

USAID EVALUATION HIGHLIGHT NO. 36

March 1995

Strengthening Democratic Institutions: The Case of Sri Lanka

[This online version does not contain any of the report's tables, figures, charts, or graphics. To order a complete hard copy of this Evaluation Highlight, contact the DISC, 1611 North Kent Street, Suite 200, Arlington, VA 22209-2111, telephone (703) 351-4006; fax (703) 351-4039.]

Summary

After a decade of social and civil strife, Sri Lanka has found its democratic base eroded and its people unserved or underserved by an antiquated justice system. Power has become concentrated in the executive branch, and voices for reform, if heard at all, have at best been diffident.

What are the prospects for revitalizing Sri Lanka's democratic institutions? In July 1993 a team from USAID's Center for Development Information and Evaluation (CDIE) undertook an assessment of rule-of-law programs supported by the Asia Foundation and USAID. Over the past 10 years the Asia Foundation has invested more than \$1 million in the legal sector. In the early 1990s USAID initiated its own rule-of-law program as part of a larger effort in democratic development. The Agency authorized several initial grants totaling \$788,000. Although funded by USAID, this program is being implemented by the Asia Foundation. Together the programs have supported a wide range of activities but are now concentrating on two: legal education and alternative dispute resolution—ways to resolve legal disputes outside the courts.

Legal education engages democracy building on two broad strategic fronts. One, it seeks to *build a constituency for reform* among the legal community. In that direction USAID and the foundation have supported a continuing education program for practicing lawyers. These efforts are intended to increase professionalism and to nurture a broader sense of justice. The CDIE team learned that there does in fact exist, within lawyers' ranks, a widespread dissatisfaction with the way the system works—and some movement for change.

And two, legal education seeks to *strengthen the legal system* itself. Toward this end support has been provided to improve law-school curriculum. The intent is to steer away from a theoretical and toward a practical mode of teaching. The evaluators found evidence that the efforts are paying off in a more activist attitude among both faculty and students. For example, the Legal Aid Centre at the University of Colombo is undertaking major research and publishing efforts in issues of law and social change.

The second area of concentration, alternative dispute resolution, advances the strategy of *structural reform*. USAID and the Asia Foundation have supported a countrywide mediation program that has been largely successful. By May 1993 more than 200 mediation boards (made up of volunteers) had received nearly 110,000 cases. Without the boards, more than half those cases might have ended up in a ponderous court system.

Mediation councils aside, the team found a great need for legal aid. Practically speaking, legal aid exists now only in Colombo, and even at that is severely restricted. Legal aid is relatively inexpensive. More investment in it is warranted to bring a greater measure of justice to the population at large.

The team also found a major need for modernization of the court system. Judges, for example, have such crushing case backlogs that delays of 4 years are not uncommon. But built-in incentives to keep the status quo (such as basing lawyers' fees on number of court appearance) inhibit reform.

Overall, the team discerned some progress toward rule of law in Sri Lanka—but slow progress. The evaluators felt that significant improvements to the justice system will have to await the conduct of systematic research on problems that constrain judicial performance. More important, improvement will depend on the emergence of more vigorous constituencies.

Background

For the past decade the Sri Lankan ship of state has had to navigate a sea tossed by ethnic and ideological conflict.

In 1983 Tamil extremists launched an insurrection to establish an independent state in the north and east, where Tamils are a majority. Repeated efforts at negotiating a peaceful settlement have failed. The insurgency continues to ebb and flow, exacting a heavy cost in life and property.

In 1987 another camp emerged, this time from the majority Sinhala community in the south. Inspired by the hope of ethnic Sinhalese nationalism, the Peoples Liberation Front sought to overthrow the Sri Lankan Government and fundamentally reshape society. The government quashed the rebellion in 1990, but again at great human cost.

Embattled and under siege from two quarters, the government sought refuge in a number of measures that over time have compromised democratic norms and practices. The measures have also worked to concentrate power in the executive branch. The 1979 Prevention of Terrorism Act and other emergency measures have enabled the military and police to engage in extralegal and extrajudicial actions.

It is in this context of uncertainty that the Agency and the Asia Foundation are investing in making democracy a stronger and more integral feature of Sri Lanka's future.

USAID's Assistance Approach

The USAID contribution to democracy in Sri Lanka began in the mid-1980s with the provision of small grants to various nongovernmental organizations (NGOs). The grants supported the development of legal literacy education programs.

The Agency then shifted the implementation of its programs to the Asia Foundation. The foundation has a long-standing interest in strengthening democracy in Sri Lanka, having opened

its office in Colombo in 1953. In both the public and private sectors, the foundation has provided grants designed to strengthen civil society and the institutions that constitute a vital democratic order.

In fiscal years 1990 and 1991 USAID grants to the Asia Foundation for legal development totaled \$788,000. Current and recent USAID/foundation projects include legal aid (1988–94), alternative dispute resolution (1990–94), court improvement (1985–91), legal education (1985–93), legal literacy (1988–90), and constitutional reform (1992–93).

How to go about reforming a nation's legal system? USAID has identified four strategies to meet four essential needs. They are

Building constituencies and coalitions when host-country political leadership in support of legal development is weak. The aim is to forge political and public pressure for reform.

Advancing structural reform when structures within the legal system are weak. Structural reform seeks to bring about progressive change in constitutional and other laws.

Creating access mechanisms when people are, in effect, excluded from the legal system. Efforts include providing legal aid, strengthening public defender staff, and introducing systems for alternative dispute resolution.

Strengthening the legal system when institutional capacity is inadequate. This is a nuts-and-bolts strategy: improving record keeping; designing training programs for judges, staff, and lawyers; acquiring modern technology such as computers for case tracking.

Findings

This evaluation examines the success of those strategies in Sri Lanka. In particular, it looks at those activities that have received the most funding. They are the Ministry of Justice mediation boards, the Bar Association continuing education program, and the law faculty and curriculum development efforts at the University of Colombo.

Constituency- and Coalition-Building Strategies

Which constituency groups might help influence the ruling elite? The team identified three that receive USAID or Asia Foundation funding: the bar association, the media, and the commercial sector.

Among these, the *bar association* is considered the most promising for promoting judicial reform. Surveying lawyers in a workshop, the CDIE evaluators found widespread dissatisfaction with the way the legal system works. Delays, unprofessional staff, lack of facilities, and poor record keeping ranked high on their list of complaints. "Malpractices exist, such as bribing clerks to remove court papers from the records," said one respondent. "Trial dates are too far apart," noted another; "[they are] sometimes separated by four or five months."

Although the bar has not pushed for reform in the past, the evaluators found plenty of grist for framing a reform agenda. What is needed is an appropriate forum. With USAID support, the Asia Foundation is working at that by polling lawyers and judges on their ideas on judicial reform. The foundation is also organizing conferences between judges and lawyers—traditional adversaries—to air the issues.

More important, the foundation (with USAID help) is supporting a continuing legal education program for practicing lawyers. The theoretical nature of law study in Sri Lanka is such that most attorneys do not actually learn how to *practice* law during their years in law school. The program offers a wide range of workshops designed to improve the knowledge and skills of younger lawyers, particularly those from rural areas. Donor assistance aims not only at enhancing the competence and professionalism of lawyers, but also at helping the bar become a more vigorous and service-oriented organization.

As for the *media* and the *commercial sector*, the outlook for constituency building is less sanguine. The government oversees all news reporting, and its level of control is extensive. Private radio stations and a newly established private television station have not been allowed to report the news or to air documentaries about Sri Lanka. Reporters, editors, and producers fear reprisals from government ministers if they, the ministers, do not like what is being printed or aired.

For the past several years the Asia Foundation has sought to improve the quality of journalism by holding training seminars and by funding the development of a school of journalism. These efforts strive to create a more professional cadre of journalists who will engage in a more vigorous pursuit of the news.

The commercial sector has no interest in reform one way or the other. It has, in effect, thrown in the towel, avoiding the judicial system altogether. “As far as I know,” said the chief executive officer of one major conglomerate, “our group does not have a single case pending in the courts.” Litigation takes too long (5 to 10 years) and ties up too much money. Businessmen have found their own ways to circumvent the courts. One such strategy is to rent rather than purchase land to avoid having titles contested. Trying to strengthen the advocacy role of commercial associations, USAID has funded the Federation of Chambers of Commerce and Industry of Sri Lanka. The effort appears to be problematic. “Most [businessmen] prefer the back door,” a federation representative told an evaluator. “They do not want to deal with macrolevel problems.”

Structural Reform Strategies

USAID and the Asia Foundation have supported the Sri Lankan Government’s efforts in introducing a national mediation program. The program creates greater access to mediation as an alternative to court proceedings. (It involves major structural change, so it is discussed here rather than in the next section, on access.)

Mediation in Sri Lanka dates back to the precolonial era and extends past the period of British rule. Over time, however, the conciliation councils—the vehicles for mediation—deteriorated. They became politicized, with mediators appointed on the basis of patronage rather than skill.

Moreover, people complained, the councils were taking on the trappings of court proceedings rather than mediation sessions. The councils were abolished in 1978.

But the courts then became overburdened. Their case backlog became so great that the government in 1990–91 reinstated the mediation function by establishing mediation boards. Building on lessons learned from the failed conciliation councils, the government designed the boards with five distinctive qualities: (1) The governing board is kept at arm's length from politics. (2) Mediators are appointed on merit. (3) They are monitored by mediator trainers to ensure adherence to the rules of mediation. (4) Boards have no power to summon disputants. (5) Settlements lack decree status.

By December 1991, 211 boards had been created. Their use has grown rapidly. After about a year of existence the boards averaged 24 cases a month. Now they average 56. Through May 1993 the boards had received 108,520 cases. Government officials estimate that 60,000 of these cases might have ended up in the courts had it not been for the mediation alternative.

Evaluators analyzed at random 1,528 cases from 11 boards. The team found a high degree of efficiency. Of the cases sampled, 61 percent had been resolved within 30 days; 94 percent had been resolved within 90 days. And the price is right. To file a case, complainants pay a one-time fee of 5 rupees—10 cents.

Mediators are volunteers, many of them retired professionals—teachers, civil servants, and the like. Although the job does not pay a salary, mediators (especially board chairmen) often work long hours. Why do they do it? Board members interviewed by evaluators often replied that they derive satisfaction from the knowledge that they have helped a neighbor. Clearly, Sri Lanka provides a wellspring of civic consciousness in the form of volunteers to serve as board members. The Mediation Commission would like to create partial subpoena power requiring disputants to appear at board meetings. Parties would not be required to settle the dispute, but the likelihood of settlement would increase if attendance were compulsory.

The possibility of subpoena power concerns some observers, however. They feel that such power would make the boards too much like the courts and not an alternative at all. Some also worry that summonses could be used to advance the political agenda of a mediation chairman, who might summon only his political enemies. Moreover, inasmuch as loan-arrear cases make up a large proportion of board business, subpoena power could work to the advantage of the large financial institutions and against the poor citizenry. The matter is still open.

USAID is supporting structural reform on two other fronts as well. First, USAID has provided a grant to the Asia Foundation to support the Law and Society Trust, an NGO, in creating a forum where issues of constitutional reform can be addressed by members of the political and intellectual elite. The Law and Society Trust is a reputable, long-standing organization. It has been active in supporting research and education programs to enhance public access to legal services, particularly among poor and disadvantaged groups.

The grant has enabled the trust to sponsor a series of workshops on issues pertaining to constitutional and institutional reform. Attendance has been by invitation only, with invitees being selected from among lawyers, judges, political leaders, academics, and NGO officials.

Second, USAID has supported the establishment of a Center for Legislative Information at the University of Colombo. It is headed by the university's vice chancellor, a distinguished academic and a public figure with personal access to the ruling elite. The center will address issues of constitutional reform such as electoral laws, balance of power, and delegation of authority to local governments.

The university center will encourage faculty members to undertake policy research for use by various parliamentary committees. Faculty members will prepare option papers on a broad range of issues. Working with members of parliament, they will determine the most constructive options and promote them in position papers. The assumption is that the ruling elite will welcome such expert analysis. They may not, of course; nonetheless, the investment is small and seems warranted as a kind of venture capital with potentially large returns.

Access Creation Strategies

Since the mid-1980s the Asia Foundation has been providing small grants to several organizations engaged in rendering free legal aid. They are the government-operated Legal Aid Commission, the Open University Legal Aid Clinic, the Women's Lawyers Association, and Sarvodaya Legal Aid Services. The latter two are NGOs.

Overall, however, the CDIE team found the supply of legal aid services to be woefully inadequate. Each of the four legal aid organizations has only one office, and that is in the Colombo metropolitan area. Legal aid outside Colombo is rarely available. Existing aid comes from samaritan lawyers who give of their free time at various outstations.

Lack of funds accounts for the shortage of legal aid. Even the Legal Aid Commission operates on a shoestring—\$10,000 annually, a large portion of which goes to office rental. The commission has only a few lawyers of its own and relies on a cadre of outside lawyers. In taking on complicated cases at rates well below market, their interest is limited.

Despite the short supply, the *demand* for legal aid is brisk. Both the Legal Aid Commission and the Women's Lawyers Association serve about 200 individuals a month each. Nearly two thirds of the 222 cases sampled by the evaluators were brought by women. Land disputes, marital issues, and accident claims made up the bulk of the cases.

Getting access to the court system through legal aid, however, does not necessarily mean receiving satisfaction. Losing parties often fail to comply with court decisions. A summons can be issued ordering compliance, but the delinquent individual can evade it, often by bribing the server. Enforcement thus is a serious problem.

Legal System Strengthening Strategies

The Asia Foundation has actively supported projects to strengthen the legal system in Sri Lanka. Projects have included assistance to the Judges Training Institute from 1986 through 1990, help in computerizing the Supreme Court in 1989, and support for curriculum reform at the three law campuses.

The initiative at the Judges Training Institute failed. Operated by the Sri Lankan Government, the institute lacked either constituency or coalition support. Computerization has been marginally more successful. It was seen as a logical way of dealing with the court system's crushing case backlog and lengthy delays. (In 1990 the court system's backlog was estimated at more than 390,000 cases; delays of 4 years are not uncommon.) Computerization of the Supreme Court has improved administration of the court's case load. But computers exist in only a handful of the other courts, and there are no links between those computers. Judges generally agree that all courts need to be computerized.

Upon examination, however, the team learned there is more to the backlog and delay problem than lack of computers. For one thing, many judges are not putting in a full day on the bench. That may be due to a lack of discipline, but it is also attributable to a second constraint, which is that trials are noncontinuous. Typically, a month or more passes between court sessions for any given case. Judges therefore spend a lot of time refreshing their memory of cases that were last heard weeks earlier. Inadequate systems for document retrieval contribute to delay, as does a centralized system for conducting forensic examinations.

A number of built-in incentives perpetuate the inefficiency. Some court staff and lawyers resist such obvious changes as instituting continuous court sessions and computerizing records. For example, lawyers use the condition of delay and backlog to defer cases. And, being paid on a fee-for-appearance basis (rather than flat-fee), they have a clear vested interest in noncontinuous trials. Lack of computerization works to the financial advantage of clerks, some of whom can be induced to "lose" an important document.

Law schools offer a more promising catalyst for change. Traditionally, training at the three law institutions has been highly theoretical. Professors put little emphasis on critical analysis, practical application, or exposure to actual cases affecting Sri Lankans. USAID and the Asia Foundation are trying to bring more relevance to the law curriculum at each institution. Specifically, the foundation

is financing an ambitious project in which Sri Lankan scholars are writing textbooks in 15 subject areas featuring the use of Sri Lankan case law materials. The current absence of such textbooks requires that law faculty use lectures and rote learning as the primary medium of instruction.

Has assisted the law faculty at the University of Colombo in reforming the curriculum. The changes seek to modernize courses in commercial law and comparative constitutional law. They also seek to introduce new courses in environmental and human rights law.

Has supported establishment of the Legal Aid Clinic at the Open University. The clinic sponsors legal literacy workshops and provides free legal aid to low-income individuals. The clinic actually

serves a dual purpose. Aside from helping people with their legal problems, it gives students hands-on educational experience that helps them understand the relevance of the law to larger social and economic issues.

Support for curriculum reform comes in part from faculty. Faculty, in particular those with overseas training, have come to realize that current methods of instruction are antiquated and in need of change. Impetus for change also comes from students themselves, who realize that the curriculum needs to be made more relevant to social realities.

The incipient reform is yielding results. The Legal Aid Centre at the University of Colombo, for example, is beginning to establish a track record of research, workshops, and publications on major issues of law and social change. It recently completed a 2-year study of women and domestic violence. Fifteen students worked on the project, on their own time, with no extra credit. Similarly, in 1992, 25 University of Colombo law students worked with a group of students from other South Asian countries in a symposium on legal education. They advanced their findings in a paper published by the Legal Aid Center. The paper's bottom line: Major revisions in curricula and teaching methods are needed if lawyers are to become agents of social change.

Conclusions

Several conclusions emerge from an analysis of the Sri Lanka case that relate to other developing countries.

First, in many societies at a similar level of development to that of Sri Lanka, there may be civic capacities at the local level that can help resolve disputes, provide legal assistance, and push for reforms. In Sri Lanka alternative dispute resolution has capitalized on a reservoir of volunteerism in staffing mediation boards, which are male dominated. This suggests that the same might be done with women, who could be mobilized to help their sisters who frequently need legal help because of abandonment and domestic violence. Such social resources do exist but frequently remain untapped.

Second, with regard to access, there exists a great need for legal aid for Sri Lanka's low-income people—the vast majority of the population. The cost of such aid to the provider is low (roughly \$4 per client served). Investing in legal-aid services throughout the country would involve little cost and could be achieved without adding to the government bureaucracy. NGOs, through subcontract arrangements, could provide such services.

Potential NGO services aside, the government, donor agencies, and the NGOs need to come up with new ideas on ways to deliver legal aid. Women are in special need of such services. In addition to lacking money, women may fear abuse in any encounter with police, or the judicial system in general. To the credit of the Sri Lankan Government, the new mediation program is coming to grips with some of these issues.

Third, a lack of innovation reflects legal reform's low priority with many of the political elite. Moving it higher on the agenda seems to depend on pressure from reformist constituencies and

coalitions. However, as Sri Lanka demonstrates, among the media, the commercial sector, and (to a lesser degree) the bar, this may be easier said than done.

Fourth, with conventional constituencies (such as the media and the commercial sector) unable or reluctant to exert reformist pressure, attention shifts to coalitions of *individual elites* as a source of such pressure. That is, instead of trying to sway an entire elite constituency, donors should look for individual members of a constituency (or of several constituencies) and bring those individuals together. USAID and the Asia Foundation are supporting this strategy. In this way, the national mediation program owes its existence to higher officials within the judicial system. Likewise, individual faculty members are pioneering improvements in curricula at several law schools.

This Evaluation Highlights was prepared by Ross Bankson of Conwal Incorporated for CDIE . It summarizes the findings from USAID Working Paper No. 196, "A Strategic Assessment of Legal Systems Development in Sri Lanka," by Gary Hansen, Mary Staples Said, Robert Oberst, and Jacki Vavre. These documents can be ordered from the Development Information Services Clearinghouse (DISC), 1611 North Kent Street, Suite 200, Arlington VA 22209-2111, Telephone (703) 351-4006, Fax (703) 351-4039.