Chapter 3

Values and Raison d'être

"Thou shall not ration Justice." This was the "epigrammatic commandment" Chief Judge Learned Hand of the United States Federal Court of Appeal for the Second Circuit gave to a gathering of volunteer lawyers at the 75th anniversary dinner of the Legal Aid Society of New York on 16 February 1951.[1]

The Chief Judge had in mind "the vital importance of making sure that accused persons do not lack for counsel needed to assure a fair trial".[2] Ideally, the same may be urged of publicly funded legal aid. In like mind, the Legal Aid Services Council adopted in 1999 as its vision that it would:

> "actively [contribute] to upholding and enhancing the *Rule of Law* by striving to ensure *Access to Justice* and *Equality before the Law* to people of limited means" (emphasis supplied).[3]

This vision statement underlines that ensuring access to justice through provision of legal aid cannot be a half-hearted or on-and-off charitable effort. Important values shared by the community are involved.

The Hon. Donald Tsang, then Chief Secretary for Administration, shared similar values when he said, on officiating at the Fifth Anniversary Reception of the Council on 22 January 2002:

> "The *rule of law* is the *cornerstone* of our society. It protects the *rights of individuals* and provides a *level playing field for all*. In upholding the rule of law, we need to facilitate *the community's access to our justice system*. Here our legal aid services play a crucial role. Through the provision of publicly funded legal aid services, the Government seeks to ensure that no one with reasonable grounds for taking legal action in Hong Kong is prevented from seeking justice because of a lack of means" (emphases supplied).[4]

The three statements above together provide an introductory interplay of the discursive components that form this Chapter. The Rule of Law, Access to Justice, Equality before the Law, and Human Rights are values justifying and buttressing the institution of legal

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1 See Dilliard, Irving (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (New York: Vintage Books, 1959) p xvi.

2 Ibid.

3 Legal Aid Services Council, *Annual Report 1999-2000*, p 8.

4 See Press Release, *Speech by the Chief Secretary for Administration, Mr. Donald Tsang, at the Fifth Anniversary Reception of the Legal Aid Services Council*, http://www.info.gov.hk/gia/general/200201/22/0122172.htm.

aid. Each of them highlights a fundamental aspect of the institution of legal aid. The Rule of Law, it can be said, underscores the **institutional** framework and objective that publicly funded legal aid services seek to serve and realize. It is also the same framework within which the other values are consummated. Access to Justice is the immediate goal that publicly funded legal aid services seek to secure for litigants and is said to be the **practical** and often the **substantive** value that publicly funded legal aid services, an essential part of Hong Kong's system of justice, seeks to achieve. Equality before the Law is similarly another such immediate goal. Equality often demands provision of legal aid services to a meaningful extent from a relative perspective, given the adversarial context of litigation in Hong Kong. Associating the provision for legal aid services with the demand for them as of right and even as a human right elevates the discourse to a **normative** level and highlights the essential nature of legal aid as an institution of a society based on the Rule of Law. The recognition and realization of human rights demand that institutions such as independent and impartial courts and legal aid should be established; at the same time it is only through such institutions that human rights are respected and upheld. This Chapter serves to study each of these values both in itself and in relation to each other; both in the Hong Kong and comparative contexts; and in relation to the institution of legal aid, both in the way legal aid contributes to their realization and to the extent they seek to provide justification for having and developing the provision of legal aid services in their various forms.

RULE OF LAW

The Rule of Law has been compared to an "empty vessel", taking in different content depending on the ideological viewpoint of the speaker.[5] It has also been described as 'analogous to the notion of the "good", in the sense that everyone is for it, but have contrasting convictions about what it is'.[6] Governments contest with their critics over the content of the Rule of Law, the former arguing that the Rule of Law has been established and maintained and the latter refuting that the claimed commitments to the Rule of Law are illusory or have been compromised and what is done has more to do with Ruling the

5 Peerenboom, Randall, *Varieties of Rule of Law: An introduction and provisional conclusion*, in Peerenboom, Randall (ed), *Asian Discourses of Rule of Law* (London and New York: Routledge) p 1.

This point has been acknowledged in Hong Kong; see *Reports of the Sittings of the Legislative Council of Hong Kong (Session 2001/02)* p 1250, where the Hon. Audrey Eu indicated on 7th November 2001 that the upholding of the Rule of Law "is a very broad topic involving a wide range of issues such as judicial independence, respect for human rights and liberties, equality before the law and clarity of legislation". The Hon. David Li, on the other hand, observed on the same occasion that 'in recent years, the phrase "rule of law" has been given a political shadow. The phrase is repeated so often, in support of so many policies, that it risks losing its meaning': Ibid, p 1234. See also Goodstadt, Leo, *Prospects for the Rule of Law: the Political Dimension*, in Tsang, Steve (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Basingstoke and New York: Palgrave, 2001), pp 195-196, urging commitment to the Rule of Law going beyond rhetoric and expediency, after discussing examples of post-1997 official statements on the Rule of Law.

6 Tamanaha, Brian, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) p 3.

governed than with the Law. Nevertheless, there is an apparent unanimity among governments and the governed in the world that adherence to the Rule of Law is "an accepted measure … of government legitimacy".[7] Hong Kong's discourse about the Rule of Law bears little difference from the above description. As Chen and Cheung illustrate, many in Hong Kong appear to have since the 1980s taken the Rule of Law as a part of Hong Kong's socio-political identity and thus a **defining characteristic** of the Hong Kong system that must not be allowed to be abrogated, compromised or diluted.[8]

Academics like Peerenboom and Tamanaha, in describing the varieties of Rule of Law debated in different jurisdictions, sought to aid the discourse by dividing the conception of the Rule of Law into two general types: a thin conception that stresses "the formal or instrumental aspects of rule of law" (or perhaps the necessities for a system of rules to be a functioning legal system) and a thick conception that builds from the thin conception to include "elements of political morality such as particular economic arrangements … forms of government … or conceptions of human rights" or "requirements about the content of the law (usually that it must comport with justice or moral principles)".[9] Chief Justice Barak of the Supreme Court of Israel, writing extra-judicially, sought to understand the complicated concept of Rule of Law by distinguishing its three fundamental aspects: *formal* rule of law, *jurisprudential* rule of law, and *substantive* rule of law. The formal aspect addresses the obligation to act in accordance with the law as a matter of order, or the rule of the law but not the content of the law. The jurisprudential aspect addresses attributes to a system of rules, such as equality of the law, stability or certainty of the law, publicity of the law, and non-retroactive nature of the law, that would constitute minimum requirements for a legal system to exist, thus ensuring a system of the rule of law and not the rule of man. The substantive aspect addresses the spectre of corrupt law (*lex corrupta*) that does not run foul of the formal and jurisprudential aspects as described above by infusing the Rule of Law with the meaning of "the proper balance between the individual and the collective", and elaborated as "the proper balance between, on the one hand, society's need for political independence,

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7 Ibid, pp 2-3.

8 Chen, Albert H Y and Cheung, Anne S Y,*Debating Rule of Law in the Hong Kong Special Administrative Region 1997-2002* in Peerenboom, Randall (ed), *Asian Discourses of Rule of Law* (London and New York: Routledge) pp 272-273.

The authors further observe that many hold such a view in spite of the fact that there is yet to be developed in the academic field a "Hong Kong conception of the Rule of Law". See, for example, Tsang, Steve, *Commitment to the Rule of Law and Judicial Independence*, in Tsang, Steve (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Basingstoke and New York: Palgrave, 2001), p 1; Griffiths, John, QC, *The Constitution of Hong Kong: The Hub of the Wheel of State* in *Hong Kong 1983* (Hong Kong: Government Printer) p 9 (where the author, the then Attorney General of Hong Kong, stated that "the greater contribution [of Britain to the world] has been the transplantation of … the Rule of Law"); and Chan, Ming K, *The Legacy of the British Administration of Hong Kong: A view from Hong Kong* (1997) 151 *China Quarterly* 567 (where the author considered the Rule of Law to be "a foremost British legacy for Hong Kong and is rightly perceived as such" by the Hong Kong people).

9 Peerenboom, Randall, *Varieties of Rule of Law: An introduction and provisional conclusion*, in Peerenboom, Randall (ed), *Asian Discourses of Rule of Law* (London and New York: Routledge) pp 2-4; and Tamanaha, Brian, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) pp 91-113.

social equality, economic development, and domestic order, and, on the other hand, the needs of the individual, his or her personal liberty, and his or her human dignity".[10]

Although the public debate in Hong Kong about the Rule of Law arguably has its own dynamics,[11] public statements have been made indicative of some of the themes and aspirations of the Rule of Law. It has been succinctly pointed out that the Rule of Law results in **certainty** about the way people interact. "Certainty is promoted when: (a) contracts are capable of enforcement; (b) rules are not only applied to all but also applied equally; (c) rights of all individuals and legal entities are recognized and respected; and (d) protection from arbitrary action is afforded to all[12]. When the virtues of certainty as described above are applied to the relationship between the Government and the governed, one finds readily the three broad understandings or sets of meanings that Tamanaha identified as running through the Rule of Law tradition, namely, **Government limited by law, Formal Legality**, and **Rule of law, not man**;[13] or the formal and jurisprudential aspects of the Rule of Law that Barak stated.

The Hon. Elsie Leung stated in her capacity as Secretary for Justice that she understood the Rule of Law to mean also: "Justice must also be reasonably speedy and affordable, because if access to the Courts is slow and costly, the rule of law will be diminished".[14] Not surprisingly, in an earlier debate in the Legislative Council, the Hon Wong Wai Yin stressed that the system of legal aid and related services was a **support system** essential to the establishment and maintenance of the rule of law in Hong Kong, in that it made "equality before the law a reality in practice".[15]

This is the conception of the Rule of Law which adequate provision of publicly funded legal aid services helps realize and maintain. In this connection, the other values underlying the institution of legal aid to be discussed in this Chapter, namely Access to Justice, Equality before the Law, and Human Rights, can be seen as part and parcel of the Rule of Law, as well as manifestations of the Rule of Law.

ACCESS TO JUSTICE

The Chief Secretary for Administration said in November 2001 at the Legislative Council that the Government's legal aid policy was to **ensure that those having reasonable grounds but lacking the means to enforce their legal rights through the**

10 Barak, Aharon, *Purposive Interpretation in Law* (Princeton and Oxford: Princeton University Press, 2005) pp 242-246.

11 See Chen, Albert H Y and Cheung, Anne S Y, *Debating Rule of Law in the Hong Kong Special Administrative Region 1997-2002* in Peerenboom, Randall (ed), *Asian Discourses of Rule of Law* (London and New York: Routledge) pp 274-275.

12 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 2001/02)*, p 1233 (per the Hon David Li).

13 Tamanaha, Brian, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) pp 114-126.

14 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 2001/02)*, p 1259.

15 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1991/92)* pp 3929-3934.

courts of Hong Kong were able to do so.[16] This statement affirmed once again the view of the Government appointed Working Party on Legal Aid in its January 1986 report (the Scott Report) that "the provision of legal aid is essential within [Hong Kong] society as a way of enabling those of limited means to obtain legal representation in the courts and thereby to secure access to justice" (emphasis supplied) and consistently maintained by the Hong Kong Government ever since.[17]

The Scott Report records that the Working Party on Legal Aid resolved in favour of devoting public resources to legal aid "as a matter of high priority", subject to regard being paid to "the characteristics of our community and the need to avoid excessive public expenditure"[18] by reference to the following comments of the Lord Chancellor's Advisory Committee on Legal Aid in England and Wales:

> 'The answer to that lies in the unique position of legal aid among social services. Legal aid is a social service but, more importantly, it is a vital part of the justice system itself. The phrase "law and order" is one of the clichés of political discourse, often employed to denote no more than the prevention of crime. But law is not merely an instrument of social control, a restriction upon individual freedom of action; it is also a positive instrument for defending individual liberties and giving reality to civil rights. Law in this positive sense as well as in its restrictive sense, is a necessary condition for order. If individuals cannot secure their legitimate rights and defend their interests through a system of justice, they will resort to other means in an endeavour to do so. For the majority of citizens, it is legal aid that *transforms* a theoretical right of access to justice into a practical reality. …… *If the rule of law and equality before the law lie at the heart of the social system, then equally legal aid lies at the heart of the legal system*' (emphasis supplied).[19]

The Hon Margaret Ng made essentially the same point when she spoke in 2002 in a seminar of the Legal Aid Services Council on "Legal Aid and the Community" stressing that legal aid should not be viewed from the social welfare angle but rather as a service to the whole community by upholding *justice* and the rule of law, and by ensuring that citizens would not be deprived of rights to a fair trial because of insufficient financial resources to engage lawyers. In this context, legal aid should not be cash-limited.[20]

"Justice" cannot possibly be limited to *access* in the sense of having an opportunity *procedurally* to seek justice, as litigants in person who could afford court fees may commence or defend legal proceedings before a court of law, typified as the institution administering and dispensing the social value called "justice". Rather, a *substantive*

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16 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 2001/02)*, p 1252. The Chief Secretary for Administration affirmed this policy objective in his speech at the Fifth Anniversary Reception of the Council on 22 January 2002.

17 *Legal Aid: A Report by the Working Party* (January 1986) paragraph 1.8. The Scott Report indicates that making legal aid available is "to meet the concern that many people would suffer hardship or were deterred from seeking access to the courts because of their inability to pay likely legal costs" which are particularly high in Hong Kong: Ibid, paragraph 2.12.

18 Ibid, paragraphs 1.9, 1.10.

19 Lord Chancellor's Advisory Committee on Legal Aid in England and Wales, *Legal Aid Annual Report (1983-1984)*. The Hon Simon Ip incorporated the point emphasized above in his speech in the Legislative Council on 1 July 1992, urging the Government to undertake a comprehensive review of legal aid services: *Reports of the Sittings of the Legislative Council of Hong Kong* (Session 1991/92) p 3941.

20 Legal Aid Services Council,*Annual Report 2001/02*, p 67.

dimension for the bringing into reality of "justice", the very thing itself,[21] is involved, for a litigant in person left to conduct the legal proceedings by himself without advice and assistance, or access to the same, could not always be expected to render a sufficiently competent and dispassionate presentation of his or her case to make "the overall attainment of justice [to be] the by-product of the collision of adversaries" in a system of administering justice by adversarial litigation.[22]

Cohn captured the substance of the issue in vivid terms:

> "Our law makes access to the Courts dependent on the payment of fees and renders assistance by skilled lawyers in many cases indispensable. Under such a legal system, the question of legal aid to those who cannot pay must not be allowed to play a Cinderella part. Its solution decides nothing less than the extent to which the State in which that system is in force is *willing* to grant legal protection to its subjects. *Where there is no legal protection, there is in effect no law.* In so far as citizens are precluded from access to the Courts, the rules of the law which they would like to invoke are for them as good as non-existent" (emphases supplied).[23]

The pairing of the *formal* or *procedural* guarantee of access to justice with the *substantive* guarantee of access to justice is necessary to ensure that the conclusion of a dispute before a court administering justice independently and impartially will be a just one, determined by the *intrinsic merits* of the case put forward by the parties, rather than other qualities of the parties themselves.[24] This is because a court may risk compromising its independence and impartiality in the adjudication of disputes if it were to assist unreservedly a litigant, acting in person, in the conduct of his or her case. Justice, after all, has to be seen to be done, in addition to being done.

While the soundness of the proposition that access to justice carries with it both procedural and substantial dimensions may seem obvious nowadays, the present understanding on access to justice is, as Cappelletti and Garth illustrates, the result of an evolution, if not transformation, in theoretical conception of the state's role in relation to the right to judicial protection. Access to justice was characterized as an individual's formal right to litigant or defend without hindrance from the state, merely requiring restraint on the part of the state and not positive state action for its protection, in the liberal, laissez-faire states of the late 18th and 19th centuries. Justice was thus regarded as a commodity "purchased" by those who could afford its costs, and those who could not were not cared for, it being their own misfortune for which they were responsible.[25]

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21 This is so, even though, as Zander acknowledges, '[the] concept of justice in legal cases … is too deep for any research project", as "[the] question is too elusive, too complex to unravel. It would require knowledge of too many unknowable facts": Zander, Michael, *The State of Justice* (London: Sweet & Maxwell, 2000), p 2.

22 See Jolowicz, J A (1988) 8 *Legal Studies* 1, 4-5.

23 Cohn, E J, *Legal Aid for the Poor: A Study in Comparative Law and Reform* (1943) 59 *Law Quarterly Review* 250, 251.

24 See Legal Action Group, *A Strategy for Justice: Publicly funded legal services in the 1990s* (London: Legal Action Group, 1992) p 112.

25 See Cappelletti, Mauro and Garth Bryant (eds)*Access to Justice: a World Survey* (Sitjhoff and Noordhoff, Alphen aan den Rijn, 1978) in Paterson, Alan and Goriely, Tamara, *A Reader on Resourcing Civil Justice* (Oxford: Oxford University Press, 1996) p 92. This view on access of justice did not inhibit voluntary efforts on the part of lawyers to offer legal aid and assistance to poor persons, so that the "credibility" of the law was enhanced, faith in the legal profession renewed, and the poor kept "satisfied": Rhode, Deborah L, *Access to Justice* (Oxford: Oxford University Press, 2004) pp 58-59.

However, since the end of the Second World War, governments in the Western liberal democracies began to accept that their responsibilities to provide access to justice "do not end with the provision of courts. The state should also ensure that people have the advice and assistance they need to discover their legal rights and, if they choose, pursue legal solutions to their problems".[26] Rights proclaimed in the earlier centuries should, by state action, be made effective; "possession of rights is meaningless without mechanisms for their effective vindication".[27] In other words, Sir Ian Jacob was reported to have said, the civil justice system "responds to the social need to give full and effective value to the substantive rights of members of society which would otherwise be diminished or denuded of worth or even reality".[28]

Governmental recognition of the necessity of state action to make access to justice effective in the sense of being realistic and realizable is not only associated with the development of the welfare state (which provided for entitlements or benefits such as housing, education and social welfare capable of being enforced by the citizen) but also urged upon by a transformation in academic discussion that in time matured into a critical examination of civil justice arrangements in the Western world known as the "access to justice" movement. Cappelletti and Garth, who documented this movement from a comparative point of view, consider the "access to justice" movement to be a "continuing social development, involving a constant debate about how much access to provide and how much and what kind of justice should result".[29] The debate has been visualized in terms of three "waves" of legal reform or reassessment: (1) the reform of institutions delivering legal aid and assistance to the poor; (2) the extension or development of "public interest litigation" or representation for "diffuse interests" and (3) the evaluation or questioning of traditional institutions of dispute resolution and the finding of alternatives.[30]

The reform of institutions of legal aid and assistance delivery is in reality a complex web of issues, i.e. whether legal aid and assistance should be *confined* to provision of professional representation or *extended* to encompass, at a community level, satisfying each and every legal need through making available of advice, non-professional assistance, and information; *modes of delivery* of legal aid; *scope* of legal aid; *funding* and associated restrictions, limitations and accountability; and *quality* assurance and accountability.

In Hong Kong, the traditional, representation based, form of legal aid has been and will face challenges over the proper manner of administration, demands for expansion in scope both in terms of categories of persons and of types of cases to be covered, and concern over funding.[31] However, it is important to note that considerations of

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26 See Goriely, Tamara, *The Government's Legal Aid Reforms* in Zuckerman, A A S and Cranston, Ross (eds), *Reform of Civil Procedure* (Oxford: Clarendon Press, 1995) p 347.

27 See Cappelletti, Mauro and Garth, Bryant (eds) *Access to Justice: a World Survey* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978) in Paterson, Alan and Goriely, Tamara, *A Reader on Resourcing Civil Justice* (Oxford: Oxford University Press, 1996) p 94.

28 See *Access to Justice*, Interim Report to the Lord Chancellor on the civil justice system in England and Wales (June 1995) Ch 1, paragraph 1, p 2.

29 Cappelletti, Mauro and Garth, Bryant. *Access to Justice and the Welfare State: An Introduction*, in Cappelletti, Mauro, *Access to Justice and the Welfare State* (Alphen aan den Rijn: Sijthoff, 1981) p 2.

30 Ibid, Pts 1-3.

31 See Chapters 4 and 5.

substantive justice are behind the Government's commitment to meet its policy objective that funding for legal aid is non-cash limited, i.e. supplementary provision may be sought if the approved provision in the annual Estimates of Expenditure is inadequate to cover legal aid costs arising from eligible legal aid applicants.[32] The Government expressed the view in 1997 that:

> "In our legal system where opposite parties present their respective cases in an adversarial manner, the legal costs to be incurred varies very significantly from case to case. It depends on a wide variety of factors including the nature and complexity of the case, the length of the trial and the manner in which the opposite parties pursue or defined their case. To impose a cap on the spending on a legal aid case would prejudice its conduct and might eventually affect the prospect of success. *This is clearly not in the interests of justice and the interest of the legally aided person.* By implication, if we are unable to impose a cost ceiling on each legal aid case, we cannot impose any ceiling on total legal aid spending, because the number of cases brought before the court, the number of legal aid applications, and the number of approved legal aid applications cannot be determined in advance" (emphasis supplied).[33]

Initiatives for a community based legal advice and assistance solution have been raised to meet perceived demands for information, advice and assistance.[34] As early as in 1992, it was raised in the Legislative Council that "people need more than legal representation in a court case as a form of legal service. Equally important are the availability of accessible and effective preventive legal services and general legal advice before a legal dispute deteriorates into litigation".[35]

Cause-based interest groups or organizations have devised strategies to pursue their particular area of concern or agenda through litigation made possible by securing publicly funded legal aid, or assistance to litigation.[36] Alternative dispute resolution has become not only a component for consultation in civil justice reform but also an element of publicly funded "legal aid" in matrimonial proceedings.[37]

"Access to justice" accordingly, as Zander observes, "has become a term of art signifying the arrangements made by the state to ensure that the public at large and especially those who are indigent can obtain the benefits available through the use of law and the legal system".[38]

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32 Legal Aid Services Council,*Annual Report 1999-2000* p 41.

33 Administration Wing, Chief Secretary for Administration's Office,*Legal Aid Policy Review 1997: Findings and Recommendations* (December 1997) paragraph 64. On the other hand, the Government did acknowledge its public responsibility to ensure that public money is properly spent and undertook to explore measures to further enhance the costs control and case progress monitoring: Ibid, paragraph 65. The Legal Aid Services Council expressed support and indicated disagreement with "any notion to place a ceiling on total legal aid spending, as this would in effect be determining the maximum number of persons needing legal aid service in total disregard of others' financial eligibility or merit of their cases": Legal Aid Services Council, *Comments of Legal Aid Services Council on Legal Aid Policy Review 1997: Findings and Recommendations* (March 1998) p 8.

34 See Chapter 5.

35 See the speech of the Hon Wong Wai Yin, in *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1991/92)* pp 3929-3934.

36 See Chapters 5 and 8.

37 See Chapter 2.

38 Zander, Michael, *The State of Justice* (London: Sweet & Maxwell, 2000), p 6.

EQUALITY BEFORE THE LAW

The progression epitomized by the "access to justice" movement has been underpinned by a principle of equality: the selfsame principle of "Equal Justice under Law" chiseled on the entrance to the United States Supreme Court. The Legal Action Group has put the point more firmly: the just conclusion to a legal problem must be accessed to by anyone on an equal basis, and not affected by "inequalities in wealth or power".[39]

What the Legal Action Group has asserted can be described as a *substantive* vision of equality, so that the poor or less well-off are put in a relatively level position in terms of availability of human and financial resources with the opposing side which may be the Government or a corporate entity. As William Blake wrote, "one Law for the Lion & Ox is oppression".[40] Lord Justice Sedley went further in his Hamlyn Lectures to indicate that the difference in "financial muscle" affects the development of the law as well, since it might be that "the lion litigates and the ox puts up with things".[41]

A similar view was expressed in 1992 at the Legislative Council that to the grassroots, legal aid and related services are meaningful at least in the sense of "*redistribution*" in narrowing the gap between the rich and the poor and mitigate the factors of social instability due to the disparity of wealth; protect the poor from those who use the law as a tool; encourage citizens to settle disputes by lawful and peaceful means and increase their understanding and approval of, and respect and support for, the legal system thus increase future "problem-solving capacity".[42]

This is to be contrasted with the principle of "*equality of arms*", by which the court tries to ensure fairness in action, so that "everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under *conditions* which do not place that party at a substantial disadvantage vis-à-vis his opponent" (emphasis supplied).[43] What the principle of equality of arms secures, however, is access to the court on an adversarial setting.[44] The principle of equality of arms secures an important goal of fair *procedures.*

A consequence of this interpretation of the principle of equality of arms is that legal aid made available to a party to litigation in the form of representation and other resources cannot possibly match in an egalitarian manner with those at the disposal of the opposing side. Sometimes the legally aided party may even have more resources than the unaided opposite party. Such a consequence may have to be a necessary one, since, as the

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39 Legal Action Group, *A Strategy for Justice: Publicly funded legal services in the 1990s* (London: Legal Action Group, 1992) p 112. In fact, distinctions other than wealth can be made among applicants, such as residence and immigration status.

40 Blake, William, *The Marriage of Heaven and Hell* (Nonesuch ed) p 203. A much more quaint way of making the point was that by Lord Justice Mathew: "In England, justice is open to all, like the Ritz" (recorded in Megarry, R E, *Miscellany-at-Law* (London, Stevens, 1955) p 254).

41 Sedley, Stephen, *Freedom, Law and Justice* (London: Sweet & Maxwell, 1999), p 46 (where Sedley LJ pointed to the increasing incidence of litigation by the rich and famous on particular aspects of fundamental rights, such as the right to advertising as a form of free expression and the right to privacy of celebrities).

42 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1991/92)*, pp 3947-3950.

43 Lester, Anthony and Pannick, David (eds), *Human Rights Law and Practice* (2nd ed) (London: LexisNexis UK, 2004) paragraph 4.6.31.

Scott Report noted, on assignment, the interest of the aided person were of paramount consideration and accordingly the **best available representation** should be provided to be commensurate with the needs of the aided person but subject to the financial restraints imposed on the expenditure of public money.[45]

HUMAN RIGHTS

The language of rights is the ingredient of powerful advocacy. A right implies the existence of a corresponding duty to fulfil the right. Hence to say that a person has a right is to say that some other person has a duty to fulfil that right if required by the first-mentioned person. The existence of such a duty on the part of another makes a right a claim deserving greater priority than other claims, such as utility or righteousness.[46]

A right may also be contrasted with a freedom; while a right connotes "benefits derived from duties owed by others", a freedom connotes "benefits derived from the absence of restraint upon oneself".[47]

A *"human*" right is accordingly not only a prioritized claim, but also a special kind of right. This is because it is a right that any person may claim by reason of his or her being a human being; a human right is in this sense "inherent". Having a human right implies of course a corresponding duty on the part of some person other than the claiming person to fulfil the human right. This duty often is to be borne not by a single person but by persons in control of the community's resources necessary to fulfil the right, who also often are themselves representatives of the community of which the claimant is part. In short, the corresponding duty is to be performed by governments, political majorities, and sometimes, even corporate entities.[48]

Why should being a human being entitle one with human rights? There are various *moral* justifications.[49] A theoretical justification more generally propounded has been the

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44 The principle of equality of arms is breached and a trial or hearing thus becomes unfair if the expert witness of one party is not given the same facilities as an expert appointed by the other party or the court; if a party does not disclose to the other party materials in its possession, control or custody that may (especially in the criminal context) be relevant to the other's case; or if a party's witnesses are not subject to cross-examination by the other party; see Lester, Anthony and Pannick, David (eds), *Human Rights Law and Practice* (2nd ed) (London: LexisNexis UK, 2004) paragraphs 4.6.32, 4.6.33.

45 The Scott Report, paragraph 5.29.

46 Donnelly, Jack, *International Human Rights* (Boulder, San Francisco, Oxford: Westview, 1993) p 20.

47 See *Leung Kwok Hung & Ors v HKSAR* [2005] 3 HKLRD 164 (Court of Final Appeal) at 201G-I (per Bokhary PJ).

48 Donnelly, Jack, *International Human Rights* (Boulder, San Francisco, Oxford: Westview, 1993) pp 20-21.

49 Donnelly, Jack, *International Human Rights* (Boulder, San Francisco, Oxford: Westview, 1993) pp 21-24. See also Waldron, Jeremy (ed.) *Theories of Rights* (Oxford: Oxford University Press, 1984); Gewirth, Alan, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982); Perry, Michael, *The Idea of Human Rights* (Oxford: Oxford University Press, 1998); Ignatieff, Michael, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001).

conception derived from the idea of the dignity of the human being. The Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in 1948 as a "common standard of achievement for all peoples and all nations" on the basis that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, just and peace in the world".[50]

The Universal Declaration of Human Rights enshrines rights in the civil and political field (such as the right to life, liberty and security of person) and rights in the economic and social field (such as the right to an adequate standard of living). The distinction of the two categories of rights, however, does not, when thoroughly considered, suggest a difference of importance. Both civil and political rights and economic and social rights demand a commitment of resources on the part of the government. As Donnelly argued, a life with only civil and political rights and without a minimum guarantee of economic and social rights is not a life of dignity.[51]

Article 10 of the Universal Declaration of Human Rights states:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

Article 10 spawned the enactment of the more comprehensive provisions of Article 6 of the European Convention on Human Rights[52] in 1950 and Articles 10 and 11 of the International Covenant on Civil and Political Rights[53] in 1966 (which was adopted in 1991 as Article 14 of the Hong Kong Bill of Rights[54]), and like provisions in many national constitutions and bill of rights.[55] These provisions, which are those of positive laws, allow one to conceive that they are commands reinforced by sanction and even moral justification.

Entitlement to legal aid has become a manifestation of the human right to a fair hearing in the determination of a person's rights and obligations and of any criminal charge against him.[56] A hearing to determine the rights and obligations of a person or a criminal charge against him may be held to be unfair and in breach of a human right, with sanctions to follow, if he is deprived of legal aid to engage legal representation.

The importance of legal representation to secure a fair hearing cannot be understated. Cheung JA highlighted this matter as follows:

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50 Universal Declaration of Human Rights, Adopted on 10th December 1948, GA Res 217A (III).

51 Donnelly, Jack, *International Human Rights* (Boulder, San Francisco, Oxford: Westview, 1993) pp 25-28.

52 European Convention for the Protection of Human Rights and Fundamental Freedoms (Signed on 4 November 1950) 213 UNTS 221.

53 International Covenant on Civil and Political Rights (Adopted on 16 December 1966, GA Res 2200 (XXI) (1966)) 999 UNTS 171, (1967) 6 ILM 368.

54 See the Hong Kong Bill of Rights Ordinance (Cap. 383).

55 Examples include the Canadian Charter of Rights and Freedoms 1982, section 11; the New Zealand Bill of Rights Act 1990, sections 25, 27; and the Constitution of the Republic of South Africa Act 108 of 1996, sections 34, 35.

56 See Chapter 6.

> "Lawyers are an integral part of the administration of justice. The rule of law depends on a very large extent on the presence of competent and independent-minded lawyers. With the increasing complexity of cases in a modern society, the contribution of lawyers both in the civil and criminal fields is invaluable. However, their importance is most acutely felt in criminal cases or quasi-criminal cases (such as disciplinary proceedings) where a person is faced with penal sanctions. In these cases the law and human wisdom consider that the accused person should have a choice of being represented by a lawyer no matter how intelligent or able he may be in his own calling. Leaving aside the emotional difficulties of asking someone who is faced with a serious charge to defend himself, a person in an advanced and open society is entitled to seek the assistance of independent experts such as a lawyer when he faces legal problems. Just as we will not expect a sick person to read up the medical textbooks in order to find a cure for his illness, we should not expect a lay-person to be able to advance his own case when he is faced with a serious charge. The entitlement to legal representation if a person so wishes is a basic and fundamental part of the concept of fair trial".[57]

In other words, legal aid by way of legal representation "is not an independent social instrument; it is an essential ingredient in the administration of justice [the first of all social services] without which the law must remain partial and socially discriminative".[58] It is, as Cohn said, "a service which the modern State owes to its citizens as a matter of principle. It is part of that protection of the citizen's individuality which, in our modern conception of the relation between the citizen and the State, can be claimed by those citizens who are too weak to protect themselves." Indeed Cohn argued that the case for governmental protection when legal difficulties arose was much stronger, because "the State is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is therefore the duty of the State to make its machinery work alike for the rich and the poor".[59] Therefore, it is unduly narrow, if not erroneous, to regard legal aid as a government subsidy to individuals in the resolution of disputes.

Arguing an entitlement to legal representation in terms of a right implies availability on demand irrespective of means and merits. An element of *inalienability* should be involved, requiring the entitlement to be taken seriously, so as to prevent resource allocation on the basis of cost-benefit analysis.[60] However, the Scott Report reasoned against making legal aid available to all subject to contribution, believing that the public might have the perception that public funds were being used to provide aid to persons with substantial means and thus thought to be undeserving of aid.[61] The Working Group

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57 *New World Development Co Ltd & Ors v Stock Exchange of Hong Kong Ltd* [2005] 2 HKLRD 612 (Court of Appeal) at 622.

58 See Law Society of England and Wales, *Twenty-fifth Legal Aid Annual Report* (1975) p 1.

59 Cohn, E J, *Legal Aid for the Poor: A Study in Comparative Law and Legal Reform* (1943) 59 *Law Quarterly Review* 250, 256.

60 Zemans, Fredrick H,*Recent Trends in the Organization of Legal Aid*, in Paterson, Alan and Goriely, Tamara (eds), *Resourcing Civil Justice* (Oxford: Oxford University Press, 1996) pp 116-117, 122.

61 See the Scott Report, paragraph 2.15. Further, abolition of the eligibility limit for legal aid might result both in a large increase in the number of legal aid applications and in an even larger increase in the number of "insurance" applications (where litigants apply for legal aid even where they expect the cost of the case to be less than their maximum contribution liability in order to avoid the possibility that the case would eventually be an unusually expensive one and to take advantage of the protection legal aid affords against inter partes costs), leading to issue of unnecessary certificates wasteful of resources.

on Legal Aid Policy Review similarly expressed the view that to target scarce resources to meet real needs, means testing was necessary so that priority might be given to assisting those who were most in need of help.[62] Even the Chief Justice's Working Party on Civil Justice Reform acknowledged that "[in] *principle*, the allocation of public funds to legal aid, particularly for civil as opposed to criminal cases, must have its limits" (emphases supplied).[63]

In the real world, legal aid provision has been subject to prioritization in terms of relative need, cost-effectiveness, and the optimum utilization of limited public resources. Various tests of means and of merits accordingly are introduced.

Hong Kong's test for limiting availability of legal aid to those cases with merits is said to have the following functions: (a) it ensures that legal aid is not an instrument by which litigation becomes an easy first resort whenever there is a conflict of interest between parties; (b) it assist the legal aid authority in exercising caution in providing support to one individual in civil proceedings against another; and (c) it protects public funds from misuse by ensuring legal aid is not granted for vexatious or frivolous litigation.[64]

The Hong Kong practice has been to impose means testing, subject to periodic review of the eligibility criteria to follow the guiding principle that **a person should have access to legal representation without undue financial hardship but that a reasonable contribution commensurate with his financial resources should be expected from him towards the costs of the proceedings**.[65] Means of a person are relative and in assessing eligibility for legal aid, they have been measured in relation to the cost of legal proceedings if the individual were to employ lawyers privately, based upon the expectation that every one would **draw on both his income and capital to meet his legal costs to the extent that he can do so without suffering undue hardship**.[66]

However, in the case of criminal proceedings, the state prosecutes and the individual has no choice but to appear in court to protect his liberty. In this respect, the concept of the "duty lawyer" acting for defendants more or less on demand has been well developed[67] and there has been recognition of special considerations, such as the seriousness of the offence and the severity of the likely punishment, justifying waiver of means testing.

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62 Working Group on Legal Aid Policy Review, *Consultative Paper on Legal Aid* (April 1993) paragraph 4.

63 Chief Justice's Working Party on Civil Justice Reform, *Interim Report on Civil Justice Reform* (November 2001) paragraph 156.

64 The Scott Report, paragraph 3.3.

65 The Scott Report, paragraph 2.12.

66 The Scott Report, paragraph 2.13.

67 The Duty Lawyer concept was at first conceived to make available to defendants at magistrate's court a lawyer to whom defendants can turn for immediate representation on the basis of a schedule of offences selected not because of their gravity or complexity but because they were "victimless" ie offences which may be accepted by the court as proven by the word of one police officer. Thus the original aim of the Duty Lawyer Scheme was to intervene in those cases to prevent the likely occurrence of injustice. The Duty Lawyer Scheme has since then evolved into a fully fledged legal aid service, available on demand at the first hearing, excluding only departmental summonses, hawking and obstruction cases.

It can be seen from the above discussion that a constant reality faced by a scheme for the provision of legal aid is **finance**. Legal aid is but one of the public services provided to realize fundamental rights and competes with other public services like health care, education, social welfare and even police service for a finite pool of resources. Expansion in the scope and availability of legal aid must take into account that each rise in financial eligibility limits will have to meet the concomitant resource implications in terms of legal fees to be paid to legal practitioners. Self-financing, when held out as a virtue, may engender prudence both in assessing applications and in monitoring progress and performance of granted cases.[68] All these approaches are perhaps taken to avoid the undesirable consequence of legal aid provision being subject to fixed budgets.

Zander has indicated with clarity that the setting of a predetermined annual budget for legal aid means, by definition, that "there must be rationing to ensure that the budget is not overspent". Like Chief Judge Learned Hand, Zander contends that "the rationing of legal aid is an attack on access to justice".[69]

In order to prevent or for the pessimist, delay, rationing of legal aid services, the development of legal aid may have to be affected. Even the day-to-day administration of a legal aid scheme may be affected, particularly at a time of financial squeeze, when a public service with an unlimited commitment allowed to seek supplementary provision of funds is generally perceived as a burden. Such a perception may even be exacerbated when the service itself allows and facilitates the raising of minority or unpopular causes, such as the Vietnamese boat people, right of abode claimants, Falun Gong practitioners and Madam Lo Siu Lan in her case against the floatation of the Link Real Estate Investment Trust.

These are the pressure heads that test the steady hand of administration of legal aid services, which at the moment is primarily in the hands of the Government.

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68 For example, should the decision-making process of a self-financing scheme be based upon regard to financial health of the fund? Should applications under a self-financing scheme be prioritized by such as accelerating cases which are likely to produce a cash return to the fund more quickly?

69 More questions may well be asked if funding can be obtained by borrowing. Zander, Michael, *The State of Justice* (London: Sweet & Maxwell, 2000), pp 10-11. Having a controlled budget means that even those who qualifies on the means test and the merits test will be denied funding when the moneys allocated to legal aid services in general or that category of work have run out.