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What is Access to Justice? Identifying the Unmet Legal Needs of the Poor

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What is Access to Justice? Identifying the Unmet Legal Needs of the Poor

Philip Alston; Dr. Alex Boraine; Justice Catherine Brannon; Hina Jilani; and Justice Earl Johnson, Jr.

Abstract

Philip Alston moderated a panel featuring Dr. Alex Boraine, Justice Catherine Brannon, Hina Jilani, and Justice Earl Johnson, Jr.. The panelists discussed access to justice for the poor in their respective countries (South Africa, Australia, Pakistan, and the United States). The panelists discussed how the current system fails to address the legal needs of the poor, and what progress is being made in that area.

WHAT IS ACCESS TO JUSTICE? IDENTIFYING THE UNMET LEGAL NEEDS OF THE POOR

APRIL 6, 2000

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PANELISTS: Dr. Alex Boraine, *Vice-Chair, Truth and
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Justice Catherine Branson, *Justice,
Federal Court of Australia, New South
Wales, Australia*
Hina Jilani, *Founder, Women's Legal Aid
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Justice Earl Johnson, Jr., *Associate
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MR. ALSTON: Thank you very much.

This morning I got a message on my answering machine asking me if I would send a copy of my résumé to the people who are hosting a diplomatic dinner next week because they needed to know where I should be seated. In other words, they would evaluate my résumé to decide how close to the important people I should be. When I evaluate my own résumé, let me say I have no right to be chairing or moderating a session with such eminent exponents of the art and practice of access to justice.

I am, in fact, Australian by origin. The very first time I left Australia was actually to attend a conference called "Legal Aid and the Law Student," which was held in Singapore in 1970. It was a great experience. There were law students from all over the South East Asian area. On the final day of the conference, we had the great pleasure of the Attorney General of Singapore addressing us. We spent much of our time looking at the U.S. experience, which Justice Johnson was so central to.

The Attorney General of Singapore said, "Now, it's very important for all you law students to understand what's happening in the United States. It's good that you've had a week to talk

about it. Don't make a mistake by thinking that these sort of ideas are applicable in our region. And I want to say to the Singaporean students that the clinic that they are talking about will not be going ahead. Thank you very much, ladies and gentlemen, for your attendance at this conference." That was the beginning of a growing awareness in far-flung parts of the globe of the central importance of access to justice.

I just want to mention two recent activities that I have been involved with which have highlighted the importance of access to justice. For some eight years, I was the Chair of a United Nations committee dealing with the unfortunately obscure subject of economic and social human rights. In that context, we discovered that governments will go to great lengths not to make human rights justiciable in the first place, so that if you have such problems, you won't be able to get near a court. But where we discovered much more admirable and progressive approaches, they were normally coupled with the inability of those who are most in need to get their cases into court, and very little was ever done to facilitate their access to justice in relation to the issues which most concerned and affected their very livelihood.

I had the privilege last year of finishing a very major study on human rights within the context of the European Union of which I am now a resident—being still, of course, an alien there. The conclusion drawn by a group, which included Mary Robinson, the current UN High Commissioner for Human Rights, and various other distinguished experts in the field, was that the European Union actually lacks a coherent, and even serious, internal human rights policy. It is very good at pronouncing its external policies, but when it comes to human rights within the Community, it tends to say that that's not a matter which should concern it directly.

The European Council dismissed our recommendations to handle human rights violations by the European Union by stating the recommendations were completely unnecessary. Why were they unnecessary? Because anyone who had such a problem could simply go to the European Court of Justice and get their rights vindicated. Going to the European Court of Justice is about as easy as going directly to the U.S. Supreme Court.

So again, within the European Union it was almost impossible to get a judicial hearing to discuss the results of the study

that we undertook in terms of access to justice within the Community, particularly for poorer citizens or groups representing disadvantaged people. But the Union's official position still was the fallback that "The court is there; that is sufficient," and various specific proposals to facilitate an access-to-justice approach were clearly rejected. I think it is clear, then, that regardless of the context, whether it is a very rich society like the European Union or very poor societies struggling with very different issues, access to justice is absolutely central.

The agenda that we've got in the next few days provides a marvelous opportunity to explore the possibilities that might exist in the future, the phenomenon of globalization, and the opportunities for a greater commonality of action. I very much look forward to hearing all of the contributions.

This afternoon we have four speakers. They will speak for twenty minutes each, and I hope not more, because it would be nice to have time for a few questions at the end.

The first speaker, appropriately I think, is Justice Earl Johnson, Jr., basically "Mr. Access to Justice." Justice Johnson started in the mid-1960s working with Ford Foundation-sponsored neighborhood programs; became the second Director of the Legal Services program of the U.S. Office of Economic Opportunity, precisely the programs that my young colleagues and I spent so much time admiring and debating thirty years ago in Singapore; and then drafted the first version of the Legal Services Corporation Act of 1974. If he were Australian, I might suspect that he had been appointed to the bench in order to take him out of all of these trouble-making, access-to-justice activities; but if that was indeed the case, since his appointment in 1982, he has proved to be irrepressible and continued to be very much at the forefront of a wide range of activities in relation to access to justice.

It is a great pleasure to welcome him and invite him to address you.

JUSTICE JOHNSON: Thank you very much for that kind introduction.

I had not anticipated that Mr. Cooper in his welcoming remarks would provide such an excellent synopsis of my own speech today.

As he mentioned, in 1997 Judge Robert Sweet asked, and

then answered, a fundamental question: "What needs to be done to help the courts maintain the confidence of the society and to perform the task of ensuring that we are a just society under a rule of law?" Judge Sweet answered, to shorthand it: "We need a civil *Gideon*; that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system." No one could say it better, but we can say it longer.

There is some irony in the fact that last years Judge Sweet's own former law firm, where he spent his pre-bench career, earned three times as much as the entire budget of the Legal Services Corporation (or "LSC"), some indication of what it means that the United States still lacks a right to counsel in civil cases; US\$1,000,000,000 for a single law firm to represent maybe a hundred or so corporations, while the federal government was only willing to spend US\$300,000,000 on legal services for about 40,000,000 poor Americans.

Even adding in Interest on Lawyers Trust Accounts ("IOLTA") and other federal, state, and local funding, the most recent LSC Annual Report finds that all government programs in total, including LSC and all the rest, is supplying less than US\$600,000,000 for civil legal services. There are a half-dozen law firms in this country each of which took in more than the US\$600,000,000 again the amount that our governments, federal, state, and local, now spend on legal representation of the poor.

Now, I want to be clear. I am not criticizing these law firms for being prosperous, but I am criticizing our government for being penurious, not just penurious, but penurious about what Reginald Heber Smith called, "the cornerstone of American democracy," equal justice for all, irrespective of means.

Before venturing beyond the shores of the United States, I would like to pass on a couple of other disturbing comparisons. At its peak in 1981, the LSC budget, then US\$321,000,000, represented less than 1.5% of the US\$23,700,000,000 the people of the United States spent that year on lawyers. That is a little over 1% of the nation's expenditures on lawyers to provide legal representation for nearly 20% of the population. But now, two decades later, the combined governmental expenditures on civil legal services for the poor, US\$600,000,000, represents only

0.5% of the more than US\$130,000,000,000 the nation currently spends on lawyers. This is not exactly progress since we have moved from an inadequate 1.3% to a dismal 0.5%, a precipitous 65% decline in the poverty population's share of the nation's legal resources.

Nonetheless, US\$600,000,000 may sound like a lot of money to an American audience, and especially to legal services advocates accustomed to seeing civil legal services treated as a third-class afterthought to the justice system rather than the essential and integral component it is. Yet, US\$600,000,000 is a vast improvement only in the sense that a five-dollar bill seems like a fortune to a homeless beggar who has grown accustomed to nickels and dimes. In my view, we will never have adequate government funding of civil legal services in this country unless and until we have a sea change in our view of what adequate funding is.

When I first began researching civil legal services in other countries in 1973, I was only a few years away from my experience as Director of the Legal Services program of the Office of Economic Opportunity (or "OEO"). While there, I had seen the OEO Legal Services Program increase this nation's investment in civil legal services for the poor by eight-fold, from the US\$5,000,000 it had been for the entire country under charitably funded Legal Aid to over US\$40,000,000 in federal funding, which is like US\$120,000,000 now in current dollars.

So I approached our research into other countries' legal services efforts with a typically chauvinistic attitude. As most Americans would, when I started looking at other legal aid systems, I assumed it would turn out that we were well ahead of other countries when it came to providing lawyers to those who couldn't afford their own. What I found was an eye opener.

Let me begin with the legal guarantee, what we call the right to counsel. Where our country has had a guaranteed right to counsel in criminal cases since 1963, as was pointed out earlier, there is no such right in civil cases. The first shock I experienced when I began researching other legal aid systems was that, somehow, other nations also committed to democracy had recognized the critical importance of equal justice and assigned it a much higher priority. Early on, I learned about the rather primitive right to equal justice that came over to America from

England along with the rest of our common law legal system, the Statute of 1495, and the Statute of Henry VII, and I also learned about similar statutory rights to counsel in many other countries.

But as my research carried me beyond England and the common law world, I was even more astonished to find that the interpretations our courts have accorded our constitutional due process and equal protection guarantees stand in sharp contrast to the treatment similar constitutional language has received at the hands of the high courts in other countries. In 1937, over sixty years ago and a quarter-century before our Supreme Court decided *Gideon v. Wainwright*, a poor person asked the Supreme Court of Switzerland to rule whether indigent Swiss citizens have a right to free counsel in civil cases under that nation's federal Constitution. The Swiss Constitution contains a guarantee that "all Swiss are equal before the law," not unlike the U.S. Constitution's guarantee that its citizens will enjoy equal protection of the laws.

In a case entitled simply *Judgment of October 8, 1937*, the Swiss Supreme Court concluded poor people could not be equal before the law in the regular courts unless they had lawyers just like the rest of the citizenry. Consequently, it held the governments of the cantons were required to provide free lawyers to indigent litigants in all civil cases requiring "knowledge of the law." Similarly, in a decision of June 17, 1953, the German Constitutional Court also has made it clear that that nation's constitutional guarantee of a fair hearing in civil cases may require appointment of free counsel for poor people where the legal aid statute does not.

But the Swiss and German right-to-counsel decisions pale in significance to the 1979 decision of the European Court of Human Rights, called *Airey v. Ireland*, also referred to below. This landmark opinion emerged from the case of an indigent Irish woman who sought judicial separation from her husband.

Now, the European Convention on Human Rights and Fundamental Freedoms does not guarantee indigent litigants a right to free counsel in so many words. All that Article 6 of the Convention does guarantee is that all civil litigants are to have "a fair hearing." The court held that no litigant could receive a fair hearing in the regular courts without a lawyer and, conse-

quently, the Member Governments must provide free counsel to those unable to afford their own.

But in the course of its opinion in *Airey*, the European Court of Human Rights issued an unusually powerful statement about government's affirmative obligation—any government's affirmative obligation—to provide equal access to justice for low-income citizens. It said: "The Convention is intended to guarantee, not rights that are theoretical or illusory, but rights that are practical and effective. This is particularly so of the right to access to the courts, in view of the prominent place held in a democratic society by the right to a fair trial." The court concludes that the possibility to appear in person without a lawyer before the trial court does not provide the applicant with an effective right of access.

The Irish Government maintained:

In the present case there is no positive obstacle emanating from the State and no deliberate attempt by the State to impede access. The alleged lack of access to the court stems not from any act on the part of the authorities, but solely from Mrs. Airey's personal circumstances, she is poor, a matter for which Ireland cannot be held responsible.

The court does not agree. In the first place, hindrance, in fact, can contravene the Convention just like a legal impediment. Furthermore, fulfillment of a duty under the Convention, on occasion, necessitates some positive action on the part of the State. In such circumstances, the State cannot simply remain passive and there is no room to distinguish between acts and omissions. The obligation to secure an effective right of access to the courts falls into this category of duty.

Now, unfortunately for the poor of the United States, in a 5-4 decision filed just two years after *Airey*, *Lassiter v. North Carolina*, the U.S. Supreme Court held constitutional due process is satisfied in a civil case even though a poor person lacks counsel. So the constitutional right to a fair hearing in Europe requires government to provide free counsel to poor people in civil cases, but the constitutional right to due process in the United States does not impose such a requirement. Somehow, legal representation is essential to fundamental fairness in Europe, but not in the United States. Remarkable people, these Americans! They all come with a law degree, evidently.

Turning from the legal entitlement to counsel to the level of government investment, it undoubtedly would come as a surprise to the average American—not necessarily to the people in this audience—to learn where we rank compared to many European and British Commonwealth countries when it comes to public investment in civil legal services for those unable to afford counsel. England, with a population of only 50,000,000 people, now outspends the United States in absolute terms almost three-to-one, despite our nation's population of over 270,000,000 people. The English Government's net expenditure on civil legal aid is currently over US\$1,500,000,000 per year, while ours is at US\$600,000,000.

But it is when we look at per capita expenditures that the comparison becomes truly remarkable. For the United States, the combined federal, state, and local government investment works out to about US\$2.25 per person. That compares to the English expenditure of US\$32.00 per person. If the U.S. Government funded Legal Services as generously as the major Canadian provinces, the Netherlands, New Zealand, or Sweden, it would have to spend in the range of US\$2,000,000,000 to US\$3,500,000,000 a year on civil legal services. But England represents a still higher league. If the U.S. Government were to spend as much on civil legal services proportionately as the English Government does, the annual budget would exceed US\$8,500,000,000.

This vast disparity in legal services funding puts the United States and England at opposite ends of a very broad spectrum. It also means we are at very different steps on the road toward a society, which truly offers all its citizens equal justice. And thus, we face very different problems. To borrow a health services analogy, the United States is in a triage situation—indeed, one of extreme triage—trying to pick the relative few we will offer a free lawyer.

On the other hand, England—and, to a lesser extent, some of the other European and Commonwealth countries—are in a cost-containment mode. They are facing the problems the health care industry in this country might call managed care—that is, how to keep the costs down while continuing to give all their citizens the right to equal justice that these nations endeavor to guarantee.

I do not mean to suggest by all that I have said about the current state of legal services in the United States that we don't have high-quality lawyers delivering high-quality legal representation to the poor in this country. No, the contrary—I continue to be amazed by the dedication, imagination, and professionalism of so many Legal Services lawyers, including those who appear before the California appellate courts. In addition, they have become experienced practitioners of triage. In that sense, they have much to offer emerging democracies and developing countries that lack legal resources or resources in general.

In a few cities, like New York, they also benefit from the generosity of the local bar, foundations, and other private charity to augment the government funding. But to the extent justice depends on charity, it also is destined to be unequal. Let me illustrate my point. Because of an unusual concentration of private funding, a diverse array of Legal Services agencies serving San Francisco's 100,000 poor people have four times the resources per poor person as do those agencies serving the 2,000,000 poor people in my home county of Los Angeles. If the United States had public funding at the level that San Francisco does largely through private charity, we would be a lot closer to some of the European and Commonwealth countries I have discussed this afternoon.

But we do not, not even close, which brings us back to Judge Sweet and his call for a civil *Gideon* in the United States. It is time that the United States, its government, and its courts joined the growing international consensus that words like due process, fair hearing, equal protection, and equality before the law express a universal principle: a right to equal justice that is to be enjoyed by everyone. And, as the European Court on Human Rights pointed out, if that right is to be practical and effective, and not merely theoretical or illusory, for those unable to afford counsel it must include the right to a lawyer supplied by government.

So when someone asks, "What is equal access to justice?" I would answer that is what it is—certainly a necessary, but not necessarily sufficient, condition: a guaranteed right to counsel in civil cases. And if they asked, "Why is it important?" I would answer that it is important because, without it, a nation's poor people are less than full citizens and that nation is less than a true democracy.

Thank you.

MR. ALSTON: Thank you very much, Justice Johnson, for that marvelous survey of approaches elsewhere. It is very heartening, I must say, to one who works in the international human rights field to hear the approaches and precedents in that area being introduced so directly by comparison with U.S. approaches.

The next speaker is the Honorable Justice Catherine Branson, a compatriot of mine, a member of the Federal Court of Australia, an extremely important court with a very wide jurisdiction. Justice Branson has been active in virtually all levels of the law in Australia, whether as head of the Attorney General's Department in her home state, whether as a senior counsel, and, very importantly, currently as President of the Australian Institute for Judicial Administration. It is a particular pleasure for me to welcome her here this afternoon.

JUSTICE BRANSON: Thank you, Philip.

I wish to open by challenging the notion that access to justice, even for the poor, is exclusively—or, in some cases, even principally—a matter of money. Of course, not being poor is likely to correlate positively with one's capacity to obtain one's desired result from almost any legal system, but the relationship between money and justice is not always, I suggest, a simple one.

Those who have limited financial resources will be assisted by money in obtaining legal representation, paying court costs, and meeting the other expenses that arise out of litigation, but money alone will not guarantee them a fair go in the courts. Money does enhance access to litigation, but I suggest that it does not guarantee access to justice. This is because access to justice is a more complex issue than mere access to litigation. Legal representatives and judges alike need to be sensitive to the fact that any individual's values have a cultural setting. All individuals have a tendency to see the world in the light of their own experience.

In Australia—and, I suspect, in most of the countries that are represented here today—lawyers and judges are primarily literate in the culture of the middle classes from which they are likely to come. They will relate intuitively to parties with a similar background, and they will tend to view facts in the light of their own background and their own experiences, regardless of

the cultural environment in which such facts are embedded. It is for this reason, I suggest, that ethnic minorities and indigenous groups particularly often find themselves in a disadvantaged position before the courts, particularly when their opponents before the courts are themselves from the middle classes or are government institutions. In this sense, disadvantage in terms of access to justice is in addition to other forms of disadvantage. This is not merely the consequence of the material, social, and educational disadvantages known to be common amongst ethnic minority and indigenous groups.

The interests of justice demand that issues of cultural disadvantage in our courts be addressed. Public confidence in the courts also requires that issues of cultural disadvantage be addressed. The perception among people from ethnic and racial minorities that they tend to be losers in our courts undermines their confidence in the fairness of the legal system. Some may even see the system as racially biased.

In my experience, racial bias within the justice system in Australia—and, I suspect, elsewhere—is rare. I know the extent of the commitment of my judicial colleagues to do right to all manner of people “according to law, without fear or favour, affection, or ill will.” Those words are taken from the oath taken by all judges of the Federal Court of Australia. However, before we can be confident that our commitment reflects reality, we need to enhance our cultural awareness generally and our sensitivity to the extent to which our judgments may be affected by our own values and our own views, our own experiences.

None of this is intended to deny that having sufficient money to assure access to legal advice and representation is an important aspect of access to justice. In many cases, it is a necessary condition of access to justice, but I suggest it is not a sufficient condition.

This afternoon I will seek to illustrate what I have already said by reference to what is probably the most disadvantaged section of the Australian community, its indigenous peoples. I have chosen this group because, since the Federal Court of Australia has been given jurisdiction to make determinations of land title, aboriginal and Torres Strait Islander peoples have become a significant body of litigants in my court.

I will start by providing some background information

about Australia and indigenous Australians. This information about indigenous Australians, of necessity, glosses over the diverse experiences and life styles of aboriginal and Torres Strait Islander peoples and, indeed, the diversity of non-indigenous Australian experience. Nonetheless, it is sufficient, I think, to reflect the reality of a seriously disadvantaged sector of the Australian community. I will then turn to outline briefly the background to the issue of native land title in Australia, and I will identify the efforts that have been made to assure that legal advice and representation are available to indigenous Australians in this important area. I will close with an examination of some of the structural and other difficulties that nonetheless face indigenous Australians in making determinations of native title. In doing so, I hope to identify issues of far broader significance.

Australia, as many of you will know, is a common law country with a population of 18,500,000. It is a federation, known as the Commonwealth of Australia, with six states and a number of territories. I mention the names of two of the states because I will refer to them in my address, the states of New South Wales and Queensland. Australia has a written Constitution, influenced by the Constitution of the United States, which provides for a parliamentary democracy based on the British Westminster system. That Constitution contains no formal Bill of Rights. The ultimate Australian court of appeal is the High Court of Australia, and immediately below that court is the Federal Court of Australia and the supreme courts of the states and territories of Australia.

In a High Court decision, known as *Mabo*, to which I will refer in more detail in a moment, two of the Justices of the High Court of Australia observed this:

The following broad generalizations must now be accepted as beyond real doubt or intelligent dispute, at least as regards significant areas of the territory which became New South Wales. It is clear that the numbers of aboriginal inhabitants far exceeded the expectation of the settlers. The range of current estimates for the whole continent is between 300,000 and 1,000,000, or even more. Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derive their sustenance and from which they often took their tribal names. Their laws or customs were elaborate

and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined.

In the years following the colonization of Australia, the indigenous population declined dramatically under the impact of new diseases, repressive and often brutal treatment, dispossession, and social and cultural disruption. It seems likely that, by the 1920s, the Aboriginal and Torres Strait Islander population of Australia had declined to around 60,000 people.

Today, the Aboriginal and Torres Strait Islander peoples are a small, although important, proportion of the Australian population. As of June 1996, the latest figures available, they constituted approximately 2.1% of the Australian population, but with an annual growth rate of twice the rate of the Australian population as a whole. Children aged under fifteen years account for a much larger proportion of the indigenous population than the total population. Conversely, there is a very low proportion of persons aged sixty-five years and over amongst indigenous peoples.

Indigenous Australians have a lower labor force participation rate, a higher unemployment rate, and a significantly lower median income than Australians generally. The Australian Institute of Criminology has published figures which indicate that Aboriginal and Torres Strait Islands are nineteen times more likely to be taken into custody and fifteen times more likely to be imprisoned than other Australians.

The Royal Commission of Inquiry into Aboriginal Youths in Custody found, in August 1988, 20% of all those detained in police custody were aboriginal and Torres Strait Islander peoples. The rate of incarceration for indigenous youths is almost twenty-two times that of non-indigenous youths in Australia.

A study conducted by the National Injury Surveillance Unit suggested that indigenous Australians are seventeen times more likely to be hospitalized due to family violence than non-indigenous Australians. Perhaps most shockingly, the life expectancy of indigenous Australians is between fifteen and twenty years lower than that of non-indigenous Australians.

I turn, then, to consider the decision of the High Court of Australia in *Mabo*. It was in that decision in 1992 that the High Court of Australia acknowledged, for the first time, that indigenous peoples of Australia at the time of white settlement did

hold rights and interests in the respective areas of land then occupied by them. That had not at any time in Australia's history previously been recognized. The High Court further held that where native title had not been extinguished by valid legislative or executive Acts which were inconsistent with the continuing existence of native title, indigenous peoples who have maintained their traditional protection with the land continue to enjoy native title.

Subsequently, the Commonwealth Parliament enacted the Native Title Act of 1993, which, amongst other things, provides the process by which determinations of native title can be made. That Act does provide for legal assistance to be provided in different ways for those who seek determinations of native title. Because of time limitations, I won't go through the details of that, but under the Act, through the PAIC Indigenous Body, those who claim title normally obtained funding through that PAIC Indigenous Body. Those who were on the other side of such litigation have the right to seek funding from the Attorney General, and the criterion for that is principally a reasonableness criterion.

Efforts have been made in Australia to improve judicial understanding of Aboriginal and Torres Strait Islander cultures. The AIJA, of which you have already heard, has taken steps to implement a recommendation made by the Royal Commission into Aboriginal Youths in Custody that awareness about aboriginal culture amongst the Australian judiciary should be enhanced. In its endeavors to implement this recommendation, the AIJA has facilitated the establishment in most of the Australian states and territories of local committees comprised of judicial officers and indigenous peoples involved with the justice system.

To assist judicial officers to understand the differences between their own culture and that of indigenous peoples who may appear before them, the local committees have devised programs appropriate to local conditions subject to the general oversight of the AIJA. Programs have included judicial visits to indigenous communities, both urban and rural, seminars, and formal cross-cultural training.

The Federal Court of Australia, as the court principally involved in the hearing of native title claims, has also conducted

in-house seminars and workshops at which its judges have had the opportunity to hear and speak with anthropologists, judges, indigenous people, and other experts experienced in working with and gathering evidence from indigenous Australians. However, it is still too early to be confident that Aboriginal and Torres Strait Islander peoples have—or perhaps, as importantly, perceive that they have—the same access to justice as mainstream Australians.

Courts are, of course, places where the articulate, the educated, and the socially sophisticated tend to feel more comfortable than those who do not share these advantages. Particularly, difficulties face those whose primary language is not that of the court. Moreover, problems and misunderstandings can arise inside and outside the court, sometimes with significant adverse consequences for a party, where cultural differences distort verbal and non-verbal communication.

As the statistics to which I have referred already show, Aboriginal and Torres Strait Islander peoples may face all of those difficulties when they become involved in litigation. But, in addition, they can face problems peculiarly their own. There is considerable anecdotal evidence that indicates that a significant proportion of Aboriginal and Torres Strait Islanders identify courts generally with brutal criminal law enforcement policies and practices of the past and not as places where one goes to get one's rights protected. This can result in an unwillingness to attend court or an unwillingness or inability to give evidence when they get there.

The practical significance for indigenous peoples of their fear of the courts can be seen, for example, when aboriginal mothers explain their failure to attend a Family Court hearing concerned with the custody of their child in terms of their concern about being sent to jail. One of my colleagues on the Federal Court, who found aboriginal witnesses in an employment case unusually reticent, found on inquiry that many of them had come from a remote community, had never been in a town or city center before, and some of them had never, indeed, been inside a large European building. Moreover, their culture was one of quiet and measured discourse. The experience of being questioned loudly and insistently by counsel in funny black-and-white clothes simply added to their extreme discomfort at being in the court surrounding at all. The quality of the evidence

which he was able to obtain was transformed when he made arrangements for the court to sit in a nearby park land.

Other cultural problems also impinge on access to justice. Again, native title can illustrate this point well. The Native Title Act requires Aboriginal and Torres Strait Islander people who seek a determination of their native title not only to establish their entitlement to a determination in the courts of those who they see as their dispossessioners, who are of course not required to justify their acts of disposition, but also to make the justification in ways which the legal system of those same dispossessioners will accept.

It should come as a surprise to no one to find that they see that they come to the court as outsiders. Our legal system demands the disclosure of information by way of evidence. In aboriginal society, there can be cultural prohibitions on the disclosure to outsiders of information regarding the relationship between the community and its land. Indeed, some information concerning rituals and traditional stories touching on land may only be spoken of in the presence of a limited section of the community itself, perhaps only in the presence of women or perhaps only in the presence of initiated men. There is a measure of cultural violence, I suggest, in making it the price of a determination of native title that such evidence be given publicly.

Australian courts and tribunals, including the Federal Court of Australia, are seeking means by which these issues may be addressed without undermining the overall fairness of the hearing. It cannot be known how much information relevant to indigenous community relationships with land simply does not come at all to the attention of courts and tribunals for cultural reasons. If one considers the legal process at a point earlier than the formal hearing, it cannot be known in how many cases the legal representatives of indigenous peoples, who will nearly exclusively be non-indigenous peoples, fail even to identify the existence of culturally sensitive evidence. There is a growing body of material which suggests that where the material is in the possession of indigenous women, the chance of its being ignored or undervalued is regrettably high. In this and other areas, Western cultural understanding of the role of women continues to impact on the power structures of indigenous communities.

In addition, it is common for aboriginal peoples to be reluc-

tant to speak about their connection with the land other than while on that land. There can be cultural impediments in the way of individuals speaking for a community unless they can do so in the presence of others who have a particular relationship with the community.

Unless courts are willing to sit in places where they do not usually sit and to modify the traditional ways in which they take evidence, access to litigation may not amount to access to justice for these indigenous peoples. The Federal Court of Australia now sits regularly on the land the subject of a claim for native title determination. This may involve travel to remote locations in Australia and, on occasion, may involve camping out. Sometimes a group of indigenous witnesses are sworn in at the one time and, in effect, the court takes group evidence from that group.

There have been instances in which the court has made orders excluding individuals of one or other sex, other than the judge, from the hearing to allow culturally sensitive evidence to be given. Where the opportunity has arisen to build a new courthouse in a city with a significant indigenous population, the courtroom has been designed—not yet built, I hesitate to say—in consultation with indigenous peoples in a way which takes into account cultural preferences and seeks to avoid the negative association attached to traditional courtroom designs.

That is, the Federal Court of Australia is making real attempts to address issues of cultural sensitivity, but it is still in the early days. A meaningful assessment of the success of these attempts will require the passage of further time. There are other evidentiary difficulties which I might mention just in passing.

The extent to which indigenous communities who seek determinations of native title in their favor must call for evidence of the traditional laws and customs of their ancestors at the time of the first contact with Europeans is still a moot question, but it is clear that to obtain a determination, they must establish that they possess rights and interests in the land under the traditional laws acknowledged and the traditional customs observed by them. In calling evidence touching on the traditional nature of their laws and customs, indigenous communities are disadvantaged in at least two important ways. The first is that, in comparison with the Australian population as a whole, a relatively small

percentage of indigenous Australians is older than sixty-five years of age, and this can, of itself, impact adversely on the availability of evidence. The second is the issue of indigenous health. Even after cases are started, there is a real risk that evidence will be lost if court orders are not sought and made for the preservation of the evidence of the elderly and frail in the community.

A further important matter is that once attention is focused on circumstances earlier than living memory, written records assume particular importance, but Aboriginal and Torres Strait Islanders did not, at the time of first European contact, have a written language. All written records touching on the laws and customs of the indigenous peoples about that time were prepared by European observers whose capacity to appreciate the structure and operation of the indigenous community with which they came in contact and the relationship of those communities with country and other communities was severely limited. These observers were looking at something totally foreign to their own understanding. Yet, when their records are the only contemporaneous records available to the court, almost inevitably they will be given weight, and almost certainly a weight which they do not deserve. Again, this is a matter which can severely impact on the fairness of justice received by the indigenous peoples.

So what conclusions of a more general nature can be drawn from this? The general issue which I have sought to raise is not unique to indigenous Australians or to the indigenous inhabitants of any country. All those who approach the courts who are affected by disadvantages—whether language, social skill, education, or otherwise—risk achieving access to litigation but failing to achieve access to justice.

I have chosen today to speak of indigenous Australians because a particularly significant form of disadvantage, and one that is notoriously difficult to deal with, is to fall outside the mainstream as the law and the courts, including judges, view the world. The majority of judges and those who administer the justice system generally more readily empathize with those whose experiences and values they intuitively understand than with those whose experiences and values they may neither know nor understand. It is because the culture, including the life experiences and values, of indigenous peoples can be so startlingly different from the mainstream of society that their experiences in

connection with the law can illustrate so vividly general problems relating to access to justice.

The increasing diversity amongst those who constitute the legislatures, the bureaucracies, and the judiciaries in many countries will, I am sure, lead to improvements in access to justice in this sense. Fora of this kind will also help, as will all experiences which will help those of us involved in the administration of justice develop an understanding of the extent to which we see the world through our own culture and our own experiences.

May I close by congratulating the Association of the Bar of the City of New York and its co-sponsors on its sponsorship of this international forum. The issues to be addressed over the next two days are truly international in their significance. Access to justice is a fundamental aspect of the rule of law in any country and an essential prerequisite for the protection and enforcement of the civil rights of all citizens. As lawyers, we must continue to urge governments to make available appropriate amounts of money to ensure that all persons have access to the courts. But, equally, we must remember that access to justice requires much more than mere access to litigation.

Thank you.

MR. ALSTON: Thank you very much, Justice Branson, for that very frank and insightful analysis of a major problem within the Australian legal system.

The next speaker is Hina Jilani from Pakistan. It is a particular pleasure for me to introduce Hina, who I have known for a very long time. Her *curriculum vitae* is very impressive, but doesn't tell the story. She co-founded the first all-female Pakistani law firm twenty years ago. She co-founded the Women's Legal Aid Cell to offer paralegal training to handle cases of women fleeing domestic abuse, a slightly greater problem in a society such as Pakistan than it might be in some other countries, at least. She co-founded the Human Rights Commission of Pakistan in 1986.

Overall, she has been an extremely active and effective participant in a wide range of international human rights activities, leading some of my colleagues to think that she is mainly an actor on the international stage. In fact, Hina is a lawyer who has been in the front line in Pakistan for very many years, whose life has on a number of occasions been on the line, and she has

shown immense courage and is one of the truly extraordinary practitioners of access to justice. It is a great privilege, I think, for all of us to have her here.

MS. JILANI: Thank you, Philip. I think you have spoken more as a friend, rather than the moderator of this session, and you have been very kind.

I am going to speak mostly about my experiences as a Legal Aid lawyer and how litigation has been used in the context of our social and political environment for bringing about social change.

The prospects for equal justice are largely determined by the social, economic, and political environment in which institutions function. In most parts of the world, economic disparities, unequal social relationships, and political marginalization of groups and communities persist in various degrees. It is true that the growth of inequality is experienced in proportion to the deficiency of democratic conduct in structures of governance. However, democracy as a political system, or the existence of democratic institutions alone, is no guarantee for the empowerment of all sections of the society. In order to address the issues of equity, the system has to be sufficiently imbued with values of human rights, not only in law but at all levels of social belief. In the absence of these values, democracy is merely procedural and fails to eliminate disparity and exploitation, or to create institutions that can dispense justice or satisfy the needs of the common citizen in the face of vested interests of the powerful elite.

Mobilization for change, or movements for change, face even greater challenges when the political environment restricts the freedom of movement, of association, and of expression to an extent that mobilization becomes a very difficult process to achieve. It is in these conditions that the use of litigation becomes a partner or is used as a support for the movement for change.

Nevertheless, this strategy is not without its problems, especially when it is being used in an environment where neither the law, nor the institutions which are administering the law, have the sensitivity that is necessary in order to not only give equal access to justice, but also to dispense justice, keeping in mind that there are conditions of inequality in the society.

The use of law becomes very difficult and the promotion or

the respect of the rule of law becomes extremely difficult in conditions where the law itself becomes an instrument of oppression. The concept of the respect for the rule of law presumes the law to be just and equitable and that the institutions for the administration of justice are fully sensitive to the inequality of conditions in which law is being applied. When the word law is taken to apply to any state command and every legislative act in form is considered law or mere whim exerted as an act of power comes to be known as law, the rule of law becomes meaningless in the context of justice.

Institutions, which have become the victims of hampered political growth and become weak and amenable to manipulation, are incapable of enforcing justice or influencing social attitudes. More importantly, they retain no power to ensure that the conduct of the state is in consonance with standards of human rights.

It is in this context that I am going to speak about my work as a human rights lawyer and a member of organizations that have used litigation as a strategy for change. It has been a mixed experience, and we have learned many lessons in the process of using the law or the institutions of the courts in order to gain and improve access to justice for the more marginalized communities and the more vulnerable and disadvantaged sections of the society.

One of the major realities that we have come to see and to understand is that improving access to justice is a very political process and no strategy will succeed if it bypasses the political process. So litigation cannot be an alternative to the political process for change. It can only be support for it; it can only build the support for it.

I am going to speak about one of the experiences that we have had with regard to the situation of bonded labor in Pakistan, which illustrates what I am saying perhaps better than I can express it in words. The Constitution of Pakistan does state that all persons are equal before the law and entitled to the equal protection of the law. It also states—or rather, presumes—that slavery is nonexistent in Pakistan and that all practices which are slave-like practices are prohibited. Nevertheless, the truth is that slave-like practices—and slavery itself, in fact—are very much in existence in Pakistan in the form of bonded labor, in the form of

apprenticeship practices, and also in the nature of certain social practices which relate to women, like forced marriages, for instance. So this constitutional guarantee doesn't really mean very much when the realities are not confronted and the realities are not addressed.

Bonded labor, not only in the agricultural sector but also in the industrial sector, has been a reality for a long time in Pakistan. For years, at least one particular industry, that of brick kilns, was using bonded labor and had built or relied for its prosperity on the exploitation of the labor which they forced into bondage. The practice was—and again, I think I should give you just a little bit of the background of this.

Because of the economic disparities and growing inequality in the ownership of land, a lot of the landless peasants have shifted into the urban areas. These landless peasants became most vulnerable to the exploitative practice of bonded labor. In the early 1980s, when we were called upon to address this issue, there were hundreds of thousands of people living on the peripheries of the urban areas who were working in brick kiln industries and were actually bonded slaves of the owners of those industries. They were given a sum of money as an advance payment because when they had come from the villages they had absolutely nothing to survive on. They were given this advance in order to buy some necessities of life.

This advance was taken as a debt and it multiplied so quickly that by the time these people realized that they were under debt, the debt was too big for them ever to pay off. The result was that not only a particular family, but their children and their children's children, were bonded into labor.

This practice was, in fact, discovered through legal action. When *habeas corpus* petitions were filed for release and liberation of these bonded laborers, it was then that the whole issue and the whole practice of bonded labor became visible and the court cases regarding the liberation or release of bonded labor acted as catalysts for a change of a practice that was exploitative. Now, I think here it is also important to understand how the sensitivity of institutions can either give you the strength to take an issue forward and to achieve success, or can hinder and become an obstacle to the change that is sought to be brought about. It took us years and nearly 1000 *habeas corpus* petitions to convince

courts in Pakistan that there is no law in Pakistan that authorizes the detention and forced confinement of people by employers, even if the debt was a legitimate debt.

It was even more difficult for us to convince the courts that the kind of practice to which these people were subjected and the kind of debt which bound them can never be a legitimate debt; it is exploitative, and it violates all accepted norms of social justice and human rights. Ultimately, the courts did understand that, but the understanding was translated into judicial pronouncements very reluctantly. The reason for that was that, again, all institutions in societies which are dominated by a power elite become subject to the interests of those elite. While the courts did know that there was no law and that the Constitution does not allow the loss of liberty for anyone except in accordance with law, they were not willing to concede the arguments made against the practice of bonded labor.

Another issue and another category of people in whose context access to justice and the whole issue of not only the law, but also the institutions and the social environment, become extremely relevant in order to get justice is women. In the case of women, to use the law would be folly, because the law itself discriminates against women, promotes attitudes and reinforces attitudes that have led to increased violence against women, and in some ways it condones and justifies inequality in the treatment of women.

If we look at the institutions, like the judiciary, we find that judicial pronouncements have in fact promoted the attitudes which have made women more vulnerable to abuse, have justified discrimination against them on the basis of either religion or culture or tradition. In this particular condition and in this situation, it became very difficult to use the law and expect that women would either be empowered or that any significant change would take place with regard to their social, economic, or political rights.

So how did the human rights organizations, which were using the courts in order to make the issues more visible, bring into the limelight issues regarding women?

As far as individual cases were concerned, most of the women who need to litigate do so in the area of domestic or personal law. Where the personal laws are unequal, it becomes diffi-

cult for women to expect justice or equal justice from the courts. It, therefore, becomes important for Legal Aid lawyers to bring these cases to court in order to show the inadequacy of the law and to document the inequities which are represented and demonstrated, not only in the law but in the response of judicial institutions, to the situation of women.

We also found that in order to bring about a change with regard to women, to encourage them to use laws which were beneficial, and to encourage them to join our efforts in order to bring to light the inadequacies of the law, they needed much more support. Women in Pakistan are not only marginalized, they are a category of the population that is actually at risk in Pakistan.

The dimension of violence which is perpetuated against women has to be understood in the context, again, of the law and the Constitution. This will illustrate how even accepted norms of social justice or accepted standards of human rights when applied to women become conditioned by other considerations.

The Constitution of Pakistan does guarantee life, liberty, and the security of the person. Nevertheless, if we look at the plight of women, neither is their right to life guaranteed, nor is their liberty guaranteed, without the condition of their conforming to certain social norms. I am speaking about practices like honor killings, which are the extreme form of domestic violence which takes women's lives. I am speaking about practices which are accepted by our courts where women are incarcerated in shelters in the name of protection and involuntarily confined therein.

It was only through court action that these practices were identified by Legal Aid lawyers to show that they are practices which are contravening the Constitution and violating the fundamental rights of women. It was an uphill task sensitizing institutions which are neither independent of the executive nor independent of social pressures, and which in fact have not played the role of changing social reality, but have in fact reflected social biases and prejudices.

In courts where murder of women is termed as "honor killing," it can be easy to see the attitudes which have come from these practices. There is no honor in killing anyone. Nevertheless, the "grave and sudden provocation" defense has always

been applied to situations or cases in which women were murdered by men of their family.

In cases where women were asserting their right in free choice of marriage, again the court acted as allies of those social forces which have tried to prevent women from exercising human rights, which are not only guaranteed for others but are also easily given to men. In such cases, there was no respect given to the constitutional right of privacy and to the protection of the family.

Couples who had married of their own free choice against the wishes of their families were separated actually by court decree. The Islamic penal law, which is called the Law of *Zena*, is a very notorious law in Pakistan now. The law deems any extra-marital relationship between a man and woman illegitimate, and it carries penalties like stoning to death. These laws were used against such couples. If women who had complained of rape, because of the unique kind of law of evidence that we have, were not able to prove rape, they were charged with the offense of *Zena* and sent to prison.

These are the conditions in which women find themselves absolutely powerless. They are socially ostracized. And it is, again, not just a matter of money. Legal Aid organizations are able to help women in this plight.

I think it was very correctly stated that access to justice is not just for those without money. It's not just the poor who need access to justice and who need the support of Legal Aid in order to get justice. There are many conditions which could be as crucial as poverty and would need support as much as those who are poor would.

Where there is a society in which emphasis on either national or religious ideology has minimized the scope of tolerance, intolerance becomes rampant. In such cases, it becomes even more crucial that victims of this intolerance be given support whenever needed.

In Pakistan, during the military government in the 1980s, a law of blasphemy was promulgated which neither defined what blasphemy was nor restricted blasphemy only to any derogatory remarks made against the Holy Prophet of Islam. This law also has nothing to do with the intention to commit a crime. Mere perception that the crime has been committed, or the subjective

understanding of what somebody said as being blasphemous, would open somebody to the charge of blasphemy. The offense also demands a mandatory death sentence.

Some of the cases that I have come across have illustrated situations where it is not poverty that deprives you of the right to equal justice; it is either your ethnic or your religious identity, or any kind of an identity against which social prejudice has been spread because of intolerant religious attitudes or intolerance of other ethnic groups.

Today, in Pakistan anyone charged under the law of blasphemy would find it very difficult to engage a counsel, and they would find it difficult not because lawyers are unwilling to take cases. Lawyers had been willing, and they did represent some of the people charged with this crime in the early years, but it soon became apparent that not only the lives of those who are charged with the crime are at risk, but the lives of their lawyers are at risk as well. It became very difficult to persuade lawyers to take these cases.

It was not only difficult to persuade lawyers to take these cases, but it also became very difficult to find judges to sit on a bench where such a case was coming up—and I am not surprised. One of the judges who sat on an appeal bench which had acquitted a person accused of blasphemy and sentenced to death by the trial court was killed, and the person who killed him claimed with a great deal of pride that he had done it “in the name of God.”

So these are some of the conditions in which it has become extremely important that movements for social change find for themselves the ability to mobilize and that legal aid or litigation be used as a tool for social change, with the consciousness that it has to become a partner in that social change through the political process.

In isolation, this strategy does not work. When we tried to challenge the law of evidence in the courts in the context of women, where the law said that women do not have the equal capacity to be witnesses in a court of law, we did not have much success. But we brought the question from the courts into the streets, and it is there that we were able to highlight not only the injustices of the law, but the weaknesses of the institutions. Therefore, when groups and organizations join hands to bring

about a change in the social and political lives of people, they become more and more conscious of what they need to change.

It is not just for legal reform that social movements have to work. They have to work for a reform in the culture of institutions. The culture of institutions, in fact, determines whether these institutions will condone, accept, and justify discrimination and inequality, or will they, despite inadequacies and deficiencies of the law, uphold the standards of justice and the norms of equality.

Many of the organizations that work for social change either through political movement or through more legal strategies do not base their work on the availability of resources. We know that resources are always scarce. However, the only resource on which we depend is the resource of commitment—the commitment to change, the commitment to make an environment which makes the scope for access to justice wider—and towards this end we concentrate on eliminating intolerance, discrimination, violence, and for the upholding and recognition of international standards of social justice and equality.

Thank you.

MR. ALSTON: Thank you very much, indeed, Hina.

The final speaker on this afternoon's panel is Dr. Alex Boraine. I am currently a Visiting Professor at New York University Law School, and one of the great attractions for me of being there is, indeed, the center that Dr. Boraine has set up there dealing precisely with transitional justice.

He was the Vice Chair of the now-famous South African Truth and Reconciliation Commission. He was not the Chair. Desmond Tutu was the Chair. Desmond Tutu was much of the public face, but if you speak to anyone who knows about the Commission, they will tell you that much of the brains behind the entire operation was Alex Boraine. He has since then played a very important role in spreading the extraordinary experience that he had in South Africa in order to assist efforts to achieve transitions towards justice in a great variety of countries around the world. It is particularly interesting for us to hear his experiences.

Welcome to Dr. Alex Boraine.

DR. BORAINÉ: Thank you very much indeed, and thank

you also to the organizers for inviting me to participate on this panel.

The bad news is that you've got one more speaker to hear. The good news is that I am the last one, so I expect a much better response, and you can forget about the reception for another twenty or so minutes. I just told Philip that if I go over the twenty minutes, he must not hesitate to pull me down. So you've only got about twenty minutes.

I have just come from an international seminar on transitional justice a few blocks away from here. Access to justice, as we have heard and we all know, is problematic; it's ambiguous, it's complex, and I would suggest that access to justice in a society in transition probably is even more problematic, more complex than even in the normal situation.

I have been asked to speak on the South African experience. It was a very long preparation towards that, and the Commission sat for about two and a half years, so you can imagine that I am going to have to leave out a great deal in order to confine myself to these few remarks in twenty minutes.

Let me begin, however, by saying that it is impossible to really understand the nature and work of the Truth and Reconciliation Commission in my country without really taking into account the nature of the political transition.

In the dark days of the 1980s in South Africa, where we were under a state of emergency, where thousands of people were in exile, in jail, or underground—or, as we since learned, being pursued by death squads, abducted, and tortured—you had a situation of stalemate: on the one hand, you had a powerful state which used every draconian measure possible, and yet was not able to subdue the resistance to the policies of apartheid; and, on the other hand, you had resistance movements inside and outside of the country which didn't have the striking power to overthrow a very powerful state.

The only alternative really, without continued bloodshed, was a negotiated settlement. So you moved from a repressive state and a strong resistance to a negotiated settlement where former enemies sat around a common table—a remarkable experience in itself.

We moved, over the course of about four years—sometimes a fluctuating process with its ups and downs, its breakdowns, its

restarting—until we finally came to an agreed Interim Constitution. At the very end of the debate and discussion between the negotiating parties, two generals approached Mr. Mandela and said to him:

We have been protecting the negotiations. Our security forces have made it possible for you and the government to sit and negotiate a new South Africa. If we are to understand that at the end of the process it will mean arrests, indictments, prosecution, then we will withdraw our security and we will make a peaceful election totally impossible.

To listen to Mr. Mandela describe that discussion is quite moving, because he was deeply angered, deeply hurt, but also recognized that those generals had the power to carry out what they threatened. This was the basis for what came to be known as the “Postamble,” the very last clause in the Interim Constitution, which made provision for amnesty.

I think the choices facing the new South Africa were to either simply forget the past—as it were, to lapse into amnesia—or to tie up the courts for probably twenty or thirty years, to risk a violent explosion and continued conflict, or to find some other way through this.

The two extremes, if I may put it like that, were rejected. South Africa remembered and appointed a Truth and Reconciliation Commission granting limited justice, limited access to limited justice, or perhaps another kind of justice. You can determine that for yourselves. But certainly, the debate between retributive and restorative justice was joined, partly aided by a commitment by Mandela and his chief lieutenants to the concept of *obuntu*, a word in Africa meaning humanity, but perhaps to say it a little more adequately, that it is impossible for me to be human in isolation from other human beings. Therefore, the emphasis in times of human rights violation had to be on the victims rather than the perpetrators, and on an attempt to restore a broken and abused society, because to diminish a single person would be to diminish my own humanity.

This is not a well-worked-out approach. It is almost an instinctive response. I think that where South Africa made a unique contribution was to take the amnesty clause and avoid general amnesty, as happened in so many other parts of the world in societies in transition, and to make the emphasis on the

restoration of the moral order, the restoration of human dignity, by having public hearings so that the silence could be broken and that victims could tell their stories in public for the first time, and to link that with an opportunity for perpetrators to tell their stories and, in exchange for truth, to receive amnesty for political offenses. This had never been attempted, or even since.

There are many critics of that, and some of them are in my country. Understandably, there were those who demanded then—and demand still today—their day in court, as it were. But the majority, represented by the new government led by Mandela, decided that this was the only way to bring about accountability in South Africa.

After a number of months, a group of us—including, as I see, Vincent Saldanha sitting at the back there—thought about this and worked on the Act which would give the Commission its mandate. It was a democratic process. There were many debates and discussions and workshops throughout the country, many inputs by a wide cross-section of people, until finally it came to the Standing Committee on Justice in the South African Parliament, was debated there again, amended there, and then brought to the Parliament itself, where it was passed with overwhelming support from the majority of the democratically elected members of Parliament. Bear in mind that this was the very first ever democratically elected Parliament in South Africa's history, overcoming 350 years of colonialism and racism of extreme magnitude.

The fact that this was a parliamentary process was another unique feature of the Commission. The appointment of the Commissioners was equally open and democratic, with public hearings, until finally Mandela selected Tutu and myself to lead the Commission in its work.

We had close to 25,000 victims coming to the Commission telling their stories. I wish that I had the time to share with you some of those stories—stories of abduction, of torture, of vilification, of killings and assassinations, and general harassment. This public telling of their stories ended once and for all the denial which characterized so much of the small white minority which dominated the overwhelming black majority in my country.

It gave a lie to those who said that they were simply upholding the law in making sure that terrorists and communists didn't

gain control in South Africa. It gave ordinary people the very first opportunity ever to tell what had happened to them, and thereby gained, or regained, something of their social and human dignity.

There were nearly 8000 perpetrators who told their stories and, in a remarkable way, corroborated what the victims had told in their own accounts. They told of how they had killed and brutalized and tortured.

It was a catharsis of national proportion. It was live on television every day, on radio, and in the print media, and gave access to anyone who wished to attend, and the hearings took place throughout South Africa.

At the end of the process, a five-volume report was made available to President Mandela and then tabled in Parliament, which means it became a public document and is accessible to all.

Now, there were many moments when one wondered if we were going to survive this experience. Many have said that we uncovered a great deal of truth, and that is true, but that there was very little reconciliation. I dispute that.

I think reconciliation started in South Africa long before the Commission ever came into being. It started when enemies looked across a table and decided to talk to one another rather than to kill one another. I don't think that's a bad start, actually. It was continued in the process of the Commission.

But the work has to go on. The access to justice and to truth has to go on in South Africa. The seeking of the elusive reconciliation is a process that has to go on.

I want to quote—and I am very nearly at the end—from Roberto Canas of El Salvador, who stated: “Unless a society exposes itself to the truth, it can harbor no possibility of reconciliation, reunification, and trust. For a peace settlement to be solid and durable, it must be based on truth.”

This was the goal of the Commission, to seek as much of the truth as it possibly could, to make that truth known, so that it could be acknowledged by the broader population for the very first time. The Commission sought accountability so that never again could we get away with the human rights violations which took place under cover of darkness for so long.

Pepe Zalaquett of Chile has put it this way:

Although the truth cannot really in itself dispense justice, it does put an end to many a continued injustice. It does not bring the dead back to life, but it brings them out of silence. For the families of the disappeared, the truth about their fate would mean at last the end to an agonizing, endless search.

This was the acknowledged objective of the Commission—access to some justice, to some truth, to some reconciliation. In the end, the worthwhileness of the Commission will be determined not by the number of victims who came to the Commission, because there were many others who didn't, not by the number of perpetrators who told their stories, but as to whether or not South Africa itself, both in terms of economic justice and living justice, seeks to bring an end to the society that we once knew, of racism and exploitation and inhumanity, to a society which is at peace with itself and which can determine by its own commitment to the rule of law that what it experienced once will never happen again.

MR. ALSTON: Thank you very much, Dr. Boraine.

It's a terrible thing, in front of a large audience of those who are striving for justice, to have promised question time and now be proposing to unilaterally cancel that suggestion. We do, however, have a reception waiting for us. I know that each of the speakers would be more than happy to respond to questions in that context.

Thank you very much to all four panelists.