was hedged with restrictive rules including the necessity of giving security for costs and finding friends who would stand surety. The result of such restrictions was to make appeals quite impossible for the average defendant. The Summary Jurisdiction (Appeals) Act in abolishing the security for costs and in making provisions for free legal aid caused a considerable rise in the number of appeals.

However, legal aid offered at the present date in Malaysia is in a deplorable state. A very close look will be taken into various aspects of legal aid and proposals made accordingly.

A wider jurisdiction in criminal cases

Though the Legal Aid Act, 1971 was formulated in 1971, it was only in 1973 that legal aid was offered in criminal cases. This is due to the requirement in Section 10(1) of the Legal Aid Act, 1971 that criminal proceedings in which legal aid may be given must be proceedings of a description specified in the Second Schedule of the same Act and a description of legal aid available in criminal cases was inserted in the Second Schedule only in 1973. After a delay of two years, it is only to find that legal aid is offered to persons, who not being represented by counsel, have pleaded guilty and wish to make a plea in mitigation. One questions whether a counsel would make any substantial difference in presenting the mitigating factors than the accused himself. The alarming thing is that this Act excludes persons who would claim trial and thus would be in greater need of counsel to conduct the defence or to cross-examine the prosecution witnesses. It is the

writer's proposal that the jurisdiction of legal aid in criminal cases be extended to all accused persons, irrespective of whether pleas of guilty have been made.

In the area of appeals, Section 10(3) and (4) of the Legal Aid Act, 1971 provides for legal aid in cases of appeal but in effect this section is tantamount to a dead letter since no proceedings of such description are found in the Second Schedule. Bearing in mind that proposals must be realistic plus the fact that legal aid in criminal cases is as yet a fairly new feature, it is proposed that first priority be given to the extension of legal aid in courts of first instance because of the strategic importance of the trials therein. But once that is well on the way of implementation, it is proposed that attention be given to the need to provide similar aid in appeal cases. Hence in respect of the present limited jurisdiction, the proposals are two-pronged - the immediate provision of legal aid to all needy accused persons in courts of first instance with an ultimate objective of the same for appeal cases.

A Revision of the "Means Test"

A very clear picture of what the "Means Test" is all about is given in the following tables. The terms "full legal aid" and "partial legal aid" have been explained in Chapter IV.[2]

---

[2] See p.44.

TABLE 7.1

FULL LEGAL AID

STATUS	In possession of property not more than	DISPOSABLE MONTHLY INCOME NOT EXCEEDING	
		Not renting a house	Renting a house
Bachelor	$ 500	$ 104	$ 134
With 1 dependent	500	117	147
With 2 dependents	500	128	159
With 3 dependents	500	141	171
With 4 dependents	500	154	184
With 5 dependents	500	165	197
With 6 dependents	500	179	209
With 7 dependents	500	191	221

SOURCE: LEGAL AID BUREAU

TABLE 7.2

PARTIAL LEGAL AID

STATUS	In possession of property not more than	DISPOSABLE MONTHLY INCOME NOT EXCEEDING	
		Not renting a house	Renting a house
Bachelor	$ 3,500	$ 291	$ 321
With 1 dependent	3,500	304	334
With 2 dependents	3,500	317	347
With 3 dependents	3,500	329	359
With 4 dependents	3,500	341	371
With 5 dependents	3,500	354	384
With 6 dependents	3,500	367	397
With 7 dependents	3,500	379	409
With 8 dependents	3,500	391	421

SOURCE: LEGAL AID BUREAU

Two major criticisms can be advanced against the "Means Test":-

1. "It seems that the scheme is very rigid. It favours those who are in receipt of a steady or fixed income. A farmer, a fisherman, a trishaw rider or a rubber tapper who has a piece of land or some form of property, but whose income is not fixed may be excluded from the scheme."[3]

2. The scheme introduced in 1970 is not feasible today. With the high rate of inflation, salaries have increased accordingly. Even a "jaga" earns $160/- per month today and hence will not even qualify for full legal aid.

It is proposed that the "Means Test" be revised taking into account the rate of inflation and the current wages prevailing in the economic market today. Furthermore because the question of poverty is relative, flexibility should be shown in cases of persons who are not fixed income earners. Each case should be considered on its own merits.

Recruitment of more personnel into the Legal Aid Centres

Legal aid is as yet not available in every state. With the opening of new branch offices in Perak in July and in Penang at the end of this year (1976), the scheme would have covered the entire country. However legal aid is faced with the problem of shortage of staff. In every state, the legal aid centre is manned by only two officers (a Senior and a Junior Officer) and in Kedah and Perlis there is only one officer.

The above proposals demand better staffed teams to cope with the

---

[3] Nik Abdul Rashid, "Cadangan baiki kelemahan undang2 untok faedah rakyat miskin" (Proposal for improvement of the law for the benefit of the poor) in Utusan Melayu, 18 March 1976, p.7, col. 1-4.

work involved. A necessary accompaniement of any proposals concerning legal aid must be an increase in the present staff - both the legally trained as well as clerical staff. It is hoped that the recent recruitment of the law graduates into legal aid services is an indication of future trends in recruitment of staff.

Reaching out to the grass-root level

All legal aid centres are situated in the capital of every state. This is out of reach of the bulk of the poor in the rural areas for whom legal aid is specially devised. Persons needing legal aid have to travel to the capital to obtain legal aid and travelling expenses are not reimbursed.

The agreement on 1 March 1976 between the Legal Aid Bureau and the Ministry of Social Welfare Services towards joint participation in legal aid services is heralded with much welcome by the Legal Aid Bureau. An applicant desirous of legal aid can now approach the Welfare Officer in his district who has been given a month's training by the Legal Aid officers. With this new measure, legal aid has reached the rural areas.

Though this step is promising, it should not stop just there. Instead it should be a step towards the gradual transportation of legal aid to the rurals. Proposals in this area include temporary and permanent measures. A temporary measure is to maintain the present liaison with the Welfare Officers till the materialisation of a fully trained legal aid team to take over the work done by the Welfare Officers. This permanent measure will demand again an enlargement in the staff of legal aid and it will probably be many years later that

such teams can be produced. With the eventual setting up of those teams, the grass root level will have been reached.

Mandatory informing of the accused of the right to legal aid by the presiding Judge or Magistrate

Section 10(3) of the Legal Aid Act, 1971 requires a person desirous of legal aid to apply within fourteen days after the committal under the provisions of the Criminal Procedure Code, charge or conviction for legal aid in writing in the prescribed form to the Judge by whom the order was made or before whom the person was charged for legal aid. Section 10(6) provides that the Judge before whom the person appears on charge shall inform such person of his right to apply for legal aid.

If the word "shall" in Section 10(6) is mandatory, it would seem that there has been perpetual breaches of the said provision. As such, notice of legal aid to the accused is withheld at the crucial stage. Unless the latter is informed of this right through other means, it would seem that he would forfeit his right to legal aid since without notice, he would hardly know that his application must be in writing.

It is pointless to advocate wider horizons for legal aid if the very persons for whom legal aid is intended remain ignorant of its existence. Hence it is proposed that Section 10(6) of the Legal Aid Act, 1971 be made mandatory and be given effect to by the presiding Judge.

The present limitations of the system explain the small number of cases in which the Legal Aid Bureau has acted. In 1974, the Legal Aid Bureau acted for 2 cases; in 1973, 12 cases and till the month of May

1976, 8 cases. When one compares these numbers to the total number of unrepresented cases being heard in the criminal courts, they are shockingly negligible. An example of an effective legal aid scheme with far reaching results is given in the Table below.

TABLE 7.3

LEGAL AID FOR LEGAL REPRESENTATION AT APPEALS TO THE CROWN COURT

Type of appeal	Total No.of appeals	Legal aid ordered by Magistrates Courts	LEGAL AID ORDERED BY THE CROWN COURT			Appellants privately represented	Appellants not represented
			Solicitor only	Solicitor & Counsel	Counsel Only		
For an appeal against conviction & sentence	4,036	1,484	15	1,089	49	1,239	1,140
For an appeal against sentence only	5,057	2,159	47	1,006	69	1,147	847
For the respondent to an appeal	Not Available	10	-	14	1	-	-

SOURCE: CRIMINAL STATISTICS, ENGLAND & WALES[4]

[4]Criminal Statistics, England and Wales, 1973. London, Her Majesty's Stationery office, p.235.

Table 7.3 is not meant for comparison purposes for there is no basis for any comparison. The legal aid scheme available in England today is a product of many years of aspirations clamourings of persons concerned with the plight of the unrepresented accused for legislation to protect the interests of the latter. Though the first piece of legislation - the Poor Prisoners' Defence Act, 1903 bore little resemblance to its bill, the fight for legal aid for the poor has continued undaunted resulting in the reward of a comprehensive legal aid scheme today.

It would be too ambitious to expect the present Legal Aid Bureau to achieve an impact of the above magnitude overnight. But it is believed that with sufficient emphasis on the importance of legal aid backed with sufficient resources, the Legal Aid Bureau can play a significant role in championing the rights of the unrepresented accused.

Having dealt with the question of legal representation and legal aid at the court of first instance, attention is now focussed on the appeal stage to see if any proposals can be made. The persons requiring aid at this stage are the prisoners who are convicted and who cannot afford counsel to represent them on appeal. A proposal mentioned above is that legal aid be eventually extended to these persons whether as appellants or respondents in an appeal. This will require an inclusion of such a provision in the Second Schedule. However this is expected to materialize only after the proposal regarding legal aid in the court of the first instance is fully implemented.

In the meantime, an alternative proposal is that a legally trained officer be stationed in every prison to assist the present officer-in-charge of appeals. Valuable though the latter's advice may be, it is limited because he is not read in the law. This is especially so when an appeal contains complicated questions of law and fact. With the inclusion of a legal officer, more complete advice can be given to prisoners desirous of appealing - advice based on long years of experience of the officer-in-charge and legal counsel of the legal officer. The value of such a team cannot be underestimated in the light of the needs of the prisoners.

Such then are a few proposals made in answer to the crying needs of the current situation. It is in the interests of justice that the present imbalance evident in the contest in the lower court be corrected and assistance offered to prisoners who intend to appeal but lack means to engage counsel.