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THE ADMINISTRATION OF JUSTICE IN ASIA
A CONCEPTUAL AND PROJECT SURVEY

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EXECUTIVE SUMMARY

This report reviews the status of Administration of Justice (AoJ) projects and other related directly and indirectly funded activities of AID in Asia within the broad context of justice systems and their relationships to governance, pluralism, and human rights. The objective is to make recommendations to AID on the need for field studies that will assist in policy formation and future programs concerning the political and developmental objectives of the Agency. The report makes recommendations for selective field studies (Philippines, Nepal, Sri Lanka), the goal of which would be to improve justice systems and pluralistic governance, and the purpose of which is to develop guidelines for programs and policy guidance to the field. It presents an action plan to achieve these ends within 150 days of the approval of the plan.

AoJ projects belie their name. They are not simply a distinct and narrow category of court and judicial programming; they represent both an opportunity and an entre' into justice systems, including aspects of governance and human rights, issues of increasing importance to the United States and aid donors generally. Justice systems, including law, far exceed the judiciary, bar, legal education, and such formal mechanisms usually associated with them in the West. They include informal dispute settlement, traditional systems, legal aid, and paralegal activities. These are important because in Asia law is very different from the continuous and cumulative Western tradition. It is a product of a variety of traditions that are both discontinuous among and within countries, often in conflict, based on a different series of assumptions of the origins and functions of law, and provide or prevent access by disparate groups to the formal processes by ethnicity, religion, class, caste, and other desiderata. Yet societies are inextricably moving toward adoption of modern legal systems that are a requirement for international trade and respectability. It is, however, erroneous to assume

that Western concepts such as the 'rule of law' are meaningful in many non-western societies. Many Asian societies view law, including constitutions, as an arm of the state enforcement system, rarely connected with rights.

AID has programmed in the field of justice systems through a variety of means: directly in a small number of cases, and indirectly through three essential mechanisms: [1] The Asia Foundation; [2] The Asian American Free Labor Institute; and [3] through PVO grants. The Ford Foundation is also independently a major force in the field. In addition, through normal sectoral programs AID has affected law and regulatory provisions of a wide variety of Asian states in a number of fields, but has not specifically identified these activities as related to either law or justice. AID has not considered that foreign assistance normally creates new disputes, the provisions for the adjudication of which are normally omitted in project design.

Over the past generation, AID in the Asia or related bureau level has not given high priority to law, justice, human rights, or governance issues in its Congressional Presentations, which are the single critical expression of AID strategy, priorities, and intent. Individual AID missions have also not integrated these fields into overarching priorities as expressed through mission strategies in the Congressional Presentations. In addition, there has been little articulation in any of the groups of an overarching philosophical approach to law that is not only a guide to its conceptual place in strategy, but also as a means for better programming and evaluation.

The report notes that the use of intermediaries in delivering services in the justice system, such as PVOs, NGOs, and professional groups may be more than simply a delivery system; they may be an integral, indeed vital, part of the development of pluralism and the civic society that contribute to the process of democratization. In certain societies, local administrations may perform useful functions in justice systems.

It cautions against using quantifiable indicators of improvement in the administration of justice (such as case loads, people trained, etc.) because these may simply mean the better functioning of a repressive system.

The report calls for careful, culturally sensitive programming by Missions capable of discerning both needs and the capacities of intermediaries. It continues that without field work, the assessment of such capacities both by missions

and intermediaries is impossible.

Field work, the report recommends, should be structured on a country-specific basis, but should review and be cognizant of transnational structural issues and problems (elites, institutions, PVOs, judicial independence, etc.) from which much might be learned.

Programming in judicial systems, to be effective, needs deft project design and a knowledge of both local cultural systems as well as western (common and continental) law, and their interaction in the arena of power within the state.

THE ADMINISTRATION OF JUSTICE IN ASIA

A CONCEPTUAL AND PROJECT SURVEY

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Introduction

The Administration of Justice (AoJ) projects in the Agency for International Development belie their name. They are not simply a distinct and limited category of development assistance programming, involving the judicial branch and the legal profession, although their origins may be rooted in such specificity. They are also an opportunity to explore political, economic, and social changes and needs through such an inquiry. They are thus an entre', an administratively manageable discrete set of project interventions that are a programmatic gateway into and are intended to affect broad societal issues such the distribution of power, governance, human rights, equity, political systems, as well as economic development itself. They are means through which to conceptualize, consider, and assist in the pursuit of achieving the international goals of United States, and most donor nations associated with the OECD as well, in furthering democratic governance and plural societies in addition to enhancing economic growth. As such, their definition--in accordance with their implications and possible effects--is more broad than their initial project limitations.

This paper, although concentrating on the experience of such programming in Asia, will thus provide a broader scope for inquiry. It will attempt to link AID's Administration of Justice efforts to the strategic planning of AID. It will first consider broad issues, including preconceptions of law and justice and their relations to Asian societies, and then specific programs and projects of AID, including those administered directly by that Agency and those funded by it but programmed through intermediaries. We will also examine justice issues in some sectoral AID projects. The paper will then examine independent or autonomous programming by other important donors within the region. The study will close by reviewing:

- * The impact of such programs, recognizing that causal relationships between the broad goals of societal change and such projects may be tenuous at best;

- * The importance of programming strategies as elements in this complex field; and

* Whether further studies in Asia are needed, and if so, where.

This essay will draw upon AID's conceptual and programmatic experience, as well as those of other actors in the region, and the external literature on these issues in Asia, which, alas, is meager and spotty on a national basis in comparison to the importance of both the problems and opportunities.

The implications of this inquiry are very broad. It thus becomes necessary to examine programming that has dealt with the full range of what may be considered law, rights, and dispute settlement. This includes the gamut from constitutional reform, through legislative support and drafting, to legal education, private and voluntary advocacy, regulatory reforms, legal associations, down to village legal aid and traditional dispute settlement. There are projects in these areas. In fact, as we shall see, the lines between formal and informal legal and dispute settlement mechanisms are often blurred.

The configuration of power in the world has changed. Foreign aid is under reconsideration in many donor agencies. A new emphasis on 'democratization' and the civic society is apparent. States are moving from foreign aid dependency to self reliance. In many societies there is a need for and an interest in regeneration of the legal community to serve societal and national requirements that increasingly are articulated by broader elements of many populations.

To approach these issues we may begin with the 'administration of justice' projects. But it is apparent that along these provide little guidance for policy formulation, for such analyses normally become focused on individual institutions and their problems and normally have a high degree of cultural specificity that makes generalizations more difficult. They may teach us little. More important is broadening the scope of inquiry and conceiving of a 'justice system,'¹ one that encompasses law and the judiciary within a broad construct of participation, access, and accountability.

Asia as a whole (Afghanistan east) is the initial venue of this inquiry, recognizing that the region is an administrative donor convenience, not a societal, intellectual, or experiential whole. Indeed, in contrast to Western Europe or much of Latin America and large portions of Africa (British East and French West Africa), law in Asia has

¹ The concept was suggested by Clarence J. Dias, President, International Center for Law and Development (New York), for which I am grateful.

been profoundly and disparately affected by a virtual myriad of local traditions on which were superimposed those of imported major religions or cultural systems (Confucian, Buddhist, Hindu, Muslim, and Christian) and then those prescribed by and emanating from a diverse set of colonial regimes. These elements were and often still remain in considerable tension. Thus, laws and the social norms they represent have been discontinuous not only in the region as a whole, but in individual societies. Furthermore, individual societies were often split in terms of law; a 'dualism' developed in law as it sometimes did in economics--colonial regimes often imposed a 'modern,' European code for a portion of their colonial society, but retained traditional law for other aspects of it.²

These events, the colonial experiences, the needs for modern, internationally recognized commercial codes, the interpenetration of world trading and cultural systems, political legitimacy, and the growing sophistication of societies demanding expanded roles in decisions affecting power at all levels have created important and internationally recognized needs but within highly specific cultural venues. They have also created sets of different perceptions and expectations of law and its internal applicability quite distinct from those that may be apparent in the West.

I Conceptions and Misconceptions

'People are more fearful of the law than encountering a tiger'
Confucius

The United States attitudes toward law and its internal and external roles are mirrored in much of the past programming by AID or private organizations, such as the Ford Foundation. These attitudes reflect in large part the common law traditions emanating from England, but also from the Western European cultural tradition, even though De Tocqueville recognized that the United States was somewhat different from other Western societies in that every political issue became a legal one.

² For example, in Indonesia the Dutch administrative code of 1847, parts of which are still applicable today and have not officially been translated into Indonesian, resulted in a division of law into Dutch and local traditions. See "Restraints of the Indonesian Legal System on Commercial Development--Suggested Solutions and Priorities." Muchtar, Karuwin & Komar, December 6, 1990 [unpublished paper prepared for the USAID Commercial Law Project].

More fundamental than such manifestations of these traditions, such as those of a jury system or a civil code, are concepts that slowly and historically grew out of that Western experience. These include such ideas as respect for judicial concepts (the importance of God as judge), the role of the judge as leader and hero in the Judeo-Christian tradition, natural law, the growth of a judiciary that was seen as at least partly independent of the state administrative apparatus, the respect for law and legal institutions, and the treatment of law as codification of social norms and sometimes social aspirations.

Law was also a means for dispute resolution in societies, such as the U.S., that are profoundly confrontational between both individuals and between individuals and the state. This is important because many Asian societies go to considerable social lengths to avoid confrontations of any sort. In those milieux, the introduction of foreign legal institutions based on confrontation may result in significantly different operations. Adversarial procedures contrast sharply, for example, with East Asian concepts of consensus and harmony.

Finally there is the concept of the 'rule of law,' an abstraction constantly intoned by Western advisors and politicians but alien to most Asian societies. Western political institutions and systems were evaluated by their relationship to justice, however defined.³ Foreigners often judged Asian institutions by this, often culturally irrelevant, standard.

The importance culturally that we place on law is underscored by the large number of lawyers in the United States (some 760,000 in 1990), but it is also reflected in our stress on the importance and functions of courts, the administration of justice, legal education, and bar and other associations of the legal profession. Attitudes toward law and legal institutions are also rooted in the individualism of Western social systems, which largely determine the responsibilities and application of law, as opposed to some modern as well as traditional societies that stress certain

³ Note the following: "Owing perhaps largely to the Judeo-Christian heritage which conceptualized God as a judge and expected their political rulers (Moses, Solomon, et. al.) to be also good judges, the Europeans insisted on evaluating the performance of their political institutions by their capacity to achieve justice. On the other hand, the Koreans expected their rulers to be possessed of the capacity (or virtue) to keep the rhythm of community process of interaction in close step with the rhythm of nature." Hahm Pyong Choon, "The Impact of Traditional Legacies on the Contemporary Judicial process." In Sources of Korean Legal and Political Traditions. Seoul: Yonsei University press, 1986, p. 243.

forms of collective responsibility, e.g., the family, clan, tribe, village, etc.

The most fundamental question of law has critical and practical programming implications. The issue is: are legal values universal? If so, then programming in law and justice systems based on this assumption has a greater chance for success. If this is not true, then programming becomes more complex as it requires the knowledge of these differing approaches and contrasting milieux.

The issue is still more difficult as the patterns of legal activities are becoming interdependent and are in flux. Among modern nation-states, some sort of international commercial code is recognized as essential for trade, and all states do trade. Many states claim to adhere to the UN Universal Declaration of Human Rights, perhaps more for political legitimacy or as aspiration than as a reflection of reality. Some sort of 'universalism' is thus seen to be emerging. In Asia, westernized law is eroding traditional legal patterns. Perhaps the most apt analogy to describe the changes taking place in law is the introduction of western technology to East Asia in the nineteenth century. At first, states thought that military, then commercial, technology could be adopted, while isolating the rest of society from its influences. Traditional core values could be maintained, but societies could strengthen themselves to protect and compete with the West. They then began to realize that such changes involved adaption of social and economic institutions seemingly far removed from technology to make it effective, and changes became profound. So too with legal change.⁴

The practical answer may be that having legal values is perhaps universal, but since 'legal' as a term includes societal norms as well as institutions and concepts of authority and responsibility, there must necessarily be differences among cultures, although Westernized concepts are making inroads in many societies.

The most fundamental of the programming assumptions about law is 'The Rule of Law.' This is a profoundly important concept in Western societies, and indeed is perhaps the most salient single abstraction underpinning our legal and political systems and programming in the field of law and justice. Impartial law, open access to it, and its universality all are incorporated in those four words. It is, in effect, a statement of law as affecting the conduct of both

⁴ I am indebted to Professor Carl Green, Director of Asian Law and Policy Studies, the Georgetown Law School for this insight.

the rulers and the ruled, rather than in other parts of the world law as an instrument of rule and implicit coercion. "The Rule of Law" is constantly invoked as a fact or as an ideal. It is, however, a highly culturally specific abstraction. We tend to avoid differentiating between the rule of law applied internally in a state, and one applied internationally between states. One can exist without the other.

But all of these attributes of the Western concepts of law and justice, and indeed the salience of these ideas, have in part been imposed on the various countries and societies in Asia with asymmetrical results by country, by cultural group, by class, and by region. This is also true in societies such as Japan, China, and Thailand without colonial traditions. To eliminate the unequal treaties of the nineteenth century, they had to adopt--at least in part--modern legal codes. It is also in part true of the contemporary period, where the United States has been accused of 'social engineering:'

Law and development programs have been perceived largely as an attempt to impose the western ideas and institutions, specifically American, on the third world.⁵

In the West, the development of attitudes toward formal law and legal codes has been continuous, cumulative, and incremental, resulting in respect for and a recognition of the tradition and importance of law (if not always its efficacy) to daily life. In many of the societies of Asia, however, the attitudes have been profoundly different because law was discontinuous, often alien, irrelevant to the daily lives of ordinary peoples, and seen as means by which either indigenous or alien elites controlled political and economic power. Further, customary law in some countries such as Thailand was often in conflict with statutory law, leading to selective enforcement, and thus opening important avenues for corruption.⁶ With this historical and contemporaneous complexity, programming in the field of law and justice in Asia thus requires a deftness of historical and social understanding not normally encouraged in operational agencies.

⁵ Youngsol Kwon, "Law and Development in Korea: Retrospect and Prospect." Conference on the Consequences of Modernization and Social Development in Asian Societies. Seoul, Asiatic Research Center, Korea University, June-July 1987.

⁶ Interview, William Klausner, Consultant, The Ford Foundation, Bangkok, June 1992.

As one author noted (specifically in relation to India, but applicable more broadly):

Most people have found the [formal, foreign-imposed law] process inaccessible, or too costly in time or money, or biased by caste, class, and gender criteria, or worse--a paper tiger; i.e., even if you are shown to be legally right, there is no guarantee that you will in fact get your just due, what might be called the problem of enforcement...Finally, of course, there is the feeling that the very basis of our state law (Anglo-Saxon) is faulty--that mediation between law and justice is critically influenced by cultural, moral norms.⁷

If Western societies have often misinterpreted the role of law in parts of Asia, many Asian regimes and societies have also unconsciously and consciously used modern law for more traditional, and often authoritarian, and sometimes fiscal, ends. In the colonial period in some districts of East Bengal, government revenues from litigation taxes were greater than those from agriculture. In Burma (Myanmar), the state today sanctimoniously invokes laws they have created to serve their immediate, repressive purposes, while intoning the importance of adherence to law as a national duty.

In Confucian societies today, there is a strong tendency for the state to consider itself moral simply because it is the state, opposition thus being immoral by definition, and law and justice is then geared to support specific regimes, individuals, and/or immediate political interests. "Confucius saw the law as a deteriorated form of norms applicable only to the uneducated whereas li [proper rites, rituals] would be preferable to be applied to the educated, decent upper class."⁸ As one author noted, "Law in a Confucian society was a set of secular norms for purely political purposes, with no connotations of spiritual or divine elements as we find in the

⁷ Sethi Harsh, "Access to Social Justice Through Law: The Role of PVOs." The Ford Foundation, New Delhi, August 1986; unpublished document #011652, p. 5.

⁸ Seongdoo Yong, "Korean Perceptions of Law and Modernization." Asiatic Research Center Conference 1987, op. cit. Problems in adopting foreign law did not only exist between the west and various states in Asia. William Shaw traces the difficulties of the introduction of the Chinese Ming code into 15th century Korea in Law and the State in Traditional East Asia, Brian E. McKnight, ed. Honolulu: University of Hawaii Press, 1987.

law of the West."⁹ It was a "device for enforcing predetermined Confucian norms of authority. Since it is all justification, there is no restraining force."¹⁰ So the Confucian tradition denigrated law in theory, but used it, while the opposing Chinese tradition, the Legalists, used law, but was denigrated by Confucian norms.

Thus law and AoJ projects in each society are inextricably bound in a diaphanous societal web where they become the surrogate indicators as well as the potential agents of change and continuity.

1. Law, Justice, and AID

The political goals that were always inherent in the foreign assistance program of the United States have been resurrected to become a centerpiece of AID programming. From its earliest beginnings following World War II, and specifically in Asia following the formation of the People's Republic of China and the Korean, and later the Vietnam, Wars, economic assistance was justified to the Congress in terms of its support to the 'free world' and the maintenance of free political systems (even when in many cases the reality was diametrically opposed to the ideal).

The efficacy of law was considered to be closely related to the efficacy of political institutions and systems. Thus, considering the evaluation of AoJ projects as a means to assist in conceptualizing the role of AID in furthering broad political objectives is both logical and indeed inherent in the nature of the justification for foreign assistance in the U.S. The fact that various administrations have stressed economic development and basic human needs (and more recently private sector and 'family values') should not obscure that these were pursued in large part for broad political ends. There has been, of course, the assumption that there was a causative relationship between such programming and the political ends sought.

The origins of projects specifically entitled AoJ activities in Latin America in the early 1980s should not eclipse the long history of AID and predecessor agency involvement in reform of legal systems. This involvement was

⁹ Dae-Kyu Yoon, Law and Authority in South Korea. Boulder: Westview Press, 1990. p. 18.

¹⁰ Ibid.

part of a general optimism of the power of American institutions, including law, that permeated the atmosphere in the years following World War II.¹¹ This attitude broadly affected the U.S. 'interlocking directorate' of both public and private leadership in foreign affairs, as these individuals moved between both sectors with ease and were subject to the same intellectual influences. AID, USIA, The Asia Foundation, and the Ford Foundation all began to work in aspects of law. The Ford Foundation seems to have been the earliest, and began programming in enhancing access to the legal system in the U.S. beginning in 1953, and shortly thereafter began similar work in Asia. Japanese judges were trained in the U.S. The India Law Institute program began in 1958. As one Ford Foundation report noted:

At the same time that interest in the use of legal services as a means of promoting social change began to gather momentum in the United States, the Ford Foundation, along with a variety of other development assistance agencies, began to examine the use of law as a means of promoting economic and political development in the Third World. In the early years of the law and development movement, legal assistance was often perceived as an administrative mechanism for strengthening the democratic process. Legal assistance seemed to fit with vague notions of political development, rule of law, and participatory democracy.¹²

The results were, however, often not salutary.¹³ As one Ford staff wrote:

The rejection [of U.S. legal institutions in Latin America] highlights one of the major weaknesses of the early law and development efforts--the unstated

¹¹ See Robert Bellah, The Good Society (1991) for a discussion of this issue.

¹² A. Gridley Hall, "Ford Foundation Support for Legal Services in Developing Countries--A Survey." The Ford Foundation, New York. July 1989. Unpublished, p. 9.

¹³ For a devastating study of Ford and AID legal programming in Latin America, see James A. Gardner, Legal Imperialism--American Lawyers and Foreign Aid in Latin America. Madison: University of Wisconsin Press, 1980. Mr. Gardner was a consultant to the Ford Foundation.

assumption that American legal institutions could be transferred without modification and still have relevance in the vastly different cultural settings found in the Third World.¹⁴

This inherent assumption of the relevance of U.S. legal systems abroad, even if benignly motivated, was both inchoately arrogant and long in dying. As late as 1989, the American Council of Learned Societies had conceived a project and raised funds from the Ford Foundation to demonstrate the impact of the U.S. Constitution (in celebration of its bicentennial) on those of other countries. The Asia seminar, which was fortunately changed to consider constitutionalism more broadly, demonstrated that such relationships were often tenuous at best. There seems to have been little institutional memory of some basic aspects of an earlier failure based on similar programmatic assumptions. Legal assistance has not been immune to the virus of instant judicial transplantation, and the rate of rejection has been high.

AID, in addition to its legal programs in Latin America partly in collaboration with the Ford Foundation, began efforts in law under Congressional instructions in the mid-1960s through Title IX (of the Foreign Assistance Act) program to increase civic participation. This broadly based effort, administered from Washington and which lasted until about 1981 when it was eliminated by the new administration, largely provided support to U.S. institutions, and studied such issues as the role of legislatures and the legal processes, the latter through a Yale University Law School grant. The available files on this program, which was extensive, are most scanty. Yet the concern was evident in both the legislative and executive branches that both the making and administration of law were legitimate concerns of foreign assistance.

Concentration of donor programmatic attention on formal legal institutions was supplemented by growing interest in informal dispute settlement mechanisms, questions of human rights, access to justice, and the interaction among all of these factors. Some of this attention was the product of a growing body of anthropological literature on dispute settlement (and perhaps the greater presence of social scientists in donor organizations), but some emanated from new or revived donor developmental interests and ideological preoccupations. There also was, in a number of societies, a realization that the formal, western-imposed judicial systems did not work adequately, and thus there was a growing interest

¹⁴ Hall, op. cit.

in rediscovering traditional, popular mechanisms for dispute settlement at the local level. Some of these attempts, such as those in Sri Lanka, were formally empowered through 'statutory conciliation.'¹⁵

The reversion to traditional and/or popular means of justice or dispute settlement through bypassing or destroying older court systems was in some societies a statement of political revolution--the intentional destruction of old regimes and their sources of power, including the court system. This was true in a number of states, including the USSR, in the People's Republic of China about 1950, and in Burma in 1962 following the military coup (a system of People's Justices was later installed, but has recently been eliminated).

In some cases the introduction, or reintroduction, of traditional dispute settlement mechanisms were designed to increase access to justice in non-revolutionary settings. This was true in Sri Lanka, with the reformation of the Statutory Conciliation Boards,¹⁶ and in India with the Panchayat system.¹⁷

No value judgements on the efficacy of either traditional or modern systems are implied here; we note simply the relative relevance of each in a particular society. A modern system socially may be more 'just' or objective in its decisions but more difficult of access (and thus not 'just'), while a traditional pattern may provide access (thus being 'just') but simply reinforce class, caste, or ethnic prejudices (and thus be 'unjust').¹⁸ Either or both may be corrupt, another concept that is culturally specific.

In many cases, these local institutions and procedures were more than simple means to decide disputes. They were in fact aspects of local governance. They thus demonstrate the link between the administration of justice systems and politi-

¹⁵. For a discussion of the Statutory Conciliation Boards, see Neelan Tiruchelvam, The Ideology of Popular Justice in Sri Lanka. A Socio-Legal Inquiry. Vikas Publishing House PVT Ltd., 1984.

¹⁶. See Tiruchelvam, op. cit.

¹⁷. See Marc Galanter, Law and Society in Modern India. Delhi: Oxford University Press, 1989.

¹⁸ Anthropological literature from Afghanistan before 1978 indicates that the introduction of a modern judicial system in tribal areas had unfortunate repercussions: traditional dispute settlement mechanisms were ignored, blood feuds that they were designed to prevent continued, and local resources in the form of fines or judicial bribes left the community.

cal mechanisms, reinforcing the rationale for conceptualization of law and justice as a means to approach political development.

The close, sometimes unexpected, interaction of formal, westernized court systems and more traditional means and attitudes for dispute settlement in Asia further illustrate the need to consider both in any approach to the administration of justice. The introduction of a modern court system may have as its most profound affect in certain societies on the encouragement of traditional dispute mediation. Northern Thai courts seem to have been highly instrumental in forcing mediation to avoid court appearances.¹⁹

In Korea, the judge himself often performs the function of a traditional mediator with the result that a large number of cases are settled before trial.

In the course of the [judicial] hearing, the dispute is aired, the facts of the case are elicited, and the matter is resolved. But, the final outcome is not a judicial verdict rendered by the judge, a ruling of right and wrong handed down from the bench. Instead, the judge acts as a mediator, urging the two to settle their differences amicably, suggesting terms for a compromise, and helping them to reach a reconciliation. When the disputants leave the courtroom, it is not with a judgement, but with a written compromise agreement, to which both have voluntarily consented.²⁰

Law is a means to achieve certain societally defined goals.

If the going myth is that law counts, people will use law to the limits of its assumed capacity to get things done. But if a god or gods alone provide, then priests will exercise authority. If the understanding of politics suggests that powerful men get things done, then patron-client relations are likely to prevail. The analytical problem is to ascertain in any society what exactly the most sensible

¹⁹. See David Engels, Justice in a Northern Thai Court.

²⁰. See Linda Sue Lewis, Mediation and Judicial Process in a Korean District Court. Unpublished Ph.D. Dissertation, Columbia University, 1984.

means, or mix of sensible means, of reaching goals are.²¹

Constitutions are at the apex of legal systems and their development has sometimes been the subject of foreign donor support. Although in the United States we popularly conceive of the U.S. constitution as the font of our present corpus of law (although Magna Carta and the common law tradition obviously precede it), in much of the world constitutions ratify what power relationships already exist, and are changed by coup or revolution as well as by amendment. Constitutions are designed to limit the power of the state, and it may be both ironic and logical that donors are often anxious to strengthen the state to deliver effectively social and other services to the people while at the same time attempting to limit its sway. Although there is an implicit assumption (on an American model) of congruence between a constitution and the body of state law, if not always practice, in fact this congruence should not be automatically accepted. Constitutions may be limiting, but they are also cosmetic or aspirational, and in both categories may not reflect the realities of either power or rights. Korea had, for fifteen years, a Constitutional Committee, 'a supreme organ delegated with the power of judicial review...with no case ever referred to or decided by it.'²² Constitutions may thus also be irrelevant.²³

Several other aspects of the legal process may be mentioned: the independence of the judiciary, the timely application of justice, the quasi-legal professions, the changing roles of legal elites, and law as a civic organizational instrument.

Writing in 1989, LAWASIA officials implied that there was no country in Asia that did not have some major problem with the independence of the judiciary. Such independence could be threatened by lack of security of tenure, intimidation by transfer, control over judicial resources, stringent security

²¹ Daniel S. Lev, "Social Movements, Constitutionalism, and Human Rights." Working paper prepared for the Asian Regional Institute of the American Council of Learned Societies Comparative Constitutionalism Project conference. Chiangmai, Thailand, February 1989.

²² Youngsol Kwon, op. cit.

²³ For an analysis of the constitutions of East and Southeast Asia, see Lawrence W. Beer, ed. Constitutional Systems of Late Twentieth Century Asia. Seattle: University of Washington Press (School of Law, Asian Law Series #12), 1992.

legislation, or other forms of implicit or explicit coercion.²⁴

The degree to which the independence of the judiciary was intimidated varied by state, but it is evident that the concept of complete independence was not well established in practice, however much it may have been intoned in theory.

Timely access to law is another aspect of justice. In India, in some jurisdictions there is up to a ten year backlog of cases.²⁵ Clearly, the poorer the society the more costly are delays in access to the courts, even when they are relevant, and perceived to be relevant, to the needs of the people.

In many societies, the quasi-legal professions have been ignored both by those societies legal elites and by foreign donors. Paralegals often provide the critical link between people and the state and the people and the formal legal system. They are the interpreters of law and bureaucracy to the masses. In Korea, such groups as the 'judicial scribes' were ignored by both practicing and academic legal communities.²⁶

The new societal and political needs in a number of states have prompted the recognition by judicial and legal elites for the necessity of reform. There are a number of instances in which judges and lawyers individually have provided assistance to the poor or those who had no hope of institutional legal access. Given the inherently conservative nature of most formal legal institutions (which by their nature support the status quo) and law schools (in which the profession is the primary focus), this raises the question of whether reform of justice systems is best approached through institutional change, individual change, or some combination of the two.

This point raises the question of law as an organizational instrument to assist civic organizations to become established, protect themselves against states that are sometimes predatory, and pursue justice related or other social beneficial ends.

The links between rejection and acceptance of modern legal codes, between law projects and governance, and between

²⁴ The articles do not list every country, but the message was quite clear. See New Zealand Law Journal, November 1989.

²⁵ "Law and Order--Justice in India." Law Institute Journal, November 1986 [Melbourne, Australia].

²⁶ See Jay Murphy, The Judicial Scribes and Others. Seoul: Hollym Press, 1965 [?].

rights and legal programming require a broad exploration of the amorphous, ill-defined areas of law, justice, rights and governance, and their interactions over time. If not a journey without maps, it is one without parameters.

2. Definitions and Limitations

Administration of Justice projects are broadly conceived in this study because of the inextricable conceptual and practical links between political and legal systems, between law and human rights, and between law and economic development. Legal and justice issues by their nature pervade society; justice, like corruption and fairness, is defined by local social norms. Justice is also sometimes defined not by what it is, but by injustice, which sets the limits on justice.²⁷

It is far more difficult to consider AoJ within this broad context than in terms of an evaluation of an individual project's specificity. There are no quantifiable indicators that can provide guidance, as one might find in health or population statistics. Projects that deal with law and justice also often require long gestation periods, so timely evaluation is difficult. In this broad approach, it is not sufficient to quantify the numbers of judges trained or cases resolved or any other specific attribute of a legal program and expect that it will automatically tell us about justice--the 300,000 pending backlog of legal cases of irrigation in Pakistan indicates more about injustice than its obverse. Programmatic accomplishments in terms of numbers could mask more effective implementation of repressive and anti-democratic institutions rather than representing political or judicial liberalization.

But analysis of AoJ projects, broadly considered, is also more rewarding because they prompt the donor to consider, respect, and program with local traditions in central focus. They also allow avenues of inquiry into the process of governance that are otherwise often ignored by donors.

We are in a sense using AoJ projects as partial surrogate indicators of broad social progress. In drawing lessons from

²⁷ See the Encyclopedia of the Social Sciences. 'Justice.' For a discussion of the issues of justice in the Philippine context, see Jose W. Diokno, "A Filipino Concept of Justice," and Felipe B. Miranda, "A Concept of Justice," in Seminar on the Administration of Justice in the Philippines: Focus on the Poor. University of the Philippines, August, 1988.

them, we attempt to predict how best to help ameliorate authoritarian political systems and advance rights and justice. Although such considerations complicate our tasks, they provide a more rewarding and potentially more important set of analytical tools with which to assist in formulating future programs.

Programming in law is neither limited to the judicial branch of government alone, nor improving access to it. Such programming has pervaded AID for many years, but considered as aspects of sectoral projects and programs, such as providing land titles in an agriculture project or changing tax codes in local government. In Asia alone, as we will demonstrate below, AID has been continuously engaged in reform of legal, regulatory, and administrative codes and regulations. Such programming was usually considered as elements of development projects, although their implications for law were often important. AID projects were often involved in increasing tax revenues through reforming regulations, encouraging environmental legislation, changing administrative regulations related to decentralization, improving commercial and investment codes, and developing legal means for land surveys and registration. Such programs, then, were important attributes of changing and responsive legal systems even though the emphases may have been sectorally inspired and justified.

There seems little question in international, and increasingly in local, perspectives that efficient and objective legal systems are becoming prerequisites for good governance and political legitimacy (even in Confucian societies) as international interdependency has expanded. They are also a requirement for effective and sustained economic development, although the latter point has sometimes been overlooked, and there seems to have been some resistance in direct programming in law by some agencies. As one study noted:

Typically, external aid agencies have been reluctant to assist in strengthening judicial systems because the link to development is seen (incorrectly) as indirect. More particularly, external agencies have feared that their involvement in law enforcement will risk their association with inequitable or unjust law enforcement. While they are very real, these risks can be exaggerated. The urgent need for solid legal training and for technical assistance in improving court administration poses no risks. Nor does

assistance in publishing and disseminating a country's body of laws.²⁸

This writer would stress that the link between law and development is evident, and that the two critical factors required for economic development and investment are predictability and mechanisms for the fair adjudication of disputes. Transparency and accountability are related, but perhaps subordinate, requirements. The political dangers of donor association with repressive law enforcement are also substantial unless the conceptual issues associated with such programming are first carefully assayed.

One USAID document aptly described the situation:

Weaknesses in economic law and government procurement do more than slow the pace of economic expansion and national development. Such weaknesses also relate closely to equitable distribution of the fruits of economic development...Overcoming such problems [uncertainty, mistrust, lack of predictability, etc.] requires significant improvements both in the substance of economic laws and government procurement policies, and in the processes by which such laws and policies are developed, disseminated, administered, and enforced.²⁹

This inquiry cannot deal with the question of justice within the project context. It is nevertheless important. There are some 300,000 legal and unsettled disputes in Pakistan connected with the irrigations systems as a whole.³⁰ Yet the issue of establishing and monitoring dispute settlement in AID projects that are sectorally conceived has rarely been addressed as part of project design. In fact, it would be a reasonable hypothesis that donor-supported aid projects designed to institute change will by their nature create disputes, the amelioration of which should be addressed

²⁸ Ismail Serageldin and Pierre Landell-Mills, "Governance and the External Factor." The World Bank Annual Conference on Development Economics, April 25-26, 1991.

²⁹ USAID/Jakarta, "Economic Law and Improved Procurement Systems." Project Paper, August 20, 1991.

³⁰ Personal communication, James J. Dalton, former AID consultant on AID supported irrigation programs in Pakistan. September 1992. This does not imply that these disputes were a result of AID programming.

in such project design. Land titles, access to jobs or water, changes in tax structures, and the newly created availability of some services (which by necessity in developing societies are likely to be rationed) all create potential disputes that require formal or informal adjudication.

3. Is the Delivery Medium the Message?

In our conceptual focus on law and justice, we should not lose sight of the potential importance of how foreign-supported activities in the legal field are institutionally delivered, and the present and potential roles of local and foreign public and private institutions at all levels in furthering project goals.

The institutional means through which to provide AoJ assistance may perform far more important roles than simply as a programming mechanism. Such organizations operating effectively in their societies may be some of the very stuff from which pluralism springs. They may provide services to the disadvantaged, transparency to governments, and advocacy for unpopular or unrecognized issues.

But the 'delivery vehicle' that may be appropriate in one state at one level may be politically inappropriate in another environment. AID may directly support the advisors on a constitution in Nepal, and the Asian American Free Labor Institute (AAFLI) may rewrite the labor code in the same country, both with positive effects. But in another state, the mere mention of foreign involvement at similar levels concerning issues viewed as impinging on sovereignty could be regarded as politically incorrect and indeed disastrous to the regime accepting such aid. On the other hand, indigenous private and voluntary organizations (PVOs), which might be acceptable in other locales, may not have the prestige with which to influence change at the level required.

There are three generic questions that we might raise here related to how such assistance is delivered:

1. Is the development and expansion of indigenous 'delivery' organizations a prerequisite for institutionalized change whether at the highest level of administration or the lower level of public access to justice? A negative answer implies extremes: satisfaction with the existing justice delivery system or such dissatisfaction that one implicitly wants to diminish its effectiveness. For example, the former Korean CIA had extra-judicial but effective (in its own terms) functions, and diminishing its capacities would have assisted

justice. If (as this writer hypothesizes) the answer is generally yes, then should those institutions be public or private?

2. If they are private (e.g., PVOs, NGOs, or professional groups), could they act as leavening forces to diminish the concentration of political and/or economic power, and thus further pluralism and eventually democratic governance? If they are public, would they have more access and a more immediate impact but tend instead to concentrate power in the public sector, thus making pluralism more difficult? What are the trade offs between generally slower, localized private progress, and faster but perhaps more concentrated public sector activities?

3. Is it appropriate from both donor and recipient perspectives to support projects with such groups (e.g., can the donor effectively identify and evaluate local PVO-NGO present capacities and potential? Can the potential recipient politically or socially receive support without endangering its status or credibility, etc.)? Indeed, are there alternatives to these organizations in highly centralized states?

We need not answer these questions at this point, although we will attempt to deal with them more comprehensively later in the report. Their full consideration may have to await field work in selected countries. They should be kept in mind if the report is to make recommendations about the development of a law and justice strategy leading to improved governance.

The transition to democratic governance is complex. A free election alone does not a democracy make, contrary to the popular press and indeed many in a variety of countries. It alone should not itself be a cause for great democratic jubilation. It may be more a manifestation of other, more central, changes and values--an effect of democratization rather than a cause, or indeed both. Such elections also may be irrelevant--minor mutations of a rigid body politic. Just recently, purportedly fair elections have been ignored or overthrown in Myanmar, Algeria, and Haiti.

More basic in many societies, as political scientists have argued for several decades, is the development of a 'civic culture,' groupings for common, localized, or specialized goals that reflect or become civic trust, which in turn is translated into political trust. Related but not necessarily congruent with it is the growth of pluralistic centers of power that make demands on governments and prevent indiscriminate concentration of power. It is this change that

this writer argues was the essential factor in political liberalization in Korea in 1987, and the subsequent growth there of a 'relatively' independent judiciary.³¹

In a sense, then, the strengthening of PVOs, NGOs, or professional groups could assist the overarching goal achievement of democracy, justice, and pluralism. Thus, such support is not only a tactic in legal programming, but a strategy aimed at promoting over the longer term pluralistic governance. One should consider, however, that PVOs or professional groups vary in size, influence, competence, class structure, and dedication to reform.

The question then should be asked whether USAIDs (individually, collectively) have the capacity to make such assessments based on realistic understanding of the local power structure and institutions. It is apparent that in Colombia USAID was so blessed.³² In other countries, with staff depletions but mounting bureaucratic requirements, this may not be possible.

Another important issue for states that have indigenous or colonially imposed centralized administrative systems is whether local governments might not be one avenue to foster pluralism and justice. If responsive governments at local levels can be developed to perform a variety of functions from collection of taxes and their effective local allocation to informal dispute settlement to administering legal systems in accordance with appropriate norms, might not this avenue offer the foreign donor a means to improve the administration of justice and strengthen forces for pluralism?

Thus two programming modalities (in addition to direct projects at the central level) for fostering pluralism may be appropriate: support to indigenous PVOs and professional organizations, and to local governments. At this point, the strengthening of foreign PVOs (through the former Operational Program Grants and Development Program Grants provided by AID) is a secondary concern--a way station or intermediate means to develop indigenous capacity, for dependence on foreign

³¹ For the classic study of the historic concentration of power in Korea (until the time the book was written) see Gregory Henderson, Korea Politics of the Vortex (Cambridge: Harvard University Press, 1968). For the changes, attributable in part to urbanization, see David I. Steinberg, "Socio-Political Factors in Korean Economic Policy." World Development, Vol. **, 1988. To paraphrase Tom Stoppard, a relatively free judiciary is not one controlled by the ruler's relatives.

³² See the Development Associates, Inc. report on the AoJ project in Columbia. 1992.

involvement is likely to be only transitory.

The broadening or deepening of the foreign or local for-profit sectors is separate issues in promoting pluralism. Although often forces contributing to such ends (in Korea in the 1992 elections), by themselves they seem unlikely to encourage social or distributional justice. But this should be the subject of a separate inquiry.

With these issues in mind, we turn now to AID's experience in direct programming in law and justice in Asia.

II AID's Experience in Direct Programming in Law in Asia

There have been three areas of the world in which the involvement of AID and predecessor agencies has been so massive as to attempt the remaking of substantial elements of those societies. These have been Egypt (Israel is not included because assistance was not generally programmed), Central America, and parts of Asia. In Central America, the genesis of the AoJ projects, American involvement has been pervasive. In Egypt, it has been pervasive in infrastructure but not as institutionally intrusive. In Asia, American assistance has been massive and was involved in core attributes of the societies in Korea, Vietnam, and the Philippines.

In those three societies, the United States assistance, both directly and through surrogates, has attempted to remake societies because of the massive commitment of U.S. resources for strategic reasons in those states. A part of those efforts were important legal and regulatory projects and programs.

1. Law, Justice, Rights, and Democracy as Strategy

More importantly, however, than U.S. involvement in individual country programs, no matter how intrusive, has been the expression of the importance of justice, law, democracy, and rights in AID's conceptualization of its priorities in Asia. It is an hypothesis of this paper that the Agency's priorities and emphases are best reflected in its Congressional Presentations to the Congress, which are the critical documents on the basis of which funding is provided

by the Congress to the Agency.³³ These documents vary in format and categories. They have had introductory statements, or overviews, that have at various periods separately presented U.S. interests in the region as well as those of AID. They, therefore, are probably the single best indicator of the importance of these fields to AID leadership. Insofar as Congressional liaison staff of AID have an important role in the process of reviewing the documents, they probably also represent how AID staff gauged the extent of Congressional interest in these subjects. In other parts of the Department of State, such as that concerned specifically with human rights, these presentations would have a completely different stress. The extent of total U.S. interest in these fields would therefore probably have to be judged by the executive branch budget as a whole. This need not concern us here.

In reviewing these documents for the past generation, it is evident that on a regional basis (whether Asia or Near East-Asia Bureaus) there has been little stress on any of the justice/rights categories. In spite of intense interest in human rights in the executive branch in the late 1970s, there is a singular gap in this field in AID programming priorities on a regional basis. It is not until FY 1991 that AID priorities are indicated. Thus, in that year U.S. objectives included 'pluralism, including the promotion of democracy and the promotion of freedom and competition--the political, economic and social institutions of a nation.' Programming targets were 'open markets, open societies,' with democratic pluralism in Asia stressing 'voice, choice, and governance.' Voice was interpreted to mean PVOs, private sector activities, choice included free and fair elections, and governance 'strengthening institutional performance of the legislative, executive, and judicial branches.'

The Asia overview section for FY 1992 continued this stress, with support for a three-pronged program of strengthening the private sector, supporting democratic pluralism and strengthening democratic institutions, and the family.

In the FY 1993 Asia overview, five priorities are indicated: [1] development of free markets; [2] environmental planning and management; [3] improving individual well-being; [4] strengthening democratic institutions and processes; and

³³ In the early period during and following the Korean War, these documents were classified as secret. When later versions were unclassified, the overt security concerns were subordinated to more developmental ones. Classified documents, to which this writer does not now have access, may better reflect that continuing preoccupation.

[5] addressing transnational issues.

If the overview, or regional bureau strategy statements, were generally sparse in their treatment of justice, rights, and democracy over the past generation, individual country statements (as opposed to individual project descriptions) were generally not forthcoming. The paucity of interest is significant. For example, if one follows the presentations on Bangladesh, one finds a mention of martial law government in FY 1985, but no concern expressed about the administration of justice. In the next year (FY 1986), the report notes that U.S. efforts are critical in support of Bangladesh's development policies and moving toward representative democracy. From FY 1987 through FY 1990, no mention is made of any of these issues.

In the Philippines, the FY 1986 presentation noted that one of the U.S. objectives was 'to revitalize democratic institutions,' but there was no mention of this in the AID strategy statement. The document was written before the overthrow of President Marcos. In FY 1987, the U.S. was concerned with 'revitalization of democratic institutions,' but in FY 1988, this concern is omitted. In FY 1989, Philippine democracy once again becomes a U.S. interest, and this is expanded on in the FY 1990 presentation: 'the US has a profound interest in supporting democracy in the Philippines because of the broad historical ties between the two countries.' This was essentially repeated the following year.

In most other countries, these topics are omitted over this long period, but when mentioned in a few cases, these references are sporadic. The only country presentation that specifically includes law is Sri Lanka (FY 1993), in which support to strengthening democratic institutions and the rule of law are specifically included.

The conclusion, then, is evident: in strategic terms, law, justice, rights, democracy and related concepts were not conveyed to the Congress as of priority interest at the Asia regional level.

If the regional bureau was less concerned with law, AID/Washington was in the early period of Title IX more interested. Title IX was the vehicle for this activity. The FY 1973 Congressional presentation for Development Assistance and Humanitarian Assistance noted a work in the development of legislatures through a 1971 grant to the Comparative Development Studies Center, SUNY/Albany for such studies. Other related grants were given to Duke University and the Universities of Iowa and Hawaii. These did include some Asian focus.

In that same document, mention is made of a preparatory study to explore issues in the rule of law. The complex issues of economic and political development, participation, legal systems and modernization, and income distribution and social development are all the subject of research programs that included the Fletcher School of Law and Diplomacy (Tufts University), the Maxwell School (Syracuse University), the Yale University Law School, Harvard University, and Rice University.

Overall, however, the efforts on law and justice and related fields were not internalized within the Agency; the programs that were attempted were those initiated at the request of the Congress (through Title IX), but seemed to have little impact at the Mission level.

2. Law, Justice, Rights, and Democracy as Projects

Without an extensive search of the AID files, including retrieval of materials from Suitland, Maryland where the bulk of them are stored, and a major expenditure of time and funds, is virtually impossible to get accurate data on the full range of projects that had legal or regulatory aspects, the amounts of such projects spent on those activities, and the participants trained in the field. Such a study would probably offer few new insights that would affect the present analysis, and thus is not recommended here.

Without such a search, however, it is still possible to make some generalizations and point to specific issues. There have been very few direct projects funded by USAIDs in Asia that have focused on and were justified as dealing with law, justice, and rights.

The earliest such program in the past twenty years found in the region seems to have been in Afghanistan (#306-11-790-123). This National Development Training project was specifically designed to train Afghan legal specialists at George Washington University Law School, and in Iran. From 1972 through 1976, some \$1.655 million was spent on this activity.

Another program was in Nepal (#357-0163). This Democratization in Nepal was included in the FY 1992 presentation and budgeted the initial year at \$750,000, with a life-of-project budget of \$2.5 million. Although much of its program was still in the planning stages, it included support to a parliamentary secretariat, training for the press,

assistance to an independent judiciary, and strengthen local government.

The single most ambitious project affecting legal processes is in Indonesia, and although approved in 1992, it is yet to begin. This is the \$20 million project to transform the commercial code and the procurement system of that state.

Although focused on development issues, this legal project has implications far more broad than on that aspect of law alone.

In addition to projects that are directed toward law and justice in the field, there are centrally funded projects that are budgeted in human rights categories, such as Section 116 (e) of the Foreign Assistance Act.

Although there are few projects that are concentrated on law and justice, many projects in the Asia region specifically attempted to improve access to law or justice, to transform regulatory agencies, change tax, environmental, irrigation, or other codes, affect regulations regarding local government, or otherwise change the administrative/legal structure of aspects of a particular society. A list of these projects would be so extensive as to be unproductive. These projects range from providing titles to lands to administrative and tax reform, to work with the police.

Such projects might be classified into two categories: [1] improvement in the structure, administration, operations, or access to or enforcement of legally related institutions or regulations; and [2] the development of new institutions or regulations.

A selective country by country review gives some indication of the depth of the involvement. The most extensive has clearly been in the Philippines. There, major programs involved land reform, local development, provincial development, decentralization, area development, real property tax administration, major infrastructure projects designed to provide additional municipal tax revenues, internal security and the police, extending capital markets, and a wide range of regulatory operations of environmental projects. In none of these projects, as far as one can tell, was law or justice concerns specifically highlighted as an objective to be pursued or attained. The most pervasive of these projects is one currently underway on decentralization, in which AID is providing \$50 million in a phased approach to the Philippine government enactment of various types of legislation related to delegating more authority at the local level.

In Afghanistan, in addition to the direct law program

noted above, the USAID provided support to Financial Administration Improvement (1956-75) to improve customs, tax, and assessments law and regulations.

In Pakistan, where assistance is currently suspended, Project Design and Implementation Fund II (1991-97) was instituted to support the democratic pluralism initiative. Although much of this project was to have been indirect support through PVOs, it is unclear how much was directly administered by the Mission. The Private Sector Project (1988-95) did include as an element in the privatization effort an objective of developing mechanisms for dispute settlement. Energy Planning and Development (1983-87) was partly concerned with both policy formulation and the regulatory aspects of the energy sector.

In Bangladesh, the Local Government and Infrastructure Project (1991-97) was devoted to revenue enhancement. In Korea, USAID supported the Social and Economic Development Institute (1971-75) which drafted the legislation on foreign trade. In Thailand, decentralization projects, land settlement, highland development, and assistance to the Thailand Development Research Institute were all instrumental in both policy and regulatory endeavors.

In Indonesia, in addition to the legal project listed above, and an important and influential participant training program, policy and regulatory assistance was provided through the Agriculture and Rural Sector Support Program, which (contrary to its name) assisted in the reformulation of economic policies and regulations in a wide segment of the society, including the stock market and tax collection.

Neither these projects nor others simply omitted through lack of time, do justice (sic) to the numbers of individuals trained through a variety of specific and generic participant training projects. Many of these individuals were likely to have been engaged in some aspect of law and justice.

Yet if one were to consider, in an admittedly impressionistic manner, the totality of USAID-funded projects related to law and regulations in the Asia region, it seems evident that the stress has been on improving the tax bases and compliance with the existing legislation of a variety of governments at the national or local level, rather than broadening access to justice. Although in many cases such programming may result in a more equitable distribution of the tax burden, both between central and local governments and among individuals, it has placed the United States in the position of seeming to support administrations that themselves may not have appeared in the popular viewpoint to be concerned

with equity.

One can argue that local autonomy (thus pluralism on the road toward democracy) is directly related to the ability of local government to collect and use local revenues, for if they return local taxes to a central government, which then redistributes these assets back to local administrations, autonomy is most often vitiated. Thus indirectly AID may have fostered such pluralism. Local governments could use revenues to enhance local rights (or local repression), and develop locally responsive dispute settlement mechanisms.

One important issue is whether there has been a consistent pattern within any particular USAID of a country program that is integrated in justice/law/rights terms and sectoral needs: that is, where access to equitable law and justice has been an integral part of a national effort and included in the goals and objectives of all types of projects, not just those concerned with law itself. This review indicates that this has not been the case. In fact, programs were not conceptualized in these terms. Rather, there have been individual projects that were bent on improving some aspect of law or justice or regulations, but that project might have had no relationship to the rest of the program. In some cases, it seems to have been an unrelated appendix to the main Mission purposes, included as a sop to AID/W or local PVOs, or when additional funds were forthcoming from AID/Washington, or when advocated by individual Mission elements.

If the USAIDs experiences have been fragmented in direct programming, what has been done indirectly, and how?

III AID's Experience in Indirect Programming in Law in Asia

There have been three major institutional avenues for indirect programming in law and justice by AID. These involve two institutions and a category of financing. These are The Asia Foundation, the Asian American Free Trade Movement (AAFLI), and the PVO support or co-financing efforts of individual missions.

1. The Asia Foundation

AID support to The Asia Foundation began in 1968, when AID started to fund the core budget of the Foundation with the State Department (through the Bureau of Educational and

Cultural Affairs that later became a part of USIA) providing a portion of funding for educational, cultural, media, and exchange of persons projects. When AID turned to more of a basic human needs approach to programming under the 'New Directions' of 1973, The Asia Foundation's efforts were somewhat less appreciated because they were viewed as 'elitist.' This issue is important and tensions are inherent in any small-grant organization to become less elitist. Such organizations, to have the largest impact with the smallest expenditures, will necessarily be 'elitist' for they will work through elites if they are to affect policies and change. Shortly thereafter, AID/W stopped direct core support to The Asia Foundation, which thereafter had a separate line item in the Department of State budget.

AID support did not cease, however, It continues with major grants today provided by AID/W under human rights legislation, and most importantly by individual USAIDs that provide project-specific grants that cumulatively but annually reached some \$14.5 million in FY 1991, \$15.3 million in FY 1992, and an anticipated \$17.6 million in FY 1993.³⁴ Part of these funds were or are direct AID grants. For others, the Foundation in an individual country may compete with other local and international PVOs for support under various 'PVO-Co-Financing' projects (they have different names in different countries). These umbrella projects provide the missions with flexibility in making relatively small grants to local or foreign PVOs in fields consonant with their, or the Agency's, priority objectives.

A major percentage of the Foundation's programming has been concerned with law, justice, courts, legal training, legal aid, and rights and governance more generally. Of the \$27.2 million in grants anticipated to be given in FY 1993, 77.4 percent will be for 'democratization,' which includes law and justice projects. Although the programming categories have changed to include 'law and development,' 'law and governance,' 'law and administration,' etc., a judicious (sic) estimate of the percentage of grant funds made available by the Foundation over the past generation would perhaps reach to one-third, depending on definitions, years, and other desiderata. Whatever the figures may be, and here again pursuit of such specificity would add little to our understanding of the dynamics of the processes involved without field work, these programming areas have been since the early 1960s a major component of the Foundation's

³⁴ Of total cash resources of \$30.4, \$33.2, and \$37.5 million in those respective years. There were in-kind contributions (largely in books) of between \$13-14 million in each of those years.

activities.

A selective country programming review of the Foundation's proposed FY 1993 budget is instructive in the degree to which law, justice, and related topics figure prominently. The Foundation now prepares its budgets on the basis of 'issues' (not necessarily listed in priority order, so 'Issue I' may not necessarily be the top priority) and within each issue a set of objectives, followed by evaluative criteria for each objective. For example (the following categories exclude other governance/democracy projects, as well as some related to improving regulations in other fields, such as the environment, etc.):

Bangladesh	Issue I--Enhancing representative government, strengthening Parliament, promoting electoral fairness (\$318,000 budgeted in FY 1993).
	Issue II--Increasing the efficiency and accessibility of the justice system. (objectives include streamlining court administration, reducing backlog, improving legal education, promoting legal aid, etc. (\$355,000 budgeted in FY 1993).
Cambodia	Issue I--Assisting the legal and judicial reform process, including legal training, traditional mediation, and independent judiciary (\$280,000 budgeted in FY 1993).
China	Issue IV--Legal development (\$84,600 budgeted in FY 1993).
Indonesia	Issue I--Strengthening the capability and responsiveness of the Parliament, including enhanced public awareness of legislative functions (\$371,000 budgeted in FY 1993).
	Issue III--Enhancing public access to and understanding of the law (\$365,000 budgeted in FY 1993).
	Issue IV--Strengthening the legal foundation for private sector growth, including judicial training in civil and commercial law, protection of intellectual property rights, etc. (\$211,000 budgeted in FY 1993).
Korea	Issue III--Furthering the efficiency and independence of the Korean legal system, including judicial reforms, support of the

Constitutional Court, refining legal education, improving legal resources to professionals in law (\$210,000 budgeted in FY 1993).

Mongolia Issue I--Strengthening the new Parliament (\$140,000 budgeted in FY 1993).

Issue III--Advancing the legal and constitutional underpinnings of democratic government, including an independent judiciary (\$233,000 budgeted in FY 1993).

Nepal Issue I--Enhancing Parliament's capabilities (\$366,000 budgeted in FY 1993).

Issue II--Improving access to the law (\$313,000 budgeted in FY 1993).

Pacific Island Nations

Issue I--Strengthening Parliaments (\$129,000 budgeted in FY 1993).

Issue II--Increasing legal rights and participation of Pacific Island women (\$76,000 budgeted in FY 1993).

Issue III--Strengthening legal systems, including harmonization of customary and formal legal systems, and improving management of formal and informal court systems, access to law, etc. (\$368,000 budgeted in FY 1993).

Pakistan Issue I--Strengthening national and provincial legislatures (\$975,000 budgeted in FY 1993).

Issue II--Increasing the capacity and responsiveness of the legal system in protecting rights and resolving disputes (\$210,000 budgeted in FY 1993).

Philippines Issue II--Strengthening accessible means of dispute resolution and government's ability to manage conflict (\$418,000 budgeted in FY 1993).

Sri Lanka Issue I--Strengthening the formulation and administration of law, including public access to justice (\$245,000 budgeted in FY 1993).

Issue II--Enhancing legal expertise for economic reform, including improved legal skills in business and commercial law (\$175,000 budgeted

in FY 1993).

Taiwan	Issue I--Enhancing the constitutional reform process (\$25,000 budgeted in FY 1993).
	Issue III--Enhancing civil rights through an independent judiciary, an active bar, and an informed citizenry (\$70,000 budgeted in FY 1993).
Thailand	Issue I--Government accountability, including issues of corruption (\$167,000 budgeted in FY 1993).
	Issue II--Political accountability, including that of the legislature (\$284,000 budgeted in FY 1993).
Vietnam	Issue I--Strengthening the legal infrastructure for economic development, including the judicial system, improving the training of legal professionals (\$138,000 budgeted in FY 1993).

One important strength of the Foundation's efforts has been the autonomy of their field offices, which develop their program priorities and budgets with a minimum (at least compared with AID) of centralized control and under which local representatives have a great deal of authority and scope for innovation.

In addition to country-specific projects, in which Korea probably has had the most comprehensive effort, there have been San Francisco-administered regional projects, the most important of which has probably been LAWASIA. Starting as an Australian initiative to bring Australian lawyers and jurists into closer contact with their Asian counterparts, it has broadened its base, and has published extensively and had a wide variety of meetings and conferences on law and legal problems throughout Asia. It has had a standing committee on human rights.

2. The Asian American Free Labor Institute

The second indirect avenue of programming is the Asian American Free Labor Institute. Founded in 1968 under AFL-CIO auspices and a companion of other older such institutes in Latin America and Africa, AAFLI has been funded by AID since its inception. Through 1977, some \$16 million had been appropriated. Figures today indicate that about \$60 million

[??] have been provided by AID for these activities.

AAFLI has interpreted its mandate rather narrowly because of the training and backgrounds of its individual field representatives, who have come out of the labor movement. Its program may be characterized as labor-specific (as opposed to consideration of such labor-related activities as employment generation, unemployment, demographic changes, etc). AAFLI has been involved in organization, training, and worker rights issues. Individual projects are more apt to be run directly by AAFLI (AAFLI thus being more operation and management oriented) than most other American non-profit organizations with projects.

The AAFLI program extends from the South Pacific to Turkey, From 1968 through 1990, AAFLI has trained 529,888 persons in education seminars. Of this number, 211,881 were from the Philippines, with Korea (68,738), Thailand (65,783), and Sri Lanka (60,007) the next largest activities. The training includes such subjects as basic trade union principles, specialized labor subjects, leadership, collective bargaining, and organizing.

It is the worker rights aspect of AAFLI that prompt consideration of its program in this paper. In some cases, the efforts of AAFLI have been direct--advising on a new labor code for Nepal. More often they have been concerned with sectoral issues having impacts on labor (farm labor, labor intensive industries, etc.), or with the concept of organization and worker rights and freedom to organize as a whole.

AAFLI has also been concerned with compliance: publicizing minimum wage regulations and attempting to get industries to adhere to them in Indonesia (USAID provided a grant to the Indonesia AAFLI office to do a minimum wage survey, which found that only 37.5 percent of the 80 factories surveyed were in compliance with the Indonesian minimum wage, which was about US\$1 per day), enforcement of child labor laws in Bangladesh, or the Equal Gender Employment Law in Korea.

In their publications, AAFLI has made the case that strengthened unions are a key to democracy, and they have in the Philippines helped to support the democratic unions against attacks from 'communist worker front organizations.'

3. PVO Grants

The third aspect of indirect programming is the generic

PVO project that is funded out of USAID budgets. These umbrella activities are sometimes quite large, as in the Philippines. The individual activities may relate to law or justice, they may be completely sectoral, and groups such as The Asia Foundation, which receives either core support or individual grants, may also compete for funds in the co-financing projects. These grants may be open to both recognized international non-profit organizations, and increasingly to indigenous PVOs, which have developed the capacity and program philosophy to manage, account for, and run projects that are likely to be closer to the grassroots. In the Philippines, USAID has run courses to improve the administrative capacity of the indigenous PVOs to manage projects and funds.

Since umbrella grants such as PVO co-financing are administered in the field, detailed information on each of the subprojects is normally not available in Washington. It becomes virtually impossible without more time than is currently available to ascertain the extent of the justice-related activities in any particular country. This information should await field studies.

Here again the statistical base is quite weak without more of an effort at this stage and in connection with this document than is justified.

4. The Ford Foundation

A related, but distinctly separate, organization that does not take government funding but works extensively on issues of law, justice, and governance, is the Ford Foundation. The magnitude of Ford funding is extensive, often rivaling a bilateral aid program. From FY 1950 through FY 1987, the Ford Foundation provided \$630.9 million in the Asia and Pacific region. Of this amount, \$115.5 was spent between FY 1982 and FY 1987. The largest single recipient of Ford funds was India with \$210 million since the inception of the program in 1950. Far behind were Indonesia (\$68.5 million), Pakistan (\$54 million), The Philippines (\$41.3 million), and China and Thailand (\$23 million each). Asia and the Pacific averaged about one-third of the total of Ford's 'Developing Country Programs,' which in the 1950-1987 period totalled \$2.1 billion.

The Ford legal program was first run from its New York headquarters, but it then spun off (taking its Ford staff) into an independent organization, the International Legal Center, still funded by Ford. That organization later became

the International Center for Law and Development in 1977, and was for five years supported by the Foundation. It now receives grants from Scandinavian and other international groups.

In the Ford "Developing Countries Program" in FY 1982-1987, a major proportion of grants were made in a variety of fields associated with justice, rights, and governance. Of the \$40.8 million spent under the general heading of 'human rights and social justice, 23 percent was for 'civil and political liberties,' 9 percent for 'international human rights and law,' 39 percent was for legal services, and 3 percent for 'refugees and migrants rights.' An additional \$13.9 million was obligated for the 'governance and public policy' theme, which included 4 percent for dispute resolution and 17 percent for civic participation.

In Asia, major Ford programs and activities in these fields are in China, the Philippines, and India. The Ford comments on the China program, which ranges very broadly over legal training and education (in five years 106 Chinese law teachers were trained or did research in the U.S.) are revealing:

A major priority of the post-Mao leadership has been to revitalize and improve the country's law, legal procedures and system of legal education. The aim of having law play a central role in Chinese economic, political and social life represents a sharp departure from the informal and often radical approach to social control and dispute resolution characteristic of the Maoist period. The emphasis on the formal legal system also constitutes a sharp departure from the traditional Chinese reliance on the guidance of human behavior through internalized moral standards, rather than through external rules of positive law, and favoring informal means of compromise over formal adjudication of conflicts.³⁵

In India, which has seen major support to aspects of law and justice over many years, Ford has started programming 'not with law reform, but at the other end of the process, with the potential users of legal institutions,' who have little access to the possibilities of law, and governments that are limited

³⁵ Ford Foundation FY 1988 Program Review, China. Document #011663.

in following legal procedures.³⁶

Ford provides support for legal aid and rights projects in such places as Indonesia, but the program has varied in scope and intensity over the years.³⁷

A core of Ford activities in these areas of concern is the Philippines. There, Ford invited two well-known academic consultants to visit the country in the closing days of the Marcos era to help determine what might be done.³⁸ The program now is extensive, and vies with The Asia Foundation as the most important source of program monies in the rights and legal field.

This report cannot now review the activities of a number of organizations that have been concerned with justice in Asia. A complete picture of the field should include an analysis of the roles of the International Commission of Jurists, Amnesty International, and Asia Watch, all of which publish annual and/or special reports on related conditions in Asian societies.

IV Conclusions

In reviewing the files of AID, as well as the limited academic literature on law and justice in Asia available in local libraries,³⁹ it has become apparent that there has been little attempt in almost any quarter to formulate a philosophical approach to law and justice in Asia, to develop a comprehensive programming strategy for the region (which--because of its diversity--may be impossible in any case), or to formulate sets of realistic goals on a national basis beyond those that have become part of the conventional 'wisdom' of what is desirable, e.g., the rule of law, and independent judiciary, and the like. Such a strategy, or a set of strategies each more culturally specific, are not desirable simply in theoretical terms, but as part of a

³⁶ Ford Foundation, Program Review, South Asia, FY 1984. Document #008376.

³⁷ For a useful paper on the Indonesian legal scene, see Terry], 'Program Statement: Human Rights-Social Justice (Indonesia). 1984. Document #011753.

³⁸ 'Human Rights and Public Affairs in the Philippines,' by Roger Plant. August 1984. Document #000762

³⁹ There is apparently a considerable amount of ephemeral literature--reports by organizations, conference papers, and the like that are important for any overall analysis. Review of such materials should await field work.

programming plan that uses the strategy to set forth (in Logical Framework parlance) goals and purposes toward which actions can be taken.

It also has become evident that there are no USAID missions that have articulated a comprehensive and integrated national programming plan in which these subjects fit. Although there is much programming in this field, it is largely through individual, uncoordinated grants or projects--mostly through intermediaries--that seem viewed by Missions as useful but not central to their activities. Over the years, the Congressional Presentations have generally excluded this field from any overall priority consideration. Although there is considerable thought now being given to the link (if any) between open political and economic systems, there has been far less work done on at the programming level on the issue of law and justice and its relationship to pluralism and democratic governance.

The Asia Foundation, and to a somewhat lesser degree the Ford Foundation, on the other hand, have successfully integrated legal/ justice/rights programming into the mainstream of their operations, and have given them major emphases. Yet no organization seems to have articulated a comprehensive philosophical statement on law and justice programming and its relationships to the development process and governance. They also seem to have avoided such issues as relationships between concepts of power and law either personally or institutionally. Perhaps these may be unnecessary in operational terms, but such analyses could point out the difficulties in predicting 'success' in such programming.

The relationship between the mode of programming in the field of law and justice through intermediary institutions may in fact become an element in the furtherance of civic societies and pluralism--both political and economic--as these institutions are strengthened. These groups often advocate pluralism as a concept and rights of various sorts more particularly. This relationship, postulated in academic works of an earlier era,⁴⁰ may be highly relevant both as a programming method and as contributory to pluralistic growth.

Certain states have allowed the development of these intermediary institutions. The most prominent are the Philippines and India (there are over 40,000 non-profit organizations registered in India). In the Philippines, in June 1990 President Aquino founded a group called 'kabisig,'

⁴⁰ See Almond & Verba, The Civic Society.

an alliance with the PVO community to push state-sponsored programs that were held up in the legislature and the bureaucracy. In a sense, it contributed to the politicization of the PVO community as PVOs were formed by relatives of government officials to take advantage of this new and important source of funding. In Thailand, PVOs have expanded, but those in more autocratic states in the fields of law and justice, such as Indonesia, are still both weak and harassed.

In Korea, the growth of such autonomous institutions was a late product of increased urbanization (and thus loss of government control) only in the mid-1980s. It has taken a revolution in Nepal to allow their growth, and in Pakistan they are still limited.

This essay cannot address the important question of the USAID capacities, either individually or separately, to plan comprehensively, administer directly, or assess local PVO capacities in the field of law and justice. It is likely that most Missions cannot do any of the above simply because they have a different range of staff who are overworked in other fields, and they have not believed that a comprehensive approach would be acceptable or desirable in AID/W. Thus, if PVOs are either useful or important or both for delivery of services or in themselves, it seems questionable whether Missions now have thought through these relationships.

Law and justice programming cannot be separated from issues of human rights or governance, and they directly relate to the furtherance of pluralism in politics and in an economic atmosphere, especially where markets have international contacts and needs. In any consideration of law and justice programs and modes of delivery, issues of governance should be essayed.

Further, law and justice programming dependent on evaluations that attempt to quantify results may miss the critical elements of access to or understanding of modern judicial systems in societies that have quite heterogeneous backgrounds. Effective improvement of justice may relate more to traditional dispute settlement than to modern courts (although both are necessary).

V Recommendations

It is recommended that AID/W pursue the analysis of AoJ projects in the wider context within Asia.

Two separate approaches are possible: the first is one concentrating on individual countries. The second focuses on

problem areas of justice systems. The advantages of the first lie in an administratively manageable, time limited, and intellectually discrete approach. The problem area approach is more suited to academic and extended analyses. The avenue recommended here is one concentrating on countries, but seeking broader understanding (within the time and financial constraints) of sectoral problems.

This approach should be pursued through in depth field studies of selected milieux within carefully selected countries. Without field studies, the complex relationships between law and justice and rights and pluralism and the means by which to further these goals will not become apparent. Field work is also required to assess the capacities of USAIDs and PVOs to program in this area. Field studies should illuminate some of the generic problems of justice systems.

Field studies should not only review projects; they should explore a range of legal and informal institutions that affect law and justice. Such studies should draw out local academicians, lawyers and judges, administrators, and knowledgeable people at the potential user level of judicial services to determine what has been done. Such studies should also gauge the potential of the foreign, but more importantly, the indigenous PVO community to contribute to the process of pluralism.

VI Narrowing the Analysis: Field Studies

Several considerations might prompt decisions as to which countries AID might sponsor further work in the field. The purposes of such field work would be the following:

- * To draw lessons from a detailed analysis of field conditions for the relationship between law, AoJ, and other related programming for the development of pluralistic or democratic governance.

- * To draw lessons from such analysis for other legally related programming and sectoral problems within justice systems.

- * To determine the most effective mechanisms for the delivery of such services to achieve such ends.

- * To determine whether the indigenous PVO is a factor in the movement toward pluralism, and if so, details on how that process works in selected countries.

* To analyze AID's direct capacities to conceptualize and program in these fields.

* To analyze the effectiveness of designated intermediaries in furthering this process.

It seems evident from this analysis that it is necessary to do some field work before definitive lessons could be learned from the study that has been done. Although the scope of this essay points out the breadth of AID's efforts, the real efficacy of any of these programs, direct or indirect, is not known through lack of field studies for most, and evaluations for critical projects and institutions.

The issue, then, is not whether field studies are desirable, but where most might be learned from such studies.

The initial inquiry was conceived broadly to allow a more free-floating analysis of the full range of AID and intermediate programming and countries. It is now appropriate to make recommendations for more detailed analyses.

The following mix of considerations, based on the above objectives, might provide guidelines for the choice of such field work. These are:

Those countries in which:

- * AID has programmed directly in legal activities;
- * AID has programmed in sectors but where there are significant legal/judicial issues raised;
- * AID has programmed indirectly through foreign PVOs (e.g., The Asia Foundation, AAFLI);
- * AID has programmed indirectly with indigenous PVOs;
- * Other organizations (Ford Foundation) have been active in the field;
- * The U.S. national interests are significant;
- * Future AID programming might be possible;
- * PVOs are significant forces for pluralism.

As we have seen, the evidence from AID direct programming in legal/AoJ fields demonstrates that the experience has been quite limited. Those countries are Nepal and Sri Lanka, and Indonesia for commercial law (in the last case, the project is

massive, but is just getting underway, so there would be little to learn operationally from that particular project).

AID sectoral programming involving law and regulatory provisions are concentrated in the Philippines, and Indonesia and Thailand to a lesser degree. All three states have been involved with local government/decentralization projects.

In all three countries The Asia Foundation has been prominent, although historically in the legal field its most extensive program has been in Korea, perhaps followed by Thailand. AAFLI has been active in Nepal on labor legislation.

AID programming with indigenous PVOs has been extensive in the Philippines, and less active in other countries.

The Ford Foundation law, governance and related activities have been most extensive in Asia in India, China, and in the Philippines.

The U.S. interests seem most striking in the Philippines, in spite of the absence of the bases, and in Indonesia. Pakistan seems the most important country in South Asia in terms of overall U.S. foreign policy, but there has been a suspension of U.S. assistance.

Future AID programming is likely to be concentrated (insofar as Asia will be on anyone's priority list) in the Philippines and Indonesia, with Sri Lanka, Bangladesh, and Nepal prominent as well (Pakistan is still excluded because of nuclear issues).

Given the complex mix above, this writer recommends that first priority in Southeast Asia should be given to the Philippines (which has the most pronounced non-profit sector), and that Sri Lanka should be given the same priority in South Asia, followed by Nepal. The choices have been made on the basis direct and indirect programming by all institutions, future U.S. and AID interests, and the presence of indigenous intermediaries to test the medium-as-the-pluralistic-message hypothesis. A great deal about legal programming itself might be learned in China, Korea, and India, but they would be of less direct interest to future AID efforts.

Preparatory to any field work in any of these states, some time should be spent in reviewing project files for each country (AID, The Asia Foundation. AAFLI) and some of the academic literature related to these fields. A small day-long conference might be held on each country to be visited, bringing in academic specialists who have knowledgeable about

law/governance issues to interact with the team chosen to do the field work, the responsible AID and consultant officers, and those in AID/State concerned with governance questions.

VII An Action Plan

An action plan needs to be developed for AoJ review in the Asia region that would supplement what has already been accomplished in Latin America. In Logical Framework terms, the goal of such actions emanating from such a plan would be:

To improve justice systems broadly defined and pluralistic governance in developing societies through public and private foreign assistance.

The purposes would be:

To develop guidelines for future programming by AID, directly and indirectly through intermediaries, to help achieve such goals.

The outputs would be:

1. An appraisal of the types of programming that have worked or failed and the conditions that contributed to either;
2. An evaluation of the capacities of the PVO-NGO-professional organization generically both as a force for pluralistic governance and as a means to deliver justice related programs;
3. Appraisals of individual organizations (domestic and foreign) in any country to contribute to such ends;
4. An assessment of the capacities of USAIDs to conceptualize, assess, work with, monitor, and evaluate justice-related activities both directly administered and through intermediaries;
5. An assessment of generic problems in justice systems that require future analysis;

6. Recommendations to AID/Washington on specific programmatic guidelines and mission activities to contribute to such objectives.

The following is an indicate set of actions and a timetable to achieve these results:

- Day 1 Approval of a plan to proceed on an Asian field evaluation[s] to be built into the Latin American studies, using the Latin American matrix. Decision on which countries to be studied, and approval to have a small seminar on this subject with outside consultants. Further searches of the literature, AID and other files on countries to be studied. Teams chosen.
- Day 5 Cables sent to the field, consultation with relevant PVOs, etc. on proposed field studies, etc.
- Day 30 Holding of seminar in the Washington area.
- Day 45 Agreement on guidelines, objectives, etc. of studies based on seminar and previous studies. Communications with field missions, PVOs, key individuals, etc. on detailed arrangements.
- Day 60 Field visits begin.
- Day 90 Field trips completed with teams returning with draft report. Draft Report begins to be reviewed in AID/W.
- Day 110 Draft conclusions and recommendations formulated and submitted to AID/W.
- Day 130 One-day seminar held with outside consultants to discuss recommendations.
- Day 150 Field guidance drafted for new AID administration.