CONGESTION AND DELAY IN ASIA'S COURTS

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Case backlog and consequent delay in the disposition of disputes is a problem familiar to legal professionals the world over. The individual hardships occasioned by inordinate delay in the resolution of cases, and the resultant diminution of popular confidence in the judiciary, are frequent themes in professional journals and the popular press.

Although the problem of delay remains a concern in many American jurisdictions, Third World literature evinces greater alarm over the dangers to political stability posed by increased congestion and delay in the courts. Evidence suggests that developing nations are experiencing a rapid increase in litigation such as that which occurred in late nineteenth and early twentieth century America coincident with this country's transformation from an agrarian subsistence economy to a commercial, industrial one.[1]

The American legal system had more than a century to develop in tandem with evolving economic, social and political relationships. The responsiveness and adaptability of American legal institutions were further aided by study and dialogue which took place in an open society, and by the availability of a well established physical infrastructure, trained personnel and materiel resources.[2]

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1. In the St. Louis Circuit Court, for example, over the fifty years between the decade of the 1880's, which witnessed the dawn of industrialization in the American West, and the close of the 1920's, the average number of cases filed per decade more than quadrupled while the average rate of litigation (cases filed per capita) more than doubled. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 39 (1983).

2. Although the myriad causes for shifts in the type and volume of litigation in

By contrast, economic development and social change in Asia are proceeding at a far more rapid pace. The reasons for this accelerated pace include the availability of sophisticated technology, advances in mass communications, greater accessibility to higher education, national ambition and the influence of a world-wide commercial economy.

Despite the general rush to modernize over the past four decades, Asian governments have allocated little in the way of additional resources for the administration of justice. During the same period, the number of disputes brought to Asia's courts have increased markedly. Increased attention to the issue of worsening court congestion and backlog in the Asian literature reflects this perception.

Case backlog is considered a serious problem in every non-communist developing country in Asia.[3] However, the research capability of many lesser developed countries (LDCs) is limited by the scarcity of funds and trained personnel. Consequently, information on court congestion is far from complete.[4]

The object of this paper is to present Asian views of the problem of court congestion and delay[5] in ten Asian countries;[6] to say something about the probable causes of the problem; and to offer

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post-industrial America are outside the bounds of this paper, it is illustrative of our sizeable resource base that in response to the "dramatic rise in federal court filings in recent decades . . . Not only has the increase in judges kept up with the caseload, but there has been a massive increase in the support staff." *Id.* at 37.

3. From Pakistan in the west to the Republic of Korea in the northeast, non-communist Asia is comprised of 16 countries with a total population of approximately 1.1 billion. Little reliable data on the problems of dispute moderation in the nations of Vietnam, Kampuchea, Laos, Mongolia, North Korea and The Peoples' Republic of China are available. However, as these countries develop economically and formalize and depoliticize their systems of conflict management, delay problems may become evident.

4. For the most part, government research into court delay is a recent phenomenon in Asia.

5. For the most part, terms such as "congestion", "backlog" and "delay" are not explicitly defined in the Asian literature. The implicit meaning of these terms varies with the commentator, the country and the structure of the legal system under scrutiny. Therefore, not only do substantial differences in law, practice and the meanings of court congestion and delay make cross-national comparisons unreliable, given the nature of information presently available, even same-country studies cannot be compared without careful analysis and qualification. It is not the aim of this article to impose a false consistency on the terminology or to presume meanings identical to those which are found in Anglo-American studies of court delay. Rather, one must recognize that the meanings of congestion, backlog and delay are as specific to the literature of a given country (or a particular study) as causes and potential remedies are to local conditions. Since the problem of delay is primarily national, formulation of a standard international definition is unnecessary. However, consistency in the meaning and usage of court delay terminology within the literature of each country is important and, for the most part, is yet to be achieved.

6. The availability of information helped to define the geographic parameters of this study. Little is available from Burma, Nepal, Bhutan, the Maldives, Brunei and

strategies for reducing Asia's massive case backlogs so as to heighten judicial responsiveness to the needs of disputants.[7]

I. WESTERN INFLUENCE

The traditional legal cultures of Asia were profoundly affected by Western colonialism. Even the legal systems of countries not under direct European colonial rule, such as China, Japan, Korea, Formosa (Taiwan) and Thailand underwent significant changes as a result of exposure to Western concepts of jurisprudence.[8] In all Asian countries, however, at the national level, European laws and legal structures came to predominate.[9] By and large, the legal systems received from the West during the colonial period were confirmed at independence as the basic law of the country.[10] However, penetration of received law into the rural areas, where most Asians still live, is far from complete.

Legal systems in Asia vary significantly from country to country, due in part to historical factors and current levels of economic and political development.[11] Most Asian countries, however, have pluralistic legal systems in which several distinct bodies of law—formal, non-formal and religious—operate. Western civil or common law predominates among the urban based citizenry, in the more developed sectors of the economy and in matters of national administration. Customary laws remain paramount in isolated regions. In addition, a substantial body of law rooted in religious philosophy and practice affects particular issues such as marital status, inheritance of property, and small-scale commercial transactions. Finally, in most countries there is a growing body of statutory and administrative law which has been enacted and developed since the achievement of national independence.

Afghanistan, while incorporating the countries of the South Pacific or the Middle East would not have been possible within the confines of a journal article.

7. Most of the literature on court congestion and delay in Asia is of limited distribution and only available locally.

8. Of course, various indigenous legal traditions, both secular and ecclesiastic, predate European contact and some of these pre-contact legal systems retain considerable vitality.

9. Often the successful borrowing of Western law has meant an accommodation rather than a surrender of traditional values. *See* C. KIM, SELECTED WRITINGS ON ASIAN LAW 62 (1982).

10. This seemingly uncritical adoption of European law and legal systems is less surprising when one considers the numbers of lawyers educated in the tradition of the "mother country" involved in independence movements and post independence governments.

11. The persistence of pre-colonial legal traditions, both religious and secular, is most evident in the less developed countries of Asia.

II. CIVIL LAW NATIONS

Excepting the Middle East, the non-communist civil law nations of Asia are Japan, the Republic of Korea (Korea), the Republic of China (Taiwan), Thailand and Indonesia. These five countries fall easily into two sub-groups. The three Northeast Asian civil law nations (Japan, Korea, Taiwan) share a larger cultural tradition. They are more economically advanced than the other two and their legal systems have much in common.[12] In fact, the court systems of all three are patterned on the German court system. The traditional Confucian preference for non-formal methods of conflict resolution is evident in the legal cultures of all three countries.[13]

The two Southeast Asian civil law nations, Thailand and Indonesia, are less developed, less politically centralized and less culturally homogeneous. Customary and religious law retain considerable vitality, particularly in rural areas.

Because the problem of case backlog and delay appears to worsen as the development process accelerates, the management of court congestion in the recently developed civil law countries of Northeast Asia is instructive. Of the three Northeast Asian nations, the Korean example is most meaningful.[14]

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12. Both Korea and Taiwan (then known as Formosa) were colonies of Japan during the first half of the twentieth century.

13. The Confucian preference for non-formal mechanisms of conflict moderation continues to influence popular perceptions of the legal process. *See* KIM, *supra* note 9, at 57, 197, 455. Haley, on the other hand, questions conventional notions that the Japanese are reluctant to litigate noting that some nationalities, such as the Koreans, seem to be even less litigious. Japanese society appears to have been at its most litigious during the period of transformation from an agrarian to an industrial and commercial economy. For example, Haley found that litigation in Japan "has been less frequent in absolute numbers in the postwar years than the period from 1890 to the outbreak of the Sino-Japanese War in 1937." Relative to population, the contrast is even more striking.

According to Haley, the Japanese government pursues a deliberate policy of discouraging litigation by restricting both access to the courts and limiting the range of remedies available to the Japanese courts. Haley notes that the number of cases disposed of per judge in 1974 was 1708, nearly twice that of a California Superior Court Judge (964 cases in 1971-72). "The number of judges in Japan has remained constant for the entire period from 1890 to the present." As a result, says Haley, Japanese courts are overcrowded and delay is acute. *See* Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 364-381 (1978). Unlike many Asian nations, Japan's formal disputing system has not had to accommodate a host of frequently hostile linguisitic, cultural, religious and ethnic communities for whom little common ground exists for the peaceful resolution of conflicts outside the courts. A popular bias in favor of non-formal methods of conflict resolution is more easily satisfied in culturally homogeneous Japan than in plural societies which characterize much of the rest of Asia. The Northeast Asian preference for face saving conciliation and mediation over direct courtroom confrontation helps explain and acquiescence of the Japanese electorate in government policies which discourage litigation.

14. For a discussion of court delay in Japan see Ishida, *The Japanese Judicial System and Delay in the Courts: The Experience of Japan*, in FIRST INTERNATIONAL SEMINAR-WORKSHOP ON MANAGING DELAY IN THE COURTS 56-65 (P. Valera-Quisumbing ed. 1985). Japan's mature economy means that its court delay problems differ markedly

A. Sources of Delay and Congestion in the South Korean Courts

The Republic of Korea has experienced rapid economic development since the armistice in 1953. Although trailing Japan in most economic indicators, South Korea is well ahead of most other Asian countries.[15]

The Korean court system is composed of a Supreme Court, the High Courts, the District Courts, the Family Court, the Branch Courts, and the Circuit Courts.[16] The Supreme Court is the apex tribunal of the nation for cases and controversies arising under the Constitution or the laws of Korea. As a court of last instance, it hears appeals from the judgements and rulings of the High Courts, and the appellate divisions of the District Courts and Family Courts.[17]

In administrative cases, the High Courts have original jurisdiction as courts of first instance. As a general rule, however, the High Courts are intermediate appellate courts with jurisdiction over appeals brought against judgements rendered by the District Courts and the Family Court.[18]

The District Courts are the courts of general original jurisdiction, deciding all cases except those falling under the exclusive jurisdiction of the specialized courts. District Courts also have appellate jurisdiction over single-judge District Courts, Branch Courts and Circuit Courts.[19]

Despite extensive training of court personnel, the addition of more judges, and a basically non-litigious legal culture, the workload of Korean judges rose substantially in the 1970's. As illustrated in the chart below, this is primarily because the increased inflow of cases outpaced efforts to streamline court procedure.[20]

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from those of most Asian nations. Its solutions, too, are frequently beyond the reach of less developed countries. On the other hand, Korea and Taiwan are undergoing an economic and social transformation only slightly ahead of most of Asia. Unlike Taiwan, substantial information on court congestion is available in Korea.

15. FAR EASTERN ECONOMIC REVIEW ASIA 1985 YEARBOOK 6-7 (H. Punwani ed. 1984).

16. SUPREME COURT OF THE REPUBLIC OF KOREA, JUSTICE IN KOREA 17 (1981).

17. INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 259-261 (S. Song ed. 1983).

18. SUPREME COURT OF THE REPUBLIC OF KOREA, *supra* note 16, at 21.

19. INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA, *supra* note 17, at 261-262.

20. SUPREME COURT OF THE REPUBLIC OF KOREA, *supra* note 16, at 52.

Litigation Caseload per Judge

Year	Supreme Court	High Courts	District Courts
1971	396.6	149.0	588.2
1980	640.0 (13)	187.9 (78)	614.8 (445)

Note: The number of judges at each level is enclosed in parentheses. These numbers are from Supreme Court of the Republic of Korea, Justice in Korea 51 (1981).

Thus, despite a 40 percent increase in the number of High Court and District Court judges in the nine years from 1971 to 1980, the average caseload per judge at the Supreme Court level increased over this period by more than 60 percent. With the exception of the staggering increase in workload for the Supreme Court, the overall increase in case workload per judge was not intolerable through 1980.

However, more recent data reveal a conspicuous increase in the volume of litigation from 1980 through 1982.[21] During this same period, the number of judges increased only slightly.[22] According to a Seoul District Court Judge, Yong Ho Oh, while the average caseload per judge in the Supreme Court declined to 484, it had risen to 213 in the High Courts and 774 in the District Courts.[23]

Despite the confidence expressed by Judge Oh in the Korean judiciary[24], a 1981 survey of 500 judges, prosecutors, lawyers and

21. Y. Oh, Some Proposals to Relieve the Delays in Civil Procedure of Korea 3 (1983) (paper delivered at Regional Conference on Managing Delay in the Courts, Manila, Philippines), *reprinted in* FIRST INTERNATIONAL SEMINAR-WORKSHOP ON MANAGING DELAY IN THE COURTS 66 (P. Valera-Quisumbing ed. 1985). Between 1977 and 1979, the number of civil cases, excluding cases of summary procedure, declined from 260,000 cases to 230,000. However, in 1980, the number increased to 290,000. In 1981, the total of civil cases jumped to 360,000 and in 1982, the number of cases reached 380,000.

22. *Id.* The number of judges increased from 523 in 1980 to 572 in 1982.

23. *Id.* To reduce the case overload on the Supreme Court and speed the disposition of cases, the Special Act for the Facilitation of Civil Procedure was enacted in 1981. The special Act restricts the grounds for appeal to the Supreme Court and permits speedier judgements in small claim suits.

Of the civil cases of first instance, 92.7 percent ended within five months of the institution of the action. A further 6.9 percent were resolved within a year and 0.4 percent within two years. With appealed cases, 51.2 percent ended within four months from the day the documents of action were forwarded, 66.8 percent were concluded within a year and 79.5 percent within two years.

24. *Id.* Equating efficiency in the disposition of cases to the skills and competence of the Korean judiciary, Judge Oh observed that "the comparatively speedy solution of

law professors, and 200 legislators, journalists and businessmen revealed substantial reservations regarding judicial competence.[25]

The Korean Ministry of Court Administration offered the following reasons for court congestion and delay: 1) understaffed courts; 2) lack of trained court administrators; 3) inadequate court facilities;[26] 4) inadequate budget;[27] 5) excessive adherence to formalities that result in trial delays; and 6) lack of empirical research on the causes of delay.[28] Ministry officials lamented that research designed to achieve reform has rarely been undertaken. Law scholars are concerned almost entirely with aspects of trial. Authorities on administration are interested solely in public administration. No Korean scholars specialize in problems of court administration. As a result, systems of court administration lag behind other fields of public administration.[29]

In addition to an insufficient number of trained judges, delay in civil cases is partially the product of Korean law and custom which allows litigants to present their own cases in court. Also, litigants have the right to claim new causes of action and present new evidence at any time prior to the conclusion of the trial.[30] Furthermore, Korean courts do not take an active role in identifying the points of dispute. Trial time could be reduced significantly if judges helped litigants agree on the issues prior to trial.[31]

While no empirical studies on case flow management have yet been undertaken in Korea, judges and other legal professionals have recommended a number of solutions for delay in the disposition of

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civil cases . . . would seem to be based somewhat on the fact that Korean judges have passed the very difficult judicial examination and that they are generally estimated as men of ability."

25. Moon In-koo, The Chosun Ilbo (Seoul), September 15, 1981. The paper reported that over 82 percent of those surveyed agreed that the Korean justice system does not meet the needs of citizens. A majority felt that trials are not conducted according to facts and law (fifty-three percent of those polled responded negatively on civil trials, 77 percent on criminal trials and 72 percent on administrative hearings.) Sixty-five percent felt judges lacked specialized knowledge and social experience or showed favoritism.

26. Memorandum of interview with officials of the Korean Ministry of Court Administration 2 (1983). A trial team may have access to a court room only once per week.

27. *Id.* at 1. In fiscal year 1982 appropriations set aside for the courts comprised only 0.5 percent of the total government budget.

28. *Id.*

29. *Id.*

30. Y. Oh, *supra* note 21, at 3-5. In common law jurisdictions the identification of a specific cause of action prior to trial is essential. Failure to do so can lead to dismissal of a complaint.

31. *Id.* at 4. For the information of his colleagues, Judge Oh noted that pre-trial procedures such as discovery have been widely adopted in the United States in order to discourage the tactic of "surprise which made it difficult for the parties to adequately prepare for trial."

civil cases. These include 1) increasing the number of judges (though it is acknowledged that to do so would require a larger budget allotment); 2) conducting studies of ongoing workload to assure its even distribution; 3) assessing the role which computer technology might play in speeding the documentation and administration of cases; 4) permitting only qualified attorneys to bring a cause of action before the courts; 5) adopting a policy of discouraging postponements; and 6) requiring the courts to assume the responsibility for defining the issues in dispute and to actively encourage pretrial settlements.[32]

Despite the many advantages the Korean court system enjoys over the court systems of other Asian countries—a substantial resource base, well-trained judges, cultural homogeneity, a centralized political tradition and a non-litigious citizenry—litigation has jumped dramatically in the last few years while the number of judges has remained relatively stable. The additional burden on Korean judges is a source of concern to the Korean legal community. It remains to be seen how those in authority will respond to the increased demands on the Korean justice system.

B. The Southeast Asian Civil Law Countries

Economic and social conditions in Southeast Asia differ significantly from those which prevail in Northeast Asia. By virtue of its relative affluence, Northeast Asia has a reservoir of available funds which can be tapped to relieve a burdened court system. Southeast Asian nations have far less in the way of uncommitted capital reserves on which to rely. In addition, "high tech" options are less feasible in Southeast Asia, both because of the dearth of qualified personnel and (again) because of the relative scarcity of funds to meet the start-up and maintenance costs. Furthermore, in some cases lawyers and judges may be less well-trained than their counterparts in Northeast Asia.

Litigation in the less developed civil law countries is rising dramatically despite a relatively lower stage of industrial development. A partial explanation is that the cultural and ethnic pluralism of Southeast Asia allows less common ground for non-formal dispute mediation.[33] More importantly, the transformation from agrarian subsistence economies to cash crop commercial agriculture is resulting in a major demographic shift away from the countryside to the cities.

Available evidence suggests that the evolution of new forms of social relations coupled with a decline in the effectiveness of tradi-

32. *Id.* at 4-5.

33. *See supra* note 13, regarding the non-formal option in culturally homogeneous Japan.

tional mechanisms of conflict resolution, has led to a surge in litigation. Legal institutions and patterns of legal practice, inherited from the somnolent colonial era, appear ill-equipped to handle this increased demand.

1. *The Extent and Causes of Court Delay in Indonesia.* Indonesia received its fundamental law and court structure from the Dutch. Dutch colonial law distinguished among Europeans, natives, foreign Chinese and other foreign Orientals. Different laws applied to each population group and each had its own court. Thus, in the colonial period, there was pluralism both in the law and in the judiciary.[34]

This complex system continued until the reorganization of the general courts in 1951. Country Courts were established as the courts of first instance; High Courts as appellate courts; and the Supreme Court as the apex court for all population groups in Indonesia.[35] Subsequently, four judicial spheres were established: the general courts and the special religious, military and administrative courts.[36]

Coexisting with the formal law are various customary (adat) legal traditions as well as Islamic (Shari'ah) law which is applicable to particular types of disputes.[37] In addition, because of the relative scarcity of trained lawyers, non-legally-trained persons (bamboo lawyers) are also allowed to represent parties in court.[38]

Delay in the courts[39] has been cited as a cause of popular dis-

34. Gandasubrata, *Indonesia, Administration of Justice: Procedural Reforms on Court Congestion*, in 2 1980 ASEAN COMP. L. SERIES, ADMINISTRATION OF JUSTICE: PROCEDURAL REFORMS ON COURT CONGESTION 1, 2-3 (P. Valera-Quisumbing ed. 1982).

35. *Id.* at 4. Established in Act no. 1/1951. *See also* E. DAMIAN & R. HORNICK, INDONESIA'S FORMAL LEGAL SYSTEM: AN INTRODUCTION 19-29 (1981).

36. Gandasubrata, *supra* note 34, at 4. Established in Act no. 14/1970.

37. The jurisdiction of the Indonesian Shari'ah Courts is primarily confined to family law including marriage, divorce, reunion, family gifts, inheritance, guardianship of minors, joint property rights, the rights of women and children, etc. *See* B. Arifin, The Administration of Shari'ah Laws in Indonesia 17-18 (1983) (paper delivered at the First ASEAN Shari'ah Administrators' Conference Workshop). For a study of the political context of the Shari'ah Courts, *see* D. LEV, ISLAMIC COURTS IN INDONESIA (1972). The spelling of Shari'ah varies slightly from one country to another.

38. Z. Atmadja, Responsibility for Preventing Delay 12 (1983) (paper presented before the Regional Conference on Managing Delay in the Courts, Manila, Philippines). The geography of Indonesia places an immense burden on the administration of justice. In a country of approximately 3000 islands, transportation is difficult and courts nearly inaccessible to many rural people. As a result, cases are often delayed because of the inability of witnesses or the accused to appear in court.

39. In 1982, a total of 23,485 cases had not been resolved within statutorily prescribed time limits. A. Soetjipto, Practical Methods of Avoiding Delays in Criminal Cases 1-B (1983) (paper presented at the Regional Conference on Managing Delay in the Courts, Manila, Philippines).

satisfaction with the administration of justice in Indonesia.[40] Acknowledging the deleterious effects of delay, the Indonesian Supreme Court (Mahkamah Agung) undertook a nine-month study of delay in selected courts.[41]

Among Indonesian legal commentators there is a consensus that the number of judges is insufficient to process the number of cases coming before the courts.[42] Another frequently cited cause of delay is the Indonesian judge's broad authority to postpone a case.[43]

In a 1980 paper, Justice Purwoto Gandasubrata distinguished between external and internal causes of delay:

> The internal factors are, among others, (a) an inadequate number of courts; (b) an insufficient number of judges and assisting personnel; and (c) an inefficient exercise of judicial process or an ineffective management of the courts. Whereas the external factors are among others, (a) the imperfections of regulations on judicial systems and law procedures, and (b) the growing sense of law among the people and the emerging legal institutions giving aid to more and more people.[44]

The recently completed study of court delay in Indonesia focused upon High Courts and District Courts with the greatest backlog problem.[45] The authors found that increasing the number of judges did not reduce court congestion.[46] Rather, they concluded that the adoption of a positive work ethic (work "spirit") by judges and court personnel was the most effective way to increase court

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40. Z. Atmadja, *supra* note 38, at 19-20. "Delay affects many cases in almost every urban place in Indonesia, denying justice to thousands of litigants and unavoidably affecting the people's lessened confidence in the Judiciary."

41. A. Soetjipto, E. Djunaedi, L. Soegondo, J. Djohansjah, H. Bustaman and H. Soeharto, Report of the Study on the Causes of Delay in High/District Courts and the Methods of Resolving Them 1 (February 22, 1986) (unpublished manuscript) [hereinafter cited as Report]. No attempt was made to ascertain the total number of backlogged cases (defined as cases not tried within one month of filing). Rather, efficiency ratings of high, medium or low were calculated for judges and court clerks in pre-selected problem courts. Although it is probable that the Jakarta courts adjudicate a higher proportion of complex cases than do courts in less highly commercialized regions, case difficulty was not a factor in the calculus.

42. A. Soetjipto *supra* note 39, at 5. There are 2113 judges out of a population of 151 million. Each judge must serve approximately 65,000 people.

43. *Id.* at 4, 6, 7. A judge may authorize the delay of a case indefinitely despite statements in the Basic Law of Judiciary Power (Law no. 14 of 1970) that justice shall be administered fairly, promptly and inexpensively. Nor is the power of Indonesian judges restricted by the recently enacted Indonesian Criminal Law Procedure (December 31, 1981) which establishes maximum time limits for the disposition of criminal cases, but does not require judges to adhere to these limits.

44. Gandasubrata, *supra* note 34, at 19.

45. Report, *supra* note 41, at 4. These were the High Courts of Medan, Pedang, Jakarta, Surabaya and Ujung Pandang and selected of their district courts. Targeted courts were observed by a field investigative team. In addition, 437 judges, prosecutors, police officers, attorneys, court clerks and litigants were interviewed.

46. *Id.* at 5.

productivity.[47] Alluding to the problem of graft, the authors urged improvements in judicial salaries, allowances and medical care.[48] They also recommended improvements in judicial recruitment, academic and practical course work and the implementation of mandatory in-service training.[49]

Indonesian commentators agree that court clerks are frequently undertrained, overworked and underpaid. The authors of the report recommended periodic conferences between judges and court clerks and increased use of court calendars as means to combat court delay.[50]

An inadequate police force was also cited as a major obstacle in the settlement of criminal cases. The number of police investigators, as well as their training and resources, were determined to be insufficient.[51] In contrast, the greatest problem confronting public prosecutors was summoning defendants and contacting witnesses across long distances via underdeveloped transportation and communication systems.[52]

Lawyers were criticized for incompetence, and for requesting postponements for personal reasons.[53] To combat excessive postponements, the report recommended that they be granted only when a valid reason is given and that they be limited to two days per request.[54]

The authors found court rooms and materiel to be woefully inadequate.[55] The Supreme Court and Department of Justice were urged to increase the budgetary allotment for the court systems.[56]

Concluding their report with a call for immediate and determined action, the authors contended that the accumulating backlog of cases threatens to drown the Indonesian judicial system. While short of critical at the moment, "should it [court delay] get worse, the judicial system might crumble and people will loose confidence towards the judicial institutions [which] . . . would weaken the state's foundations . . .".[57] Before the optimum strategies for reduc-

47. *Id.* at 5, 11. To foster greater discipline the authors proposed that the chief judge establish standards for his court and apply them vigilantly. To cut down on the number of trials, judges were urged to take an active role in pre-trial settlement efforts.

48. *Id.* at 9. "Only those who are strong and highly principled are able to withstand temptations, usually coming in the pecuniary form."

49. *Id.* at 8.

50. *Id.* at 8-9.

51. *Id.* at 10.

52. *Id.* at 9-10.

53. *Id.* at 6, 11. The majority of lawyers questioned indicated that the reason for requesting a postponement was unpreparedness or "too many cases to be handled."

54. *Id.* at 11.

55. *Id.* at 12-14. "[I]t can be concluded that the budget for building maintenance and for stationeries is not adequate."

56. *Id.* at 13.

57. *Id.* at 15.

ing delay can be identified, the findings of the Supreme Court report must be carefully studied.[58]

2. *Court Congestion and Delay in Thailand.* While English and American law and practice have had some impact on the Thai legal system, the predominant influence has been European civil law. As in all Asian civil law countries, trial by jury is not practiced. Both questions of law and fact are decided by the judge.[59] Unlike common law jurisdictions, decisions of higher courts are not absolutely binding upon inferior courts. Rather, they are considered to have lesser precedental value as "persuasive authority".[60]

Thailand has a three tiered court system consisting of the Courts of the First Instance, the Court of Appeal, and the Supreme Court. The operation of Thailand's courts is under the authority of the Ministry of Justice. The Minister appoints all court personnel except judges and is responsible for law reform in the fields of legal practice and legal procedure.[61]

Although information on court congestion in Thailand is limited, available data show a sharp increase of case inflow, prompting an admission that the Courts in Thailand are experiencing significant backlog problems.[62] In addition, the past several years have seen a dramatic increase in the number of lower court decisions brought to the Court of Appeals and the Supreme Court for review.[63] The result is an ever-increasing number of new appeals annually, further exacerbating an increasingly large backlog of

58. One option available to Indonesia is to increase the authority of its vital religious courts and customary law moots in order to reduce case flow into the formal courts. Efforts of this nature, which might provide useful models, have been tried with some success in Sri Lanka, the Philippines and Papua New Guinea. In the past, however, Islamic movements have posed a political threat to the authority of the Indonesian government. Any proposal to broaden the jurisdiction of adat moots and Islamic courts would be closely scrutinized for possible incompatibility with Pancasila, the purposefully secular State ideology.

59. Boondech, *The Thai Judicial System*, in THE LEGAL SYSTEM OF THAILAND 13, 14 (1981).

60. *Id.* at 19-20.

61. *Id.* at 13. *See also* Mahakun, *A Brief History of Thai Law*, *id.* at 21.

62. Comparing 1978 figures to those for 1982, the number of civil and criminal cases filed in the Courts of First Instance jumped 28 percent (from 258,000 to 329,000 cases). Memorandum of an interview with Judge Kanok Indrambarya of the Ministry of Justice, Office of Legal Affairs 1 (March 10, 1983). *See also* P. Wichitcholchai, Delay on Court Proceeding 2 (August 1984) (unpublished manuscript). Judge Pornpetch Wichitcholchai warns of the "grave and irreparable" harm that court congestion can do to the administration of justice in light of the increasing numbers of Thais who depend on the courts to settle their complaints.

63. C. Wibunsin, A Project to Expedite the Processing of Appeals in the Higher Courts 1 (1983) (summary translation of an unpublished manuscript).

undecided cases. Appellate level courts are especially backlogged.[64]

In addition to the dramatic increase in cases filed, a lack of financial support from the government is felt to have contributed to Thailand's court delay problem. In 1980, the budget allocated to the Ministry of Justice comprised only 0.357 percent of the total budget allotment of all Ministries. Despite the recent jump in cases filed in the courts, only 0.354 percent of the total Ministries budget was allocated to the Ministry of Justice in 1983.[65] Because of these financial constraints, there was a shortage of well-qualified court officers and administrative staff to manage the day-to-day operation of the courts.[66]

Judge Prasobsook Boondech sees five principal causes of congestion in Thailand's courts:[67] an insufficient number of judges;[68] an inadequate budget; insufficient courtrooms; an out-moded system of court administration; and appeals as of right. Two options under consideration by the Thai Judicial Council are amending the Civil and Criminal Codes of Civil Procedure to restrict the right of appeal and instituting (through legislation) an arbitration policy to promote out of court mediation of civil and commercial disputes.[69]

Status of Cases	Appeals Court			Supreme Court		
	1980	1981	1982	1980	1981	1982
New Appeals	7,477	8,743	11,246	3,494	4,563	4,109
Decided	7,488	8,635	10,607	3,142	4,071	3,948
Carried over	252	360	999	2,166	2,658	2,819

64. *Id.* In the first eight months of 1983, cases pending in the Appeals Court rose to 5,056.

65. Judge Kanok Indrambarya, *supra* note 62, at 1. Debate over the causes of court delay has entered the popular press and become a political issue. While acknowledging that many Thais believe that going to court is their last and worse option, a leading Bangkok newspaper asserted that the courts are the last hope of the people for justice. The article maintained that the courts are not the possession of the well-connected, as many believe, but rather are the fair and impartial forum they are intended to be. However, the writer acknowledged that excessive delays in the processing of disputes puts the litigants through great hardship. The newspaper blamed court delay not on the judges who it said are overworked and underpaid, but on the slow processing of cases, poorly maintained court buildings, and inadequate public facilities. Siam Rath, July 24, 1984. While these are not particularly telling criticisms, the Ministry of Justice responded in a subsequent article. The Ministry contended that the principal causes of court delay are *lack of money*—the Ministry of Justice is seeking a budgetary increase from 0.3 percent to 1.0 percent; *lack of manpower*—the Ministry is seeking a Deputy Regional Chief Justice for each Judicial Region; and *lack of knowledge* on the part of prospective litigants of how to access the courts most efficiently. Siam Rath, August 2, 1984.

66. Judge Kanok Indrambarya, *supra* note 62, at 1.

67. Boondech, *Thailand, Administration of Justice: Procedural Reforms on Court Congestion*, in 2 1980 ASEAN COMP. L. SERIES, ADMINISTRATION OF JUSTICE: PROCEDURAL REFORMS ON COURT CONGESTION 77, 83-90 (P. Valera-Quisumbing ed. 1982).

68. *Id.* at 84. In 1970 only 29 of 271 passed the judges qualifying examination—a year in which there were 350 vacancies.

69. Letter from Judge C. Wibunsin (December 23, 1983).

To free judges from the arduous task of recording court proceedings by hand, the use of tape recorders is now standard.[70] In addition, a three-year pilot project to train and place law clerks was initiated by the Ministry of Justice in 1984.[71]

The incremental steps which are being taken in Thailand to bring the court backlog problem under control are encouraging. The feasibility of various possible solutions is being tested and judges and government officials are becoming aware of the dimensions of the problem. What is lacking is a comprehensive study of the operation of the Thai judicial system which would pinpoint problem areas, and which could provide the empirical foundation for an overall strategy of reform and modernization.[72]

III. COURT CONGESTION AND DELAY IN COMMON LAW COUNTRIES

The common law countries of South Asia include Pakistan, Bangladesh, India and Nepal. The Southeast Asian common law nations consist of Malaysia, Singapore, Brunei and Burma.[73] In none of Great Britain's Asian colonies did English common law and legal practice entirely supplant pre-existing legal traditions. Furthermore, since the departure of the British, inherited colonial law and procedure have evolved in response to local socio-economic and and political conditions.[74] Therefore, it is not surprising to find that the problem of court delay and its solutions are perceived differently from one country to the next.

A. Court Congestion in Bangladesh

Bangladesh provides an illustrative case study of how the problem of court delay is viewed in a less developed common law country. The structure of the Bangladesh court system was largely inherited from Pakistan and Great Britain.[75]

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70. C. Wibunsin, *supra* note 63, at 1-2. The computerization of court decisions and legislative enactment is also under study.

71. *Id.* at 3.

72. A Ministry of Justice study of the causes of delay in four Bangkok metropolitan courts (the Civil Court, the Criminal Court, the Court of Appeals and the Supreme Court) and nine Provincial Courts was initiated late in 1985. The findings should be released shortly.

73. As a result of their complex colonial histories, Sri Lanka and the Philippines have hybrid civil law-common law systems. The common law nation of Papua New Guinea, though an observer nation within ASEAN and sharing a common border with Indonesia, is generally considered to be a member of the Pacific Islands community of nations.

74. Pakistan, for instance, is adopting an Islamic legal system. Malaysia has barred appeals to the English Privy Council from December 31, 1983. Impoverished, agrarian Bangladesh has a far different social structure from modern, urban, affluent Singapore.

75. A. HOQUE, THE LEGAL SYSTEM OF BANGLADESH 17 (1981).

Atop the court hierarchy in Bangladesh is the Supreme Court, which is comprised of an Appellate Division and a High Court Division. Both divisions have criminal and civil jurisdiction. The Appellate Division hears appeals from the High Court Division and also has constitutional advisory jurisdiction.[76] The High Court is responsible for the judicial and administrative supervision and control of the subordinate courts. In addition to hearing appeals from the subordinate courts, Article 102 of the Constitution of Bangladesh empowers the High Court to issue specified orders of prohibition when no other adequate remedy is provided by law.[77]

Subordinate civil courts include the District Courts, the Courts of Subordinate Judges and the Courts of Munsif, the Criminal Courts of Sessions Courts, and the Magistrates' Courts.[78] Courts and tribunals of special jurisdiction include the Labour Court, the Special Tribunal, the Juvenile Court, the Conciliation Board and the Village Court.[79] The latter two are intended to provide a non-formal inexpensive forum for dispute moderation and to extend effective jurisdiction of the formal legal system to rural Bangladesh.[80] Nevertheless, for most citizens of Bangladesh, travel even to the nearest Village Court can take hours, even days.

Given the concentration of commercial activity in Dhaka and the limited access to courts in the rest of the country, it is not surprising that most cases are brought before the High Court Division in the capital.[81] It is in Dhaka that court delay receives the greatest attention. To "expedite disposal, including clearance of backlog of cases," the Supreme Court Bar Association recommended the addition of ten judges to the Dhaka High Court.[82]

The Bar report identified a number of causes of delay in the disposal of criminal cases. Included were 1) inadequacy of the machinery for investigation of crimes; 2) corruption; 3) paucity of full-time judicial magistrates, paucity of judges of the Courts of sessions trying criminal cases and the burdening of existing magistrates with executive functions; 4) inadequacy of supporting staff and infrastructure available to the magistrates and courts of sessions; and

76. *Id.* at 42.

77. *Id.* at 43-46.

78. *Id.* at 65.

79. *Id.* at 66.

80. F. Munim, Administration of the Courts 4 (August 1985) (unpublished paper). The Village Court system was established by the Village Court's Ordinance of 1976 to resolve petty civil and criminal cases.

81. In one year, 750 out of a total of approximately 835 cases, were brought before the High Court Division. Bangladesh Supreme Court Bar Association, Memorandum on Changes in the Administration of Justice in Bangladesh 9 (January 12, 1983) (submitted to the Marshal Law Administrator) [hereinafter cited as Memorandum].

82. *Id.* at 10.

5) lack of proper supervision of the work of the magistracy.[83]

Regarding delay in the disposition of civil cases, the Bar identified the paucity of judicial officers as a primary problem. The "cadre strength" sanctioned in 1947 has not been increased despite a doubling of the population and a manifold increase in the number of cases and the volume of legislation. Other factors cited were 1) inadequate recruitment to fill existing vacancies; 2) highly inadequate staff and infrastructure including libraries and other facilities; and 3) inadequate budgetary resources allocated for administration of justice.[84]

In addition to more judges, the Bar also expressed the need for additional qualified support staff to manage court calendars, keep court records, and generally oversee the efficient operation of the courts. The Bar report also suggested that lawyers specializing in complex cases receive advanced continuing education and that law books, journals and Bangladesh law reports be made more available.[85]

In a 1985 paper, the Chief Justice of the Bangladesh Supreme Court, Dr. F.K.M.A. Munim, suggests six reforms to reduce court congestion in Bangladesh. They include (1) an improvement in the quality of judges; (2) improved training of court managers and administrators; (3) the imposition of a rational staffing system for court management; (4) improved training in the art and technique of administrative management of the courts in order "to take advantage of the sophisticated technical transformation of the system"; (5) the "establishment of a Judicial Training Centre for training of the judicial officers"; (6) and an increase in the number of courts.[86]

In response to increased demand upon the court system, the number of courts has more than doubled over the past five years. In 1976, the President of Bangladesh established a Law Committee to suggest ways to streamline the legal process and make it more responsive. In its report, "the committee observed that no individual member of the legal profession nor any bar association suggested

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83. *Id.* at 13.

84. *Id.* at 14-15.

85. *Id.* at 10-14.

86. F. Munim, *supra* note 80, at 2. In response to increased demand, the number of trial courts more than doubled between 1981 and 1984. Reports Munim:

> In 1984, 55 courts of District Sessions Judges, 76 courts of Subordinate and Assistant Sessions Judges and 460 courts of Munsifs were created and these courts have been duly filled by appointment and promotion of judges, as against 19 courts of District and Sessions Judges, 74 courts of subordinate and Assistant Sessions Judges and 141 courts of Munsifs in 1981. Similarly, Magistrate's courts have also been set up in all the 460 Upa-Zillas to cope with the volumes of cases.

Upa-Zillas are local government administrative units.

'any radical change in the existing procedure for Trial of both civil and criminal cases'."[87] However, at least one commentator has concluded that it is these time-honored procedures, affirmed with such conviction by the Law Committee, that lie at the root of court congestion in Bangladesh and necessitate very different solutions from those applied in the United States.[88]

In 1983, the Supreme Court Bar Association called for a comprehensive survey of the entire justice system. The proposed study would diagnose the underlying causes of the problems confronting the administration of justice with "the objective of making justice speedy and more readily available to the people."[89] While laudable, a research program involving "not only members of the judiciary and legal profession but all those who are affected or who have useful contributions to make" may be unnecessarily ambitious.[90] Certainly a study of case flow management is needed to discern and remedy bottlenecks in the dispute management process. To that end, the Committee for Law Reform was established by the government in 1985 to identify the factors responsible for delay and devise a method to continuously monitor court proceedings in order to maintain peak efficiency.[91]

B. Congestion and Delay in the Courts of India

The Indian legal system is modeled after that of the English.[92] The Supreme Court is the apex court in India. Immediately below

87. *Id.* at 4-5.

88. P. Li, Selected Comparisons Between Bangladesh and California Court Systems 1 (May 1985) (unpublished paper). In contrasting court procedure in Bangladesh and the United States, Li notes that almost no cases are settled before trial in Bangladesh, while in the United States, 90% of civil cases and 95% of criminal cases never go to trial. Over 90% of criminal and civil cases are appealed in Bangladesh. In the United States less than 1% of civil cases are appealed, while of the criminal cases which are appealed only 3% are reversed in the United States. In contrast, 90-100% of appealed criminal cases are reversed in Bangladesh as well as 20-50% of the appealed civil cases, three times the U.S. figure. Trials are piecemeal in Bangladesh whereas they are continuous, for the most part, in the United States. In Bangladesh, judges take all notes and must write opinions. Discovery is used extensively in the United States. Discovery is never used in Bangladesh. Pretrial/settlement conference procedures are also employed extensively in the United States. In Bangladesh, they are never used. Li concludes, "thus calendaring methods, pretrial and settlement conferences, firm trial dates, etc., may not be applicable in an analysis of the causes of and remedies for court delay in Bangladesh."

89. Memorandum, *supra* note 81, at 12-13.

90. *Id.*

91. Comment by F. Munim, Proceedings of the LAWASIA Chief Justices' Conference, Penang, Malaysia, Session 5, at 4 (August 19-22, 1985).

92. So much so as to prompt one commentator to observe "the extent of our overall normative dependency on English law jurisdictions is so great as to impart an anglophile profile to the ILS" (Indian Legal System). U. BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM 80 (1982).

is the High Court. The subordinate judiciary consists of the Senior courts (District and Sessions) and the Junior courts (Magistrates and Munsifs).[93]

The systematic study of delay in the Indian courts began more than sixty years ago.[94] More recently, the issues was addressed in detail by the Law Commission of India.[95] In its 1964 study of the Indian Code of Civil Procedure, the Law Commission observed that "the appalling back-log of cases . . . has unfortunately become a feature of nearly all courts of the country."[96] By 1978 the language of the Law Commission reports evidenced greater alarm over court delay.[97]

The Law Commission's 1964 report attributed delay in the resolution of cases to an insufficient number of judges, inadequate support staff, lack of adequate renumeration for judges and unnecessary adjournments during trial.[98] The 1978 report settled upon a definition of cases in arrears: civil cases not resolved within one year and criminal cases not concluded within six months of filing (unless appealed).[99]

The Commission concluded that the arrears problem was worsening, in part, because the creation of new rights and the evolution of new social interests resulted in growing numbers of cases.[100] The result, observed the Commission, was "too much court business for too few judges."[101] To bring the arrears problem under control, the Commission called for additional courts and judges[102] and proposed that retired judges be brought back to clear up the arrears.[103]

The Law Reform Commission identified causes of delay at var-

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93. *Id.* at 63.

94. Government of India Ministry of Law, Law Commission of India Twenty-Seventh Report (the Code of Civil Procedure, 1908) 7 (December, 1984) [hereinafter cited as Ministry of Law].

95. *Id. See also* H. Khanna, Seventy-Seventh Report on Delay and Arrears in Trial Courts (November, 1978).

96. Ministry of Law, *supra* note 94, at 6.

97. According to Khanna:

> Of late the problem of delay in the disposal of cases has assumed gigantic proportions. This has subjected our judicial system, as it must, to severe strain. It has also shaken in some measure the confidence of the people in the capacity of the courts to redress their grievances and to grant adequate and timely relief . . . . Weakening of the judicial system in the long run has necessarily the effect of undermining the foundations of the democratic structure.

H. Khanna, *supra* note 95, at 1.

98. Ministry of Law, *supra* note 94, at 9-10, 15.

99. Khanna, *supra* note 95, at 3.

100. *Id.* at 91.

101. *Id.* at 5.

102. *Id.* at 2.

103. *Id.* at 36.

ious stages of the formal disputing process. Delays in the service of summons were noted[104] as were delays in the filing of written statements.[105] Failure of the trial judge to frame the issues was cited as a cause of delay.[106] The Commission chided both bench and bar for under-utilizing pretrial discovery.[107] Trial judges were criticized for inadequate efforts to conciliate cases[108] and for fixing too many cases for trial on the same day and then continuing many of these.

In response to rising concern over delays in the administration of justice, the Indian Law Institute commissioned a study of the delay problem in the Indian Supreme Court. Published in 1978, the study revealed a steady increase in the number of cases pending in the Supreme Court.[109]

Over the thirteen years from 1965 to 1977 during which the backlog of cases in the Indian Supreme Court increased over eightfold, studies show "a noticeable increase, at all [court] levels, of initiation and arrears."[110]

The report of the Indian Law Institute concluded that merely increasing the number of judges—as was done in the Supreme Court in 1960—would decrease the arrears problem only briefly.[111] Instead, the Law Institute proposed other tactics including a narrowing of the jurisdiction of the Supreme Court, the institution of separate branches for constitutional and non-constitutional work or the creation of a Federal Constitutional Court.[112]

The Law Institute found that training for court administrators and staff was urgently needed[113] and called for the overhaul and modernization of the court's equipment and facilities.[114] Finally, the report recommended an extensive review of the Supreme Court's management structure and the creation of a division of the

104. *Id.* at 11-12.

105. *Id.* at 13-14.

106. *Id.* at 15.

107. *Id.* at 15-17. Order XI and XII of the Indian Code of Civil Procedure.

108. *Id.* at 17.

109. R. DHAVAN, THE SUPREME COURT UNDER STRAIN: THE CHALLENGE OF ARREARS 35, 42-43 (1978). In 1965, 3,930 cases were instituted in the Supreme Court while 2,282 were pending at year end. By 1977, 14,501 cases were instituted while 18,215 remained pending despite a three-fold increase in the number of cases annually disposed of by the court.

110. U. BAXI, *supra* note 92, at 60, 63. Arrears increased at all court levels despite significant system-wide increases in the number of judges. The Indian judiciary must respond swiftly and decisively, says Baxi, because the courts are confronted by a nationwide "docket explosion".

111. R. DHAVAN, *supra* note 109, at 45. According to Dhavan, even doubling or trebling the number of judges would not diminish the arrears buildup in the Supreme Court "unless it is radically altered in structure, jurisdiction and style." *Id.* at 59.

112. *Id.* at 45.

113. *Id.* at 71.

114. *Id.* at 35.

Court to serve the research needs of judges.[115]

In a recent paper P.N. Bhagwati, Chief Justice of the Supreme Court of India, identified some of the factors contributing to case backlog in the Indian courts. In addition to slovenly drafted legislation, he attributed the steady increase in case inflow to population growth in India and to "a growing consciousness among the people as to their rights and entitlements," abetted by a vigorous legal aid movement which is bringing to the courts litigants, "who were hitherto priced out of the legal system."[116] Chief among the external causes of delay, observes Bhagwati, is the growing complexity of Indian society which gives rise to more complicated and qualitatively different disputes.[117]

Among the internal causes of delay in the disposition of cases by the courts Justice Bhagwati cites 1) "the practice of oral argument we have inherited from the British";[118] 2) the traditional reliance of the courts on oral arguments rather than written briefs; 3) the plethora of appeals lasting 10, 15, or even 20 years; 4) patterns of practice in the legal profession which encourage postponements and delays as methods for charging higher legal fees; and 5) incompetent lawyers and poor quality judges.[119]

The parallel which the Chief Justice draws between evolving economic and social conditions in developing countries and the region-wide surge in the amount and complexity of litigation is compelling.

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115. *Id.* at 35, 42-43.

116. P. Bhagwati, *Nature and Causes of Delay* FIRST INTERNATIONAL SEMINAR-WORKSHOP ON MANAGING DELAY IN THE COURTS 27 (P. Valera-Quisumbing ed. 1985). In the many frivolous lawsuits filed in the Indian courts, Dhavan sees a peculiarly Indian tendency to inundate the courts with vindictive litigation. Interview with Rajiv Dhavan (June 1, 1986).

Similarly, Cohn noted that disputes filed in the British courts of India took years to be resolved, "and there were too many appeals from lower courts. Use of forged documents and perjury in the courts became endemic (Spear 1951). It was evident that courts did not settle disputes, but were used either as a form of gambling on the part of legal speculators . . . or as a threat in a dispute. There is apparently no quicker way of driving an opponent into bankruptcy than to embroil him in a lawsuit." Cohn continues, "in attempting to introduce British procedural law into their Indian courts, the British confronted the Indians with a situation in which there was a direct clash of the values of the two societies; and the Indians in response throught only of manipulating the new situation and did not use the courts to settle disputes but only to further them." Cohn, *Some Notes on Law and Change in North India*, in LAW AND WARFARE 154, 155 (P. Bohannan ed. 1980).

117. P. Bhagwati, *supra* note 116, at 29.

118. Allegiance to the English tradition runs deep. "It is to be noticed that the conclusion reached by the Law Commission not to depart from the Anglo-Saxon system of procedure is based on almost complete unanimity of public opinion." Ministry of Law, *supra* note 94, at 8.

119. P. Bhagwati, *supra* note 116 at 10.

C. Court Congestion and Delay in Pakistan

Pakistan's secular court structure is a product of the British colonial administration of India. The Supreme Court is the apex court of Pakistan. In addition to appellate jurisdiction over all cases from the High Courts involving a legal question of constitutional interpretation, the Supreme Court is vested with advisory jurisdiction in matters which may be referred to it by the President.[120] The Supreme Court is also responsible for establishing the rules of practice and procedure of the courts.

The jurisdiction of the country's four High Courts is both original and appellate. Each High Court maintains a number of branch courts serving major cities in its region.[121]

Each province within Pakistan is divided into administrative districts. Each district is under the judicial jurisdiction of a District or Sessions Judge who is appointed by the provincial governor. The magistrates who try the criminal cases are also appointed by the provincial governments.

A comprehensive study of the causes and severity of the court delay problem in Pakistan has yet to be undertaken. However, judges and lawyers who do operate within the judicial system are convinced that the problem is acute. Those prepared to publicly call attention to the problem point to a history of government neglect resulting in the declining quality of education in the law colleges, the serious dearth of legal reference materials and the lack of competent court administrators. Some lay the blame for case backlog on an excessive reliance on a Western style legal system. Others condemn existing methods for selecting judges and urge the institution of a judicial training center to teach judges how "to improve the quality of judgements and speed up the disposal of cases."[122]

Poor working conditions and the lack of trained support personnel are decried.[123] With an average of 125 new cases entering the court system daily, "the judge is so hard pressed that he is not in a position to devote more than four minutes in the hearing of a

120. GOVERNMENT OF PAKISTAN, PAKISTAN YEARBOOK 1982, at 202, 204 (1982). Despite the broad authority vested in the Supreme Court, its jurisdiction was restricted by the Provisional Constitution Order (PCO) of 1981. Under Article 15 of the PCO, specific executive orders including Orders of the President, Martial Law Regulations and Orders and all other laws made on or after July 5, 1977, cannot be called into question in any court on any ground whatsoever.

121. *Id.* at 207.

122. Amer, *Judiciary Neglected is Justice Denied*, MAG, March 3-9, 1983, at 10-11, 13. The article quotes a leading advocate, Khalid Ishaq: "Only those people become judges in our country who fail to become good lawyers . . . which means only the leftovers become judges in our country."

123. *Id.* at 11. According to Ishaq, "[t]he conditions of our courts, believe you me, are absolutely deplorable. There is only one room whereas you hardly find any steno or typist in our courts. Do you think any court can run under such circumstances?"

case."[124] The terms and working conditions "are so bad", contends retired Justice Fakhruddin G. Ibrahim, "that capable persons would definitely avoid becoming a lower court judge." "You cannot", he continued, "expect professionally skilled persons to work under such circumstances." According to Justice Ibrahim, the number of judges needs to be doubled.[125]

The legal system of Pakistan is clearly at a crossroad. President Zia-ul Haq has proclaimed his intention to reorganize the country's judicial system in line with Koranic tenets and values and to make inexpensive justice easily available to the people.[126] Although the process of Islamicization is not yet fully implemented, the development and expansion of the Shariat and Qazi Courts is underway.[127] The Federal Shariat Court system was established in May of 1980. The Shariat Appellate Court is a Bench of the Supreme Court. Three of its seven members are Ulemas.[128]

The impetus for the Islamicization of Pakistan's legal system is political as well as religious. Many in the legal profession are opposed to the present government. However, a strong selling point for the advocates of Islamicization is the promise of a prompt resolution of disputes, whereas the "judicial courts" cling tenaciously to their 150 year old tradition and their backlogged court system.[129]

Observes the Chief Justice of the Federal Shariat Court, "Islam says that a court should be within walking distance of a man's residence so that he can dispose of his business on the same day." The Qazi Courts promise physical accessibility and a timely resolution of disputes.[130]

Ultimately, the Islamic court system and the common law system will likely reach an accommodation. In time, they will probably evolve separate jurisdictions. Meanwhile, money and creative energy which might otherwise contribute to the modernization of Pakistan's common law court system are being diverted to the Islamicization of the law movement. Until the merits of the common law court system are clearly demonstrated, the populist appeal of

124. *Id.* at 12.

125. *Id.* at 13.

126. GOVERNMENT OF PAKISTAN, *supra* note 120, at 201.

127. *Shoora Adopts Qazis Court Ordinance: Major Step Toward Islamic System*, Pakistan Times, Feb. 21, 1983. *See also* Iqbal, *Qazi to be Accorded Special Privileges*, The Muslim, Jan. 21, 1984, at 1. A Qazi court will be located in every police station and will entertain both criminal and civil disputes.

128. GOVERNMENT OF PAKISTAN, *supra* note 120, at 210. President Zia had vowed to implement Islamic Shariat law totally by June, 1984, but that has not yet happened. *See* FAR EASTERN ECONOMIC REVIEW, *supra* note 15, at 215.

129. Iqbal, *supra* note 110, at 3. At present the courts are "flooded with litigation and therefore not in a position to dispose of cases in time while the Qazi Courts Ordinance has ensured speedy disposal of cases."

130. *Id.* at 1.

the religious courts will continue to pose a strong challenge.[131]

D. Court Congestion and Delay in Malaysia

Judicial power in Malaysia is vested in the Federal Court (the apex court), the High Courts and the Subordinate Courts.[132] The lowest level of the court hierarchy is the Penghuke's Court in Peninsular Malaysia and the Native Court of East Malaysia where local criminal and civil disputes are mediated by village headmen.

In addition to Malaysia's common law heritage, the various ethnic communities of Malaysia have their own customary methods of resolving disputes.[133] Muslim law—the Shariat and Kadi court systems—is preferred by many Muslim Malays for the resolution of domestic disputes.[134]

Most Malaysian commentators agree that case backlog is a serious and growing problem but one which does not yet threaten the integrity of the judicial system. The typical civil suit takes about eighteen months from the date of filing to the final resolution of the dispute in the lower courts.[135] However, many cases in the High Court take two to three years or longer for final disposition.[136]

The Lord President of Malaysia is less sanguine than many of his colleagues regarding the growing delay problem in Malaysia. "Unless a new method of adjudication is found to cope with the increasing number of statutory offenses and certain types of civil litigations, not only the legislative policies intended by the statutes passed by Parliament cannot be realized, [but also] the present system of administration of justice will also be clogged and perhaps collapse."[137]

A major cause of delay in criminal cases before the lower

131. With the lifting of martial law in December of 1985, debate over Islamicization may become an issue in the looming political contest between President Zia and Benazir Bhutto.

132. M.A. WU, AN INTRODUCTION TO THE MALAYSIAN LEGAL SYSTEM 118 (1983).

133. The adat (customary law) of the Malays is one example.

134. The Shariat and Kadi courts offer a less formal, speedier and cheaper method of resolving minor disputes than is available in the formal courts.

135. Yaakob, *Nature and Causes of Delay, Remedies Applied and Results*, in FIRST INTERNATIONAL SEMINAR-WORKSHOP ON MANAGING DELAY IN THE COURTS 41, 46-47 (P. Valera-Quisumbing ed. 1985). The majority of Subordinate Courts "are now able to give dates of hearing within three to six months from the time the accused person is first charged in court in criminal cases and within six months to one year from the time pleadings are closed in civil cases." The contrast between what Malaysian jurists see as delay and conditions prevailing in many South Asian Courts, for example, serve to remind us that the concept of delay is peculiar to each country. *See supra* note 5.

136. Interviews with senior legal officers (Dec. 1983).

137. M. Abas, Opening speech at the LAWASIA Chief Justices' Conference, Penang, Malaysia (1985).

courts is the failure of the police to complete their investigations by the date of the hearing.[138] Faced with repeated requests for adjournment based on this ground, the courts often discharge the accused. Counsel for the accused is often responsible for delays as well, hoping that with the passage of time, witnesses will forget details.

The courts also contribute to the mounting backlog by adjourning cases when it appears that a trial cannot be completed within the time allotted on the docket. Owing to crowded dockets, several months often elapse before adjourned cases can be completed. One proposed solution is to adopt the practice of continuing cases day-to-day until they are resolved.[139]

The shortage of trained and qualified personnel is particularly evident in the Magistrate Courts. In 1980, 16 percent of the 98 Magistrate posts in Peninsular Malaysia went unfilled.[140] An added problem in multi-lingual Malaysia is a shortage of able translators, many of whom opt for higher paying private employment.[141] In an effort to retain experienced court personnel, "the government has introduced attractive incentives in their emoluments by increasing their monthly salaries and providing perks like entertainment allowance, housing allowance, car loans and housing loans."[142]

Congestion in the High Courts is more serious. One observer notes that civil cases filed as long ago as 1971 were still awaiting trial in 1980.[143] Because the hearing of criminal cases has priority, civil cases must wait several months for a court date.[144] There is consensus in the legal community that there are not enough High Court judges to deal with the increasing number of cases filed each year.[145] The number of continued cases has risen significantly over the past decade. In 1969 a total of 4459 civil cases were "re-

138. Yaakob, *Administration of Justice: Procedural Reforms on Court Congestion*, in 2 1980 ASEAN COMP. L. SERIES, ADMINISTRATION OF JUSTICE: PROCEDURAL REFORMS ON COURT CONGESTION 22, 33 (P. Valera-Quisumbing ed. 1982).

139. *Id.* at 36. An objection which has been raised to successive scheduling is the uncertainty introduced into the docket. To accommodate cases which run over their allotted time, other scheduled cases would have to be reset, resulting in a hardship to witnesses, litigants and counsel. Of course, a common solution in courts with an established policy of hearing cases to conclusion is to set aside a certain number of contingency hours per day in which no new cases are set. Experience quickly teaches how much non-reserved time is likely to be needed to cover the carryovers.

140. *Id.* at 38. Little orientation or training is provided newly recruited Magistrates.

141. *Id.* at 37. Support personnel, such as secretaries, typists, bailiffs, process servers and document searchers are in equally high demand. *Id.* at 40-41.

142. Yaakob, *supra* note 135, at 46.

143. Yaakob, *supra* note 138, at 46.

144. *Id.* at 43–44. For instance, in one division of the High Court from August to December of 1980, only 103 of 862 civil cases filed with the court could be set for hearing.

145. *Id.* at 45. In 1980 there were eighteen High Court judges in Peninsular Malaysia.

turned". By 1979 this number had risen to 7474 cases. Criminal cases fared little better, recording a fifty percent increase in returned cases between 1969 and 1979.[146]

Appeals to the apex court, the Federal Court, are increasing steadily. The following data on the volume of cases appealed to the Federal Court illustrate this fact:

Appeals to the Malaysian Federal Court[147]

	Criminal			Civil		
Year	Registered	Disposed	Pending	Registered	Disposed	Pending
1972	28	22	6	142	126	141
1976	53	29	38	180	161	200
1979	46	30	85	251	220	296

Comparing the data for 1972 and 1979, civil cases, both registered and disposed, increased by about 75%. Over the same period, the number of pending civil cases doubled. The rise in registered or disposed criminal cases over the same seven year period was not quite as large, (64% and 40%, respectively), but the number of pending criminal cases in 1979 was 14 times higher than in 1972.

Facing a steady increase in the number and complexity of cases, and a growing backlog problem, the Lord President expressed dismay that "court procedures remain the same—long winded, full of technicalities and far from being simplified."[148] Therefore, the Lord President advocates the incorporation of alternate forms of dispute resolution settlement such as negotiation, arbitration and conciliation.[149]

In mid-1984 the Judicial Department of the High Court of Malaysia initiated a study to identify the causes of delay in the administration of justice. When released the findings will help to guide

146. *Id.* at 48.

147. *Id.* at 46.

148. Yaakob, *supra* note 138, at 34-35. Judges, on the other hand, maintain that inexperienced lawyers contribute to delay by introducing irrelevant evidence and specious arguments. It has been recommended that lawyers not appear in the Subordinate Courts until they have received at least one year of intensive training after being called to the Bar. Papua New Guinea, for instance, has initiated a similar program for law school graduates and lawyers from non-Commonwealth countries wishing to practice in PNG.

149. M. Abas, *supra* note 137, at 4.

those involved in streamlining the dispute process in Malaysia.[150]

E. Court Congestion in Singapore

Much of the law and formal legal structure of Singapore was taken from the British. The lowest court of the hierarchy is the Magistrate's Court.[151] The District Court is the second level of the Subordinate Court System of Singapore.[152] The highest level is the Supreme Court which is comprised of a High Court exercising original and appellate civil and criminal jurisdiction; a Court of Appeal exercising appellate jurisdiction for civil matters; and a Criminal Court of Appeals.[153]

As with other developing countries in Asia, Singapore has experienced a recent jump in litigation. The volume of cases before the High Court has grown dramatically over the past decade. Three hundred ninety-nine civil actions (excluding adoption and probate petitions) were filed in the High Court in 1970, whereas by 1979 the number had surged to 6,021, an increase of more than sixteen times the 1970 figure.[154] Commentators attribute this remarkable increase in the number of cases filed in the Singapore High Court to rapid economic growth and greater public awareness of legal rights and liabilities.[155]

Not only has the number of High Court judges held at seven for the past twenty-two years—despite the tremendous increase in cases—but the responsibilities of the judges have also grown. "With the abolition of trial by jury in 1970, trial by two judges was introduced, causing a further constraint on available judge time."[156]

As such, delays are inevitable. On an average, civil cases come to trial eighteen months after being set for hearing. Criminal cases—to which greater urgency is attached because the accused may be incarcerated pending trial—take about eight months.[157]

District Court Judge Michael Khoo distinguishes causes of delay which are "outside the hands of court administrators" from those over which the court has control. In the former category he includes the increasing number of cases, too few judges, pre-trial delays by lawyers and litigants and unnecessary adjournments and

150. Letter from Puan Noor Azian bte Shaari, Registrar, High Court of Malaysia (August 7, 1984).

151. R. Kishan, *Legal System and Structure of the Courts in Singapore*, 4 ASIAN L.J. 145, 148-149 (Dec. 1981).

152. *Id.* at 150-151.

153. *Id.* at 153-154.

154. Khoo, *Singapore. Administration of Justice: Procedural Reforms in Court Congestion*, in 2 1980 ASEAN COMP. L. SERIES, ADMINISTRATION OF JUSTICE: PROCEDURAL REFORMS ON COURT CONGESTION 60, 65 (P. Valera-Quisumbing ed. 1982).

155. *Id.* at 64.

156. *Id.* at 65-66.

157. *Id.* at 64.

postponements. In the category of causes of delay over which the court has control, Khoo lists bad management of court resources and ineffective methods for disposing of cases without need for a trial, that is to say, greater reliance on pre-trial procedures to dispose of some cases and greatly shortening the trial time of others.[158] According to Judge Khoo, effective pre-trial settlement "enables the court to be 'robust', that is to say, to take matters into its own hands to speed up the economical disposal of the action."[159]

Singapore has been quicker to respond to the problem of court delay than other South and Southeast Asia nations. Observes Judge Khoo, "the past decade has seen the Singapore problem of congestion, backlog and delay being confronted from several directions, each independent and quite unrelated, and some considerable success has been achieved to meet the many variables that contribute to the problem."[160]

Although the relevance of Singapore's efforts to control case backlogs must be qualified because of the unique character of the country,[161] its successes merit attention as exemplary innovations. Absent an increase in the number of High Court judges, additional relief from case backlog was secured through procedural reforms enabling courts to take greater control of the adjudicatory process, rather than deferring to the will of the litigants. For instance, in civil cases, High Court judges adopted a more active posture in encouraging pre-trial settlement, in clearly defining the issues to be tried, and in controlling the evidence to be presented in order to shorten the trial.[162]

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158. *Id.* at 64-66. Khoo urges greater reliance on pre-trial procedures to dispose of some cases before trial and to shorten the trial time of others.

159. *Id.* at 66. In discussions with the author, several ranking members of the Singapore judiciary expressed the private opinion that the principal cause of continued delay in the processing of disputes is the shortage of judges. There is also some concern over the quality of appointments to the judiciary. The shortage of skilled support staff was also cited, as were the laborious and archaic methods of recording the proceedings of the trial. There are no court stenographers. The trial judge must take down the relevant information in long-hand. On appeal, the judge's handwritten notes constitute the written record of the trial. It is felt that this practice distracts the attention of the judge from the subtleties of the oral presentations, and results in the filing of a greater number of appeals than would otherwise be the case. Thus, both the duration of the trial and the quality of judicial decisions are adversely affected by the practice of having the judge keep his own hand written record of the proceedings. A similar concern is voiced in Malaysia, but at least one Malaysian commentator feels that a lasting solution requires procedural and structural reform and that a sudden increase in the number of judges "may undermine the quality of justice." *See* Yaakob, *supra* note 118, at 51.

160. Khoo, *supra* note 154, at 64.

161. Singapore is a small, highly urbanized, politically centralized, affluent island nation.

162. Khoo, *supra* note 154, at 66.

> Pre-trial disposal not only provides speedier remedies . . . but also greatly eases case loads. In 1979, out of a total of 2,815 writ of summons actions disposed of, only 465 were either actually tried or were settled the day of

In criminal trials, the preliminary inquiry was modified.[163] The magistrate no longer hears oral testimony. Both the prosecution and defense now submit written statements. A determination is made on the basis of the written submissions whether sufficient evidence is disclosed to bring an accused to trial for the offense charged.[164] Speedier inquiries help to prevent injustice, it is asserted, because accused persons need no longer languish in jail awaiting a preliminary inquiry.[165]

Another procedural reform which helped speed the disposition of criminal cases allows either the accused or the public prosecutor to admit any fact. Prior to the enactment of the Criminal Procedure Code of 1972, oral proof of every fact in issue, even though not disputed and admitted by the parties, was required.[166]

To reduce congestion in the High Court, the jurisdiction of the Subordinate Courts was increased, thereby diverting cases to less backlogged forums. In criminal matters, for example, District Court jurisdiction was increased from offenses for which the maximum term of imprisonment does not exceed seven years to offenses punishable with sentences less than life imprisonment upon the petition of the Public Prosecutor and the consent of the accused.[167]

An increase in the jurisdiction of the Subordinate Courts in civil matters was adopted in 1976.[168] Case flow management is facilitated by court rules allowing subordinate court judges greater control over the pre-trial stages of civil cases than are allowed their High Court counterparts.[169]

In recent years, two procedures employed by court administrators in Singapore to speed case disposition have been the "double-

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the trial. 1,335 of them were judgements obtained in default of appearance, 81 in default of the service of defense to the action, 516 were summary judgements, while 418 were either discontinued, withdrawn or settled before setting down.

163. *Id*, at 67. Criminal Procedure Code (Cap 113), Act No 12. of 1972.

164. Khoo, *supra* note 154, at 67.

165. While the new streamlined preliminary inquiry is undeniably quicker than the earlier procedure, Singaporean jurists have yet to comment on whether the new system seriously compromises traditional protections accorded accused persons under the pre-existing preliminary inquiry system.

166. Khoo, *supra* note 154, at 68-69. Criminal Procedure Code, Section 375 (Amendment Acts Nos. 12/72 and 10/76).

167. Khoo, *supra* note 154, at 69. The Criminal Procedure Code was amended in 1960 by Ordinance No. 18/60. With the exception of criminal cases in which a sentence of death or life imprisonment is possible, all criminal trials are now held in the Subordinate Courts. In 1979, for example, 3549 criminal cases were disposed in the Subordinate Courts while the High Court disposed of only 51 criminal cases of first instance.

168. *Id.* at 70. Subordinate Courts Act of 1976, Act No. 6/76.

169. Khoo, *supra* note 154, at 70-71. The housing of all Subordinate Courts in a single central location, a 26 court complex, permits timely monitoring of congestion and the rapid redistribution of cases.

fixing" system and the "filter court". To minimize loss of judicial time when scheduled cases need not be tried—because of a settlement in civil cases or a change of plea to guilty or the unavailability of a key witness in a criminal trial—court administrators adopted a system of "over booking" or "double fixing" in order to fully utilize judicial time. Under such a system, an additional case was assigned for hearing at the same time. If time was not available in a given court, a case could be transferred immediately to a court which had disposed of its cases ahead of schedule.[170]

Approximately fifteen cases which appeared unlikely to go to trial or which seemed likely to be brief trials were assigned each day to the "filter court". The presiding Magistrate attempted to dispose of them, himself, but in the event that he was unable to, he "filtered" them to courts in which a free period had opened.[171]

The difficulty with such a system was that the litigants, their witnesses and counsel were compelled to wait until a court was able to take their case. The trade-off, of course, is that the "filter court" and the "double-fixing" systems enabled the courts to dispose of substantially more cases than was earlier possible. Furthermore, because distances are short in Singapore and the courts centrally located, the inconvenience to litigants is minimal.

Reforms in court practice, procedure and organization continue to be implemented as problems with previously adopted methods of reducing court delay become apparent. In 1984, the system of case disposal in the Subordinate Courts was revamped. The "filter court" procedure was abolished in favor of a central control court.[172]

To relieve the courts of thousands of unnecessary cases annually, Judge Khoo has urged the adoption of a program whereby those prepared to plead guilty and pay a fine for minor criminal offenses may do so by mail. Section 136(2) of the Criminal Procedure Code provides for such an alternative to a court appearance, but as yet the fine by mail option has not been adequately publicized.[173]

It is evident that Singapore is attempting to deal with its court congestion problems through procedural and infrastructural reforms. While much has been achieved, it is clear that the number of disputes reaching the courts continues to increase. Further reforms such as the addition of more judges, the introduction of efficient systems for recording, preserving court proceedings, and the intro-

170. Khoo, *supra* note 154, at 72-74.

171. *Id.* at 72-73.

172. Letter from R.E. Martin, Registrar, Singapore Supreme Court (July 31, 1984).

173. Khoo, *supra* note 154, at 75-76. Examples of such offenses include public littering and traffic violations.

duction of alternatives to formal adjudication are likely to be adopted.

IV. THE HYBRID LEGAL SYSTEMS OF SRI LANKA AND THE PHILIPPINES

The colonial histories of the Philippines and Sri Lanka are longer and more complex than those of most Asian countries. Not only do the formal legal systems of both manifest the influence of a succession of metropolitan countries, but elements of pre-colonial customary and religious legal traditions are present as well.

Western colonial contact with Sri Lanka (Ceylon) began early in the sixteenth century when the maritime provinces of Ceylon came under Portuguese control. The Dutch succeeded the Portuguese in the mid-seventeenth century and were in turn displaced by the British at the close of the eighteenth century. However, the British did not abrogate the legal system which had been established by the Dutch. Instead, the Roman-Dutch law of the United Provinces was confirmed as the residuary general law of the Ceylon.[174]

By the close of British rule in 1948, "there had been a substantial infiltration of the English law into the legal system of Ceylon."[175] The Ceylonese court structure and patterns of legal practice also underwent reform under the British. "It was a system", observed a noted Ceylonese historian, "in which the traditional, the parochial and the indigenous elements were all but obliterated by the relentless and pervasive pressures of anglicization."[176]

Spanish dominion over the Philippines began in 1521 and spanned more than 350 years. Despite fifty years of American colonial rule, much of the Spanish civil law tradition, as well as some elements of pre-colonial legal cultures, persists. While American law has influenced Philippine constitutional law, public law and commercial law, "Filipino customs, traditions and ideals are still embraced in the New Civil Code of the Philippines that reflected the Spanish Civil Code, which in turn originated from the Roman Civil Law."[177]

The residual influence of civil law traditions notwithstanding, the legal culture of both countries has been substantially influenced by British and American law and practice. Decisions of the courts carry greater precedental weight than previously. Judges are se-

174. Nadaraja, *The Administration of Justice—1796-1948: The Law*, in 3 HISTORY OF CEYLON 332 (K. de Silva ed. 1973).

175. *Id.*

176. *Id.* at 326.

177. Carrillo, *The Philippine Legal System and Court Structure*, 4 ASIAN L.J. 136, 137 (1981).

lected from among successful practicing attorneys rather than from among law school graduates. Additionally, unlike the civil law countries, no institutionalized program for the training of judges existed—at least until quite recently.

A. Court Congestion and Delay in Sri Lanka

The highest ranking court in Sri Lanka is the Supreme Court. Below it are the Court of Appeal and the High Court. Next in the hierarchy are the District and Family Courts, and the Magistrate's and Primary courts.

In recent years, the Sri Lanka legal community has evinced growing concern over delay in the resolution of court cases. Expressions of alarm from leading judicial officers raised public awareness of the threat excessive delays pose to the rule of law.

O.S.M. Seneviratne, President of the Court of Appeal, observed that "the laws delays have been 'a perennial' and 'endemic' problem." He continued,

> A quick remedy for the laws delays is of paramount importance. It has to be done before the public turn against the very institution of the courts and consider the courts system an institution of obstruction rather than an institution from which expeditious justice can be sought. What a calamity it will be if the public lose confidence in the courts and such a situation arises?[178]

Attorney General Shiva Pasupati acknowledged that some cases had been pending before the Court of Appeal for more than ten years. He noted that "in any year the institution of appeals exceeds the appeals disposed of so that the number of pending appeals will necessarily have to increase from year to year." He continued, "The position is no better in the original Courts— both civil and criminal. There is no doubt that respect for law and order will diminish unless effective justice is dispensed."[179]

Supreme Court Chief Justice Neville Samarakoon observed that between 1970 and 1982 "Work in the court has gone up . . . by well over 200 percent, but we have the same number of Courts to tackle them."[180] In the same speech, the Chief Justice indicated that to meet the growing litigation, the number of Magistrate's Courts and the number of District Courts will have to double. He lamented the fact that the government had budgeted "not even five cents" for capital expenditures on the courts in 1983.[181]

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178. *Laws Delay—Hopeful Signs from Above*, JUSTICE, Dec., 1984, at 7-8 [hereinafter cited as Laws Delay].

179. *Id.* at 7.

180. Address by Chief Justice Neville Samarakoon, Ninth Convocation of the Bar Association of Sri Lanka (March 26, 1983), *excerpted in* 1 B.A. SRI LANKA L.J. May-June 1983, at 5.

181. *Id.*

While expressing relief that the number of judges on the Court of Appeal would soon increase from 12 to 18 or 19, Justice Seneviratne opined that "the expeditious disposal of the appeals cannot be eliminated by an increase in the complement of the Judges." He indicated that "The cause of delay apparently lies elsewhere."[182]

The Secretary of the Judicial Service Association identified the following causes of delay in the courts of Sri Lanka:

> In the Civil Courts, non service of processes of court and delay in execution of orders, inefficiency and corruption in the administrative frame work, application for dates by parties and counsel, failure to obtain documentary evidence due to the inefficiency and corruption in other departments, and the economic difficulties faced by litigants in their day to day life which prevented them from taking steps they had to take, in time, resulted in a serious backlog in the calling roll and trial roll of the several District Courts. Long drawn cross-examination and irrelevancies, interlocutory appeals, which necessitated a stay of proceedings, and non availability of counsel on trial dates on personal and other grounds, only helped to worsen the situation.[183]

The Secretary indicated that the situation in the Criminal Courts was particularly serious. Coupled with ethnic strife, increases in the crime rate resulted in the near complete suppression of bail in Grave Crime (felony) cases. Thus, the jails as well as the courts were overburdened.[184]

In October 1984, a distinguished committee of legal scholars undertook a nine-month study of the causes of court delay on appointment from the Ministry of Justice. Released in July 1985, the Law's Delays Committee Report is the most thorough assessment of the causes of court delay yet produced in Asia.[185] The committee noted that "in an adversary system of justice, such as ours, 'delays destroy justice . . . . deterrence is lost . . . . costs are increased . . . . court resources are wasted'. . . and severe emotional hardship" is inflicted upon litigants.[186] In combination, these factors "undermine the efficacy of the whole legal system, sapping its strength, vitality and even its integrity, and make the majority of litigants lose

182. Laws Delay, *supra* note 178, at 8.

183. K.S. Wijewardena, Managing Delay in the Administration of Justice 1 (1983) (unpublished manuscript).

184. *Id.*

185. R. Wanasundera, Report of the Sri Lanka Law's Delays and Legal Culture Committee 1985 i-iv (July 1985). The District Courts and Magistrate's Courts, in the view of the Laws Delay Committee, are the "backbone" of the Sri Lankan judicial system. For that reason, they received the greatest attention. *Id.* at 2.

186. *Id.* at 2, 27. Contending that the time is right for a thorough "study of the organization, structure and methods of the court and the court office", the committee lamented "that courts which were planned for a Victorian age are still being run practically on the same lines and manner as in the Colonial period."

confidence in it."[187]

The committee report acknowledged that increases in the volume of litigation were responsible for the court delay crisis in Sri Lanka.[188] The committee also reported several reasons for the increased popularity of the courts, including population explosion, universal free education which raised the literacy rate in Sri Lanka, higher living standards, economic development and a wider social and political awareness.[189] The problem is exacerbated by the "low priority" which the State "has chosen to give to the administration of justice in the recent past".[190]

To gather information, committee members interviewed judges and lawyers and scrutinized a sample number of case records. Outstation courts as well as Colombo metropolitan courts were visited. Most attention was focused on the District Courts and the Magistrate's Courts.[191]

The committee studied the quarterly work returns and diaries of judges, conferred with members of the Bench and Bar, reviewed records, registers and court documents, and inspected courts, court officers and record rooms. Written memoranda on the causes of delay were requested of all judges and members of the Bar.[192]

Having documented delay, backlog and congestion empirically,[193] the committee identified the two principal causes of court delay: inept trial roll management by the judge,[194] and the ten-

187. *Id.* The author found considerable dissatisfaction with the formal legal system in a 1975-1976 nation-wide survey of the legal needs and legal perceptions of the poor in Sri Lanka. J. Falt, A Survey of the Legal Needs and Legal Perceptions of the Poor in Sri Lanka (1977) (unpublished manuscript).

188. R. Wanasundera, *supra* note 185. *See also* Table II. Data on the increase in cases instituted and cases pending between 1980 and 1984 in the District Court of Gampola are illustrative of the delay problem throughout the Sri Lanka court system. In 1980, the total of pending cases—cases carried over by the court from previous years—was 36. This figure represented 10.5% of the cases instituted in the Gampola District Court in 1980. By 1984 the same court carried over 253 cases which represented 81.3% of the cases instituted in that year.

189. *Id.* at 2.

190. *Id.* at 2-3.

191. *Id.* at 2. The report concentrated on the District Courts and the Magistrate's Courts because they are the mainstay of the legal system, according to the authors of the study.

192. *Id.* at 1. Absence of hard data and expertise in social statistical analysis compounded the committee's task.

193. *Id.* at 7. The committee had before it a fourfold task: to define "delay"; to confirm its presence; to identify its causes; and to propose solutions. To assess the degree of delay, the committee determined "the length of time in the abstract that would normally be expected by the law from the date of institution to date of judgement, with reference to the various defined steps or stages it has to go through." The "date of institution" the committee defined as the day on which the relevant papers were duly stamped and submitted by the lawyer to the Record Keeper who thereupon makes the appropriate entry in the Plaint of Application Register.

194. *Id.* at 12

dency to grant requests for trial postponements on the flimsiest of reasons.[195]

The committee report contended that the main reason for the numerous requests for postponement is that lawyers take on more work than they can handle by practicing in several courts.[196] To expedite the disposition of cases, judges must assume greater responsibility for case-flow management, and exercise rigorous administrative control over "bottlenecks", including the granting of postponements.[197]

Minimal government appropriations for the administration of justice contributed to the court delay crisis.[198] "The existing system itself" the committee concluded, "is in a state of neglect and disrepair."[199] To remedy deficiencies in court administration, the committee report urged improvements in (a) planning, (b) organization and training, (c) staffing, and (d) directing and controlling.[200] Establishment of a training program for court administrators was also advocated.[201]

A number of avoidable delays in the earliest stages of the dispute process were identified. These included the tendering of summons[202] and the registering, numbering and binding of papers once a complaint had been filed.[203] Greater reliance on the registered post for the service of summons was recommended.[204]

Corruption was found to be "rife among Fiscal's officers charged with the duty of executing writs, making the execution of money decrees very difficult."[205] The creation of a separate fiscal

195. *Id.* at 12-13. The committee noted that "the predisposition of some judges to grant such postponements for the mere asking enables such applications to be made with impunity."

196. *Id.* at 22. The custom of seeking postponements is rooted in the economics of lawyering in Sri Lanka. An editorial in The Island newspaper acknowledged that lawyers make their money by charging clients for each appearance in court. Another paper recalled that Sri Lanka's lawyers freely admit to the practice of running up bills by appearing in court only to obtain postponements. Any major shift in the practice of granting postponements will require lawyers to restructure their fee policies. *See Legal Woes*, The Island (Colombo), July 15, 1985. *See also The Law's Delays*, Daily News (Colombo), July 17, 1985.

197. R. Wanasundera, *supra* note 185, at 12, 25, 31-33.

198. *Id.* at 3. "The inability or the indifference of the Government in many cases in providing the required courthouses and accommodations is another major source of delay."

199. *Id.* at 3.

200. *Id.* at 25.

201. *Id.* at 27.

202. *Id.* at 10.

203. *Id.* at 7-8, 28. Delays—often as much as 6 months—are directly attributable to slackness on the part of the process server and the failure of the complainant to provide a proper address or contributory.

204. *Id.* at 10, 34-35.

205. *Id.* at 20, 34.

branch directly responsible to the judge was proposed to reduce the effect of corruption among minor officials.[206]

The committee proposed a solution for every problem it identified. It recommended adopting business office management procedures to correct the numerous inefficiencies in office routine.[207] The need to collect and publish statistics in order to identify the sources of delay was also stressed.[208] In addition, the committee recommended that an institute be established to provide bench books and introductory and in-service training to judges and court administrators.[209]

Finally, the committee acknowledged that the relatively high cost of litigation placed justice beyond the reach of many Sri Lankans. To provide access to affordable methods of dispute resolution, the committee recommended an examination of lawyers' fees and proposed greater reliance on alternatives to litigation such as mediation and conciliation.[210]

Concluded the influential *Sun*,

> Seminars, conferences and periodic outbursts have done little to make the law more amenable and accessible to the average citizen. We now have a blueprint that could haul the whole overloaded system up by its bootstrap. We urge that an administration of justice (amendment) bill, based on these recommendations be presented in the streamlined procedure underlined by them. If justice is done to this report, Hulftsdorp could see a new era after the next vacation.[211]

Given the constraints under which the members worked, the Law's Delays Committee produced a thorough and well reasoned report. The methodologies employed by the committee provide a useful guide for future research in developing countries, and the findings and conclusions of the report will be of considerable interest in jurisdictions desiring to reduce court delay.

B. Court Congestion in the Philippines

Drawing upon American models, the court system of the Phil-

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206. *Id.*

207. *Id.* at 37.

208. *Id.*

209. *Id.* at 26-27.

210. *Id.* at 3, 25.

> What is needed today is a system of justice at the grass roots . . . . Most of the disputes which touch the life of the poor people who are hardest hit by the law's delays are of minor nature which can be settled in the village or the closest provincial town through a system of popular justice.

Legal Woes, supra note 196.

211. *Legal Blockbuster*, Sun (Colombo), July 19, 1985. "Hulftsdorp" is the law courts area of Colombo.

ippines assumed its modern form with the Judiciary Act of 1901.[212] Subsequent modifications under the Reorganization Law of 1932, and the addition of the Court of Appeals under the Commonwealth in 1935, established the structure which carried through independence in 1946 to August, 1981 with the enactment of the Judiciary Reorganization Act. of 1980.[213]

In the present four tier court system two tribunals are principally trial courts and two are appellate courts.[214] Above the inferior trial courts are the Regional Trial Courts which are akin to the Superior Courts of many American states. In addition to being courts of original jurisdiction for many disputes, the Regional Trial Courts also exercise appellate jurisdiction over all cases decided by the Metropolitan and Municipal Courts.[215]

The Intermediate Appellate Courts comprise the third tier of courts while the Supreme Court is the apex court of the Philippines.[216] Among its constitutionally vested powers the Supreme Court is empowered to "promulgate rules concerning pleading practice and procedure in all courts."[217]

Although there is little information on the status of individual court dockets, the distribution of pending cases within the Philippine court system is evident from a single-year study. The 430,829 cases pending on July 31, 1979 were distributed among the 1,622 Philippine courts as follows:[218]

Supreme Court	4,202
Court of Appeals	7,364
Court of Tax Appeals	440
Courts of First Instance	131,274
Juvenile and Domestic Relations Court	7,410
Circuit Criminal Courts	2,059
Courts of Agrarian Relations	8,235
City Courts	114,738
Municipal Courts	115,107
Total	430,829

Expressing alarm over the growing backlog problem, then

212. E. Fernando, Report to His Excellency President and Prime Minister Ferdinand E. Marcos by the Committee on Judicial Reorganization 6 (1980).

213. *Id.* at 7-13. *See also* R. Puno, The Justice System in the Philippines 1 (1985) (unpublished manuscript).

214. R. Puno, *supra* note 213, at 2. The bottom tier consists of the inferior trial courts, the Metropolitan Trial Courts, the Municipal Trial Courts and the Municipal Circuit Trial Courts.

215. *Id.* at 6-7.

216. *Id.* at 8-9.

217. PHILIPPINE CONST. art. X, section 5, para. 5.

218. Bautista, *Philippines, Administration of Justice: Procedural Reforms of Court Congestion*, in 2 ASEAN COMP. L. SERIES, ADMINISTRATION OF JUSTICE: PROCEDURAL REFORMS ON COURT CONGESTION 49, 51 (P. Valera-Quisumbing ed. 1982).

Philippine Minister of Justice Ricardo C. Puno provided the following statistics on the dramatic jump in cases before the courts:[219]

Total of Cases Pending Before All Philippine Courts

Year	Number of Cases
1971	200,000
1976	301,000
1983	450,000

Note: Numbers are rounded off

Between 1973 and 1980 the number of cases pending at year end in Philippine courts increased at an average yearly rate of 8.04%.[220] On the basis of the nearly half million presently docketed cases Minister Puno calculated that one out of every twenty-five Filipinos is actively involved in a case, either as a litigant or a witness.[221]

Despite the court reforms of 1982, Phillippine commentators contend that congestion and delay continue to beset the Philippine justice system. A study of the judicial system by the Committee on Legal Reform found the annual increase in cases before the Courts of First Instance to be little affected by the reforms.[222]

Pending Cases at Year End

Court	1981	1982	% increase	1983	% increase
CFI (RTC)	155,607	177,475	14.5	187,267	5.5

Most commentators concede that delays in the processing of disputes have so clogged Philippine court dockets that the integrity of the entire justice system is compromised. Wrote Justice Guerrero in his concurring opinion in *De La Llana v. Alba*, "the congested character of court dockets rising annually is staggering and enormous looming like a legal monster."[223]

Justice Guerrero went on to say that:

> The general clamor that the prestige of the Judiciary today has deteriorated and degenerated to the lowest ebb in public estimation is not without factual basis. Records in the Supreme Court attest to the unfitness and incompetence, corruption and immo-

219. Puno, *The Last Word*, in FIRST INTERNATIONAL SEMINAR-WORKSHOP ON MANAGING DELAY IN THE COURTS 287, 288 (P. Valera-Quisumbing ed. 1985).

220. E. Fernando, *supra* note 212, at 6.

221. Puno, *supra* note 219, at 288.

222. Committee on Legal Reform I, Private Sector Council on Public Issues 12-13 (1984) (unpublished report, R. Romulo, chairman). [hereinafter cited as Committee]. The Courts of First Instance became the Regional Trial Courts after 1982.

223. De La Llana, et al. v. Minister Alba, et al., G.R. No. 57883, 112 SCRA294, at 49 (Supreme Court of the Philippines 1982). In *De La Llana*, the Philippine Supreme Court upheld the constitutionality of the Judicial Reorganization Act of 1980.

rality of many dispensers of justice.[224]

Reflecting upon the urgent demands for reform from "different sectors of society", Justice Barredo observed that

> The most vehement and persistent, loud and clear, among their gripes, which as a matter of fact is common to all of them, is that about the deterioration in the quality of performance of the judges manning our courts and the slow and dragging pace of pending judicial proceedings.[225]

"There is a general perception by the public", said the report of the Committee on Legal Reform, "that the judiciary is in a perilous state. It is understaffed, underpaid and under attack on grounds of lack of integrity, inefficiency and incompetence."[226] While acknowledging that many honest and able judges are to be found among the Philippine judiciary, the committee asserted that "the interminable length it takes to dispose of cases and the pitiful court facilities have engendered in many the impression that the judiciary is not performing as expected."[227]

In an article in the journal of the Integrated Bar of the Philippines, the Dean of the College of Law of Ateneo de Manila University quoted Qurube C. Makalintal, Speaker of the National Assembly (Batasang Pambansa) and former Chief Justice of the Philippine Supreme Court, that "a number of men on the bench have proven themselves unworthy of the judicial robes they wear. They are either unprepared, incompetent or corrupt . . . Some, indeed, are pinned, half in jest and half in seriousness, with their respective price tags."[228]

The Philippine public is serving notice that it will not passively accept the degeneration of its justice system. Justice Guerrero reports, for example, that "an increasing number of administrative cases are being filed by victims of judicial misconduct, abuse and arbitrariness."[229]

Nor has the apex court escaped criticism. Dr. S.P. Lopez writes of the Philippine judiciary, "they all owe their appointment or reappointment to President Marcos. The Supreme Court today is a Marcos court. With one or two signal exceptions, it has performed as expected." There is nothing to prevent judges from "performing their duties according to the dictates of reason and conscience," says Lopez, "except the habit of obedience and con-

224. *Id.* at 49-50.

225. *Id.* at 39-40.

226. Committee, *supra* note 222, at 10.

227. *Id.*

228. Ferrer, *The State of the Administration of Justice*, 9-10 J. INTEGRATED B. PHILIPPINES 86, 87 (1981-1982) (Quoted from an August 28, 1982 speech before the Philippine Association of Law Professors).

229. De La Llana, *supra* note 223, at 50.

formity that has been bred in every judge by a stern system of reward and punishment."[230]

The assertion that unconscionable political influence from the Executive has undermined judicial performance and independence is a contention of Dean Ferrer as well. "The malaise afflicting our judicial system may be largely ascribed to the degenerated moral climate prevailing in our country today [which is] bereft of leadership by example . . . trial judges are neither blind nor deaf . . . Judges can see only too well that their superiors instead of preserving their independence and keeping their measured distance, defer only too willingly, in the guise of judicial activism, to the wishes of the Executive."[231]

In his decision to affirm the constitutionality of the Judiciary Reorganization Act of 1980, Justice Barredo contended that "judicial reorganization becomes urgent and inevitable not alone because of structural inadequacies of the system or the cumbersomeness and technicality-peppered and dragging procedural rules in force, but also when it becomes evident that a good number of those occupying positions in the judiciary, make a mockery of justice and take advantage of their office for selfish personal ends."[232]

"The much-publicized reorganization of the judiciary has not solved the problems", maintains the Committee on Legal Reform. The report continues:

> Part of the reason lies in its half-hearted implementation. The recommendations of the Integrity Council were ignored in the main and the very purpose of the reorganization subverted by political considerations. Moreover, a high number of vacancies at all court levels remain unfilled. This coupled with inefficient management of the courts has led to the continued clogged court dockets.[233]

To his query "What has brought about this sad state of our judiciary?", Dean Ferrer answers: the "unrealistically low salaries of judges,[234] the lack of state support for judges' housing,[235] insufficient funds for maintenance and operation of the courts,[236] politi-

230. Committee, *supra* note 222, at 10-11. Quoted from Veritas, August 12, 1984.

231. Ferrer, *supra* note 228, at 89-90.

232. De la Llana, *supra* note 223, at 40-41.

233. Committee, *supra* note 222, at 12.

234. Ferrer, *supra* note 228, at 89.

235. *Id.* According to Dean Ferrer, the absence of state supported housing accommodations for judges in the Philippines is an economic hardship and contrasts with the policies of Singapore and Malaysia which provide free housing for their judges.

236. *Id.* "[T]he miniscule appropriation of less than one percentum (1%) of the total national budget for the maintenance and operation of the courts [makes] the judiciary a neglected poor relation of the executive and the legislative departments." Dean Ferrer notes that the percentage of the national budget appropriated for court operation

cally motivated appointments to the judiciary,[237] and the failure to fill judicial vacancies.[238]

In its report on the court delay problem the Committee on Legal Reform observed that "despite the recent judicial reorganization the general impression of the public and most members of the Bar is that the judiciary is not performing as expected."[239] The Committee concluded that "dockets remain clogged and cases take an interminable length of time before they are tried and decided" because:

1. Too many judges are incompetent or dishonest;
2. There is a pervasive "lowering of moral values in Philippine society as a whole and the legal profession in particular";
3. Legal education is inadequate;
4. Most appointments to the Bench are made on consideration of loyalty, regional origin and patronage;
5. Judges' pay is "woefully inadequate";
6. Court facilities and equipment are antiquated;
7. Court staff are poorly trained and insufficient in number;
8. The Canons of Professional ethics are often ignored by lawyers; and
9. "Court procedures have been abused by lawyers to attain their objectives of delay . . . . *It seems postponements by lawyers have been the major cause of delays in court.*" [emphasis added][240]

Another commentator cites the following as principal causes of delay in the administration of justice:

I. *Court related*: Poor management of trials and court calendars (particularly the practice of piecemeal trials); lack of space and equipment; lack of competent court personnel including stenographers; and lack of modern methods of court operations.
II. *Counsel-related*: Incompetence and/or lack of preparation; lack of communication with witnesses; lawyer's unmanageable court calendar.
III. *Court complementing agencies*: Lack of supervision of Warrant Officers; inadequate knowledge of proper investigative work; delay in the availability of certain evidence; non-appearance of victims/witnesses in court trials; jail facilities wanting.[241]

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and maintenance prior to the declaration of martial law in 1972 was from 2% to 3%. This was three times the present proportion.

237. *Id.* at 90. Despite the recommendations of the Integrity Council, "appointments based on considerations of personal loyalty and regional origin continue to be made. Some of those previously purged from the bench, have been recalled and reappointed for political reasons."

238. *Id.* "The Judiciary Reorganization Act . . . for all its supposed urgency, is still awaiting implementation . . . . Awaiting to be filled are 504 judicial vacancies in different parts of the country where the wheels of justice have ground to a complete halt."

239. Committee, *supra* note 222, at 2.

240. *Id.* at 2-3.

241. A. Almario, Managing Delay in the Administration of Justice: The Olongapo Experiment 3-8 (1983) (unpublished manuscript).

Several commentators have opined as to the reasons for the increase in the numbers of cases being filed in Philippine courts. In his 1980 report to President Marcos, Chief Justice Fernando suggested two causes for the continuing upswing in litigation: 1) economic and commercial development in the Philippines which in coming decades "are likely to be attended with problems of even greater complexity and delicacy"; and 2) "new social interests . . . primarily those economically underprivileged [which] have found legal spokesmen and are asserting grievances previously ignored."[242]

Roberto Soberano, Assistant Solicitor General, sees several causes for the "high input of cases", including population growth, rural-urban migration with resultant increases in criminality, increased awareness of rights and privileges as a result of economic and social development which gives rise to litigation, the rapid expansion of business and industry, advances in technology which create complex contractual relationships, the proliferation of motor vehicles which "swamp the courts with accident cases", the flood of new goods in the market place giving rise to product liability cases, environmental pollution from emergent industries, "new legislations and government regulations", the expanding rights of individuals and the litigious predisposition of businesses.[243]

In Soberano's view, adding more court rooms and appointing more judges could resolve the high input problem were it not for a concomitant low output problem which "goes into the heart of the court system itself, and raises questions on the capacity of the system itself to tackle the problem."[244]

Soberano classifies the causes of low output by whether they are a "people component (judges, lawyers, fiscals, court personnel)", a "procedural component (rules of court)", a "facility component (court equipment and supply)" or a "complementing component (other agencies such as the post office, sheriffs, . . . probation officers, social workers, prison system, local government)." Every component is functioning inefficiently.[245]

The other major cause of delay is the predisposition to grant postponements, "almost like the court is in conspiracy with the lawyers."[246] According to Soberano, trial judges can control the causes of delay if they are prepared to exert full authority over the proceedings, the parties, their lawyers and court personnel.[247]

242. E. Fernando, *supra* note 212, at 3.
243. R. Soberano, Nature and Causes of Judicial Delay 1-2 (1984) (unpublished paper).
244. *Id.* at 2.
245. *Id.* at 2-3.
246. *Id.* at 3.
247. *Id.* at 5-6.

Despite the recent rash of criticisms, no one doubts "that there are still many selfless, dedicated, competent and upright judges" in the Philippine judiciary.[248] Several have taken steps to define the delay problem, to assess its seriousness and to initiate reforms. In a 1984 paper, Judge Maximo A. Maceren found considerable confusion in the court delay literature with regard to terminology. " 'Backlog' and 'congestion' are often employed interchangeably with 'delay' ", he observed. Maceren urged that those concerned with the study and remedy of court delay in the Philippines adopt a common set of definitions for these terms.[249]

To date, two studies have been undertaken in the Philippines to assess congestion and delay in the courts. Though limited in scope, both point out the seriousness of the problems besetting the Philippine judiciary. A study of the proceedings of the Metro Manila Trial Courts (a total of 127 trial courts in greater Manila) between 1972 and 1976 found 54% of the unnecessary delay attributable to lawyer-instigated postponements, while postponements caused by the court-system (poor calendaring, absence of judges or stenographers, etc.) accounted for another 23% of the unnecessary delays.[250]

A second study of nine criminal cases and nine civil cases in one branch of the court of First Instance in Manila found that lawyers initiated 56% of the postponements in criminal cases and 72% in civil cases. Most of the delays, the study concluded, were avoidable.[251]

While concern over court delay in the Philippines has increased in tandem with the magnitude of the problem, attempts at solution go back at least two decades. In 1968, a conference of all judges of the Court of First Instance considered ways to expedite the trial and disposition of cases. The Supreme Court established committees to study the problem beginning in 1973. In 1974, the Court Studies Committee undertook a survey of Metropolitan Manila courts "to identify their organizational and management problems and to propose solutions."[252]

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248. Ferrer, *supra* note 228, at 90.

249. M. Maceren, Managing Delay in the Courts—Solutions: Changing Work Pattern 4-5 (August 1984) (unpublished paper presented to the Second National Convention of Lawyers, Manila). Maceren proposed delay be defined as "an excessive or abnormal lapse of time [in the progression of] a case from its filing to final disposition." While delay is measured in time, congestion "which refers to the condition of a court over-burdened with a huge and heavy volume of cases", is "measured by volume and number." It is accumulated delay which produces a backlog crisis. *See also* R. Soberano, *supra* note 243, at 1.

250. M. Maceren, *supra* note 249, at 12.

251. Public Administration 248, *Towards Expeditious Justice: A Policy Analysis of the Law's Delay*, 25 PHILIPPINE J. OF PUB. AD. 117, 128-131 (1981).

252. M. Maceren, *supra* note 249, at 2.

A Trial Court Manual Committee created in 1975 formulated a Manual for Trial Court Judges "to guide the judges in their duties and responsibilities, especially in the administration of their respective courts."[253] Seminars on executive development of judges were conducted between 1974 and 1979. These included workshops and lectures to improve the management of the courts.

In 1983, an Institute of Judicial Administration (IJA) was established at the University of the Philippines Law Center. Under the auspices of the Supreme Court, the IJA provides short-course training for judges and court administrators to conduct and encourage research on the operation of the courts and to present recommendations for the improvement of the administration and management of the Philippine courts to the Supreme Court.[254]

In addition to the training of judges and court administrators in case management, several other proposed solutions to the court delay problem have been forwarded. The Committee on Legal Reform recommended the following:

1. An increased emphasis on legal ethics in all law school subjects;
2. Active policing of its own ranks by the Integrated Bar;
3. Strict enforcement of anti-graft laws;
4. Higher salaries for the judiciary;
5. Active leadership of an independent Supreme Court;
6. Adequate material support from the national government;
7. A modernized law school curriculum;
8. Establishment of a Judicial Commission to pass upon all nominees for appointment to the judiciary;
9. Computerization of Supreme Court decisions, legislative enactments and Presidential decrees;
10. State funded law libraries in key regions around the country;
11. Strict and uniform enforcement of pre-trial procedures;
12. Utilization of affidavits in lieu of direct testimony from witnesses (when the parties consent); and
13. The adoption of a system of continuous trials, with the mandatory pre-trial consultation between the judge and the litigants, with the objective of settlement and the narrowing of issues.[255]

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253. *Id.*

254. R. Puno, Missions of Judicial Administration in Asia and the Pacific 16,17 (1985) (unpublished proceedings of the LAWASIA Chief Justices' Conference, Malaysia, August 19-22, 1985). The IJA held its first seminar in judicial writing and caseflow management in trial courts in May of 1984.

255. Committee, *supra* note 222, at 2-6. A leading Philippine practitioner has observed that while "all the rules of court we have adopted are basically from the U.S. Federal Courts", pre-trial discovery procedures and pre-trial conferences are not used effectively. One explanation for the fact that "discovery interrogatories and all these modes of discovery end up in delay" is regional differences in the usage of English, the language of the courts. P. Roco, *Solutions: Institutional, Techniques and Skills—Prac-*

Noting that Filipino judges do not consciously manage the case flow in their courts, Judge Maceren urged judges to take active and direct control over the flow of cases. At the same time, Maceren called for the employment of trained court administrators to serve as coordinators and innovators in the case flow management process.[256]

In his report to the President, then Chief Justice Fernando called for more realistic levels of funding for the judiciary and its personnel. He also proposed the establishment of a Judicial Academy[257] and the institution of alternate systems for the resolution of disputes, including the Shari'a court system[258] and conciliation courts.[259]

Filipino commentators appear convinced that their legal system is facing a major crisis, partly of its own making and partly as a result of external economic and political forces. Whether the courts continue to founder or are able to recontrol the dispute process and regain public confidence depends upon the willingness of able, good-willed individuals to work for needed reforms. Reliable information is essential to the formulation of comprehensive recommendations. A national study of the many causes of court delay is long overdue.[260]

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ticing Lawyers' Perspective, in FIRST INTERNATIONAL SEMINAR-WORKSHOP ON MANAGING DELAY IN THE COURTS 200, 207-211 (P. Valera-Quisumbing ed. 1985). Furthermore, more than two dozen languages are native to the Philippines. For most Filipinos, English is a second or third language.

256. M. Maceren, *supra* note 249, at 13-15.

257. A Judicial academy has since been established.

258. The Code of Muslim Personal Laws of the Philippines, Presidential Decree No. 1081. Creation of Shari'a District Courts and Shari'a Circuit Courts was implemented in 1983.

259. E. Fernando, *supra* note 212, at 26-27. Patterned upon Sri Lanka's Conciliation Court system, Philippine Barangay (village) courts were established in 1980. Between then and 1984, 260,388 disputes were submitted to local Barangay courts. Of that number, 229,200 (88%) were settled. Another 18,044 cases (7%) were referred to the formal court system. *See* R. Puno, *supra* note 254, at 28. While informal conciliation courts doubtless resolve a great many conflicts, many of these are marginal in nature and would not reach the formal courts in any case. Aside from important questions of the quality of "justice" dispensed by such forums and the risk of political co-optation inherent in informal or quasi-formal court systems, the effectiveness of the Barangay courts cannot be accurately measured without comprehensive study.

260. On February 25, 1986, Corazon Aquino succeeded Ferdinand Marcos as President of the Philippines. A provisional government was proclaimed on March 25 and the National Assembly abolished. Within days, the resignations of several Marcos appointed judges of the Supreme Court and the Appeals Court were requested and accepted. *Philippines: Going to Work*, Asianweek, March 16, 1986, at 15. A draft constitution was completed in October of 1986, and was approved by the voters in a national referendum held in February of 1987. *See* Tasker, *Cobbling a Constitution*, FAR E. ECON. REV., August 21, 1986, at 19.

V. THE UNDERLYING CAUSES OF COURT DELAY

In contemplating the causes of court delay, it is useful to distinguish between problems of inflow and problems of output. Among Asian commentators there appears to be a nearly unanimous, region-wide belief that the incidence of court litigation has taken a significant jump in recent years. The litigation surge is explained variously as a by-product of population growth, a heightened legal awareness on the part of the people (legal literacy), the increased availability of legal aid[261] or a greater incidence of complex cases.[262] Others such as the Chief Justices of India[263] and Bangladesh[264] point to an underlying transformation of Asian society as the root cause of increased litigiousness. It is reasonable to assume that to one degree or another, all of these factors contribute to the increased inflow of disputes to the courts.

Although further research is indicated, the perceived surge in litigation appears to be associated with the economic development of Asian LDCs. The transformation from local subsistence to market oriented commercial economies may contribute significantly to the increased usage of the courts.[265] Typically, dispute resolution in

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261. Given the region-wide (perhaps world-wide) trend towards resolving conflicts in the courts, despite the high cost burden on the poor, legal aid's potential contribution to social justice in developing countries is great. At present, however, most legal aid programs in Asia are underfunded and understaffed. Although individual legal aid cases may be of considerable significance, the amount of litigation initiated by legal assistance programs is quite small. For an analysis of the role of legal aid in the development process, see J. Falt, Legal Aid and the Empowerment of the Poor in Developing Countries (April 1985) (paper delivered at the Second Annual All University of California Conference on Southeast Asia, Berkeley).

262. F. Munim, *supra* note 80, at 2. "Even a quarter of a century ago, litigations on intellectual property, international patent matters, international financial commitments, various multinational projects, unauthorized technology transfer, oil pollution, industrial pollution, high-sea fishing, exploration of sea and on numerous other subjects were almost unknown in most developing countries." The greater incidence of complex disputes appears to be an unavoidable by-product of economic development. The solutions are the same ones required to remedy lagging output.

263. P. Bhagwati, *supra*, note 116, at 8.

> New social interests and rights of the people are also pressing for recognition in the courts. The consequence is that there is an enormous increase in the demands on the law and its institutions and a large number of problems and disputes which were hitherto unknown are now finding their way into the courts and adding to the already heavy judicial workload.

264. F. Munim, *supra* note 80, at 2.

> [Third world nations are] witnessing social and economic transformations on a gigantic scale, newer concepts and values relating to the functions of law and courts and also the role of the State are emerging. Besides, in view of the fast developing changes in social relations complications are arising in legal relations between individuals or groups of individuals, groups and the State.

265. Because the number of potential disputes and disputants is finite, surging litigation rates cannot continue indefinitely. At some point, the accelerating rate of litigation

subsistence societies seeks a balancing of interests. There is little interest in apportioning blame. Instead, techniques of compromise

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associated with economic development must peak and begin to decline—although the total number of disputes brought to the courts may continue to rise—as reliable low cost alternatives to formal trials become routinely available.

Toharia may have identified just such a litigation crest in his study of court usage patterns in Spain. *See* Toharia, *Economic Development and Litigation: The Case of Spain*, in 4 JAHRBUCH FUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 39 (1976). To determine the effect of Spain's economic development (and consequent social change) on the volume of cases brought to the courts, Toharia looked at legal activity (measured by the number of documents each year authorized by a notary), and judicial activity (measured by the number of voluntary and contested civil actions brought to Spain's courts of first instance each year). To fix the level of development as the key variable, Spain's fifty provinces were grouped into one of five categories of industrial development according to the percentage of active population employed in agriculture. Upon examining the change over time in per capita rates of notarial activity and contested civil actions (those involving two conflicting parties) in each of the five provincial categories, Toharia concluded that "development leads to an increase in legal activity." *Id.* at 49. Noting that by far the greatest increase in notarial activity was in commercial fields, Toharia observed that "in Spain economic development and volume of legal activity are positively associated." *Id.* He also pointed out that "between 1910 and 1967 the gap between the maximum and minimum number of notarial instruments per 1000 inhabitants increased 425 percent . . . a reflection," said Toharia, "of the uneven effect of economic growth on the various provinces." *Id.* at 51.

Toharia's conclusion that "judicial activity seems little affected by major changes in society — such as the process of economic growth of the 1960's" is less compelling. *Id.* at 53. Comparing the ratios of contested cases per capita in his five provincial categories in 1960 with those in 1967, Toharia found a 16 percent decrease in those provinces employing the highest percentage of people in agriculture. Over the same period, however, Toharia found that in "those provinces which seem to have entered a phase of economic take-off, the process of growth does seem to have a substantial effect on the flow of cases." *Id.* at 56. Figures for the two groups of provinces undergoing economic take-off rose 22.2 percent and 39.3 percent between 1960 and 1967.

Toharia noted that the ratio of contested cases per capita in the most industrial provinces of Spain rose only 0.8 percent over the same seven year period. From this he concluded that "the process of development will at first stimulate judicial activity . . . At a later point, however, judicial activity levels off," despite the fact that "legal activity has increased enormously" over the same period. *Id.* at 56-57.

Toharia's conclusions would be more persuasive had he considered the possible dilutory effects of internal rural-urban migration on litigation rates in the 1960's. An influx of rural laborers into Spain's urban centers would hardly be surprising. Bringing with them their rural bias against going to the courts, *id.* at 48, these new urbanites might temporarily moderate an upward trend in per capita litigation.

The deterrent effect of court congestion also may have slowed the upward trend in per capita litigation in Spain's urban centers. The mean number of cases brought to the District Courts in the four least agricultural provinces. *Id.* at 58. Given the potential for court delay, many urbanites, in culturally homogeneous Spain, may have chosen non-formal dispute resolution alternatives open to them.

Toharia's finding that the rate of contested cases in the most agricultural group of Spanish provinces declined by 16 percent from 1960 to 1967 is perplexing. An explanation may lie in the fact that the number of District Courts in those provinces was reduced by 11 percent (from 152 to 135) over the same period. *Id.* at 58. Particularly in agricultural regions, where transportation may be least developed and the distances between courts relatively great, the closing of seventeen District Courts could account for much of the observed decline in per capita litigation. Furthermore, it would help to

and conciliation are employed to restore social harmony.[266]

The shift from subsistence agriculture to cash cropping involved a shift to a money-based economy.[267] In commercialized contractual economies, which characterize the West and, increasingly, Asia, disputants need to know who is right and who is wrong; who must pay, how much, and to whom.[268] Under such conditions,

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know whether anything occurred in the later Franco years to discourage use of the courts — thus masking, at least temporarily, a growing preference for court litigation.

Without many more country studies it is impossible to say whether the Spanish experience is common or exceptional. Italy, a nearby more economically developed Mediterranean civil law country had a litigation rate three times that of Spain in 1966. *Id.* at 57. Not only economic developmebnt, but law reform, varying degrees of access to the courts, civil war, economic boom and bust cycles, changes in government, and world wars all appear to have affected the litigation rates of these two countries over the course of the twentieth-century. We should expect this to be so in the Third World as well.

If further study confirms that accelerating rates of litigation associated with economic development eventually level off, such knowledge would be useful in allocating judicial resources — targeting the most rapidly developing regions for the greatest increments of assistance. If correct, Toharia's thesis should be most evident in Taiwan, Korea and Singapore where social change precipitated by economic development has progressed the furthest. For the less developed countries of Asia, the promised litigation crest may be decades away. *See also* Friedman, *Trial Courts and Their Work in the Modern World*, in 4 JAHRBUCH FUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 25 (1976). Reflecting on the evolving role of trial courts, Friedman conjectures that as traditional societies transform "an ever-increasing percentage of the population will make use of formal legal instruments and engage in formal legal transactions . . . the number of litigated cases may also go up, because the *number* of consumers of law is increasing so rapidly." Basing his conclusions in part upon Toharia's study, Friedman concludes that "the rate of formal trials will level off" with industrial maturity because the costs of litigating will be permitted to rise and "delays in trials will become intolerable" discouraging the average potential litigant from using the courts. *Id.* at 33. One must question, however, whether politically fragile states are capable of withstanding the social and political fallout from such a policy of neglect, particularly in light of a growing "tradition of activism among at least *some* judges and lawyers" which Friedman acknowledges. *Id.* at 53. Clearly, as Friedman notes, a great deal of research remains to be done.

266. A. HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 144 (1976). Conciliation is preferred in traditional societies because in small demographically stable communities, disputants interrelate in a variety of ways—as neighbors, as kin, as members of religious or social organizations, as collaborators on community projects, and so on. Given the continuous, multi-level nature of the relationship between community members, the social harmony of the group is best served by a non-adversary, non-contentious process of grievance moderation. *See* Rothenburger, *The Social Dynamics of Dispute Settlement in a Sunni Muslim Village in Lebanon*, in THE DISPUTING PROCESS—LAW IN TEN SOCIETIES 166 (L. Nader & H. Todd, Jr. eds. 1976).

267. Scott, *Patron-Client Politics and Political Change*, in N. UPHOFF & W. ILCHMAN, THE POLITICAL ECONOMY OF DEVELOPMENT 184 (1972).

268. In addition to requiring a zero-sum resolution, commercial disputes differ in degree of complexity (requiring the allocation of a greater number of judge hours per case) from most disputes which arise in pre-commercial societies. This it not to say that pre-commercial societies are simpler than those in which economic development and monetization of exchanges have occurred. The social structures of pre-commerical societies may appear as complex or more complex than those of many post-industrial socie-

people of different socio-legal cultures were brought together in large numbers for the first time. When conflicts arose, the traditional dispute system of one was rarely acceptable to the other. The search for a mutually acceptable forum settled upon the legal institutions of the nation-state.[269]

There are compelling reasons why the nation-state (particularly in the post-colonial period) encouraged the use of the courts. The courts served as mechanisms for extending and legitimizing state power. Where the courts penetrated, they displaced already weakening customary systems of dispute resolution, thus consolidating state control. Furthermore, the courts of the nation-state serve as a bellwether, identifying issues of popular concern and channeling dissent and social pressures for change through the legal system, where by application of the case method, they are disaggregated into politically manageable units.

If economic transformations and the consequent failure of traditional methods of conflict moderation are the principal causes of the mass migration to the courts, what factors inhibit the resolution of disputes in the courts (output) and what solutions hold promise?

The perceived causes and remedies of court delay vary with each country. That such differences exist is not surprising, given the substantial dissimilarities in positive law, court structures, political circumstances, socio-economic conditions and legal cultures (including patterns of legal practice).[270]

Despite such differences, certain causes of court delay appear in more than one country. It is worthwhile to identify these recurrent causes because the solutions they evoke may have broad appli-

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ties. Rather, it is here suggested merely that dispute resolution mechanisms are attuned to the cultures in which they are imbedded. (With the passage of time, even imposed legal systems come to accommodate the interests of the receiving society — which itself may be undergoing change.) Styles of conflict moderation and the remedies available to disputants are appropriate to the interests of the community. The profound realignment of social relations occasioned by the commercialization of economic exchange created new social interests which gave rise to new types of conflict requiring novel methods of resolution.

269. Although the legal institutions and positive law of the nation-state were largely imposed by Western colonizing countries, they did possess important advantages over preexisting customary legal systems. First, national law was recorded in writing. Thus, parties to an agreement could research the law and draft contracts accordingly. Second, the colonially "received law" of the nation-state had evolved over the centuries to facilitate commercial transactions. Third, although costly, the courts of the nation-state offered the promise of an impartial forum for the resolution of disputes.

270. Substantial, frequently unstated, dissimilarities among court delay studies make cross-study and cross-country comparisons quite risky. Differences in objective, methodology, definitions, legal processes (though the same words may be used, their meanings may differ), patterns of practice and expectations vary widely. One court's delay problem may appear marginal to another experiencing even longer delays. *See supra* note 6.

cation. On examination, the causes of court delay which reoccur in the literature are of four types: materiel; personnel; procedures and practice; and external.

Materiel causes refer to perceived deficiencies in the infrastructure of the courts. Within this category of causes are insufficient number of courtrooms, inadequate libraries and antiquated facilities and equipment. Their solution depends upon funding. Determined lobbying by the judiciary and the private bar may be needed. The task is made more difficult when the private bar is considered politically antithetical to those in control of the government or where the prospect of a strong and independent judiciary is cause for concern—circumstances not at all uncommon in the Third World.[271]

The first five causes of delay pertaining to matters of personnel are: too few judges; government tardiness in filling judicial vacancies; lack of training for judges;[272] poor quality of legal education; and inexperienced lawyers.

Most Asian countries have increased the number of judges substantially in recent years. However, except in countries where the economic transformation of society is largely completed any reduction in delay due to an increase in the number of judges appears to be transitory.

The failure of government to fill vacancies on the bench in a timely fashion may be benign. In such a case, the findings of court sponsored research may help to persuade a preoccupied executive of the deleterious effects of such neglect. However, where a conscious political decision to delay judicial appointments is made, the judiciary is in a less favorable position.[273] Political pressure from the lawyers, press, or populace may be necessary. Here again, the findings of studies on the causes of court backlog and delay can be useful.

The importance of programs for the continuing education and

271. The starving of the judiciary by a non-democratic elite determined to maintain political dominance is substantially different from a situation in which the public through its elected officials restricts access to the courts and limits judicial remedies out of a cultural preference for non-formal dispute resolution. *See supra* note 13 and accompanying text.

272. A related concern is the absence of a merit system for the selection of judges. *See* Bautista, *supra* note 218, at 52-53.

273. Some governments may attempt to deflect demands for expanded legal rights and protections by enacting progressive laws while maintaining a weak remedy system in order to preserve a zone of immunity in which activities can take place without the application of formal legal remedies. However, legal literacy campaigns and the growing effectiveness of structural legal aid programs in several Asian LDCs are making "on the books" remedies more accessible. *See* P. Bhagwati, *supra* note 116. *See also* LEGAL OUTREACH: THE ASEAN EXPERIENCE (C. Flores & E. Pascual eds., 1985); SYMBIOSIS—LEGAL DISSEMINATION IN RURAL THIALAND (Vitit Muntarbhorn ed., 1985); PAPUA NEW GUINEA NATIONAL LAW WEEK 1984 (I. Wallace ed., 1985). *See also* J. Falt, *supra* note 261.

training of judges, court administrators and others involved in the dispute process is now widely recognized. Judicial training programs contribute greatly to the knowledge and skills of the participants. Seminars and workshops are an effective way to convey information on caseload management and to marshall the abundant intellectual resources of the judiciary. Judicial training institutes are being established in the Philippines (1983),[274] Bangladesh (1985)[275] and Sri Lanka (1986).[276] Others may follow. Countries with relatively small numbers of judges and similar legal systems (such as Singapore, Malaysia, Sri Lanka and Bangladesh) might consider collaborating on the development of judicial training programs—perhaps with a rotating venue.[277]

Improvement in the education and competence of law students and new admittees to the bar can be achieved in several ways. Rigorous standards can be set for law school curricula and admissions. Accreditation of law schools or law faculties might be tightened. The study of law could be limited to graduate students.[278] Bar exams can be made more stringent. Restricting new lawyers to specified courts for a period of time is another approach.

The last five causes of delay pertaining to personnel are inadequate investigative infrastructure, inadequate or poorly trained staff, poor administration of court resources and court calendars, no court stenographers,[279] and lack of law clerks to undertake legal research for the courts.

In some cases, the investigative infrastructure is not only inefficient, it is also corrupt. Institutional reform, personnel changes, and increased funding may be needed. Broadening the authority and oversight responsibility of the courts may help. Assignment of responsibility for service of process to the plaintiff and greater reliance on process service by mail have been proposed as well.

Commentators in every country under review ascribed at least some of the delay to insufficient or poorly trained court staff. However, budget increases for staff enhancement and training are not likely to be forthcoming without compelling justification. Proposed expenditures must be weighed against the economic and political

274. *See supra* note 254 and accompanying text.

275. F. Munim, Remarks at the LAWASIA Chief Justices' Conference, Penang, Malaysia, Session 5 at 4 (Aug. 1985).

276. P. Li, Report on the LAWASIA Chief Justices' Conference 2 (Sept. 5, 1985) (unpublished manuscript).

277. The idea of a moveable venue for judicial training programs was broached by senior members of the Singapore judiciary during meetings with the author in December, 1983.

278. At present, the study of law is a post-baccalaureate program only in the Philippines.

279. *See supra* note 70 and accompanying text. In Thailand, court proceedings are now taped—freeing judges from the obligation to record the proceedings in longhand.

costs of inaction. Local research findings, augmented by illustrative examples of the efficient use of court personnel in other jurisdictions, should strengthen the case for reform.

Most commentators feel that court resources are poorly utilized. The Singapore experience with filter courts and central control courts is one example of how court time can be effectively utilized.[280] The advantage of a full-time court administrator to calendar cases, manage case flow, collect and keep statistics and records, provide budgetary and fiscal management, oversee the efficient use of space and equipment and provide in-service education and training for court staff is obvious.

The use of law clerks to handle at least some of the research burden would allow judges time to process more cases. Indian commentators who have advocated the addition of law clerks to the staff of the court may wish to consider the law clerk pilot program now underway in Thailand.[281]

Under the category of delays attributable to procedures and practice are: ineffective pretrial efforts to settle or clarify issues, overly complex and time consuming court procedures, judges too willing to continue cases, piecemeal trials, and appeals that are too easy and inexpensive.

Pre-trial discovery and settlement are discouraged by patterns of legal practice in Asian countries where lawyers base their fees on court appearances.[282] As a result, trials by surprise are commonplace in many Asian jurisdictions. Thus, American court practices designed to encourage pretrial settlement are of marginal relevance to court delay specialists in Asia.[283]

Discontinuous (piecemeal) trials are as much a product of custom as they are a response to the backlog of pending cases. The familiar practice of scheduling one witness for today and another for a month hence should be discouraged. Judges must create the expectation that every case will be heard and that lawyers must be ready for trial.

Discontinuous trials and the willingness of Asian judges to grant continuances are related issues.[284] Numerous explanations

280. *See supra* note 170 and accompanying text.

281. *See supra* note 71 and accompanying text.

282. While over 90% of civil and criminal cases are terminated without trial in the United States, only 50% of such cases are settled before trial in the Philippines. In Malaysia, the figure is 25%, while less than 10% of the civil and criminal cases are settled without trial in Bangladesh. Only in culturally homogeneous Korea, with its strong social bias for the informal resolution of conflict does the percentage of cases settled prior to trial (94% in 1985) equal that of the United States. R. Puno, *supra* note 254, at 17-18.

283. *See supra* note 88 and accompanying text.

284. According to a recent poll of judicial officers from Bangladesh, Singapore, Malaysia, Korea, Pakistan, Thailand, Brunei, Papua New Guinea and the United States,

have been offered for the prevalence of this practice. Among them are the absence of a jury, overcrowded dockets, other commitments of counsel, the Asian predisposition to wait for solutions, greater willingness among Asian judges to let the parties arrive at their own resolution, a desire to postpone the day when a loser must be declared—which would result in loss of face—and, as previously mentioned, deference to the lawyers' need to earn a living.[285]

Traditions of practice notwithstanding, it may be necessary to reassess interpretations of the rule against champerty. The contingent fee system encourages out of court settlement and discourages frivolous litigation.[286] Where it is uncommon, lawyers often charge according to the number of court appearances they make. A billing system based on court appearances motivates lawyers to drag out cases, seek unnecessary postponements and run up fees.

In jurisdictions where the right to appeal is clearly abused, some restrictions may be required. The appellate courts in civil law countries which are hit hard by the rise in litigation would be especially benefitted.[287] There are political risks to be considered, however. For instance, too great a restriction would run afoul of popular expectations.

Lack of pre-trial discovery, absence of a vigorous policy to promote pre-trial settlements, discontinuous trials, and the willingness of judges to approve unnecessary postponements are aspects of court practice and procedure singled out by commentators on court delay to explain why Asian justice systems are proving incapable of meeting the needs of increasingly litigious, modernizing societies. In most Asian countries, the litigation surge is far from cresting. Asian courts will be inundated with even more cases in the future. Although reforms may not be welcome by the local bench and bar, they are needed nonetheless.

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only in the latter two countries do the courts ordinarily operate on a continuous trial basis. Singapore does so only in criminal proceedings. R. Puno, *supra* note 254, at 18.

285. *See* Comment, *Remedies to Court Congestion*, 19 SYRACUSE L. REV. 714-725 (1968), *quoted in* Bautista, *supra* note 218.

286. A concern expressed frequently in jurisdictions in which the contingent fee system is practiced is that it would operate to deny the poor their "day in court". However, because one lawyer makes an informed, determination that a particular claim will not prevail in court does not mean that either he or a colleague at the bar might not accept the case for an agreed upon fee—as is typically done for criminal cases. In fact, the contingency fee system enables people too poor to pay lawyers' fees to have their day in court. An experienced Sri Lankan attorney recently observed that "one of the major factors for the law's delay . . . is the poverty of litigants . . . . A great number of the litigants were in such poor financial circumstances that they are not able to carry through a case in the normally expected manner." R. Wanasundera, *supra* note 185, at 3.

287. Gandasubrata, *supra* note 34, at 17, 21. The minimum suit value entitling parties to lodge an appeal in the Indonesian courts is Rp.100 (equivalent to ten cents in U.S. currency).

The fourth category of causes appearing in Asian court delay literature is that of those external to the courts. These causes are insufficient government budget allotments, corruption, and political interference. (Though a problem in many countries, this issue is most clearly articulated in the Philippine literature).

At 1.06% of the 1984 national budget, the Philippines judiciary has one of the highest percentage allotments in Asia.[288] Most Asian judiciaries are allotted substantially less than one percent. Chronic underfunding inhibits the implementation of reforms. As one commentator put it, however, the "judiciary is not considered to be a wise investment—there is no immediate economic return."[289]

As an element of the expanded research capability proposed below, Asian judiciaries might consider establishing a formal information link with the legislative branch of government so that information on specific needs of the courts will reach key decision-makers in the budget process.[290] Such a liaison would enable the judiciary to make a forceful and persuasive case for increased funding.[291]

Corruption, bribery and political interference in the selection and promotion of judges are not topics that lawyers or judges wish to discuss. Indeed, it may endanger more than one's career to do so. The public nature of the discussion in the Philippines is an important first step toward a solution - a step which has yet to be taken in other jurisdictions where the problem prevails.

In general, corruption thrives where poverty is prevalent, where judges are poorly paid and where people are accustomed to petty bribery in order to "grease the skids" of a slow and inefficient bureaucracy. Under such conditions, it may be unrealistic to expect the judiciary to sustain a higher ethic, what one commentator has called "a shared notion of lofty ethical behavior . . . which enabled the judiciary to function as a respectable and efficient organization."[292]

Options exist for curtailing the inflow of cases as well as enhancing the output. Decriminalization of victimless crimes is one way to relieve the clogged dockets of the municipal courts. Further,

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288. R. Puno, *supra* note 254, at 18.

289. *Id.* at 10.

290. In some countries, the link would be with the national assembly or parliament. However, in countries where the activities of the legislature have been suspended or severely curtailed, key decision makers may be found, instead, in the office of the chief executive.

291. The American judiciary maintains just such a liaison. Through the Chief Justice of the United States Supreme Court, the Judicial Conference of the United States reports twice yearly to Congress.

292. Ferrer, *supra* note 211, at 87.

on-the-spot warrants could be issued by police for a variety of petty offenses, thus keeping such cases outside of courts unless contested.

Greater reliance on nonformal dispute management systems also can help relieve crowded court dockets. Many disputes can be resolved through the processes of mediation and conciliation which are fundamental to most customary legal systems. The Barangay Courts of the Philippines[293] and the Conciliation Courts of Sri Lanka represent efforts to direct disputes away from the expensive formal court system. Neighborhood mediation committees are an American example of a similar low-cost administratively simple approach to the resolution of conflicts. Opportunities exist for the development of low-cost alternative courts in several countries. For example, the various adat law traditions of Indonesia could provide the foundation for the development of a conciliation system.[294]

Particularly in domestic matters, the Islamic Courts (Shariat and Kadi Courts) are forums of preference for many people. Efforts are underway in several Asian countries to strengthen the Islamic Courts and provide formal training for Shariah judicial officers.[295]

As has been seen, a rapidly increasing inflow of cases combined with inadequacies of materiel and personnel, inefficient procedures and practice, all exacerbated by external factors, are producing massive backlogs in the courts. In several Asian countries, leading

293. Almost 90% of the 63,359 disputes submitted to the Barangay courts in 1984 were settled there. R. Puno, *supra* note 254, at 28.

294. The possible imposition of a conciliation court system in Thailand was discussed with the author during a recent visit. Of course, the parties must agree to abide by the decision of the conciliators. Where appeal to the formal court system is easy, appeals by losing parties may obviate the purpose of conciliation. Interviews with Ceylonese attorneys in 1976 and in 1981 suggested to the author that conciliation courts may not, in fact, siphon off marginal cases from the court system. In fact, inexpensive conciliation systems may actually attract more cases—disputes which would not otherwise have proceeded beyond self-help—than they redirect. The development of cheap, procedurally simple alternatives to formal court systems bears an important caveat. Ideally, a variety of options should be available to anyone with a grievance, adjudical, mediative and conciliate. However, as governments increasingly turn to low cost alternatives to their overburdened formal justice systems, the impulse to exclude the poor from the courts may intensify. Depriving the poor plaintiff of his choice of forums is ethically questionable and politically risky. In addition to being susceptible to political manipulation, experience suggests that conciliation systems become increasingly formalistic with time and tend to adjudicate more and conciliate less. While such systems can resolve individual conflicts, they do not address the underlying socio-economic causes of conflict. For that reason, the quest for informalism has shifted from conciliation courts to apex courts (the Supreme Court of India is a prime example) as the forum best able to address the social inequities of marginalized people.

295. Not only are the Islamic courts popular because their norms are shared by the disputants who make use of them, but also because they resolve conflicts quickly and cheaply, Thus, disputants are attracted away from the backlogged, expensive formal courts. The incorporation into the Islamic courts of additional procedural guarantees of "due process" may raise the cost and slow the pace of dispute mediation in these courts and thus diminish their appeal.

jurists, politicians and other commentators advocate major reforms to forestall the imminent collapse of their court systems. Having touted their formal courts as fair and impartial arbitrators of conflict, concluded several commentators, the developing nations of Asia must make good on their promise or run the risk of widespread political alienation.[296]

The correct mix of strategies to relieve congestion and delay in the courts will vary according to the dimensions of the delay problem in a particular jurisdiction, the structure and responsiveness of the local legal systems, local legal culture, political circumstances, available financial resources and prevailing social conditions. For that reason, imported solutions (and imported "experts") may not be the answer.

The Need for Research

In many jurisdictions, rigorous empirical studies of the delay problem have yet to be undertaken.[297] Much of the information on the causes and dimensions of court congestion in Asia is incomplete or impressionistic. Those closest to the problem are convinced of its severity and believe that conditions are worsening steadily. However, comprehensive studies must be undertaken before major reforms can be formulated with confidence. Planners and policy makers must understand the systemic reasons for the saturation of formal disputing systems before attempting major reforms.[298] They must know what disputes are being processed (and which are not), in what ways, and why.[299]

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296. Of course, the prospect of a more efficient court system raises the possibility of increased use of the courts—perhaps even erasing the gains achieved through reform. Such fears cannot justify inactivity. The supply of disputants is not inexhaustible. Furthermore, going to the courts will remain a relatively expensive and time consuming option for the most potential litigants. Particularly where cheaper, less formal alternatives exist (such as the well used Barangay concilation courts in the Philippines) they are likely to remain the forum of choice for many disputants. *See supra* note 277.

Finally, with the possible exception of the relatively less-litigious, homogeneous societies of Northeast Asia, popular dissatisfaction may move reluctant governments to undertake needed judicial reforms and modernization.

297. Before the best solutions can be determined, it is necessary to know what kinds of cases are delayed, how many are delayed, for how long, and why. U. BAXI, *supra* note 92, at 60.

298. Noting that some Indian courts are severely backlogged while others are underused and that certain types of cases seem to be delayed longer than others, Dhavan contends that management errors and the misconceptions of policy makers are major causes of court congestion and delay in India. Personal interview with Rajiv Dhavan (June 1986). In some cases, however, a seemingly sub-optimal distribution of courts and judicial resources may represent an expedient political compromise rather than an administrative oversight.

299. Because economic development in Papua New Guinea began later than in most of mainland Asia, PNG offers a promising venue for studies of the impact of development on rates and patterns of litigation.

Research is clearly needed, and while a regional sharing of ideas and experience is of obvious benefit, solutions must fit the causes and circumstances particular to each country.[300] Given the fact that those charged with the design of improved systems of dispute management must take into account social and political factors which influence the types and numbers of cases entering the courts and determine available options, a multi-disciplinary study of the causes of delay is essential.[301]

Studies thus far conducted substantiate the assertions of those most directly involved in the administration of justice that most Asian court systems are unable to keep pace with an ever increasing volume of litigation. Future research will confirm or dispel Asian perceptions of a serious litigation surge, identify and rank the causes of court delay, and test proposed remedies. Longitudinal studies of court usage patterns will inform policy makers of who uses the courts and for what purposes, and provide needed information on the management of course caseloads.

The effects of a failing justice system are too serious to ignore. It is not just that commercial and industrial development may be retarded, or that the judiciary may lose "any substantial influence on important aspects of social life."[302] If left untreated, growing queues at the courts may lead to public bitterness and a loss of confidence in them.

Unless acceptable alternative systems for the resolution of disputes are adopted to relieve the pressure on the courts, extrajudicial acts of self-help are likely to increase in number with the time required to resolve disputes in court. Ultimately, political movements antithetical to the interests of the government can be expected to garner popular support by promising more effective methods for achieving justice.

Present information suggests that a rapid rise in litigation is occurring in Asia as a result of economic development and is not likely to abate without a fundamental shift in development policies. Absent such a shift, policies should be established which facilitate the efficient processing of disputes. Abundant intellectual resources reside in every country in Asia. The real challenge is to summon the political will to do something about the problem while there is still time.

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300. The formulation of a regional standard of delay is unnecessary. *See* discussion in *supra* note 5.

301. While information on the design of court delay studies undertaken in developed countries might be informative, significant differences between delay problems in Western nations and those of Third World countries preclude the wholesale transfer of Western methodologies. Local needs and local circumstances require local solutions.

302. *See* Toharia, *supra* note 265, at 63.