APPLYING LEGAL AID MODELS IN NATIONAL CONTEXTS: LESSONS FOR POLICY MAKERS

A SUMMARY OF LEGAL AID SYSTEMS IN EIGHT COUNTRIES: AUSTRALIA, THE PEOPLE’S REPUBLIC OF CHINA, INDONESIA, MALAYSIA, MYANMAR, THE PHILIPPINES, SINGAPORE, SOUTH AFRICA
The report “Applying Legal Aid Models in National Contexts: Lessons for Policy Makers” is the result of a collaborative effort between the Ministry of Justice of the Government of Vietnam and the United States Agency for International Development (USAID) through the Governance for Inclusive Growth Program. The opinions expressed in this report are those of the authors and do not necessarily reflect the views of USAID or the Government of the United States of America.
# TABLE OF CONTENTS

EXECUTIVE SUMMARY ........................................................................................................ 1
INTRODUCTION ..................................................................................................................... 11
LEGAL AID CASE STUDY No 1: AUSTRALIA ................................................................. 12
  Background and history ..................................................................................................... 12
  Right to representation in serious criminal cases ......................................................... 12
  Budget .............................................................................................................................. 13
  Model of providing legal aid .............................................................................................. 13
  Example of a state Legal Aid Commission: Legal Aid NSW ........................................ 14
  Types of legal aid services ................................................................................................. 16
  Lessons from the Australian system ................................................................................ 20
LEGAL AID CASE STUDY No 2: THE PEOPLE’S REPUBLIC OF CHINA ........... 21
  Background and history ..................................................................................................... 21
  Budget .............................................................................................................................. 22
  Model for providing legal aid: a mixed model .............................................................. 23
  Beneficiaries .................................................................................................................... 25
  Legal aid providers .......................................................................................................... 26
  Types of legal aid provided .............................................................................................. 28
  Lessons from the China legal aid case study ................................................................... 28
LEGAL AID CASE STUDY No 3: INDONESIA ............................................................. 29
  Background and history ..................................................................................................... 29
  Model of providing legal aid: government funding, services provided by civil society organizations ................................................................................................................. 30
  Types of legal aid services provided ................................................................................ 33
  Challenges in delivery of services .................................................................................... 34
  Community based paralegals ........................................................................................... 35
  Legal aid provided through the courts ............................................................................ 36
  Lessons from the Indonesia legal aid case study ............................................................ 37
LEGAL AID CASE STUDY No 4: MALAYSIA ............................................................... 38
  Background and history ..................................................................................................... 38
  Models of providing legal aid ............................................................................................ 40
  Beneficiaries ..................................................................................................................... 41
  The Bar Council Legal Aid Centers: focus on criminal cases ....................................... 42
The National Legal Aid Foundation (Yayasan Bantuan Kebangsaan) ................................................................. 43
Types of legal aid services provided ................................................................. 44
Civil society organizations and legal aid ....................................................... 45
Lessons from the Malaysia legal aid case study ............................................. 45
LEGAL Aid case study No 5: MYANMAR .............................................................. 46
Background and history ............................................................................. 46
Beneficiaries ................................................................................................. 48
Sources of legal aid funding ........................................................................ 51
The model for providing legal aid: judicaire .............................................. 51
Legal aid providers ...................................................................................... 52
Beneficiaries ................................................................................................. 52
Types of legal aid services provided ............................................................ 53
Lessons from the Myanmar legal aid case study ......................................... 54
LEGAL AID CASE STUDY No 6: THE PHILIPPINES ...................................... 55
Background and history ............................................................................. 55
Legal aid providers ...................................................................................... 57
Models of providing legal aid ..................................................................... 57
Types of legal aid services provided ............................................................ 58
Beneficiaries ................................................................................................. 60
The Integrated Bar of the Philippines (IBP) .................................................. 61
Legal aid providers ...................................................................................... 61
Budget ......................................................................................................... 61
Beneficiaries ................................................................................................. 62
University law clinics .................................................................................. 62
Lessons from the Philippines legal aid case study ...................................... 63
LEGAL AID CASE STUDY No 7: SINGAPORE .................................................. 64
Background and history ............................................................................. 64
Capital cases: The Legal Aid Scheme for Capital Offences (LASCO) ............. 69
Criminal representation: the Criminal Legal Aid Scheme (CLAS) of the Law Society of Singapore ....................................................... 70
Lessons learned from the Singapore legal aid case study .................................. 72
LEGAL AID CASE STUDY No 8: SOUTH AFRICA ........................................... 72
Background and history ............................................................................. 72
Model of providing legal aid ..................................................................... 74
Types of legal aid services provided ............................................................ 78
Other legal aid providers ........................................................................... 78
EXECUTIVE SUMMARY

Introduction

This report is provided in response to a request of the National Legal Aid Agency of the Ministry of Justice of the Socialist Republic of Vietnam. It aims to provide summaries of the legal aid systems in the eight countries specified in the request. The major characteristics of these systems are briefly identified in the Executive Summary below, and are presented in further detail in the body of the report. The country case studies are presented in alphabetical order.¹

Legal Aid Case Study No 1: Australia

A mixed model of full time public defenders and private lawyers under judicaire contracts. There are eight independent Legal Aid Commissions, one in each state or territory. Every person accused of a serious crime must be represented by a lawyer or released.

Each of the eight legal aid commissions in Australia hires full time staff lawyers and also sub contracts to private lawyers as well as providing funding to the over 200 Community Justice Centers and organizations providing legal help to indigenous Australians. Approximately half of the funding is usually allocated to criminal cases. The commissions also provide duty lawyers at every local court. The duty lawyers deal with minor cases and ensure that all persons arrested, who are usually brought before a magistrate within 24 hours, are represented at a bail hearing and assisted to fill in a legal aid application if the case will proceed. Funding for the commissions is split between the national and state or territory budgets. Law Access is a telephone advice program that provides free legal advice to over 100,000 persons per year.

Lessons learned

Mixed model with substantial offices with staff lawyers and also private lawyers through judicaire provides a strong and flexible system.

- Independence of the legal aid body from government, police and prosecutors means that criminal defense lawyers provide a strong defense for their clients.
- Placing an independent ‘duty lawyer’ at each court is a good way to provide cost-effective legal aid. The public know where to go to access legal aid and the lawyers can deal with many cases every day.
- The means and merits test is set out clearly and published. Only those who cannot afford to pay are provided with legal aid.
- The system includes community legal centers which can provide advice and assistance in local communities.

¹ The research for this paper was conducted from October 3 to October 20, 2016. Interviews with key actors and previous research conducted by the author were drawn on in order to compile the report within a short time frame.
• Approximately 50% of the budget spent directly to pay lawyers appearing in criminal cases.
• The large, independent legal aid institution allows for strong control over performance, ethics, case-management systems.
• Telephone advice service provides help to around 100,000 persons per year.

**Legal Aid Case Study No 2: China**

A mixed model of full time staff lawyers and private lawyers hired under ‘judicaire’ arrangements in more than 3,000 legal aid centers, under a division of the Ministry of Justice. All lawyers are required to assist with legal aid cases through these Centers.

In 1997 the Ministry of Justice began implementing a program under which the National Legal Aid Center (NLAC) would establish a legal aid center in every province, municipality and county. Over 3,200 legal aid centers with over 14,000 staff had been established. The legal aid system has four tiers, with the national and provincial responsible for policy and coordination and the work conducted by the musicality and county level offices. All lawyers have a duty to conduct legal aid cases when requested to do so by the legal aid centers. Payments differ, with more for civil than criminal cases. Although legal aid lawyers defend those charged with criminal offences the rate of conviction in Chinese courts is over 99%. There are also more than 50,000 legal aid volunteers, mostly law students from over 600 law schools, and also “barefoot lawyers” that are similar to community based paralegals.

**Lessons learned**

• Has been able to respond to a very large population by establishing over 3,000 legal aid centers in a relatively short time.
• The organization of the system with several layers, each supervising the layer below allows for an integrated model across the country.
• Employs a mixed model of using staff lawyers and private lawyers to increase flexibility. Each office can choose their own mix, according to the needs of that area.
• Requiring all private lawyers to provide legal aid services adds to the resources for legal aid. However, those private lawyers may not be very supportive of the legal aid client, nor have the legal skills required for legal aid work, which is quite different to commercial work.
• The large number of legal aid Centers has been beneficial in spreading legal aid, but they have not included sufficient requirement to focus on criminal cases, and most persons charged and tried in the courts do not have a lawyer.
• The lack of independence of the legal aid providers means that both parties to criminal cases represent the government. The conviction rate of over 99% of criminal cases in the courts reflects a major drawback of
the Chinese system. There is a lack of strong independent representation for legally aided persons in criminal cases.

- The distribution of the budget at the provincial level creates an imbalance of supply and demand. The budgets for different provinces vary widely. The wealthier provinces have larger budgets, and can give more for legal aid. However, the poorer provinces, with the lower budgets, are the ones that have many more poor individuals who need legal aid.

- The ‘barefoot lawyers’ program is an interesting way to extend legal services when there are not enough lawyers, similar to community-based paralegals in other contexts.

**Legal Aid Case Study No 3: Indonesia**

A new government-funded national legal system implemented by accredited civil society Legal Aid Organizations. Also, a court legal aid system of legal aid posts at courts to assist with low level advice and assistance, traveling circuit courts and waiver of court fees for the poor.

The 2011 Legal aid law established a system under which government funding is managed and supervised by the Department of Law and Human Rights but legal aid services are implemented by independent civil society organizations that have been verified and accredited. To date 405 Legal Aid Organizations have been accredited with a ranking of category A, B or C, depending on the capacity and number of lawyers. Each category may be reimbursed for a different number of litigation cases, and non-litigation ‘bundles’ every year, with category A allocated the most (60 cases and 60 non-litigation bundles.) The litigation cases are all reimbursed approximately $USD 400, to make payments easier.

The system is managed by the regional offices of the Ministry and proof of work, court documents etc., can all be photographed and uploaded to an online database through an Android app on a smartphone.

Legal aid is also provided by the courts in non-complex matters through Legal Aid Posts at every court, often manned by trained paralegals, circuit courts that travel to remote areas and a waiver of court fees for the poor and marginalized.

Despite the progress made in establishing the legal aid system the large majority of those arrested on criminal charges are not represented by a lawyer and may spend months in custody before their first hearing in a court.

**Lessons learned**

- The system of funding over 400 civil society organizations to implement the legal aid services is ground-breaking. These organizations provide
services which are independent of the government even though the
government pays them on a case by case basis.

- The system builds on the strength that already exists in the national
  setting-civil society legal aid. Those civil society organizations that
  have proven that they have provided legal aid services in the past can
  now get much needed funding from the government.

- Have developed a relatively simple system of payment. Lump sums for
  litigation cases, or non-litigation 'packages' so there is no need to
  calculate differences in each case. This is easy to calculate but lacks
  the ability to differentiate between cases.

- The payment system through Android smart-phones with all documents
  photographed and uploaded to the internet-based database is innovate
  and after some significant problems in the beginning is now working
  well.

- With no legal aid commission or public defender service there is
  insufficient capacity to cover the needs of the population. Civil society
  provided legal aid is very helpful, but it is not enough. A large legal aid
  institution with staff lawyers is also needed to meet the demand.

- The legal aid posts at the courts is very helpful for minor cases. The
  posts are often manned by civil society paralegals who help people fill
  out forms, give advice etc.

- Citizens are held for far too long in custody before being brought before
  an independent magistrate or judge and legal aid lawyers often cannot
  access clients in custody. There is a weakness in the legal rights of
  those arrested.

- The court appointed lawyer scheme for criminal cases has not been
  successful because court personnel, prosecutors and police are able to
  influence which lawyers are chosen as defense counsel. They often
  choose those who do not provide a strong defense for clients and in
  many cases, do not actually appear, but provide a ‘paper defense’ only.
  This is similar to other contexts.

- Police witnesses often do not appear in criminal cases and there are
  no strong sanctions. This makes cost effective legal aid impossible to
  achieve.

**Legal Aid Case Study No 4: Malaysia**

Primarily a *judicaire* model with the professional lawyers’ association,
the Bar Council responsible for starting and maintaining a significant
system with its roots in pro bono work. Government now funding this
criminal model and providing civil legal aid with the Court providing
counsel in capital cases.

There are four mechanisms for delivering legal aid in Malaysia. These are:
1. Court funded and appointed counsel in capital cases
2. Government Legal Aid Bureaux that provide legal aid primarily in civil cases and criminal cases in which there has been a plea of guilty.
3. Sixteen Legal Aid Centers established through charitable pro bono work of members of the Malaysian Bar Council, which have provided services in criminal cases and also some civil cases.
4. The Legal Aid Foundation, a collaborative initiative in which the government provides funding for criminal legal aid cases that are handled by the Bar Council Legal Aid Centers.

All persons arrested in Malaysia are provided with legal aid. On arrest the police must telephone the Legal Aid Centre who will send a lawyer from the list approved by the Bar Association. Each person arrested receives legal aid without a means test until brought before a magistrate and a bail application has been completed. Following this an application for legal aid must be completed, and will be decided according to a means and merits test. In addition, civil society organizations provide a range of legal aid services and the courts have been providing free legal counsel to those charged with capital crimes since the British colonial days.

Lessons learned

- The government legal aid office handles civil cases and the bar association implemented system handles criminal cases. This provides more independence in criminal cases which is very positive.
- The national bar association is strong and ethical and has made a major contribution to legal aid.
- The combination of government funding and the bar association’s involvement in providing independent lawyers in all criminal cases is a good example of a country in the region achieving a relatively high quality and independent criminal justice legal aid system that is cost-effective.
- There was a problem of police witnesses not attending court hearings but it has largely been overcome by introducing and implementing performance indexes for the judges, so that if cases are delayed it will affect a judge’s chances of promotion etc.
- The bar association proved that it could carry out ethical and effective legal aid and then the government decided to provide major funding to that system, but does not try to direct it, and the legal aid services in criminal cases are independent of the prosecutors and police and government.
- The civil law cases are handled by the government system which can work well but is problematic if the cause of a poor person’s legal problem is a government representative.
Legal Aid Case Study No 5: Myanmar

Court appointed lawyers provided in capital cases. A new national legal aid law focuses only on legal aid for criminal cases and relies on judicaire.

The Myanmar Constitution includes a guarantee of legal representation in capital cases that is administered through the Office of the Attorney General, but fees for the cases are so low that often very young inexperienced lawyers are involved in these very complex and challenging cases.

Until 2016 had been no national legal aid system and small scale legal aid services were provided by pro bono lawyers and civil society organizations. The new national Legal Aid Law passed in 2016 gives authority to the Supreme Court to administer a three-tiered system: National, regional and township legal aid bodies, with a total of over 2,000 members to administer a fully judicaire system in which private lawyers are to provide services. The system will only cover criminal cases, leaving all other areas of legal aid to be supplied by donor funded civil society organizations. The new law includes the excellent UN Principles and Guidelines on Legal Aid in Criminal Justice Systems but there are serious doubts whether the delivery system with so many members of legal aid bodies that are not front line legal aid providers can work. The system has not commenced and consideration is being given to amending the law. Civil society organizations provide a range of legal aid services. Notable examples are the two pilot project Justice Centers that operate as ‘one-stop-shops’ for a range of legal aid services, modeled on the South African system.

Lessons learned

- The new Legal Aid Law has not commenced implementation phase and will only focus on criminal cases, with private lawyers and organizations providing legal aid through judicaire sub-contracts. A legal aid system should include both criminal and civil cases.
- The Law includes the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice systems which provide very comprehensive guidance.
- The Law includes three levels of Legal Aid Bodies including 330 lower level Township Legal Aid Bodies. It appears that there are too many levels and too many members of these Bodies. This is likely to lead to the budget for legal aid being used up by the administration of these Bodies rather than being paid directly to those who provide legal aid services. Most of those involved should be lawyers and others who provide services, not representatives of government departments.
- The two pilot project Justice Centers have provided an example of how a ‘one-stop shop’ legal aid provider can be effective in Myanmar. However, they are more expensive than will be possible under a larger system.
- A contributor to the cost of the Justice Centers and other legal aid providers is the non-appearance of police witnesses in criminal cases,
forcing lawyers and accused persons to come to the court many times without being able to proceed. Unless this system is solved, cost effective legal aid will be impossible.

- The court appointed lawyers in capital cases is supported by very low payments for counsel in these cases. This has led to a norm in which only very junior lawyers are usually in these cases, which are too complex and demanding for their level of experience.

Legal Aid Case Study No 6: The Philippines

Primarily a public defender model of legal aid, mixed with some judicaire, university and civil society services. Independent body leading with the Bar Association also taking role.

The national Constitution includes a guarantee of legal aid for all persons who cannot afford legal assistance. There is also a legal requirement for police to inform a person of his right to legal aid on arrest and to arrange a lawyer if they cannot afford one.

The Public Advocates Office (PAO) is the primary legal aid service in the Philippines, along with a smaller service operated by the Independent Bar of the Philippines (IBP), legal aid clinics run by universities and civil society legal aid organizations. The PAO is an independent statutory authority that is linked to the Department of Justice but not under its direction. It employs more than 1,600 full time public defenders called Public Advocates in more than 300 offices. Like Malaysia every person charged with a serious crime in the Philippines will be represented by a legal aid lawyer if they cannot afford a private lawyer. The PAO reported that it dealt with approximately 850,000 cases in 2015, including 158,000 criminal matters resulting in either acquittal or a ‘favorable result’ such as a sentence less than expected. The PAO also runs advice services including a telephone legal advice line that is manned every day of the week 24 hours a day. It also runs a specialized forensic laboratory that assists in providing forensic evidence.

Each lawyer in the Philippines is required to do 60 hours pro bono work a year in order to keep their practicing certificate and a significant portion of this is done through the IBP legal aid program.

The Barangay (village) justice system requires all persons from the same town or village who have a dispute to attempt to solve their problem through mediation conducted by panels of local leaders. Only when two panels have failed to solve the problem may it be certified as appropriate to be heard by a court.

Lessons learned

- One of the most comprehensive legal aid systems in the region
- The government funds an independent office with sufficient funds to provide a relatively good salary to over 1,500 public defender lawyers who attend the courts every day to defend persons accused with
crimes.

- The government has invested in the legal aid system. The system led by the Public Advocates Office has been able to provide good data reflecting their work, which has led to increases in government funding.
- Allowing final year law students to appear in court if supervised by a lawyer adds to the resources available for legal aid.
- There was a major problem of non-appearance of police witnesses but this has been addressed by a concentrated effort involving courts, police and the Public Attorney’s Office. Now if a police officer does not appear the judge will arrange immediate communication of this by email and a sanction appears on the record of the police officer. This makes cost effective legal aid possible.
- The independent bar association also provides legal aid services which is a good addition but would not be enough without the large government funded but independent PAO.
- The large legal aid institution allows for strong control over performance, ethics, case-management systems.
- Universities and civil society legal aid providers help to extend the resources of legal aid providers.

**Legal Aid Case Study No 7: Singapore**

The government provides civil legal aid, the national bar association (the Law Society) provide criminal services now funded by the government and the Courts provide counsel in capital cases. A mixed model with a relatively small number of full time lawyers, substantial *judicaire* services involving ‘volunteer’ lawyers paid reduced fees, compulsory law student participation and civil society.

The government has established a system of providing legal aid in civil cases, the Court has established a system for providing legal aid in capital criminal cases and the national bar association, the Singapore Law Society has established a system for providing legal aid in criminal cases, now receiving funding from the government.

Historically the government only provided legal aid in civil cases and continues to run this service through its Legal Aid Bureaux. In the absence of a scheme to assist persons accused in criminal cases led to the establishment of the pro bono office of the Law Society of Singapore which began to provide services including representation through the pro bono work of its members. Similar to Malaysia the government has now come to support the need for legal aid in criminal cases and has provided increased funding, to be implemented by the Law Society. Also like Malaysia the Courts have established another system for providing senior counsel in capital cases. However, in Singapore very senior counsel accept this work and it is highly prestigious if not well paid. Law students must complete a portion of legal aid
work in their final year which assists the legal aid services and builds an ethical profession.

**Lessons learned**

- Historically the government did not accept that it needed to provide legal aid in criminal cases, so only set up a legal aid service for civil cases. The national bar association sought to fill the gap but could only do this to a small degree without government funding. Now the government funds both the civil law system and contributes to the bar association implemented criminal system. However, it does not direct or influence the legal aid system implemented by the bar association.

- The courts have developed a strong system of providing legal aid in capital cases, with senior lawyers being paid modest sums to accept these cases, but it has developed into a high-prestige area that is supported by senior lawyers. In some other countries the court appointed lawyer system offers little and usually only very junior lawyers are appointed in very serious cases.

- The requirement of all law students to complete some legal aid work provides resources for legal aid and makes a major contribution to the future ethics and pro bono work of the legal profession.

- Lawyers who want to be considered for judicaire work are added to a list and this list and the allocation of cases is managed in a transparent manner.

**Legal Aid Case Study No 8: South Africa**

A mixed model. The legal aid system is based on Justice Centers, which are one-stop shops with staff senior and junior lawyers, paralegals and candidate attorneys. All persons charged with serious crimes are represented.

The South African system is regarded as one of the best legal aid systems in developing countries. An independent Board, Legal Aid South Africa appoints an Executive Director who is responsible for running 64 Justice Centers each of which has a smaller satellite office. A study showed that the public defender model was more cost effective so now most of the work is done by full time public defenders who are in court most days of the week defending criminal clients. The Justice Centers also deal with some civil cases. The Legal Aid Act does not detail how legal aid is to be delivered but requires Legal Aid South Africa to produce a detailed Guide to legal aid every two years, that includes details of the means and merits test, kinds of cases that may be approved and how legal aid is delivered. The Justice Centers also support a small number of cases that can affect law reform or improve the lives of a significant number of the poor, including challenging government regulations, the Constitution etc.
Lessons learned

- A purely *judicaire* system was found to be too expensive and not cost effective. It is much better to have a mixed model.
- The requirement in the Constitution for those charged with crimes to be provided with a lawyer where the interests of justice demand has driven the government to provide independent lawyers in a large number of criminal cases.
- The Justice Centers ‘one-stop-shop’ approach is highly effective. People can come to the Centre with a range of problems and will be dealt with by a paralegal, junior lawyer, chamber lawyer or senior lawyer depending on the need.
- The small satellite offices of the Justice Centers allow the reach to extend and are connected to the much greater resources of the Centers.
- Having a significant number of staff lawyers in one office makes a strict system of performance management possible.
- Legal aid lawyers should spend most of their time in the court acting for legal aid clients.
- Paralegals and law students can make a major contribution to legal aid if they are supervised by experienced lawyers.
- Civil society organizations can provide a significant contribution to legal aid.
- University legal clinics where senior lawyers supervise students can make a significant contribution to legal aid services, but perhaps more importantly experience in social justice issues influence young lawyers and will continue to influence them through their careers.

Conclusion and Recommendations

Each country must, of course, design legal aid mechanisms that are appropriate to the legal, cultural and economic framework in which they will operate. There are many lessons that can be drawn from the manner in which the legal aid mechanisms in the eight country case studies above have developed. Among those that are most relevant are the following:

- Most of these countries have adopted a mixed model of legal aid service delivery in which a core service of full time staff lawyers, particularly dealing with criminal cases is complemented by *judicaire* arrangements in which private lawyers are sub-contracted to conduct cases. Other providers such as paralegals, legal interns, paralegals and civil society organizations should not be excluded from the legal aid mechanism as they can also make a significant contribution.
  However, paralegals and civil society legal aid organizations are not usually regulated in legal aid systems except for the work that they undertake on a contractual basis. Their general activities outside the formal legal aid system are not regulated by legal aid laws.
- The system in which courts appoint lawyers to act in a ‘dock brief’ system is often very problematic as the lawyers selected are close to
judges and prosecutors and do not provide a strong independent representation to their clients.

- The non-appearance of police witnesses in criminal cases is a major challenge to maintaining a cost effective legal aid system. An approach in which all relevant stakeholders are involved can succeed in addressing this problem.
- Legal aid in criminal cases usually demands at least half of the total legal aid budget. The resources for criminal case legal aid representation can be largely wasted unless care is taken that the lawyers in those cases are independent both de jure and de facto, from the opposing party in the case: i.e., the government agent prosecutors and police.
- All cases cannot be covered by legal aid so a strict approach to a ‘means and merits’ test needs to be included in the legal aid mechanisms. Criminal cases should be included, and other high priority cases such as those where custody of children is at stake, or land ownership for the poor etc. Care should be taken that legal aid is not available to any general categories that are not poor or marginalized groups.
- It is a duty of the government to supply adequate funding for legal aid services. It is also an integral part of funding for a criminal justice system, just as the other components of police services, prosecutors and courts are funded.
- Legal aid offices at every court, staffed by independent service providers are an effective component of cost efficient legal aid systems.

INTRODUCTION

The right to legal aid is being increasingly recognized in national and international legal systems. The manner in which this right is promoted and protected varies considerably in different national contexts. A common challenge is the fact that the demand for legal assistance for the poor and marginalized will always far outweigh the ability to meet the demand, in terms of budget and capacity to deliver services. This imbalance between demand and supply raises many difficult questions including the following:

- Who should be regarded as sufficiently poor?
- What categories are included as marginalized?
- How much is an appropriate budget and where should it be drawn from?
- Who should deliver the services- staff lawyers, sub-contracted lawyers, paralegals, law students, civil society organizations?
- What is the best method of organizing and administering these services?

The following report is provided in response to a request from the National Legal Aid Agency of the Ministry of Justice of the Socialist Republic of Vietnam. It aims to provide summaries of the legal aid systems in the eight
countries specified in the request in order to inform policy makers involved in reforming the national legal aid system. Although all of the key issues, such as legal base, background, funding, beneficiaries and legal aid suppliers are dealt with in each case study they are not presented in the same order, due to the different structures, approaches and institutions involved in each country. For example, in Australia there are multiple state and territory legal aid commissions, so a national overview is presented with more detailed treatment of one of the states. Other countries have a single supplier model, or one with several major providers. The country legal aid case studies are presented in alphabetical order.

LEGAL AID CASE STUDY NO 1: AUSTRALIA

Background and history

Australia has a federal system of government, with the authority over different areas of law shared between the national (Commonwealth) government and the eight states and territories. For example, each of the eight states and territories has their own criminal justice law and police service.

The first mechanism for providing legal aid in Australia was the establishment of the Legal Aid Bureau in 1942. In 1977 the national government passed a law the Commonwealth Legal Aid Act. This law established a system of agreements of cooperation including funding between the national government and the States and Territories that would set up their own independent Legal Aid Commissions (LAC’s.)

By 1990 all eight states and territories had set up their own independent Commission established by an Act of parliament passed by the state or territory. Each was granted independence, meaning that the Commissions could not be directed or ordered to support a case or not to support a case by any government institution. In addition, a national legal aid body was established, National Legal Aid (NLA) which is composed of the Directors of the eight legal aid sub-national bodies who elect one of their number to be the Chair.

Right to representation in serious criminal cases

Although there is no absolute legal right to legal aid in Australia the highest national court, The High Court of Australia decided that any person charged with a serious criminal offence should be legally represented, and if they are not then the trial of that person should not proceed. The effect is that all parties involved in a criminal case, including the police and prosecutors, will try to ensure a person is legally represented in any criminal case, as otherwise the judge will not allow the case to proceed.

In the case of Dietrich v the Queen\(^2\) The High Court stated:

\(^2\) Dietrich v The Queen, HCA 57, 177, CLR 292, discussed in Report of the Parliament of Australia Inquiry into the Australian Legal Aid System Ch. 4 p 1.
“an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation… in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available.”

As Australia has a common law system this judgment of the High Court, the highest court in the land, is binding law on all courts unless altered by legislation or a differing decision of the High Court.

**Budget**

The LAC’s receive funding from three sources: the national government budget, the state or territory budget and interest, contributions and fees from lawyers’ organizations. The total amount of funding in recent years has been approximately AUD$657 million³, (approx. $US 500 million.)

The amount of total funding per person, for a population of 23 million is approximately USD $22.

Each state Commission has a different composition of its Board and structure. All take a similar approach to the services provided, with some differences due to caseload, context and priorities.

Below is an example of the manner in which Legal Aid NSW (LANSW), the independent Commission providing legal services in the largest state operates and provides services.

**Model of providing legal aid**

All of the eight LAC’s adopted the mixed model of legal aid services. The majority of work is provided by full time staff lawyers, complemented by judicaire work sub-contracted to private lawyers. In addition, the national government and most of the state and territory governments also fund over 200 Community Legal Centers (CLC’s) which are independent civil society organizations that are mandated to provide advice, assistance and referrals to legal aid clients. Some of those CLC’s provide general assistance and are often situated in strategic areas where the local communities need legal aid services. Others focus on particular issues such as housing rights, women’s rights or refugee issues.

In addition, the Australian government also funds a number of organizations that have been established to provide legal assistance to indigenous Australians, such as the Aboriginal Legal Service. Indigenous Australians face a significant number of legal challenges that are different to those of other

Australians and this is recognized by the establishment and support of these organizations.

**Example of a state Legal Aid Commission: Legal Aid NSW**

**Legal base**

The *Legal Aid Commission Act 1979* (the Act)⁴ established Legal Aid NSW as an independent statutory body with a mandate to provide effective, efficient and economical services that are available and accessible to disadvantaged people in New South Wales.

The Act simply states that "legal aid" means legal aid under this Act, and "legally assisted person" means a person to whom legal aid is provided. Section 10 of the Act clearly provides the power to the Commission to determine the meaning of legal aid, the services provided and the persons that are granted legal aid, the kinds of cases that may be covered, the offices that may be opened, the *judicaire* system operated etc. Section 11 states “Legal aid may be provided by the Commission by such means as it may determine.”⁵

**Independence**

The Commission is independent so may not be directed in any way by the Minister or other government official. The Law provides a duty for the Commission to compile and provide an annual report to the Minister each year and the Minister must table the report in parliament.⁶

**Composition of the Commission**

LANSW is legally established as a Corporation. Overall management is undertaken by a Board, which is composed of nine part-time members. One is nominated by the Minister, two by lawyers’ professional associations, one by trade unions. Five others must have a demonstrated experience in providing legal aid services, representing consumers or other skills relevant to providing legal aid.⁷

A Chief Executive Officer is responsible for the day to day activities of the Commission.

The Board members, CEO and all staff of the Commission enjoy immunity to any legal liability or claim as a result of their actions as long as those actions “was done, or omitted to be done, in good faith for the purpose of executing this Act.”⁸

---

⁴ The Legal Aid Commission Act 1979 NSW  
⁵ Legal Aid Act NSW Ibid s 10 and 11  
⁶ Ibid s 13  
⁷ Ibid s 14  
⁸ Ibid s 27(2)
The Act requires the Commission to establish a legal aid fund. All funds from the state and national government budget allocations, monies recovered from costs in court cases and other sources must be deposited into the fund.

Legal aid providers

LANSW has the following organizational divisions

*Legal*
- Criminal Law,
- Family Law,
- Civil Law.

*Administration*
- Grants,
- Strategic Policy and Planning,
- Finance,
- People (human resources.)
- Organizational Development,
- IT Services and
- Records and Operations Support.

**Relevant facts for year 2015-16**

- Population of NSW: 7.5 million
- Budget for LANSW in 2015-16 AUD $253 million (USD $194 million)
- Number of staff is 965, 538 in the central Sydney office, 427 in regional offices.
- Percentage of staff that are lawyers: Approximately half of the staff are lawyers (477 are lawyers, 488 in administration and management.)
- Ratio of staff lawyers to private lawyers (*judicaire*) Approximately 60% of the legal representation and duty lawyer work was conducted by staff lawyers and 40% sub-contracted to private lawyers under the *judicaire* scheme.
- Number of cases in which there was representation by a lawyer, either staff or *judicaire*: 35,337.
- Assistance provided by duty lawyers providing services every day of sittings at the lower level courts: 174,562
- Minor legal assistance 96,410
- Legal advice provided 96,410
- Information services: 564,958

**Beneficiaries of legal aid**

In order to be granted ongoing legal assistance with a case an individual must fill in an application for legal aid. The application will include information concerning the ‘means’ of a person, that is can they afford to pay for legal services and the ‘merits’ of their case.
Means test

The means test will include the income of a person taken together with the income of another who is also financially associated with them, for example a husband or wife who supports the applicant. This income will then be reduced by deductions for family members who are dependent on them, rent for housing etc. In 2015-16 the means test applied by LANSW was approximately 60% of the official minimum wage in Australia.

The beneficiary of legal aid may be required to pay a contribution towards the cost of legal aid. This will be calculated on the applicant’s ability to pay and the total cost of the service. In some cases, a beneficiary may be required to pay a contribution for the initial part of the service but as time goes on they have no further financial resources to pay so the contribution is no longer required.

Merits test

The application will also be assessed according to criteria of the ‘merit’ of the case. Some of the guiding principles for the merits test include whether the costs involved in the case are of significant benefit to the applicant and to the population in general. Consideration will be given to the chances of success of the case as well as whether it fits into one of the categories of priority.

Serious criminal cases are the highest priority, and all persons who pass the means test and are charged with a crime will receive legal aid if a conviction would be likely to result in imprisonment or have a serious effect on the applicant’s employment, or if the applicant has a disability or other reason why they cannot represent themselves.

The Commission will also have authority to grant a person legal aid where there are “special circumstances” that may include language difficulties, illiteracy, physical or mental disability or a likelihood of domestic violence in family law disputes.

Applicants who have been refused legal aid may appeal against this decision to a committee that is separate from the Commission.

Types of legal aid services

Criminal law

The criminal law section of the Commission is the largest legal section and approximately half of the total budget for legal aid services is spent on criminal cases.

In NSW after police arrest a person they have up to four hours to decide whether to charge the person with a specific crime or release them. This four-hour period can be extended only once, up to a total of eight hours by a formal Extension warrant that includes the reasons for the extension. The limits are different for persons held on suspicion of terrorism, as they may be detained under a different law allowing police to detain them for up to two
weeks in ‘preventative detention.’

After a person is charged they must be brought to a court ‘as soon as practicable,’ so that they can be presented to an independent judge or magistrate who will confirm that the person has been lawfully arrested and decide whether or not to grant bail. If a person is arrested in the morning they should be brought to court in the afternoon. If they are arrested later in the day they may need to spend one night in the police cells before being brought before a local court.

At every local court in NSW at least one duty lawyer works from a legal aid room, with the number of duty lawyers depending on how busy the court is.

Free representation is provided to every person in custody on the first appearance before the court to apply for bail. This does not depend on a means and merits test. However, if bail is refused the lawyer will seek an adjournment and the client may make an application for legal aid. This will be determined according to the means and the merits of the case.

A duty lawyer is available for children and disadvantaged adults in every custody case in Children’s Courts (specialist courts.) The lawyer will appear at the first hearing but after that the child or adult will need to make an application for legal aid. Duty lawyers will also represent people with a mental illness (defined by the Health Act.)

As stated above duty lawyers in NSW deal with approximately 175,000 cases every year. Each duty lawyer may deal with more than 10 cases in a single day, including bail applications, requests for adjournments, and defended hearings.

Legal aid systems in which there are full time expert criminal defense lawyers, often referred to as public defenders stationed at each court, a requirement for all persons arrested to be brought before a court within a short period of time, and efficient court procedures including strict rules that police witnesses must appear on time in every case, can provide highly cost-effective legal aid for a large number of people.

More serious criminal charges will require a lawyer to manage the case. When the application for legal aid has been considered by a panel of LANSW staff and a decision to grant legal aid has been made a lawyer will be assigned to the case. If a staff lawyer is available the case will first be designed to that lawyer. If there is not a staff lawyer available the case will be offered to a private lawyer.

In NSW lawyers are divided into two categories, solicitors and barristers, who usually only appear in the higher courts and more complex matters. Barristers may not be hired directly by clients but must be ‘briefed’ by solicitors. In NSW in addition to LANSW there is the Office of the Public Defenders. These Public Defenders are all senior criminal lawyers who have been appointed,

---

9 Terrorism (Police Powers) Act 2002, NSW
and enjoy tenure, so cannot be terminated from their employment except for very specific reasons such as ethical breaches. The Public Defenders in NSW are paid by the government and are often briefed by LANSW in more complex criminal cases. LANSW also employs a team of senior solicitor advocates that will also undertake complex criminal cases directly.

The judicaire arrangements are undertaken through contracting with private lawyers. The contract will be based on the amount of time the case is expected to take and its complexity. Fees paid to private lawyers through judicaire are significantly less than the normal private rate for lawyers. However, the fees are sufficient for a significant number of private legal aid lawyers to rely primarily on legal aid referred cases as their primary source of income. Different to many developing world contexts the legal aid fees are sufficient to maintain high quality legal representation in criminal cases, although in recent years the cuts in the legal aid budgets have led some of these lawyers to more often refuse offers of legal aid cases.

Legally aided appeals will only be funded after a close consideration of the merits of the case and the likelihood of success or if the case has involved a serious miscarriage of justice.

**Family Law**

All of the Australian state and territory Commissions provide family dispute resolution services. This service is funded by the national government and is designed to help people involved in a family dispute come to an agreement without having to resort to litigation. Legal aid may be provided for primary dispute resolution mechanisms and less likely for litigation for family cases. Primary dispute resolution includes such as counseling, mediation or arbitration rather than litigation to deal with issues arising on the breakdown of marriage.

**Civil Law**

Because the funding available for legal aid cannot meet all of the needs the areas of civil law that are granted legal aid are quite limited. Grants of legal aid will often be granted for cases involving claims based discrimination or a violation of the equal opportunity laws, disputes concerning the availability or payment of government social service benefits, and war veterans who have disputes involving their pensions, etc. Some areas in which the applicant may be granted legal aid include migration, for example where a visa has been revoked, or employment disputes such as unfair dismissal. Some other areas of law that may fall within the criteria of the merits test include housing, environmental cases and cases where mental health is an issue.

Certain categories of civil cases may not be eligible for legal aid. For example, commercial transactions, buying and selling of property or land, wills and probate, claims for damage to motor vehicles or disputes between neighbors are unlikely to be granted legal aid.
Aboriginal Services Unit.

LANSW has a unit dedicated to providing assistance to indigenous Australians. This unit works closely with other organizations dedicated to providing legal aid to indigenous Australians such as the office of the Aboriginal Legal Service.

Legal information and referral

Individuals who are seeking information can attend at an office of LANSW, or at a Community Legal Centre, or can phone in to a telephone service, or access a broad range of information provided by LANSW on the internet. The information service that is provided is free and is not subject to passing a means test. It often includes identifying someone’s problem and referring them to the appropriate person or body that can assist, such as a social worker, government department or civil society organization.

Advice and minor assistance

LANSW like other state Commissions provided free advice services. Clients can attend an office, or a Community Legal Centre or telephone and be connected to a lawyer who can provide low-level legal advice. This assistance may also include drafting a letter or filling in a form. These services are free but if the legal problem is more complex, then a client will be asked to fill in an application for legal aid, and this will be considered according to the means and merits test.

Legal education

LANSW, like other Commissions produces a range of legal guides, fact sheets and other products that provide simple language summaries about issues of interest to a broad range of people. The Commission also conducts workshops and trainings on these issues, including in the prisons.

Community Justice Centers (CJC’s)

Community Justice Centers provide free advice and assistance on a range of issues. The Centers have a combination of full time staff and part-time volunteers. For example, many private lawyers work for a CJC on a voluntary or pro bono basis, one evening a week or every two weeks. Some of the CJC’s are located among communities where the population is poor or marginalized and require significant legal assistance. Others are focused on particular issues, such as assisting refugees, those with housing problems, women who seek assistance for problems of domestic violence, children and youth etc. CJC’s also offer free mediation services to try to assist people with a dispute in settling the problem without resorting to litigation.10

---

10 Information about the law NSW Community Justice Centers
Telephone advice services-Law Access NSW

Legal aid advice over the telephone is often the cheapest and fastest way to provide advice. Law access NSW provides advice on range of legal issues and handles over 100,000 calls per year.

Law Access NSW is a free government telephone service that provides legal assistance for people who have a legal problem in NSW. They can provide you with information about your legal problem and contact details for services that might be able to assist you. LANSW also operates a number of other telephone advice services dedicated to particular issues, including youth, child support service, mental health service, veterans support, and prisoners legal service.

University legal clinics

A number of universities in NSW also operate legal aid clinics. In these clinics later-year students work in providing information to clients, writing down complaints and details of legal issues and other legal services. In NSW law students are not legally able to represent others in a court hearing, but the students provide significant assistance to marginalized communities, with high-level professional supervision from academics and private lawyers.

Pro bono assistance

There are many people who earn too much to satisfy the means test for legal aid but still are not able to pay the fees demanded by a private lawyer. This is a particular problem in civil cases because the legal aid system does not cover a broad range of civil cases, due to its focus on criminal cases. Many people who cannot pay for a lawyer need help in civil cases.

Lessons from the Australian system

Mixed model with substantial offices with staff lawyers and also private lawyers through judicaire provides a strong and flexible system.

- Independence of the legal aid body from government, police and prosecutors means that criminal defense lawyers provide a strong defense for their clients.
- Placing an independent 'duty lawyer' at each court is a good way to provide cost-effective legal aid. The public know where to go to access legal aid and the lawyers can deal with many cases every day.
- The means and merits test is set out clearly and published. Only those who cannot afford to pay are provided with legal aid.
- The system includes community legal Centers which can provide advice and assistance in local communities.
- Approximately 50% of the budget spent directly to pay lawyers appearing in criminal cases.
- The large, independent legal aid institution allows for strong control.
over performance, ethics, case-management systems.

- Telephone advice service provides help to around 100,000 persons per year.

LEGAL AID CASE STUDY No 2: THE PEOPLE’S REPUBLIC OF CHINA

Background and history

The People’s Republic of China is governed by the Communist Party of China and has a population of 1.38 billion people. It has 22 Provinces, five autonomous regions and four directly controlled municipalities. China has the largest population in the world and the second largest land mass.

The first step in building a national legal aid system in China was the 1979 People’s Law Organic Law that provided the courts with a discretion to appoint defense lawyers for persons accused of crimes if the judge considered it “necessary” The 1980 Interim Regulation on Lawyers required lawyers to accept these legal aid cases.

However, like many other court appointed ‘dock brief’ models the system did not produce a guarantee of a strong defense for those charged with criminal offences as “courts assigned cases to lawyers with whom judges were acquainted and lawyers did little in the way of presenting a defense.” 11 As discussed in further detail below over 99% of criminal cases tried result in convictions.

In May 1997 the Minister of Justice issued the ‘Notice Regarding Development of Legal Aid Work’ which required all Provincial and Municipal offices of the Ministry of Justice across the country to establish legal aid Centers, in line with the official government policy to establish a Legal Aid Centre at the national level and in every, province, municipality and county in the country.

The peak body responsible for legal aid is the National Legal Aid Centre (NLAC) which was established in 1996 within the Ministry of Justice. The Director of the NLAC is one of the Vice Ministers of Justice. The role of supervision and responsibility for the operation of the legal aid system is delegated to a Vice Director who reports to the Vice Minister. The level of seniority of the leadership of the legal aid system reflects the high priority that the government places on the supply of legal aid services.

The legal profession in China has grown rapidly, in line with economic growth in recent decades. By 2013 there were an estimated 248,623 lawyers and over 20,000 law firms.12

11 Benjamin L Liebman, “Legal Aid and Public
Legal aid centers have also been established rapidly. According to the latest available figures more than 3,200 such centers had been established with 14,000 staff and 55,000 lower level legal aid work stations at the urban level. Legal aid funding grew from RMB 30 million in 1999 to RMB 370 million in 2006 during the first seven years of the program. The government reported that between the introduction of the Legal Aid Regulation in 2003 and 2015 nine million people had received legal aid and over 70% of these legal aid recipients were illiterate.

The two higher levels of legal aid center, the NLAC and Provincial Legal Aid Centers focus on development of policies, procedures and guidelines, coordination of sub national legal aid centers, training, education, research and public information activities. These two top levels of the legal aid hierarchy are not usually involved in carrying out casework and implementation. The actual legal aid work with clients are usually carried out by the city and county legal aid Centers.

Each level of legal aid center is responsible for supervision of the lower level center. The National Legal Aid Centre will oversee legal aid centers within the Provincial Justice Bureau, who supervise programs in the municipal and in turn the county level.

Legal aid services provided by social organizations, such as a women’s association or labor union are legally under the authority of the Ministry of Justice. Funding and policy decisions are made by the government without the input of civil society actors. The Ministry of Justice imposes a common standard of delivery across all legal aid centers.

**Budget**

Funding for legal aid is drawn from both the central and regional government budgets. Most of the funding for the operation of the municipal and county level legal aid center operations must be raised from their government budget allocation.

In 2006 the estimate of the total budget for legal aid was 370 million RMB for a population of approximately 12.3 billion persons. By 2008 the total budget expenditure on legal aid had grown to 670 million Yuan, approximately 6 cents per person.

---

16 Legal Aid in China by Allen C Choate Asia Foundation Working Paper Series, Paper No 12, April 2000
The China Legal Aid Foundation

The National Legal Aid Center has established the China Legal Aid Foundation, an officially registered non-profit organization whose sole purpose is to raise funds for legal aid, to add to the allocation from the government budget. The funds raised are through donations from businesses and individuals.

Discrepancy in funding between provinces

There is a major discrepancy between the amount of funding available for legal aid in different provinces with the neediest provinces having the least funding. Some wealthier provinces are able to allocate ten times the amount for legal aid services than others. The poorer provinces, with more people below the poverty line have a greater legal aid services but the least budget for them. This problem is made significantly worse by the fact that there are very few lawyers in the poorer areas as they cannot make high wages there. Because of this even the directive that private lawyers must do legal aid cases does not help in the poorer, remote areas where legal aid is a significant need.

Inadequacy of funding

With over 100 million Chinese living below internationally accepted poverty levels there is a massive demand for legal services for the poor. Despite the large number of legal aid Centers there is a large gap between the services that can be supplied with the available funding and the need.

Model for providing legal aid: a mixed model

The 2003 Regulations allow the local legal aid institutions to choose their model for delivering services, which may be to hire full time lawyers or public defenders as staff or to sub contract work to private law firms in a judicaire model. Lawyers working under the judicaire model are referred to as “social lawyers.” In most cases the legal aid institutions choose a mixed model including lawyers working under sub-contracted judicaire arrangements and full-time staff. Civil society legal aid organizations and university legal clinics are also closely aligned with the management of the legal aid Centers.

Legal aid Centers can request lawyers working in private law firms to do legal aid work and they have a legal duty to comply with the request. The 1996 Lawyers Law stated: “Lawyers must undertake the duty of legal aid in accordance with state regulations and provide the recipient with legal services in fulfillment of their duty and responsibility.” and the government strictly enforces this provision. In China all lawyers must work in law firms and if a lawyer refuses to undertake a legal aid case their law firm risks suspension.

---

17 Lawyers Law Article 42
The amount that is paid to lawyers is also determined at the local level. Civil cases are paid more than criminal cases. In China defense counsel in criminal cases have a relatively simple task as they are not permitted to contest evidence in a strong way as in other systems and almost all cases result in convictions. For example, in Beijing a social lawyer might receive around 500 Yuan for a criminal case and 800 Yuan for a civil case.

The major structural challenges

In China the government and large enterprises with links to the government hold an enormous amount of power. According to international practice legal aid providers should be independent of the government but in China the legal aid Centers are very much part of the government apparatus. What then happens when a poor person or community feels that their rights have been violated by a powerful member of the government, through an illegal action of a powerful company or an illegal regulation? What happens when a person is arrested for a crime that they did not commit? These are the challenges that provide a large percentage of the casework in developed legal aid systems. In China it is very difficult for a legally aided person to undertake a legal challenge against someone who is powerful.

Criminal cases and legal aid

Prior to 1996 the criminal law in China relied on prosecutors and judges to both prosecute and seek evidence that would assist with the defense of an accused person. Changes to the Criminal Procedure Code in 1996 changed this legal base, providing significantly greater powers to defense lawyers in a model bearing greater resemblance to a common law system. However, the Criminal Procedure Law still maintains the power of the prosecutors to imprison defense lawyers in order to maintain their authority.18

Prosecutors can use this power, particularly in cases in which a defense lawyer may wish to uncover corruption or abuse of power by police or a state agent in order to defend their client. In such a context it is very difficult for legal aid lawyers to offer a defense in cases where their client may have been forced into signing a confession by police, which is a common practice, as in other countries where the rule of law is weak.

These factors contribute to the very high rate of convictions in criminal cases in China. Between 1997 and 2005 only 0.66% of accused persons were found to be not guilty. This is a conviction rate of over 99%, a figure unheard of in developed legal systems. In addition, most defendants in criminal trials are not represented by a lawyer at all.19

Despite these challenges many legal aid Centers do provide staff lawyers and judicaire services for private lawyers in criminal cases. Although the rate of

acquittal is low these lawyers are often successful in reducing the severity of charges against their clients and reducing the sentences they receive.

**Beneficiaries**

**The 2003 Regulations on Legal Aid (The Regulations)**

The Regulations provided legal clarity on those who are eligible to receive legal aid and the kinds of cases that may be covered.

The principles of providing legal aid are set out in the first chapter of the Regulations, including the following:

- Citizens who meet the requirements of legal aid shall be entitled to obtain legal services.\(^{20}\)
- It is the government’s “responsibility” to provide legal aid.\(^{21}\)
- The performance of legal aid is a “duty” of all lawyers.\(^{22}\)

The Regulations severely restrict the kinds of cases in which legal aid is available to disputes relating to:

- State compensation,
- social insurance,
- survivor’s pensions or relief funds,
- family support and
- employment compensation.\(^{23}\)

This range of legal issues is much narrower than most legal aid systems and does not cover the most common kinds of disputes between individuals, such as those arising out of motor vehicle accidents as well as cases involving discrimination, corruption, illegal use of power or persecution.

The Regulations provide some flexibility for provinces, autonomous regions and municipalities to provide “supplementary provisions” when applying the Regulations through local laws and regulations. Some regions have expanded these categories, for example the relatively wealthy Zhejian Province which passed local regulations to include land contract rights, neighbor disputes, inferior seed and fertilizer cases, environmental pollution causing damage to agriculture.\(^{24}\)

Those who may be provided with legal aid in criminal cases was expanded by an amendment of the Criminal Procedure Law to include capital crimes, economic crimes and blindness to the reasons a court could consider when deciding whether appointing a defense lawyer was necessary. Those eligible for legal aid in criminal cases are now the poor, disabled, seniors, minors or those facing a capital offence.

---

\(^{20}\) The Regulation on Legal Aid 2003 Art 2

\(^{21}\) Ibid Art 3

\(^{22}\) Ibid Art 6

\(^{23}\) Legal Aid and the Rule of Law in the People’s Republic of China Mark Jia Ibid p 12.

\(^{24}\) Ibid p 38

APPLYING LEGAL AID MODELS IN NATIONAL CONTEXTS; LESSONS FOR POLICY MAKERS 25
The beneficiaries of legal aid in 2012 were drawn from the following groups: 50% farmers or migrant workers, 20% female, 7% disabled, 10% seniors and 15% minors.

There are low levels of freedom of expression in China make it very difficult for individuals to make complaints against legal aid lawyers who charge clients for services or provide services in an unethical way, or if there is corruption in the local government offices responsible for legal aid.

A major challenge is that there is a large class of persons who do not qualify for legal aid because they are not ‘poor enough’ to fulfill the means test but cannot afford to hire a private lawyer. Some of these cases are assisted through programs in which lawyers assist on a pro bono basis.

**Means test**

At the provincial level the means test for legal aid is the “minimum standard of living” or ‘dibau.’ The ‘dibau’ is an amount calculated by the people’s congress in each area, taking into account the cost of food, clothing, housing and other necessities.

**Application for legal aid**

When applying for legal aid a person must provide certification of economic hardship, a valid ID and written details relating to their case. Often illiterate applicants fail to provide written evidence, resulting in their application being rejected. If legal aid is not approved there is a right of appeal but this is to the same Justice Bureau that oversees the application and in practice appeals are rare.

**Legal aid providers**

Those who provide legal aid services are staff lawyers working for different levels of the legal aid Centers, private lawyers, university clinics, civil society organizations and “barefoot lawyers.”

**Lawyers**

The practicing certificate of lawyers must be renewed annually and if a lawyer does not comply with the government requirement for pro bono legal aid work he or she may not be issued with a practicing certificate. These lawyers may be required to handle between one and three cases per year.

There is a significant variation on the mix of staff lawyers and private lawyers in the legal aid Centers of different provinces, and in some areas the proportion of staff lawyers may be six times that of others. This will largely

---

25 Legal Aid in China, China Legal Publicity Ministry of Justice of the PRC 2009
26 Ibid
depend on how prosperous the region is. If the region has more available funding they tend to use more *judicaire* hiring private lawyers. Those with less funds available rely on salaried lawyers. The funding available for private lawyers is sufficiently high that there is strong competition for legal aid briefs.

**Volunteers and law students.**

The government allows law students and other volunteers to provide a range of low level legal aid services to supplement the capacity of legal aid Centers. There are more than 50,000 individuals registered as legal aid volunteers, the majority of whom are law students drawn from the over 600 law schools in the country.

A large number of universities have opened legal aid clinics that provide an opportunity for legal academics and students to provide legal aid assistance. There are often close links between the senior management of university clinics and the local legal aid Centers. Some universities select cases that have the potential for a ‘structural’ effect, through affecting law reform or widespread social change, and are not restricted by the means and merits criteria of the government Centers. In one year a leading university law clinic in Wuhan University more than 2,000 visitors were received and 500 phone inquiries are received in a year.  

**Civil society**

Non-profit civil society organizations also supply legal aid services, often focusing on particular social issues. For example, the largest civil society organization the All China Women’s Federation has established a number of legal clinics providing assistance around issues of women’s rights. These civil society organizations providing legal aid do not really do so in an independent manner but rather their actions are regulated by the government. Private law firms also provide free legal aid services.

**Barefoot lawyers**

Based on Chairman Mao’s 1960’s program of sending ‘barefoot doctors’ to remote communities a recent movement has produced a movement of ‘barefoot lawyers.’ These individuals are similar to paralegals, are often self-educated and may often take up cases of injustice and discrimination on behalf of communities. However, cases in which communities seek accountability from local government officials often attract repressive responses from the government.  

**Pro bono services**

Large law firms increasingly supply junior lawyers to work at government legal aid Centers as this tends to help the law firm maintain positive relationships with government departments.

---

27 Ibid p 28
28 Ibid p 17
Types of legal aid provided

The legal aid Centers provide advice, assistance and representation to the classes of beneficiaries discussed above. The legal aid Centers also conduct legal education and public relations exercises to spread knowledge relating to the law and legal rights. Telephone advisory services are also provided by some Centers.

The government also uses television to spread knowledge about the law, including a state-run television station that is totally dedicated to legal issues and shows about the law, the courts etc. Legal aid Centers publish summaries of laws, provide education programs etc.

Lessons from the China legal aid case study

- Has been able to respond to a very large population by establishing over 3,000 legal aid Centers in a relatively short time.
- The organization of the system with several layers, each supervising the layer below allows for an integrated model across the country.
- Employs a mixed model of using staff lawyers and private lawyers to increase flexibility. Each office can choose their own mix, according to the needs of that area.
- Requiring all private lawyers to provide legal aid services adds to the resources for legal aid. However, those private lawyers may not be very supportive of the legal aid client, nor have the legal skills required for legal aid work, which is quite different to commercial work.
- The large number of legal aid Centers has been beneficial in spreading legal aid, but they have not included sufficient requirement to focus on criminal cases, and most persons charged and tried in the courts do not have a lawyer.
- The lack of independence of the legal aid providers means that both parties to criminal cases represent the government. The conviction rate of over 99% of criminal cases in the courts reflects a major drawback of the Chinese system. There is a lack of strong independent representation for legally aided persons in criminal cases.
- The distribution of the budget at the provincial level creates an imbalance of supply and demand. The budgets for different provinces vary widely. The wealthier provinces have larger budgets, and can give more for legal aid. However, the poorer provinces, with the lower budgets, are the ones that have many more poor individuals who need legal aid.
- The ‘barefoot lawyers’ program is an interesting way to extend legal services when there are not enough lawyers, similar to community-based paralegals in other contexts.
LEGAL AID CASE STUDY No 3: INDONESIA

Background and history

Indonesia is the world’s largest island country, with 13,000 islands and a population of approximately 260 million people. A 30-year military dictatorship under General Suharto ended with a transition to democracy in 1998. The Suharto regime was characterized by widespread human rights violations and it was in this context that the legal aid system was born.

Legal aid in Indonesia was commenced through the activities of non-government organizations. The first civil society legal aid organization, the Jakarta Legal Aid Foundation (LBH Jakarta) was founded in 1969. Gradually the network of regional Legal Aid Foundations grew to 15 offices operating under the coordination of The Indonesian Legal Aid Foundation (YLBHI.) Following the transition to democracy hundreds of smaller civil society organizations were established across the country, many of which focused on particular needs such as women’s’ rights, children, workers’ rights or migrant workers. The challenges of providing affordable legal services to a population of over 250 million persons in a country of over 14,000 islands is immense.

In addition to the services by civil society organizations a broad range of ‘legal aid’ services in government departments developed. However, a study conducted in 2012 concluded that most of the ‘legal aid’ services in approximately 40 government agencies and ministries were not focused on providing legal aid to the poor, but rather for legal assistance to government representatives and former government workers.29

In 2011 the national Legal Aid Law (The Legal Aid Law) was passed. 30 A fundamental feature of The Legal Aid Law was the recognition of the strength and independence of the civil society legal aid organizations that had developed. The Legal Aid Law created a model in which the funding for legal aid is provided from the national budget to the Ministry of Law and Human Rights but the work of providing legal aid services will be conducted by verified and accredited Legal Aid Organizations.

The clients of these services, the poor and vulnerable, are referred to “Legal Aid Recipients.” The Legal Aid Law recognizes the duty in the national Constitution which states that “[a]ll citizens have equal status before the law and in government and shall abide by the law and the government without any exception.”31

The 2011 Law establishes a national legal aid system focused on government funded legal aid services provided by civil society organizations. However, the pre-existing legal aid services provided through the court system continue to make a valuable contribution to legal aid, complementing the new system.

29 Mathew Zurstrassen, Legal aid funding in Indonesia, produced for the Indonesia National Planning Agency 2014. Provided to the writer in hard copy by the author, on file.
30 Law No 16/2011 on Legal Aid
31 Constitution of the Republic of Indonesia (Undang-Undang Dasar Republik Indonesia), Article 27(1)
established by the 2011 Law. The courts operate three areas of legal aid programs:

- Legal aid ‘posts’ in each court (posbakum)
- Traveling ‘circuit courts’ that connect with local communities (sidang keliling) and
- Waivers from court fees for the poor and marginalized.

(for further detail see the section below, ‘Legal aid provided through the courts.’)

**The definition of legal aid**

The Act states that:

“Legal Aid (“Bantuan Hukum”) is legal services provided by the Legal Aid Provider for free to Legal Aid Recipients”\(^\text{32}\) This includes civil and criminal law issues, criminal and state administrative courts, litigation and non-litigation.

**Model of providing legal aid: government funding, services provided by civil society organizations**

The Minister assigned the duty to implement the Law to a unit within the Ministry that had previously been responsible for harmonization and socialization of laws, the National Law Development Agency (commonly known as BPHN.)

The Legal Aid Law required a committee of representatives of the government, civil society and legal academics to conduct the process of verifying and accrediting the Legal Aid Organizations that may receive funding under the law. In order to be accredited an organization needed to demonstrate that it had a legal entity, a permanent office, a board of management and a pre-existing legal aid program.

The first round of verifications required members of the committee physically visiting each of the more than 600 organizations that had applied, resulting in the accreditation of 300 organizations. However, a complaint during the early stages of implementation was that in many areas of the country no legal aid providers had been accredited. A second round was conducted in 20015-16, resulting in a total of 405 civil society organizations being accredited by October 2016.\(^\text{33}\)

**The implementing regulations**

The manner in which each of the organizations is funded is not included in the legal aid law, but is set out in a series of implementing Regulations, with the following effect:

Legal aid work is divided into two categories: litigation and non-litigation. Each litigation case reimbursed five million rupiah (approximately $USD 400 per case.)

\(^{32}\) Legal Aid Law Art 1(1.) Draft Regulation s1(1)

\(^{33}\) Interviews with Mr Christomo, head of the legal aid program Ministry of Law and Human Rights, 2015, Jan and October 2016.
Non-litigation legal aid work is divided into ‘bundles’. Nine different types of non-litigation work or ‘bundles’ are identified in the Regulations and each bundle is reimbursed at a different rate of payment.\(^{34}\) It may include:

- Providing legal education to the public to increase the awareness of legal issues; legal advice to members of the public;
- Legal consultation to provide advice to individuals with legal problems;
- Legal investigation in relation to a case;
- Legal documentation, physical or electronic;\(^{35}\)
- Legal research
- Mediation
- Negotiation
- Capacity building for the public to increase understanding and reduce legal challenges.
- Accompanying an accused person or a victim.\(^{36}\)

Payments are made as reimbursements, claimable after evidence has been provided that the work is completed. Eighty percent of the payments must be for litigation work. The payments are managed through the regional government offices of BPHN.

The maximum payment that may be made to any organization in one year depends on what category accreditation they received. There are three categories: A, B and C. Each of these three categories must have certain requirements and has a different maximum number of litigation cases and non-litigation ‘packets’ for which they can be reimbursed.

**Category A**

**Requirements:**

- At least 10 Advocates and 10 paralegals,
- demonstrated capacity to conduct seven of the nine kinds of non-litigation work.

**Annual funding limits:**

- Up to 60 litigation cases
- Up 60 non-litigation packages, paid at different rates for each non-litigation category (i.e., drafting paid differently than advice etc.)

Note: The allocation of the number of cases and other work per year can change according to resources available to the legal aid service.

**Category B**

**Requirements:**

- Five Advocates and five paralegals

\(^{34}\) Draft Regulations 23(2)
\(^{35}\) Draft Regulations 23
\(^{36}\) Draft Regulations 23(3)
• Demonstrated capacity to conduct 5 of the 9 non-litigation programs

**Annual funding limits:**
• Up to 30 litigation cases
• Up to five bundles of non-litigation work

**Category C Requirements:**
• One Advocate and three paralegals
• Demonstrated capacity to conduct three of the nine non-litigation programs

**Annual funding limits:**
• Up to 10 litigation cases
• Up to three bundles of non-litigation work

Only a small number of organizations, approximately ten, were able to be accredited as Category A during the first round, with some added in the second round. The largest number were in Category C.

**Legal aid beneficiaries**

The Act refers to Legal Aid Recipients, who are persons or a group of poor people who cannot independently fulfill their basic needs, including food, clothing, health services, education services, employment and housing.\(^{37}\) The manner in which a person can demonstrate sufficient vulnerability and apply for Legal Aid is covered below under the heading “Procedure for Requesting Legal Aid.” Poverty is established through the issue by government agents at the village level of a Poverty Statement Letter (SKTM) or other social allowance letters or evidence.

**Legal aid providers**

The Act defines Legal Aid Providers as “legal aid agencies or community organizations that provide legal aid services under this Law.”\(^{38}\) The Regulation states that only Legal Aid Providers who have been Verified and Accredited may receive Legal Aid funds.\(^{39}\)

A Legal Aid Provider must comply with a number of conditions set out in the Legal Aid Act and Regulation,\(^{40}\) including having a legal base, a governing body (pengurus) a permanent office or secretariat (demonstrated by a written lease, certificate of title etc.\(^{41}\)) of and at least one Advocate who is qualified to appear in court with valid authority to do so from the Supreme Court.\(^{42}\)

---

\(^{37}\) Legal Aid Act, Art 5(2) Draft Regulation S 1(2)

\(^{38}\) Legal Aid Act Art 1(3)

\(^{39}\) Draft Regulation s6.

\(^{40}\) Legal Aid Law Art 8; Draft Regulation s5.

\(^{41}\) Clarification to the Regulation s 5(4)

\(^{42}\) Clarification to the Regulation s 5(5)
The Act states that Legal Aid Providers are entitled to recruit lawyers, paralegals, professors, and law students. Advocates, paralegals, academics and law students may provide legal aid services if they act under the authority of a verified and accredited Legal Aid Provider. The nature of work that they may undertake depends on whether it involves litigation or non-litigation matters.

Litigation work can be done by Advocates qualified to appear in court acting under the direction of a verified and accredited Legal Aid Provider. Legal Aid litigation work may also be done by a paralegal or academic if the following conditions are fulfilled:

- the Advocate as mentioned above accompanies them, and/or
- there is a written delegation to the paralegal or academic from the Advocate, and
- the relevant judge agrees

Non-litigation work may be done by an Advocate, paralegal, academic or law student working under the authority of (“dalam lingkup,”) an accredited Legal Aid Provider. The meaning of “students” includes those studying in the faculty of sharia, the military college, and police college.

**Types of legal aid services provided**

The Act states that legal aid services may include legal counseling, legal advice, issuing opinions, statements of defense, obtaining information from government agencies to assist with the defense of clients and that Legal Aid Providers may “obtain guarantees of legal protection, security and safety,” whilst undertaking Legal Aid Work.

Litigation work on behalf of a Legal Aid Recipient can include accompanying and representing a client in a case in a court or administrative tribunal and the conduct of other legal work.

**Procedure for Requesting Legal Aid**

A person who wants to apply for legal aid must produce a written application which includes the following three requirements:

1. A written document or letter which provides evidence that the applicant is poor or vulnerable.
2. Personal details such as identity and address etc;
3. A summary of their problem, with supporting documents. (see below for details.)

---

43 Legal Aid Law Art 7
44 Draft Regulations 22(1) “dalam kepengurusan Pemberi Bantuan Hukum.”
45 Draft Regulations 22(3)
46 Draft Regulations 22(1) non litigasi dapat dilakukan oleh advokat, paralegal, dosen dan mahasiswa dalam lingkup Pemberi Bantuan Hukum
47 Legal Aid Law Official Gazette Explanation Art 9(a)
48 Legal Aid Law Art 9(f)
49 Legal Aid Law Art 9
50 Draft Regulations 22
If the person cannot write they may make the request for Legal Aid orally and it will be written down and signed or stamped by the Legal Aid Provider.\textsuperscript{51}

**Demonstrating that someone is poor or vulnerable**

The draft Draft Regulation states that legal aid will be provided to persons who have a certificate of vulnerability (\textit{Surat Keterangan Tidak Mampu}) issued by the village chief (\textit{kepala desa}) or traditional elder (\textit{lurah}) or someone else with similar authority, or a similar letter issues by a law enforcement official, traditional leader or community leader.\textsuperscript{52} The Clarification of the Draft Regulation explains that this letter may be issued by the police, a prosecutor, judge, the head of a prison, head of a community organization, or traditional leader.\textsuperscript{53}

**Monitoring and complaint mechanisms**

The Ministry will be responsible for monitoring and supervision and will carry out this function nationally and regionally, assisted by its regional offices. This will be coordinated with the regional governments.\textsuperscript{54}

If the Legal Aid Recipient feels that these rights have not been fulfilled by the Legal Aid Provider, that the standards of assistance have not been fulfilled or that they have not been provided with information about the provision of legal aid they may report these violations of their rights to a representative of the Ministry of Law and Human Rights or to a law enforcement official at the regional level.\textsuperscript{55}

**Challenges in delivery of services**

During the first year of operation of the mechanism for providing legal aid under the Legal Aid Act it appeared that the system may not be practically feasible. In order to prove that the work was being done each LAP was required to provide 14 different documents, including court records, etc., all in hard copy. Only around 12\% of the amount payable to LAP’s in the small national budget of around $US 4.5 million (less than US 2 cents for each of the 250 inhabitants of the country) was able to be disbursed.

In response to these challenges BPHN gradually refined many of the procedures relating to the mechanism, through a series of eight government regulations. These regulations included detailed procedures relating to:

- How legal aid is to be delivered
- The standards of legal aid and how they are to be achieved
- Monitoring and evaluation
- Distribution of funds
- Standardization of expense accounting

\textsuperscript{51} Draft Regulations 18
\textsuperscript{52} Draft Regulation s3.
\textsuperscript{53} Clarification, or \textit{Penjelasan} to the Draft Regulations 3:
\textsuperscript{54} Draft Regulations 43
\textsuperscript{55} Draft Regulations 45.
An electronic Case Management System was developed that is linked to an application for Android system smartphones. Under the new systems court documents etc can be photographed by the phone and immediately uploaded to the electronic database. The application for legal aid and other forms are also on the handphone, or computer program and can be immediately uploaded to the file of the particular case on the database.

Under the new system the documents must be lodged in three stages, and when each is satisfied a portion of the payment for the case or non litigation work is transferred. The first stage includes the legal aid application, means test, documents proving poverty, initiating claim in court etc. The second stage includes the finalization of the case through a court verdict, mediation result etc. The third stage is the completion and supply of all documents, receipts of disbursements etc. All of these are uploaded to the internet based Case Management System from wherever the cases is being managed around the country.

As a result of the improved procedures the proportion of the national allocated budget that has been able to be distributed to LAP's is as follows:

2013: 12%
2014: 34%
2015: 54%
2016: 75%. (estimated by year’s end.)

The amount of the budget allocated by the parliament for the legal aid system is in the current year is expected to be more than double that of previous years, around $US 10 million, as a result of being able to demonstrate that the system is now effective. A second round of verification and accreditation has now been finalized, with a total of 405 civil society organizations now accredited.

It should be noted that the amount allocated to legal aid through this mechanism is not the total amount allocated to legal aid in the country. Figures for the budget of the three forms of legal aid implemented by the courts (see below) which should be added, were not available at the time of writing.

**Community based paralegals**

The tradition of providing legal aid through civil society mechanisms in Indonesia extends to a number of other contexts in which communities have developed their own responses to legal needs, often with the support of international donors. These systems developed under the Dutch colonial regime in which Indonesians who did not trust the colonial courts relied on members of their communities who studied some aspects of law but were not qualified lawyers. This was the beginning of community based paralegals in

---

56 This information is drawn from interviews with Mr Christomo, head of BPHN legal aid program and staff of the program in 2014, 2015 and October 2016.
the country and the manipulation of the justice system by the Soeharto military regime onlys served to increase the desire of local communities for people they trusted who could decipher for them the mysteries of the law. Now there are thousands of community based paralegals across the country. Some are linked to formal programs. Some are part of networks with accredited Legal Aid Providers, and others are linked to university legal clinics. Programs supporting the development of community based paralegals have been supported by large international donors including the World Bank and UNDP. The World Bank provides the following guidance for the definition of a community based paralegal:

- trusted by the community;
- actively involved in community organization or activities;
- having organizational, advocacy or legal aid experience.57

**Legal aid provided through the courts**

Prior to the passage of the 2011 Legal Aid Law a range of legal aid services were provided directly through the courts, under the authority of the Supreme Court. After the Legal Aid Law was passed a controversy arose because some believed that the new Legal Aid Law centralized all government funding for legal aid to be supervised through the system administered by the Ministry of Law and Human Rights and the courts could no longer provide legal aid services.

The Supreme Court had previously run a program of providing lawyers through a ‘dock brief’ system, whereby lawyers who were required by law to be represented would be provided with a lawyer. As in many other ‘dock brief’ systems this had become problematic because the defense lawyers appointed were often close to court officials, police and prosecutors and did not provide a real defense for their clients in many cases. In fact often these court appointed lawyers did not actually appear at the hearing but were still paid, albeit a relatively low amount, for the legal aid case. Despite this a number of other legal aid programs of the court provided very valuable services to the poor and marginalized, particularly the legal aid posts that provide assistance at each court, fee waivers for the poor and other services.

The effect of the 2014 Supreme Court Regulation was to replace a previous 2010 Court Regulation and clarify that responsibility for the payment of lawyers providing legal aid representation is to be administered by the Ministry of Law and Human Rights. The courts no longer have that responsibility but maintain authority to conduct three very important programs of legal aid:

- Legal aid posts at every court (*posbakum*).
- Fee waivers for the poor and marginalized.
- Circuit courts providing court services to remote communities.58

---


Legal aid posts

The Legal Aid Posts are rooms at every court where the poor and marginalized can seek information in relation to the law and their case, and receive technical (i.e., not representation by a lawyer) assistance such as advice and referral. The Court will sub-contract the work of providing legal aid post legal assistance to civil society organizations. In many cases, the organizations that provide assistance at the courts are not accredited Legal Aid Providers but rather provide paralegals who give advice and assistance. Where a more complex problem arises, they may refer the case to a nearby accredited Legal Aid Organization. A 2013 study reported that 46% of those who accessed some form of legal aid visited a legal aid post. It is not surprising that this is the highest figure in numbers as the type of cases are not complex and usually do not take up significant time.

Fee waiver

This is a system whereby a person who is involved in a case can come to the court and apply to have the costs of the court case waived on the basis that they are poor or marginalized. The person must carry proof of the level of poverty such as a “letter of poverty” issued by their local authority.

Circuit courts

These courts are hearings of the court that travel to remote areas, increasing access to justice in those areas. A Supreme Court Regulation in 2015 created an obligation for courts to regularly conduct circuit courts outside the buildings of the courts, with expenses for judges and court officials paid for from the state budget. Court fees will be charged for processes at the circuit courts but applicants who are poor can apply for a waiver. Clients must receive a copy of the court decision on the same day as they hearing, which in the case of birth, marriage certificates, etc., can be forwarded directly to the government office responsible for issuing the document.

Lessons from the Indonesia legal aid case study

- The system of funding over 400 civil society organizations to implement the legal aid services is ground-breaking. These organizations provide services which are independent of the government even though the government pays them on a case by case basis.
- The system builds on the strength that already exists in the national setting-civil society legal aid. Those civil society organizations that have proven that they have provided legal aid services in the past can now get much needed funding from the government.

---

60 Indonesian Supreme Court PERMA 1/2015
• Have developed a relatively simple system of payment. Lump sums for
litigation cases, or non-litigation 'packages' so there is no need to
calculate differences in each case. This is easy to calculate but lacks
the ability to differentiate between cases.
• The payment system through Android smart-phones with all documents
photographed and uploaded to the internet-based database is innovate
and after some significant problems in the beginning is now working
well.
• With no legal aid commission or public defender service there is
insufficient capacity to cover the needs of the population. Civil society
provided legal aid is very helpful, but it is not enough. A large legal aid
institution with staff lawyers is also needed to meet the demand.
• The legal aid posts at the courts is very helpful for minor cases. The
posts are often manned by civil society paralegals who help people fill
out forms, give advice etc.
• Citizens are held for far too long in custody before being brought before
an independent magistrate or judge and legal aid lawyers often cannot
access clients in custody. There is a weakness in the legal rights of
those arrested.
• The court appointed lawyer scheme for criminal cases has not been
successful because court personnel, prosecutors and police are able to
influence which lawyers are chosen as defense counsel. They often
choose those who do not provide a strong defense for clients and in
many cases do not actually appear, but provide a 'paper defense' only.
This is similar to other contexts.
• Police witnesses often do not appear in criminal cases and there are
no strong sanctions. This makes cost effective legal aid impossible to
achieve.

LEGAL AID CASE STUDY No 4: MALAYSIA

Background and history

Malaysia is a federal constitutional monarchy of consisting of 13 states and
three federal territories. It is the only Federation among ASEAN countries.
Malaysia is divided by the South China Sea into two separate territories,
Peninsula Malaysia which shares a land border with Thailand, and East
Malaysia or Malaysian Borneo which shares a land border with Indonesia.

Malaysia has a population of approximately 30 million people. Around half of
the population is ethnically Malay with large minorities of Malaysian Chinese,
Malaysian Indian and indigenous peoples. As a result of the British colonial
history the government is modeled on the Westminster system and the legal
system is common law. The head of state is a hereditary king, elected for a
five-year term by the rulers of the nine Malay states and the head of
government is a Prime Minister.

Although there is no Constitutional right to legal counsel in any class of
criminal case during the British colonial period a practice developed under
which the Courts would provide a lawyer to any person charged with a capital
offence. This system of court funded counsel in capital cases continues today.
Malaysian citizens who are arrested must be brought before a magistrate
within 24 hours, but for a foreigner the limit is 14 days. 62

The formal legal aid system commenced in Malaysia with the passage of the
Legal Aid Act in 1971. The services provided under this act are primarily civil
and family law cases, with criminal assistance only for minor crimes in which
there is a plea of guilty and assistance to juveniles.

The absence of a system to assist persons accused with crimes who could
not pay for a lawyer led to a group of lawyers forming the Penang Legal
Advisory Centre in 1979, initially a small office in a rough ‘hut’ providing legal
aid services to the poor and marginalized. Soon after this a pro bono group
also established in Kuala Lumpur. The members of the Bar became
increasingly active in relation to their ethical duty to assist those accused of
crimes who could not afford a lawyer. This led to a resolution at an Annual
General Meeting of the Bar Association of Malaysia (the Bar) in 1983 to
establish Legal Aid Centers (LAC’s) in each of the provincial capitals across
the country.

Initially the funding for the LAC’s needed to be provided from contributions of
members of the Bar. Until today each of the approximately 17,000 lawyers
who must be members of the Bar Council (the Bar) is required to contribute
an annual payment of around USD$25, which provides a total of
approximately $USD470,000 per year. This amount was initially the only
funding available to provide the offices and administration for 15 legal aid
Centers across the country, with legal services provided by members of the
Bar on a pro bono basis.

By 2011 the legal aid program of the Bar had grown considerably but was
unable to deal with the large number of criminal cases in which legal aid
lawyers were needed. They lobbied the government for increased funding and
this was agreed to by the Prime Minister. A decision was made for the
government to increase its spending on criminal legal aid. However, this
increased budget would not be channeled through the existing government
legal aid scheme for civil cases but rather would be provided through the
establishment of a charity, the Legal Aid Foundation. The Foundation is
mandated to work closely with the Bar and take advantage of the Legal Aid
Centers it had established as the mechanism through which criminal justice
legal aid would be administered.

62 Malaysia Criminal Procedure Code. Act No 593.
In summary there are four mechanisms for delivering legal aid:

1. Court funded and appointed counsel in capital crimes.
2. The government Legal Aid Department, established under the 1971 Legal Aid Law that provides assistance mostly in civil cases and to juveniles.
3. The Bar Council LAC’s established in 16 sites across the country.
4. The government Legal Aid Foundation that commenced work in 2012 that provides a broad range of services in criminal matters, working closely with the Bar Council through the 16 LAC’s.

**Models of providing legal aid**

**Court appointed counsel: focus on capital criminal cases**

As mentioned above the courts in Malaysia have developed a practice according to which they will provide counsel in capital cases, such as murder, trafficking in drugs etc. This assistance is available to both foreigners and citizens. Lawyers who participate in this scheme are supplied by the Bar Association. In non-capital cases the court has the power to appoint counsel but in practice they do not.

Lawyers who wish to be part of this scheme fill in an application form to appear in the cases and send them to the Bar Association Criminal Practice Committee. The application will include their years of seniority, the kinds of cases they have appeared in and previous appearance in capital cases.

The counsel is paid for their services, not a full private rate but an acceptable fee. The Registrar of the court will keep this list. One of the challenges (as in many other countries) is that some lawyers who are close to Court Registrars regularly get briefed in these cases and some of those lawyers are not selected for their competence but through influence with the Registrar. There is a scale of payments for this system, which increases according to the level of the court. The payment scale is published online.

**The government Legal Aid Bureaux: focus on civil cases**

The government Legal Aid Department was established under the 1971 Legal Aid Act, and the Department is part of the Legal Matters Division of the Prime Minister’s Department. In order to implement the legal aid system for civil cases the Legal Aid Department has set up Legal Aid Bureaux (LAB’s) in every state and territory. This system is not independent, but is led by a Director General of Legal Aid who is a government appointee.

The LAB’s provide legal aid for selected civil cases and Shariah law cases often dealing family law. Assistance under this scheme is only available for citizens. In criminal cases the LAB’s will provide assistance to juveniles and in cases where there has been a plea of guilty will support a lawyer to

---

63 The Legal Aid Act 1971


40 APPLYING LEGAL AID MODELS IN NATIONAL CONTEXTS: LESSONS FOR POLICY MAKERS
represent at the mitigation proceedings. Assistance is generally not available if a person pleads not guilty.\textsuperscript{64} Defended criminal cases must be dealt with under other legal aid mechanisms and are often referred to an LAC.

The LAB staff are government civil servants. The LAB appoints a panel of lawyers that may be contracted under a \textit{judicaire} arrangement in matters under their mandate.

**Beneficiaries**

The LAB’s will apply a means and merits test to applicants. The means test has two divisions. The first is for applicants whose annual income is very low, and they will be provided with free legal aid. A second category which is somewhat higher will be granted subsidized legal aid, meaning they will need to make a contribution to the costs.

A person who does not qualify for either of these categories but believes there are special reasons why legal aid should be granted can apply for an exemption from the means test, through the Director of the LAB. The process of applying for legal aid includes filling out a form, being interviewed and making an oath that the information provided is true and correct.

Kinds of legal aid cases covered include the following.

- Family Law and Syariah Family Law
- Migrant and refugees
- Labour and employment
- Consumer claims and hire purchase
- Probate and Letter of Administration
- Motor vehicle and other accidents
- Money-lending matters
- Criminal matters in pleas of guilty, cases involving juveniles

To understand the kinds of cases dealt with by the LAB’s the total number of \textit{current cases} in August 2016 was in excess of 5,000, of which

- 3,623 were legal advice
- 596 Syariah family cases
- 337 other family cases
- 508 mediation cases
- 47 civil matters
- 105 criminal cases\textsuperscript{65}

---

\textsuperscript{64} The Legal Aid Act 1971 Second schedule
\textsuperscript{65} Legal Aid Bureaus Portal statistics section August 2016
The Bar Council Legal Aid Centers: focus on criminal cases

The system of LAC’s adopted by the Bar in 1983 has grown to 16 LAC’s across the country. The function of the LAC’s is to:

- Provide free legal advice and representation in civil and criminal matters, including remand proceedings and bail applications
- Promote legal awareness through education

The LAC’s are offices are managed by a small number of full time support staff but the legal services are provided on a ‘volunteer’ basis by members of the Bar. They are drawn from a list of those prepared to take the legal aid cases. In fact, the lawyers are paid for their services but the rate is far less than usually paid to a private lawyer.

A significant amount of assistance is also provided by law graduates who are undertaking their compulsory nine-month period of ‘pupillage.’ Each law graduate must complete this period under the supervision of an experience lawyer, and it must include at least two weeks legal aid work. In addition to boosting the capacity of the LAC’s this requirement gives all new lawyers an experience working directly on social justice issues which can have a significant positive effect on the ethics of the legal profession and lead to a long-term commitment to pro bono work. Usually the ‘pupils’ do not do the full two weeks in one block but work in an LAC one day per week and some continue for longer than their required period.

Dock brief system

These ‘pupils’ are able to appear in court on pleas of guilty to argue mitigation of sentence. Some LAC’s operate a ‘dock brief’ program where the pupils will attend the lower level court every morning to meet with potential clients, provide them with information about legal aid and represent them on bail applications and mitigation hearings. ‘Pupils’ may also work with civil society legal aid organizations, assist with the prison visit schemes or contribute to other work.

Beneficiaries

The applicants for legal aid at the LAC’s must satisfy a ‘means and merits’ test. The means test sets out specific elements of the test including:

- Monthly income
- Value of house or apartment
- Value of motor car or motor cycle owned
- Savings

Legal aid beneficiaries may receive a grant of legal aid but will still be required to pay a modest amount to cover the disbursements of the case, such as the travel of the lawyers and ‘pupil’ etc.
In addition to the means test the application for legal aid must also pass the ‘merits’ test, to determine that it is a priority for the LAC. Legal aid through the LAC’s will not be granted for the following kinds of cases:

- Motor accidents
- Debt collection
- Defamation
- Conveyancing
- Probate and Letters of Administration
- Capital criminal offences (as they will be covered by the court scheme.)

The LAC’s have provided assistance to over 20,000 criminal cases every year since 2008.

**Funding**

There are more than 17,000 lawyers who are members of the Bar and lawyers who are not members are unable to practice law. Every year each of these lawyers must pay approximately USD $25 per year as a contribution to the legal aid Centers.

**The National Legal Aid Foundation (Yayasan Bantuan Guaman Kebangsaan)**

Although the Bar Association’s LAC’s significantly increased their caseload and reach since their 1983 inception by 2010 it was clear that without substantial government funding only a small percentage of those needing a lawyer in criminal cases could be provided with one. In 2009 approximately 80% of accused persons charged with serious offences did not have a lawyer.

At a meeting between the Prime Minister and senior representatives of the Bar Association in early 2010 it was decided to inject a significant increase of government funding to provide legal aid lawyers in criminal cases.

The mechanism for providing this increased criminal law legal aid is the establishment of the National Legal Aid Foundation (The Foundation.) The Foundation is a registered as a company with limited liability and governed by a Board of directors. The Chair is the Attorney General, the President of the Bar Council is the Vice Chair. Additional Board Members include senior representatives of the government and the bar associations from the other two areas of Malaysia Sabah and Sarawak that are not covered by the Bar Council, and the judiciary.

As the Foundation is not a statutory body there is no legal duty for the parliament to include adequate funding in the national budget. Funding for the Foundation is a political decision, and can therefore be affected by political factors.

The mandate of the Foundation is to fund legal aid and legal assistance in connection with criminal proceedings, to provide private lawyers to represent those in need of these services, and to fund and encourage research,
education and information programs related to legal aid.\textsuperscript{66}

For Peninsular Malaysia, Foundation operates through the LAC’s of the Malaysian Bar Council whilst for Sabah, Sarawak and Federal Territory of Labuan it operates through the government Legal Aid Department and works closely with Sabah Law Association and Advocates Association of Sarawak.

**Types of legal aid services provided**

The Foundation provides free legal assistance and advice in criminal matters including Shariah criminal matters. The legal aid is restricted to citizens of Malaysia. Legal aid is made available at the stage of arrest, remand, charge, bail application, mitigation, hearing and appeal. The assistance is available for all criminal offences except death penalty cases which are covered by the Court funded scheme.

**Services to those arrested**

All persons who are arrested will be represented by an independent lawyer provided by the Bar Council and funded by the Foundation. The lawyer will attend the police station soon after the arrest and provide free legal aid to the client through the period of remand until they are brought before a magistrate and will represent the person at the bail application hearing. There is no means test for the legal aid service up to that point.

The police or other enforcement agencies have a duty to inform the arrested person of his/her right to be represented by a lawyer and will contact the Foundation to send a lawyer to represent the arrested person subject to section 28A of Criminal Procedure Code unless the arrested person has their own lawyer.

Following the bail application, a means test will be applied. Those with an income over approximately $USD 900 per month will not be eligible for legal assistance. Assistance is available for some appeals, subject to the means test and an assessment of the strength of the case on appeal.

The Foundation lawyers must be accepted to be on the panel of available and qualified lawyers. They are paid for their services but the fee is very low and only very few lawyers would consider that they can operate solely on these kinds of cases. The panel lawyers are the registered members of Malaysian Bar, Sabah Law Association, Advocates Association of Sarawak and Shariah Lawyers Association of Malaysia.

**Quality control**

Each of the Foundation lawyers must pass an examination to demonstrate that they have sufficient knowledge of criminal law and procedure. The Bar

\textsuperscript{66} National Legal Aid Foundation web site
Council audits all the Foundation lawyers. If reports are received indicating issues relating to competence of counsel the lawyer concerned may be required to undertake further training. If credible reports of ethical breaches are received the lawyer will be suspended and referred to the Bar Council disciplinary process.

When the Foundation programs commenced, with the goal of providing legal representation to all persons accused of a serious crime there were not enough lawyers with criminal law experience to provide adequate representation, as less than 5% of all lawyers in Malaysia practice criminal law. The Foundation then commenced a series of ongoing trainings in criminal law to upgrade those skills for its members. To date more than 1,700 lawyers have participated in these trainings.67

Non-attendance of police witnesses

This challenge which is common to many other systems has been significantly reduced through the introduction of the system of a key performance index. The index requires the performance of the judges to be linked to their promotion and awards. One of the factors is the time of the trial, the delays before hearing etc. This led to judges taking a more active role in relation to applications for adjournment.

There is an internal understanding between the judges and the prosecution that if a witness does not appear three times the case will be dismissed and the accused person released. In some cases, the judge will release the person.

Another aspect was the introduction of e-filing for civil cases, which has greatly reduced the problem of ‘lost files.’ which had previously created many complications for legally aided civil cases supported by the Legal Aid Bureaux.

Civil society organizations and legal aid

There are also a range of non-government organizations that provide assistance to legal aid clients. Many such organizations focus on particular areas of need and build up an expertise in these areas- for example migrants, housing, women and children etc. Non-lawyers working in these organizations are permitted to provide legal information but are not permitted to provide legal advice, which must be offered by a lawyer.

Lessons from the Malaysia legal aid case study

- The government legal aid office handles civil cases and the bar association implemented system handles criminal cases. This provides more independence in criminal cases which is very positive.

---

67 Presentation by Mr Ravin Singh, Director of the Malaysian Bar Legal Aid program, Workshop on Access to Justice in ASEAN countries Bangkok, Jan 2016
The national bar association is strong and ethical and has made a major contribution to legal aid.

The combination of government funding and the bar association’s involvement in providing independent lawyers in all criminal cases is a good example of a country in the region achieving a relatively high quality and independent criminal justice legal aid system that is cost-effective.

There was a problem of police witnesses not attending court hearings but it has largely been overcome by introducing and implementing performance indexes for the judges, so that if cases are delayed it will affect a judge’s chances of promotion etc.

The bar association proved that it could carry out ethical and effective legal aid and then the government decided to provide major funding to that system, but does not try to direct it, and the legal aid services in criminal cases are independent of the prosecutors and police and government.

The civil law cases are handled by the government system which can work well but is problematic if the cause of a poor person’s legal problem is a government representative.

LEGAL AID CASE STUDY NO 5: MYANMAR

Background and history

The Republic of the Union of Myanmar shares common border with Bangladesh, India, China, Laos and Thailand. It has a population of approximately 51 million people. Myanmar was ruled by a series of military dictatorships for approximately 50 years until the landmark elections in 2015 in which Aung San Suu Kyi’s National League for Democracy won a majority in both houses of parliament.

Since independence from the British in 1948 the country has continued to apply a common law system, with a number of relevant laws from the British period still in force. These include Civil Procedure Code (1859), Criminal Procedure Code (1882 and 1898), Indian Penal Code (1860), and Indian Evidence Code (1872).

The right to a defense for all persons accused of a criminal offence is guaranteed in the 2008 Constitution, and included in the Judiciary Law 2008, s2(f) and s340 of the Criminal Procedure Code.

The right to free legal aid for capital offences is guaranteed by The Attorney General of the Union Law 2010, §36(1) Order 33 of the Civil Procedure Code allows for the waiver of court fees for an indigent person in civil cases.

The budget for legal aid in capital cases is drawn from the Office of the Attorney General but there are no publicly available figures for this allocation. The amount that is paid to lawyers who appear in the death penalty cases is very low: 2500 Kyat (2.50 USD) for the first hearing at the Supreme Court level and 2000 Kyat (2 USD) per day for the remaining days of the court hearings. For representations before subordinate courts, the lawyer shall be remunerated 2000 Kyat (2 USD) for the first hearing and shall be remunerated 1500 Kyat (1.50 USD) per day for the other court hearings.69

Because the amount payable for these hearings is very low the legal aid capital cases have been largely handled by very junior lawyers. This creates the illusion of the provision of a fair trial that often covers a serious injustice. In these very complex cases, usually murder or large-scale drug trafficking, a junior inexperienced lawyer is unable to provide a strong defense for his or her client.70

Historical provision of legal aid: civil society

Until the adoption of the national legal aid law in 2016 legal aid services in Myanmar were limited to the representation in capital criminal cases mentioned above and services provided by civil society organizations and private law firms. A number of private firms supply lawyers to undertake legal aid cases on a pro bono basis and foreign donors fund civil society organizations that hire full time lawyers and staff to focus on legal aid cases. Some of these organizations focus on particular areas such as land cases, women and children’s’ rights, persons living with HIV, etc.

In 2012 a delegation of government and civil society representatives visited South Africa to study the model of Justice Centers “one stop shops” in which senior lawyers, junior lawyers, paralegals, law students and staff work together in Centers that supply criminal defense and other services. As a result, two similar Centers were established in Myanmar, funded by donor contributions: the Yangon Justice Center and the Mawlamyine Justice Center. These two Justice Centers employ approximately 18 full time lawyers, including senior and junior lawyers as well as ‘article clerks,’ law students and paralegals. Each also operates a smaller ‘satellite office’ in remote area of the relevant region.

The two Justice Centers also follow the South African principle of stringent quality controls. A senior lawyer supervises the actions of each junior lawyer in every single case. All lawyers and staff report on their monthly targets and must explain if they fall below the set targets. The Justice Centers also hold regular education programs in local communities and prisons and monthly training for their staff.71

70Interviews with lawyers from Yangon Justice Centre and Mawlamyine Justice Centre January 2016.
71Interviews with staff of Yangon and Mawlamyine Justice Centers Sept 2015, Jan 2016.


**Beneficiaries**

A majority of the cases handled by the two Justice Centers have been criminal cases, with the satellite offices dealing with more civil cases. The Justice Centers have formulated their own “means and merits tests” to decide who will qualify for their assistance.

The ‘means test’ to decide who is eligible to receive legal aid at the Yangon Justice Centre includes: i. person who is unemployed and has no income or assets; ii. a detainee who does not have connection with family; iii. an accused who does not have lawyer at the first hearing; iv. a single person who is employed but his/her monthly income is less than 100,000 kyat (100 USD); v. a married person who is employed but whose total household income is less than 300,000 kyat (300 USD) or more if they have school age children or a disabled or sick person in their family. All children are eligible for legal aid without any means test.

**The Legal Aid Law 2016**

In January 2016 the national parliament passed the Myanmar Legal Aid Law\(^72\) (the Law) which gives overall responsibility for providing legal aid to the Union Supreme Court.

The Legal Aid Law was one of the last laws passed by the national parliament before its term ended in January 2016. The new parliament, in which Aung San Suu Kyi’s National League for Democracy party (NLD) holds the majority of seats for the first time is, at the time of writing considering whether the amend the law, which has not commenced its implementation phase.

Although there are many positive aspects of the law there are also many serious challenges. These include the establishment of Legal Aid Bodies at three levels, with over 2000 members, which is seen to be impractical, and the limiting of legal aid funding under the law to criminal cases.

The Law only deals with legal aid in the criminal justice system, and is one of the first legal aid law in the world to specifically include the UN Principles and Guidelines on Legal Aid in Criminal Justice Systems (the UN PnG’s)\(^73\) Through inclusion of the UN PnG’s in the following section the Law adopts a broad range of international best practices relating to the provision of legal aid in criminal cases.

**Chapter 2. The Objectives of the Law include.**

\[(h)\] To operate in criminal cases according to the legal aid basic principles and guidance of the UN General Assembly.\(^74\)
The same Chapter sets out other objectives of the Law including:

- To provide legal aid for defense and appeal of criminal cases.
- To provide Legal aid education
- “To reduce unnecessary arrests and nullify illegal arrests” during investigation and examination” in criminal cases
- To promote accurate and quick judgments

Funding for legal aid under the Law will therefore only be available for criminal cases. The Law recognizes that other legal aid work will be carried out by legal aid providers outside the scope of its provisions but the its provisions do not regulate those areas of legal aid.\textsuperscript{75}

Key government agencies and responsibilities

The Law provides that the Supreme Court will establish three levels of Legal Aid Bodies to administer legal aid:

i. The Union Legal Aid Body (the Union Body) made up of ten members.
ii. Autonomous Region or State Bodies in each of the 16 state or regions (eight representatives each, a total of 112)
iii. Township Bodies (five representatives in each of the 330 townships, a total of 1,650.)

The Union Legal Aid Body is responsible for the establishment of the sub-national bodies and appointment of members.

The members of the Legal Aid Bodies are selected for five years with a maximum of two terms except for government representatives whose terms are not limited in this way.\textsuperscript{76}

The Union Body is responsible for the overall policy and functioning of the system. It is chaired by a well-known legal expert. The members include

- one representative from the Supreme Court,
- four from government ministries, one each from the Office of the Attorney General, Ministry of Home Affairs, Ministry of Relief and Resettlement and a law professor from the Ministry of Education
- two from civil society,
- one academic,
- a Secretary nominated by the Bar Council.

The Duties and Powers of the Union Legal Aid Body are set out in Chapter 4 of the Law. They include:

\textsuperscript{75} Myanmar Legal Aid Law s 47
\textsuperscript{76} Myanmar Legal Aid Law S14(b)
• Developing legal aid policy
• Supervision of the Legal Aid Bodies
• Discipline over Legal Aid Bodies
• Legal Education relating to legal proceedings
• Develop the criteria for a legal aid claimant to qualify as “poor”
• Appeals against decisions in legal aid applications
• To set the rules for selection of and supervise “recognized bodies” that may be funded to provide legal aid under the Law, to ensure that their actions are independent and in accordance with the law.
• To report on the legal aid system to the Union Chief Justice

The Region or State Legal Aid Body shall have eight members including:

• A well-known legal expert as Chair
• A representative of the State High Court
• Three government representatives from the Attorney General’s Office and the State General Administration Department, and the State Relief and Resettlement Ministry
• Two experienced legal aid practitioners nominated by NGO’s.
• One Advocated nominated by the Bar Council

The powers of the State or Regional Body include:

• Education on legal aid,
• Make the rules and regulations for selection of legal aid providing organizations and individuals
• Evaluation and approval of organizations wishing to be legal aid providers
• Supervising the performance of legal aid providing organizations
• Arranging payment for legal aid providing organizations and individuals

The Township Legal Aid Bodies shall have five members including:

• Three “well respected legal experts with a good reputation in the township”
• One lawyer proposed by the Attorney General’s Office
• One representative from social agencies and NGOs experienced with legal aid services

The duties of the Township Body include:

• Provide legal aid education

---

77 s12

50 APPLYING LEGAL AID MODELS IN NATIONAL CONTEXTS: LESSONS FOR POLICY MAKERS
Assign and supervise legal aid providers, with the agreement of the Regional or State Body
Provide monthly reports to the Regional or State body

“The Court, Attorney General Office, Myanmar police force, prison, and any complaining organization shall cooperate with the relevant legal aid body for the legal aid claimant.”

Definition of legal aid

Section 2 in the definitions section of the law states that:
(a) “Legal aid” means the hiring of a lawyer, legal education, advice, assistance and sharing information with the legal aid claimant.

Sources of legal aid funding

Funding for the Body is drawn from the Union Supreme Court annual budget. An asset account is to be established and International donors can support the legal aid system by depositing funds into this fund. Only the Union Body can receive funds from international donors. This encourages international donors to provide any funding at the national level so that it can be allocated according to the priorities established by the Union Body, including geographical locations. The Regional and Township-level bodies may receive additional funding from local, but not international sources. The budget and details of spending of all of the Legal Aid Bodies shall be made transparent to the public and subjected to audit.

The model for providing legal aid: judicaire

The model created by the Law is judicaire. That is the model is one in which the legal aid service will not directly carry out legal aid services but will authorize and arrange payment for organizations and individuals to do legal aid work. The drafting of the law is unclear on whether the Township bodies may also have power to conduct legal aid work themselves. The overall division of responsibilities can be summarized as follows:

- The Law deals only with legal aid in criminal cases
- The Supreme Court has overall responsibility
- The national Union Legal Aid Body has responsibility for developing policy and supervising the implementation of the criminal justice legal aid services
- The Regional or State Legal Aid Bodies have the power to formulate the selection criteria and procedure for organizations and individuals that wish to be included as “legal aid providers” paid for services under

---

78 Ibid s35
79 Ibid s34(b)
80 Ibid S34(a)
81 Ibid s35(a)
the Law, and arrange payment for legal aid providing organizations and individuals.

- The Township-level Legal Aid Bodies will directly fund organizations that are providing legal aid in the Township area. They may also carry out legal aid work through lawyers working for the Township Body.

**Legal aid providers**

The definitions section of the Law recognizes that “legal aid providers” that may be funded under this Law can include

- organizations
- lawyers and
- non-lawyers.\(^{82}\)

Non-lawyers must be supervised by a lawyer. These non-lawyers can be law students or persons with experience in the judicial system, a law firm or government law department.\(^{83}\)

Organizations or lawyers can apply to be “certified” as legal aid providers under the Law. There is no process of accreditation set out in the law, and it must be provided by the State or Regional Legal Aid Bodies.\(^{84}\) The regulations concerning certification have not yet been drafted.

**Beneficiaries**

The Law sets out a list of categories of those who may claim legal aid, referring to them as “legal aid claimants.” After they apply for legal aid their case will be subjected to a ‘means and merits test’\(^{85}\) to determine if they have the ‘means’ to pay for legal aid and their claim has sufficient ‘merit’ to be funded.

Section 2 of the Legal Aid Law the following definitions which include a broad range of categories of legal aid beneficiaries:

(a) **“Legal aid claimant”** means the detained, poor, children, women, those in need of special care, elderly, disabled, HIV patients and those with other infected diseases, the countryless, asylum seekers, foreigners, migrants, migrant laborers, the refugees, crime victims, those detained, arrested, accused, punished and imprisoned due to offense, and witnesses to crimes.

(a) **“The poor”** means the person who cannot afford to hire a lawyer for a criminal case in accord to this law.

---

\(^{82}\) Ibid Chapter 10

\(^{83}\) Ibid

\(^{84}\) Ibid Chapter 13

\(^{85}\) Section 6(g) of the Law provides the duty of setting criteria for decisions on means to the Union Legal Aid Body. Ch. 9 deals with means and merits test.

52 APPLYING LEGAL AID MODELS IN NATIONAL CONTEXTS: LESSONS FOR POLICY MAKERS
(b) “Child” means a person who has not attained eighteen years of age.

(c) “The disabled” means a person, whether or not from birth with any one or more long-term chronic physical weakness in speaking, hearing, knowledge, mental, or senses.

Types of legal aid services provided

Legal aid is defined to include

- legal education,
- advice,
- assistance
- sharing information with the legal aid claimant.
- Obtaining the services of a lawyer in criminal cases.  

The Law requires that in criminal cases legal aid must be available

- from the time of arrest,
- during the investigation stage,
- for criminal case hearings and trial and
- for appeals. 

Legal aid can also be provided to witnesses where the “unusual conditions” of the case requires it.

Quality control

The law specifically requires the Legal Aid Bodies to ensure that legal aid providers are not receiving any fees or benefits from legal aid beneficiaries, to provide supervision to avoid corruption and to take steps to investigate and punish those found responsible for corruption.

The rules concerning the quality control of services provided by legal aid providers are not included in the Law and must be included in regulations, which were not drafted at the time of writing.

Challenges for the new law and system

- By referring to the United Nations Principles and Guidelines in a single section of the legal aid law Myanmar has taken advantage of a comprehensive range of best practices for legal aid in criminal cases developed by many of the world’s leading experts in the area.
- The 2016 legal aid law includes many positive aspects. In particular it guarantees the right to legal aid from the time of arrest in criminal cases, includes a broad range of legal aid services and providers

---

86 Ibid s 2
87 s25, s 26
88 Ibid s 29
89 Ibid Ch. 13.
including paralegals and law students if they are supervised by lawyers.

- However, the law has been strongly criticized as impractical, particularly the inclusion of Legal Aid Bodies in 330 Townships, with a total of more than 2000 ‘members’ of the Legal Aid Bodies, who are not working lawyers providing legal aid. In addition, the law is limited to criminal cases, which is not appropriate to the broad range of needs in Myanmar.
- The practice of the ‘dock brief’ system of appointing legal aid lawyers in capital cases has produced disappointing results, with very low payment of fees meaning that junior lawyers often act as defense counsel in cases that are beyond their capacity and experience.
- The two pilot project Justice Centers have demonstrated that the ‘one stop shop’ model developed in South Africa can be valuable in Myanmar. However, because the court system is not operating efficiently and police witnesses in criminal cases often do not appear legal aid lawyers are forced to make multiple visits to court for no reason and accused persons often wait up to a year for their hearing, only because the police witnesses did not appear in court.\(^9\)

Lessons from the Myanmar legal aid case study

- The new Legal Aid Law has not commenced implementation phase and will only focus on criminal cases, with private lawyers and organizations providing legal aid through judicaire sub-contracts. A legal aid system should include both criminal and civil cases.
- The Law includes the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice systems which provide very comprehensive guidance.
- The Law includes three levels of Legal Aid Bodies including 330 lower level Township Legal Aid Bodies. It appears that there are too many levels and too many members of these Bodies. This is likely to lead to the budget for legal aid being used up by the administration of these Bodies rather than being paid directly to those who provide legal aid services. Most of those involved should be lawyers and others who provide services, not representatives of government departments.
- The two pilot project Justice Centers have provided an example of how a ‘one-stop shop’ legal aid provider can be effective in Myanmar. However, they are more expensive than will be possible under a larger system.
- A contributor to the cost of the Justice Centers and other legal aid providers is the non-appearance of police witnesses in criminal cases, forcing lawyers and accused persons to come to the court many times without being able to proceed. Unless this system is solved, cost effective legal aid will be impossible.
- The court appointed lawyers in capital cases is supported by very low payments for counsel in these cases. This has led to a norm in which

---

\(^9\) Interviews with practicing criminal lawyers in Myanmar, including staff of the Yangon and Mawlamyine Justice Centers, September 2015 and January 2016.
only very junior lawyers are usually in these cases, which are too complex and demanding for their level of experience.

LEGAL AID CASE STUDY No 6: THE PHILIPPINES

Background and history

The Republic of the Philippines is a democratic state of approximately 94 million people and reaches across 7,100 islands. It was part of the Spanish empire, under the colonial control of the USA and under Japanese control in World War II. There are six administrative regions that are divided into 26 provinces, each led by an appointed Governor. Some of the provinces are semi-autonomous areas with a majority Muslim population.

The primary provider of legal aid services in the Philippines is the Office of the Public Advocates Office (PAO). Prior to 2007 the PAO had been an office of the Department of Justice with a limited amount of independence. However, the passage of the ‘PAO Law’ in 2007 provided the office with a significant amount of independence, connected to the Ministry but only for purposes of policy and coordination of services.

In 1973, the Supreme Court created the Integrated Bar of the Philippines, the national bar association of which all practicing lawyers must be a member. The IBP’s duty to provide a legal aid program was created at the same time.

The right to legal aid is specifically included in the national Constitution of the Republic of the Philippines:

“(F)ree access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.”

The Constitution also requires the Judiciary to make rules concerning providing legal assistance to the underprivileged. In addition, it includes a Bill of Rights that adopts protections relating to a broad range of human rights, including the right to due process, bail, and habeas corpus. The Constitution states that persons accused of crimes shall have the protections consistent with international human rights standards. These include those in the International Covenant on Civil and Political Rights (ICCPR) such as the right to be presumed innocent, the right to be informed of the nature and cause of the accusation, and the right to a speedy, impartial, and public trial.

The Barangay Justice System

The Barangay is the smallest unit in the Philippines political system, akin to a village. Under the Local Government Code of 1991 any dispute involving the residents of the same city or municipality may not be accepted directly by a court, but must first go through a process of mediation at the local or barangay level. This requirement includes criminal cases where the penalty is less than one year of imprisonment or a penalty of PhP 5,000 (approximately

91 Constitution of the Republic of the Philippines Art III s 11.
92 Act of the Republic of the Philippines RA 7160, s399-422, Book III, Chapter VII, Title I
The Barangay process is initiated by one party to the dispute who files a complaint with the head of the village or barangay. This may be done in written or oral form. The head of the village will then provide notice to the other party that he or she must appear before a panel of mediators. A panel of three persons is selected by the parties from a list of those eligible. This panel has 15 days to try to solve the dispute between the parties. If they fail then the matter is referred to a second panel of persons selected by the first panel. The second panel has 15 days, extendable by a further 15 days to try to mediate the dispute. If this also fails then the panel shall issue a Certificate to File Action.

Unless a Certificate to File Action is issued and filed with the court the case will not be accepted by the local court. At any stage of the process the parties can agree, or accept referring the case for arbitration through a local village process. There is no formal legal requirement regarding the manner in which this process is conducted.\footnote{Access to Justice Assessment, the Philippines. American Bar Association January 2012 p 23. http://www.americanbar.org/content/dam/aba/directories/roli/philippines/philippines_access_to_justice_assessment_2012.authcheckdam.pdf}

The Alternate Dispute Resolution Act\footnote{Republic Act to Institutionalize the use of an alternate dispute resolution system in the Philippines and to establish the office for Alternate Dispute Resolution and for other purposes. (enacted April 2, 2004, Law No. 9285)} provides a duty on the state and all agencies to attempt to settle disputes through arbitration, mediation and conciliation.

The Rules of Court instruct that attorneys are obligated not to reject the cause of the defenseless or oppressed for any reason. Further, if, upon investigation, it appears that a party is destitute and unable to employ an attorney, a court may assign an attorney to render professional aid free of charge to any party in a case.

The 1992 Act dealing with powers of arrest\footnote{Republic Act No. 7438 on Persons Arrested, Detained or in Custody April 27, 1992 http://www.lawphil.net/statutes/repacts/ra1992/ra1992.html} requires that a police officer who arrests an individual must inform the person arrested that they have the right to remain silent and that they have the right to a lawyer “preferably of his own choice, who shall at all times be allowed to confer privately with the person arrested, detained or under custodial investigation.”\footnote{Republic Act No. 7438, 1992 Ibid} If a suspect cannot afford the services of his own lawyer the police must provide him with “competent and independent” counsel. The suspect individual cannot be interviewed without a lawyer present and unless a lawyer has read and explained the investigation report to the suspect before the suspect signs then it is not admissible as evidence.\footnote{Constitution Bill of Rights Art III S 14 par 2}
Legal aid providers

Legal aid in the Philippines is primarily delivered through three mechanisms:

- the government funded independent Public Attorney’s Office,
- the legal aid program of the national bar association, the Independent Bar of the Philippines (IBP) and
- legal aid clinics run by university law faculties.

In addition, since 2014 free legal aid and assistance for women and children is conducted through a program of cooperation between the Department of Social Welfare and Development and the IBP. A large number of Philippines citizens are migrant workers and the Department of Foreign Affairs also operates a scheme of providing legal aid for those foreign workers who face legal problems.

Models of providing legal aid

The major provider of legal aid, the PAO, relies on the public defender model of legal aid provision, with a large number of full time lawyers and support staff spread across several hundred offices and usually working out of a court which has been assigned as their duty station. There are other contributors to the provision of legal aid, including pro bono private lawyers and university clinics, so the overall makeup of the system is mixed but it is dominated by a public defenders’ system.

The Public Attorney’s Office (PAO)

The PAO has been granted clear legal authority to be the major provider of legal aid services in the Philippines. The 2007 Law No 9406 ("The PAO Law") stated that “The PAO shall be an independent and autonomous office but attached to the Department of Justice…for purposes of policy and program coordination.”

According to the Implementing Regulations of Act 9406 (the PAO Law) “The PAO shall be the principal law office of the Government in extending free legal services to indigent persons in criminal, civil, labor, administrative and other quasi-judicial cases.”

The powers and functions of the PAO are to:

- independently discharge its mandate to render, free of charge, legal representation, assistance, and counseling to indigent persons in criminal, civil, labor, administrative and other quasi-judicial cases.

The PAO is led by a Chief Public Attorney and two Deputy Chief Public Attorneys. It has a legal duty to operate offices at the Provincial, City and

---

99 Ibid
100 Ibid
Municipal level. (1) The PAO Law provides protection for the senior staff against political interference by providing that the Chief Public Attorney, Deputy Chief Public Attorneys and Regional Public Attorneys shall not be removed or suspended, except for cause provided by law.

Local government authorities are authorized to extend financial and other support in the form of honoraria and free office space, equipment, furniture and manpower to the PAO. Clients of the PAO are also exempted from paying fees usually required to bring a case in court. PAO lawyers also have the authority to swear oaths and don’t need to apply to be authorized as a notary public.

There is a high level of qualifications required for all Public Attorneys hired by the PAO and these lawyers are relatively well paid, full time staff. Each of the lawyers earns in excess of USD$2000.00 per month. All of the offices across the country are linked by the internet and each of the Public Attorneys has a computer.

The funding for the PAO comes from the Philippines national government budget and also allocations from several UN Agencies (UNICEF, UNDP, UNHCR, UNODC, UNDP) and international donors. The budget is approximately 1.8 billion pesos (USD $40 million) annually.

Between 2007 and 2015 the PAO represented clients in over 1,180,000 criminal cases.\textsuperscript{101}

The PAO operates more than 300 offices including:

- 17 regional offices
- 296 district offices
- Five sub-district offices

In 2015 the PAO:

- had over 1,500 staff lawyers and 1,000 non-lawyer support staff. There are over 3,000 courts so the percentage of lawyers to courts is approximately one in every two courts, with the eventual goal of one for every court.
- served a total of 7,747,735 clients
- handled 848,516 cases
- achieved 158,348 acquittals and “favorable decisions” such as a reduction of the expected sentence in the case due to the legal representation. This was made up of a total of 13,221 acquittals and 145,127 other favorable decisions.\textsuperscript{102}

**Types of legal aid services provided**

The PAO has the duty to provide legal representation, assistance and

\textsuperscript{101} Presentation of Dr Persida da Costa Ibid.
\textsuperscript{102} Presentation of Dr Persida da Costa Consultation on Access to Justice in ASEAN, Bangkok January 2016.
counseling in criminal, civil, labor, administrative and other quasi-judicial cases.\textsuperscript{103}

Most of the Public Attorneys are assigned to duties attached to one of the courts. The majority of the caseload of Public Attorneys is taken up with defending those who are charged with criminal offences as all persons charged with a serious crime who are unable to pay for a lawyer will be provided with the services of a Public Attorney according to the Constitutional requirement. Other services include:

- Mediation of cases not yet filed in court. (Once a case is filed the courts have a mandate concerning mediation.) In 2015 the PAO dealt with 457,138 disputes through mediation, resolving 445,758 of those cases.\textsuperscript{104}
- Legal advice telephone service manned 24 hours a day, seven days a week.
- A reality television show, focused on mediation of cases, hosted by the Chief Public Attorney ran for more than two years from 2010.
- Jail visitation and decongestion program from 2010-12 resulted in over 40,000 inmates being released from overcrowded prisons.
- Provides legal assistance to victims through the Victims Assistance Unit. This unit, established in 2012 deals with a broad range of issues including victims of violence against women and children, torture, extrajudicial killings, massacres and natural calamities.

\underline{Overcoming the challenge of the non-attendance of police witnesses}

Until recently there was a major problem caused by the non-attendance of police witnesses at the court, a challenge that is also faced in other developing world contexts. Poor individuals would be arrested and held in custody and then when the time came for their case to be heard the police witness would regularly not appear. This meant that the accused was kept in custody, the case adjourned and the Public Attorney had wasted their time and public funds by preparing for a case that was not heard.

The PAO was able to gain a coordinated approach to this problem, involving the courts, prosecution services, police and the PAO. An MOU was negotiated and signed involving all the relevant parties. The new procedures resulted in a system whereby when a police witness does not attend when scheduled in court an email is sent from the court to the police headquarters triggering an immediate professional sanction against that officer. The new system has resulted in a reduction of the problem of non-attendance by over 90%, so that it is no longer a significant challenge.\textsuperscript{105}

\underline{Forensic Laboratory of the PAO}

This laboratory is equipped with modern forensic equipment and staffed by full

\textsuperscript{103} Act of the Republic of the Philippines 9406 Rule 2
\textsuperscript{104} Presentation of Dr Persida da Costa Consultation on Access to Justice in ASEAN Ibid.
\textsuperscript{105} Interview with Dr Persida da Costa Chief Public Attorney, Jakarta June 2016.
time forensic scientists. It provides medical-legal and forensic services to those who seek assistance from the PAO Victims Assistance Unit. The laboratory staff have expertise in forensic sciences including bloodstain splatter, crime scene reconstruction, forensic osteology and archaeology, evidence photography, document examination. In 2015 the laboratory provided 144 forensic services to a variety of cases.\(^{106}\) The mandate includes a focus on inquests into deaths in police or military custody, to ascertain the cause of death through scientific and objective means.

**Beneficiaries**

Legal aid through the PAO is granted to individuals on the basis of a 'means and merits' test.

The means test is set out in an Administrative Circular that can be altered from time to time. The Circular specifies amount of income that varies for different cities and provinces. If a person earns less than this amount they pass the "means test" and are eligible for legal aid if their case also falls within the guidelines of the 'merits test' discussed below. The income figure for the means test is calculated on the basis of the amount needed for an average Pilipino family to (a) buy its "food consumption basket" and (b) pay for its household and personal expenses, which includes such things as dependents, rent etc. Ownership of land is not a factor that will disqualify someone from getting legal aid, as the test is income.\(^{107}\)

Each applicant for legal aid must sign an Affidavit stating their level of income and provide documentary evidence of their income. This may include a tax return, pay slip or other proof of income, or a Certificate of Indigence (inability to pay) from an office of the Department of Social Welfare and Development or Barangay Chairman (head of the village.)

**Merits test**

The PAO establishes criteria to guide the decision around whether a case has sufficient merit to be provided legal aid. All persons charged with a serious criminal offence who are unable to pay for a lawyer will be provided with the services of a Public Attorney. Because a person is in custody that is deemed to fulfill the merits test.

**Quality control**

Each PAO lawyer has an average caseload of hundreds of cases, and they face a chronic problem of overwork. Despite this they are relatively well respected by local communities.\(^{108}\)

Methods employed to help the PAO to maintain quality of services include the following:

---

\(^{106}\) Dr Persida da Costa *Ibid*


\(^{108}\)
• Every PAO client is given a survey form on which they can record their level of satisfaction or dissatisfaction with the service and staff, including comments. The forms are deposited in a sealed box that is opened and reviewed by the head of the district office.

• Senior public attorneys review every complaint, petition, motion, pleading etc., that is provided to the court by other junior public attorneys.

• In order to achieve a high level of performance there is a combination of supervision and mentoring, monitoring of performance and incentives. Each of the lawyers must provide a monthly report that provides data on the number of cases completed, the profile of the clients, the type of cases and the level of supervision by a senior lawyer. There are also performance-based bonus payments and additional incentives for high and improved performance.

• A Code of Conduct has also been produced for Public Attorneys and there is strict compliance required with rules and regulations including wearing of uniforms etc. Biometric systems for reading fingerprints have been installed at the larger offices to record the times of attendance of lawyers and staff.

The Integrated Bar of the Philippines (IBP)

The IBP was established as an official legal organization for the legal profession through an Act of Parliament and established as a corporate body in 1973. Each lawyer is required to do at least 60 hours of pro bono work each year in order to keep practicing law and much of this pro bono work is provided to legal aid clients.

Legal aid providers

The legal aid program of the IBP is carried out by the National Committee on Legal Aid (NCLA) The NCLA operates a legal aid program, office and a Legal Aid Clerk in each of the 83 IBP chapters in the country. However, in some remote areas where there is a shortage of lawyers there are no qualified lawyers to provide services.

There are no salaried lawyers involved in the provision of services and the lawyers who contribute are not paid, apart from a modest honorarium to cover expenses.

Budget

The NCLA receives an annual allocation of funds under the General Appropriations Act approved by the parliament. This allocation is paid through

109 Republic Act 6397
the supreme court and is distributed to the chapters of the NCLA every quarter.

Beneficiaries

The clients of the NCLA program may be referred by the courts or through one of the offices of the program. A means and merits test is applied to determine whether the person will be provided with legal aid.

The means test is based on the following criteria. The applicant and his family must not have a gross monthly income that is more than twice the minimum wage of a worker in the place where he or she lives. The applicant does not own property over a certain value.

The means test does not apply to those who fall within categories that are the targets of the ‘developmental legal aid programs,’ such as overseas workers, fishermen, farmers, women, children and other disadvantaged groups.

The ‘merits test’ includes criteria relating to whether it appears that the applicant has a valid legal claim has a reasonable chance of success.

The program of the IBP is divided into two areas:
- Traditional legal aid, including legal advice and representation
- Developmental legal aid, including legal awareness raising, education, research etc.

The traditional legal aid services provided by the NCLA include representation of clients in hearings, preparation of documents, providing advice and assistance etc.

The developmental legal aid programs are focused on producing a structural change in society through the contribution of legal aid. This includes legal aid information clinics in poor areas, production and distribution of simple language legal materials, radio shows presenting legal information, a legal audit of extra-judicial killings, prison decongestion project.

University law clinics

An increasing number of law schools in the Philippines have established legal aid clinics in which law students provide services under the supervision of an experienced lawyer. As part of these courses law students are required to undergo a practical program of providing legal services to the underprivileged.

The Supreme Court Rules allow for law students, particularly in their last year of studies, to appear in court if they are under the supervision of a lawyer. This is an important factor in encouraging universities to establish legal clinics. Another important factor that strengthens the national movement of university legal aid clinics is when universities adopt a system for accrediting students who contribute to the clinics.
The university legal clinics not only contribute to the services available to the poor and marginalized but also make a significant contribution by introducing lawyers to ethical social justice lawyering at an early stage of their career.

Civil society organizations in the Philippines also provide a broad range of legal aid services. Some organizations are focused on particular issues such as the rights of migrant workers, women, children, land issues, etc. In addition, some organizations have developed networks of community based paralegals. These are individuals who are influential in a community who are provided with training and ongoing support so that they can provide low-level legal advice and assistance and refer cases to those who can assist with more complex problems.

“At the level of the community, paralegals are the most accessible resource in terms of providing information on law and mediating conflicts.”

**Lessons from the Philippines legal aid case study**

- One of the most comprehensive legal aid systems in the region
- The government funds an independent office with sufficient funds to provide a relatively good salary to over 1,500 public defender lawyers who attend the courts every day to defend persons accused with crimes.
- The government has invested in the legal aid system. The system led by the Public Advocates Office has been able to provide good data reflecting their work, which has led to increases in government funding.
- Allowing final year law students to appear in court if supervised by a lawyer adds to the resources available for legal aid.
- There was a major problem of non-appearance of police witnesses but this has been addressed by a concentrated effort involving courts, police and the Public Attorney’s Office. Now if a police officer does not appear the judge will arrange immediate communication of this by email and a sanction appears on the record of the police officer. This makes cost effective legal aid possible.
- The independent bar association also provides legal aid services which is a good addition but would not be enough without the large government funded but independent PAO.
- The large legal aid institution allows for strong control over performance, ethics, case-management systems.
- Universities and civil society legal aid providers help to extend the resources of legal aid providers.

LEGAL AID CASE STUDY NO 7: SINGAPORE

Background and history

Singapore is the world’s only city-state, with a population of approximately 5.5 million and around 5,000 lawyers.111

The legal system in Singapore is derived from the English common law tradition. Article 9(3) of the Constitution provides that “[w]here a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.” The Constitutional protections do not extend to the state providing legal aid where a person cannot afford a lawyer.

Despite this the government has established a system of providing legal aid in civil cases, the Court has established a system for providing legal aid in capital criminal cases and the national bar association, the Singapore Law Society has established a system for providing legal aid in criminal cases.

Legal aid in Singapore is provided under three schemes

1. The Legal Aid Bureau under the Ministry of Law provides legal aid in civil cases only.
2. Criminal representation in capital cases is provided by lawyers who appear on a pro bono basis (volunteer) managed by the High Court under the Legal Assistance Scheme for Capital Offences (LASCO).
3. Criminal representation on a broader scale is provided by the Law Society of Singapore, in addition to a number of other pro bono services.

Legal aid in civil cases

Historical background

The first government legal aid system in the country was established with the passage of the Legal Aid and Assistance (Amend) Act (LAA Act) in July 1958. The Legal Aid Bureau (LAB) was set up in the same month with the purpose of administering the law and in 1984 was transferred to the Ministry of Law. The LAB is still responsible for administering the system of legal aid in civil cases.

Until recently the government took the view that it was not necessary to provide legal aid in criminal cases as it considered that an excellent system of policing and prosecutors would also look after the rights of accused persons. In that context the national Bar Association, the Singapore Law Society, began to provide legal aid in a range of matters including criminal cases, creating the Criminal Legal Aid Scheme (CLAS) in which lawyers would provide pro bono representation in criminal cases, being paid only a modest honorarium. Although there is no Constitutional right to be represented in capital cases another pro bono scheme was established, implemented by the

---

Courts in which senior lawyers supported by a junior lawyer provide high quality pro bono representation in all capital cases. This scheme is the Legal Aid Scheme for Capital Offences (LASCO.)

With the growing international consensus of the importance of independent legal representation in all serious criminal matters the Singaporean government changed their policy in 2015, with a decision to provide significant funding for criminal offence legal aid, which would be channeled through the CLAS program operated by the Pro Bono Services Office of the Law Society. The PBSO is a registered charity and also runs a number of other programs including the Community Legal Clinic Scheme and the Ad Hoc Pro Bono Referral Scheme in which lawyers give pro bono services to those who are needy but not poor enough to qualify for legal aid, and Project Law Help which provides assistance to charities and social organizations. The assistance of the PBSO is also provided through legal clinics at the lower level courts including the Civil Legal Clinics, Criminal Legal Clinics and Family Legal Clinics.

This summary will therefore deal separately with the three major areas of legal aid in Singapore: the civil scheme of the government, the pro bono program in capital cases administered by the courts and the CLAS and other legal aid programs run by the Singapore Law Society.

Legal Base

The amended Legal Aid and Advice Act 2013 (CAP 160) (LAA Act) and Legal Aid and Advice Regulations\textsuperscript{112} (1995) (the Regulations) provide the legal base for the civil law legal aid scheme (CLAS).

Legal Aid Providers: civil legal aid scheme

The LAB employs lawyers and is responsible for forming panels of lawyers that are considered suitably qualified to act in legal aid cases. The legal aid cases may be handled by a staff member or by a solicitor selected from the panel. Usually an applicant for legal aid will have their own lawyer, make an application for legal aid and that lawyer will then be funded to carry out the legal aid work, but paid a lesser rate than usual (see below, re Regulations on payment.) If two parties in a civil claim both apply for legal aid both must be represented by private lawyers from the panels.

The LAB is assisted by private lawyers and law students who give their services on a volunteer pro bono basis.

\textsuperscript{112} Legal Aid and Advice Regulations CAP 60, Regulation 1
\url{http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?Compld:3bSa6d09-7ab0-4c90-8fcd-279a5541c7d7}
Definition of Legal Aid

Under the LAA Act “legal aid means legal aid granted under this Act;”\(^{113}\) In effect any civil legal matter for which an applicant has applied and passed the ‘means and merits’ test will be considered legal aid.

Beneficiaries: civil legal aid scheme

Singapore has a large number of migrants and permanent residents. The civil legal aid scheme is available to citizens and permanent residents. Legal aid is generally not free and each applicant is assessed as to the contribution they must pay, with permanent residents paying a higher contribution than citizens. Applicants who wish to apply for legal aid in civil cases must fill in a form that includes both personal details (means) and case details (merits.) This application will then be considered and decided upon by a panel consisting of a representative of the Director of the LAB and at least two private lawyers who are members of the panels of lawyers that act in legal aid cases.\(^ {114} \)

The grant of legal aid may include the requirement of the applicant to contribute towards the costs of providing legal aid. When a person is granted legal aid they are not liable to pay any court fees.\(^ {115} \) The amount that is required to be paid is generally not more than $SGD 1,000 and must be paid in two installments, the first prior to the case commencing and the second on finalization.

If a legally aided person wishes to appeal the decision in a case they may provide a fresh application for assistance. Any person who makes a false or misleading statement in applying for legal aid, including not making full disclosure concerning financial means commits a crime punishable by six months imprisonment or a fine up to SGD $5,000.\(^ {116} \)

A legal aid scheme cannot be effective without the cooperation of the courts and LAA Act gives authority to all Courts to make practice directions which will give effect to the Act and Regulations.\(^ {117} \)

In 2015 90% of those applying for legal aid were below the means test applied where only 10% of those who applied were rejected because they were over the means test.

Funding: Civil legal aid system

The LAA establishes a fund into which funds from the national budget are deposited. Applicants may be required to pay a contribution for the costs of the civil case and these are also deposited into the fund, as well as costs awarded to a legally aided person by a court.\(^ {118} \) For example, an applicant who is very poor and their case is considered a high priority against the ‘means and merits test’ will receive full funding for their lawyer to represent

\(^{113}\) Singapore Legal Aid and Advice Act s 2

\(^{114}\) Ibid s8

\(^{115}\) Ibid s 12

\(^{116}\) Ibid s 21

\(^{117}\) Ibid s 19

\(^{118}\) Ibid s2A
them in a case. Another applicant may be approved on condition that they pay the first $SGD 500 of the costs of the case. If that applicant is then successful and the court orders for their legal fees to be paid by the other party the $500 may be repaid and the remainder paid to the LAA to be deposited into the fund.

Provisional legal aid may be granted in urgent cases, while the application is being assessed.\(^\text{119}\)

In 2013 the budget for both the LAB and other pro bono initiatives was $ SGD 9.9 million.

**Types of legal aid services provided**

Under this scheme assistance for a broad range of civil legal aid cases is provided, according to the criteria set out in the Regulations (see below.) This includes:

- Legal advice
- Legal Representation in all courts dealing with civil cases
- Legal Assistance including drafting documents, etc.
- Counseling for applicants that are emotionally distressed

The kinds of legal issues covered include:

- Divorce
- Adoption
- Custody of children
- Contractual disputes, financial claims
- Claims for compensation for injuries suffered, medical negligence.
- Wills and probate, dealing with all aspects of an estate.\(^\text{120}\)

There is a list of cases that are not covered by legal aid, include defamation, breach of promise to marry, and family law cases related only to payment amounts.\(^\text{121}\) This list, publicly available helps to guide potential applicants so they know whether their case is likely to be approved.

In 2015 approximately 50% of the caseload relate to divorce and matrimonial cases, financial claims around 10% and probate at 6%. More than half the applicants for legal aid (52%) were female.\(^\text{122}\)

**Legal advice**

The LAAA provides a separate mechanism for obtaining legal advice, which is verbal advice provided by any lawyer who is on the panel of lawyers approved to provide legal aid. An individual must apply to the LAB and provide evidence

\(^{119}\) Ibid s 7

\(^{120}\) Ateneo University Manila Human Rights Center Draft Report on Legal Aid systems in ASEAN countries. 2015. Draft provided to the author.

\(^{121}\) Schedule 1 part II.

that he or she cannot afford to pay for legal advice. When this is approved free legal advice can be provided to them by the lawyer.\textsuperscript{123}

**Regulations**

The Act provides the Minister with power to draft regulations and “Schedules” which may be changed at any time by the Minister. \textit{The Legal Aid and Advice Regulations 1995}\textsuperscript{124} provide details concerning:

**The means test**

This sets out the amount of “disposable income” that a person must fall below to qualify for legal aid. This is calculated by taking a figure for annual figure for income and deducting from that figure outgoings. The income includes all income of the applicant and his or her spouse. From this the deductions include:

- a specified amount for the applicant, their spouse and each dependent child calculated as the amount needed for expenses of that person for one year
- an amount payable for rent of a dwelling with a maximum amount set out in the regulation.
- An amount for reasonable personable savings
- A deduction if the person has suddenly lost their job and can demonstrate this.
- Other deductions set out in the Regulations

**The merits test (i.e., the kinds of cases that may be approved)**

Each application for legal aid is first considered according to the means test criteria. If those are met then the case is handed to a lawyer who will review and provide an opinion as to the merits of the case. This opinion is then considered by a panel consisting of the Director and two lawyers, to ensure a level of objectivity in decisions as to whether the case has sufficient merit to be funded.

**Legal Aid Certificate**

Once the means and merits tests have been completed a certificate of legal aid may be issued. This certificate can be tendered in court as part of the proceedings. If the legal assistance is required immediately the LAB may issue an Emergency Legal Aid Certificate that will certify that legal aid is being provided pending a decision on the means and merits test.

Applications for legal aid, including the steps for application, approvals, refusals, cancelations of legal aid, how legal aid may be altered or granted after the commencement of a case etc.

\textsuperscript{123} Ibid s 20
\textsuperscript{124} CAP. 160 Regulation 1 http://statutes.agc.gov.sg/aol/search/display/view.w3p;orderBy=date-rev,loadTime;page=0;query=Id%3A3b5a6d09-7ab0-4c90-8f8dc-279a5541c7d7;rec=0

68 APPLYING LEGAL AID MODELS IN NATIONAL CONTEXTS: LESSONS FOR POLICY MAKERS
Payment for services to legal aid providers

The Regulations provide that the lawyers that provide assistance under the legal aid civil scheme are to be paid 50% of the amount normally payable according to the official rate of payment, unless the total payment is less than SGD $1000 in which case the LAB may approve the payment to be 100%.\textsuperscript{125} Usually the payment required is between $SGD 450 and $SGD 750 for the entire proceedings of the civil case. Payment for all disbursements and out of pocket costs are to be fully reimbursed.

The Regulations also include Forms that are to be used to apply for legal aid and to claim payments, etc.

Social assistance

The LAB entered into a partnership with social services agencies in 2007 under which social workers and counselors are provided at the legal aid centers to provide counseling to applicants. Approximately 1,500 individuals are attended under this program (Give Another Lifeline or GAL) each year.

Quality control

There is a requirement for a minimum number of hours training for all employees of the LAB. Monthly meetings involve reports from staff of progress on cases and whether targets are being met. The LAB implements a monitoring and evaluation system based on the International Standards Organization (ISO) Standards.\textsuperscript{126}

The LAB has 50 full time staff and 12 Legal Officers who review more than 10,000 applications for assistance each year.

Capital cases: The Legal Aid Scheme for Capital Offences (LASCO)

Although there is no legal requirement to represent those facing the death penalty the High Court has established a scheme under which all persons charged with capital crimes are represented by two counsels, in practice usually a senior counsel and a junior counsel supporting. These lawyers appear on a pro bono basis but are provided with a modest honorarium by the Court. Despite the fact that this is not a lucrative practice, senior members of the Bar usually appear in these cases which are seen to be part of their ethical duty.

\textsuperscript{125} Ibid s 15
\textsuperscript{126} Ibid Ateneo Report.
Criminal representation: the Criminal Legal Aid Scheme (CLAS) of the Law Society of Singapore

Historical background

In 2006 the Singaporean legal profession agreed that there should be a recommended 25 hours of pro bono work conducted by each lawyer in the country. This led to the establishment in 2007 of the Pro Bono Services Office (PBSO) to help manage the pro bono work done by members of the Law Society. The scale and success of this program has gradually grown and has in recent years been significantly reinforced by government funding. The PBSO now implements the major scheme for providing legal aid in criminal cases in Singapore, called the Criminal Legal Aid Scheme (CLAS.) In addition, it implements:

- legal education programs including in prisons
- legal clinics to provide legal advice to those who are members of poor and marginalized communities three days per week in a range of different communities
- free legal help to community service organizations.
- a program to match up the services of pro bono lawyers with those who do not qualify for existing legal aid schemes but face urgent legal needs.

The model for providing legal aid

This is a mixed model of providing legal aid in criminal cases. The lawyers who appear are termed ‘volunteer lawyers.’ These lawyers do not receive a fee but do receive an ‘honorarium’ which is only a small portion of the rate that would be paid to a private lawyer. Recently, following the addition of significant government funding a small number of full time lawyers have been hired to work on the CLAS program. These full-time lawyers are young lawyers of only one to three years’ experience. The places for the full-time positions, called ‘Class fellows’ is very competitive as it is seen as a good step to professional development. Each of the young lawyers spends one year of mentoring with a top lawyer and the young lawyers meet twice a year with the Attorney General, adding to the prestige of the position.

The matching of ‘volunteer lawyers’ to those who need representation in criminal cases is done through an online system that links lawyers to cases. A lawyer can log onto the system and see what cases require representation, a synopsis of the case and the level of seniority required. The lawyer will then indicate that they are available for that case and the PBSO will select the most appropriate lawyer for the case. This decision-making process is transparent. In addition, accused persons who appear in court at their first appearance are assisted by CLAS counsel who will advise them prior to their being required to enter a plea of ‘guilty’ or ‘not guilty.’

The Law Society currently has over 300 lawyers on its schedule of volunteer lawyers under the CLAS. In 2005 over 600 lawyers were also volunteering at
least the recommended number of 25 hours for pro bono work managed by the PBSO, a total of over 68,000 hours of free legal services by qualified members of the profession.\textsuperscript{127}

Law students make a significant contribution to the CLAS. Every law student is required to complete 25 hours of clinical legal work each year, and many of them apply to undertake this work as part of the CLAS. This provides significant assistance to the schemes as the law students are able to provide administrative assistance, take the case histories of clients, undertake research, take notes for lawyers in court etc. In addition, senior lawyers consider that this program also makes a major contribution to the ethics of the profession as a whole as it gives young law students exposure to working with the poor and marginalized and opens them up to the values social justice law during their formative years.

An office for the CLAS program is provided at each courthouse in the country. Those who wish to apply for legal aid in criminal cases can attend at this office, and make an application assisted by law students and lawyers. The office also has interview rooms where potential clients can speak to a lawyer in privacy and accused persons in custody can see a CLAS lawyer whilst in the holding cells at the court.

\section*{Funding}

Until 2015 the role of providing legal aid for criminal cases in Singapore had largely been borne by the Law Society for general offences and the Court for capital offences. In May 2015 the Law Society of Singapore and the Ministry of Law announced an agreement under which the government would supply a significant budgetary input to Law Society to manage the CLAS scheme. Under this agreement the range of criminal offences covered was increased and for the first time included assistance to those who had pleaded guilty. The government announced an initial input of $ SGD 800,000 to be followed by an annual commitment of up to $3.5 million to cover operational costs, honoraria and disbursements. The Law Society will also continue to raise funds through the annual membership fees of lawyers in the country to cover the rest of the costs.

\section*{Beneficiaries}

A means and merits test is applied to all those who apply to receive legal aid in criminal cases. The criteria for the means test are similar to those mentioned above in the section on civil legal aid in Singapore through the LAB. The means test includes various aspects of assets and income against which costs per dependent person, rent, etc., can be deducted. The means test criteria are listed on the form which is available in hard copy at the offices of the scheme and on the web site.\textsuperscript{128}

\textsuperscript{127} Annual Report 2015, supra note Error! Bookmark not defined. at 56.
\textsuperscript{128} http://probono.lawsociety.org.sg/Documents/CLAS_brochure_eng.pdf
Types of legal aid services provided

The CLAS scheme provides legal aid to those accused of offences against most of the criminal statutes in Singapore.

Prior to receiving government funding the merits test was applied to more restrictive criteria than are presently used, as there were insufficient funds to cover all criminal cases. Prior to the addition of government funding only approximately 30% of those who applied for legal aid were approved. Following the injection of government funds this proportion has risen to 70% approval of applications. In 2015-16 approximately 2000 applications for legal aid were received through this scheme and approximately 1200 were accepted.

Lessons learned from the Singapore legal aid case study

- Historically the government did not accept that it needed to provide legal aid in criminal cases, so only set up a legal aid service for civil cases. The national bar association sought to fill the gap but could only do this to a small degree without government funding. Now the government funds both the civil law system and contributes to the bar association implemented criminal system. However, it does not direct or influence the legal aid system implemented by the bar association.

- The courts have developed a strong system of providing legal aid in capital cases, with senior lawyers being paid modest sums to accept these cases, but it has developed into a high-prestige area that is supported by senior lawyers. In some other countries the court appointed lawyer system offers little and usually only very junior lawyers are appointed in very serious cases.

- The requirement of all law students to complete some legal aid work provides resources for legal aid and makes a major contribution to the future ethics and pro bono work of the legal profession.

- Lawyers who want to be considered for judicaire work are added to a list and this list and the allocation of cases is managed in a transparent manner.

LEGAL AID CASE STUDY No 8: SOUTH AFRICA

Background and history

South Africa became an independent nation in 1910. Under the first constitution only a small percentage of majority black population were given the right to vote. In 1948 the conservative white government removed the right of any black citizen to participate in elections and implemented the official policy of apartheid.

Although they made up 90% of the population blacks were forcibly moved into restricted geographical areas, provided limited educational and economic
opportunities and had almost no political power. A movement for equal rights and democracy was met by mass human rights violations. In 1984 the UN Security Council adopted an earlier UN General Assembly Resolution that declared apartheid to be a crime against humanity.\textsuperscript{129}

In 1969 the South African government responded to international criticism that pro-democracy activists had been tried and in some cases executed without independent legal representation by passing the Legal Aid Law. Although the legislation was intended to provide assistance to the poor, particularly in criminal cases, in the initial years a significant portion of the budget was spent on providing legal aid to white citizens who were not necessarily poor, in a range of cases including divorce and civil disputes.

In 1994 South Africa undertook a transition to democracy. Section 35 of the new national Constitution provided that every citizen must have access to a lawyer from the moment of arrest and detention, and that if they cannot afford to pay, The Lawyer will be provided by the state in all cases where a “substantial injustice,” might otherwise arise.\textsuperscript{130}

These provisions, together with the 1969 law as repealed by the 2014 Legal Aid Act (The Act) are the basis for a system of legal aid implemented by an independent statutory authority, Legal Aid South Africa, often referred to as the Legal Aid Board (LASA.) The Act is the current legal base of LASA.

The governing body of the Legal Aid Board is a Board of Directors made up of 14 voting members. The Directors must include one judge recommended by the Chief Justice together with other representatives selected according to a number of criteria that are set out in the Act. The criteria include community based knowledge relevant to legal aid, legal education and training, civil and criminal law, public interest law, and also include broader factors such as corporate governance. The Directors are appointed for a three to five-year term and may be reappointed for one additional term.\textsuperscript{131}

LASA must appoint a Chief Executive Officer who is responsible for the general administration of the legal aid programs.

The Board must develop Regulations, for the approval of the Minister of Justice, that will provide details of the work of LASA.\textsuperscript{132}

\textbf{Independence}

One of the most fundamental international best practice relating to legal aid is independence. The Act sets out a clear duty for LASA and all of its employees to act independently. This means that they may not legally act on the direction of any member of a government ministry or other person. Section 5 states:

\textsuperscript{129} UN General Assembly Resolution XXI of 16 December 1966; UN Security Council Resolution 556 of 23 October 1984)  
\textsuperscript{130} Constitution of the Republic of South Africa S 35  
\textsuperscript{131} Legal Aid Law of South Africa s 7.  
\textsuperscript{132} Legal Aid Law s 23 ibid
“Legal Aid South Africa, its directors, employees and agents must serve impartially and independently and exercise their powers and perform their duties and functions in good faith and without fear, favour, bias or prejudice.”

Model of providing legal aid

The Act gives the Legal Aid Board the power to decide how it will provide legal aid services in South Africa, specifically providing the authority to:

“Do all things and perform all functions that are necessary to allow Legal Aid SA to achieve its aims.”

Two of the aims stated in The Act are for LASA to provide legal aid to indigent persons and to fulfill the Constitutional duty to provide legal aid to persons arrested of crimes where otherwise “a substantial injustice” would occur.

The Acts in South Africa therefore do not specifically set out the manner in which legal aid should be provided. Rather the system is based on allowing LASA to make the necessary decisions on how best to supply legal aid and to change the system as required. Such a major delegation of power over legal aid is only possible if there is faith that the Legal Aid Board will be led by a broad range of very well qualified persons who are independent and have a long history involving legal aid, and they will oversee the operations led by the Chief Executive Officer.

The Legal Aid Manual (Legal Aid Guide)

The Act therefore very carefully specifies who will serve on LASA of Directors and then provides them with very broad powers over legal aid. The details of how legal aid is provided are to be included in a Legal Aid Manual.

The Manual is not just an internal guide for LASA. It is also part of the legal base of legal aid provision and its provisions have the force of binding law. The Act states that the Manual must be updated at least every two years, approved by the Minister who must table the Manual in parliament. The Act states that the Manual “is binding on all persons and organisations providing legal aid assistance in terms of this Act.”

The Manual includes details of legal aid policy and procedures, the “systems and methods whereby legal aid is delivered,” the “requirements and criteria” for accrediting private practitioners as legal aid providers including the scale of fees payable and the regulation of any other aspect necessary for the effective functioning of LASA. This will include details of the means test and who is eligible for legal aid, what kinds of cases may be granted legal aid (the merits test) where legal aid is available etc.

---

133 Legal Aid Law s5 Ibid
134 Legal Aid Act s 2 Ibid
135 Legal Aid Act s24 Ibid
The Manual that is produced under the act is called, The Legal Aid Guide. It is separate to the annual report that is put out every year by Legal Aid South Africa.

**Judicaire or public defender model?**

In order to fulfill the Constitutional requirements for providing a lawyer to all those arrested on a serious criminal charge LASA initially established a system of *judicaire* under which private lawyers were sub-contracted to provide legal aid services in criminal cases.

However, within two to three years LASA found themselves in serious financial difficulties because the *judicaire* system was too expensive. It attempted to reduce the fees paid to private lawyers but this was met with resistance from lawyers’ professional bodies. There was also significant fraud within the *judicaire* system, with some private lawyers charging more for their services than they had actually provided and this is very difficult to effectively check. Faced with the possibility of being forced to close LASA decided to investigate if a system using teams of lawyers working full time on criminal cases instead of the *judicaire* model.

The results of the pilot project in 1997 showed clearly that using full time public defenders was more effective and cheaper, with the cost of each criminal case being approximately one third less when conducted by full time public defenders than through *judicaire*. This may surprise some as a *judicaire* system did not require LASA to pay for and provide offices and support for lawyers as with public defender system. However, the results showed clearly that groups of criminal lawyers working together were easier to supervise effectively, are more productive and are less expensive. Groups of lawyers working in one institution can be supervised more closely, can mentor each other, develop best practices, replace each other when necessary etc.  

**Development of Justice Centre ‘one-stop-shops’**

In 2001 LASA decided that its services could be more accessible to the public and cost effective if a broad range of legal aid providers worked together in one office, or a ‘one-stop-shop’ that could supply all of the legal aid responses to the problems of the poor. These ‘one-stop-shops’ are called Justice Centers. Each Justice Centre employs senior lawyers, junior lawyers, candidate attorneys fulfilling their compulsory professional training, paralegals, administrative assistants and administrative clerks. The more senior lawyers handle more complex and appeal cases and supervise the work and mentor the junior lawyers and candidate attorneys who can appear in the lower courts. Paralegals assist by meeting the clients when they first arrive at the Justice Centre, taking the details of their case, helping the client

136 The Legal Aid Board calculated in 1997 that the average cost of the criminal and civil cases handled by public defenders amounted to about R555 (about US$69) per case, or a third less than the average cost of R822 (about US$103) per case charged under the *judicaire* system during the same period: Legal Aid Board Annual Report 1995/96 (1997) 27.
to fill out an application for legal aid and liaising with a lawyer who may handle their case.

The vast majority of legal aid work in South Africa is carried out by Justice Centers and their satellite offices. However, a proportion of work is still subcontracted out to private lawyers under *judicaire* arrangements. In addition, in remote areas where it is not feasible to have a Justice Centre or satellite office LASA will enter into a contract or agency agreement for a private lawyer to handle the legal aid cases in that area as an agent of LASA. In this way the reach of legal aid can stretch even to remote areas of the country. In addition, LASA runs a program of “Impact Litigation” in which it supports a legal challenge that will affect the lives of a significant number of the poor and marginalized. This may be a challenge to a law or regulations, or it may be to support a case brought by a community or individuals where that case will set a precedent affecting many others. Only around 15 of these larger, ‘impact litigation’ cases are supported each year.

**Structure of Justice Centers and satellite offices**

LASA manages the system of Justice Centers through six regional offices led by a Regional Operations Executive (ROE). These regional offices oversee the work of 64 Justice Centers, each led by a Director. Every Justice Centers also operates one Satellite Office. Thus, a total of 64 Justice Centers and 64 smaller satellite offices are responsible for delivery of legal aid services.

The following statistics from the year 2015-16 reflect the work of Legal Aid South Africa:137

Total Budget: 1, 751, 687, 424 (USD $122,295,091)

Full time staff:
- Criminal lawyers: 1,694
- Support staff: 515
- Civil law lawyers: 331
- Paralegals: 182

New Legal Aid cases: 441,056
- Criminal cases: 388,692
- Civil cases: 52,364

Legal Advice matters: 308,563

Finalized legal aid cases: 432,210
- Justice Centers: 411,057
- *Judicaire*: 15,468
- Cooperation: 4,501
- Agency Agreement: 1,170

---

Applicants for legal aid do not have a choice of lawyer and must accept a
decision by LASA of which lawyer is appointed to assist them.

Judicaire

LASA operates a mixed system including both public defenders and judicaire. It has established an accreditation system under which all the lawyers who wish to be allocated legal aid cases under the judicaire program must be accredited. The system also provides specifically for a transparent method of selecting which lawyers are selected, how many cases they are provided with etc.\textsuperscript{138}

Maintaining a high standard of service in Justice Centers\textsuperscript{139}

Performance agreements:
Every lawyer working for a Justice Centre must at the beginning of the year sign an agreement which sets out in detail what they are expected to fulfill during the following year. For example, the agreement with lawyers will set out how many new cases he is expected to commence, how many cases he is expected to complete, how much training he must attend etc.

If a staff member meets these targets they will receive a performance bonus. In this way there is a real financial incentive for them to work hard and be productive.

Time sheets:
Each case file includes a one-page cover sheet which is a reporting tool that contains all the information about a case. The lawyer must enter on this sheet each time he consults with the client, makes a phone call etc., and record how much time was spent on each activity. They will also record when the case goes to court, and the result of the case or any preliminary hearing. A supervisor will check with each staff member once a month and look at every case, to see what is the progress. If a case has not progressed or been completed the staff member must explain why.

Performance requirements for each lawyer:
Every lawyer’s performance agreement includes a requirement for them to open a certain number of new cases and to conclude a certain number of cases. For example, at the Durban Centre each lawyer must begin 30 new matters and finalize 30 matters in the district court.

If all of these requirements are not met The Lawyer Lawyers will not receive the annual performance bonus payment.

Training for all legal staff is carried out once a month and all legal staff must attend.

\textsuperscript{138} Legal Aid Guide 2014 Ibid p 116
\textsuperscript{139} Information from visit to Durban Justice Centre South Africa by the author, 2014.
Types of legal aid services provided

Criminal cases

The majority of the Justice Centers casework involves providing a lawyer to represent every person arrested for a serious criminal offence. The fact that every South African can expect to be assisted by a competent lawyer who is independent of the government structures, police and prosecutors is viewed as a major priority that is mandated by the specific Constitutional requirement. One of the effects of this program is support by the population for the government who they have confidence will treat them fairly and who are paying for independent legal help when they find themselves arrested.

Civil cases

Because the majority of the budget of LASA is required to pay for the public defenders working on criminal cases legal aid for civil cases has been restricted. The Legal Aid Guide sets out criteria to inform the public and guide decision makers as to the ‘merits test’ of what cases can be provided legal aid.

Civil cases that may not be covered by legal aid include:

- financial inquiries into a debtor’s affairs; administration of estates and insolvency cases; certain personal damages cases, (e.g. defamation, breach of an engagement contract, infringement of dignity, invasion of privacy, seduction, adultery or inducting someone to desert or stay away from his or her spouse); small claims court cases or cases, civil appeals unless on a balance of probabilities there is a chance that the appeal will succeed and the costs of the appeal will justify the benefit to the legal aid applicant; and other cases excluded by LASA of Legal Aid South Africa from time to time.140

Furthermore, legal aid is not granted for conveyancing and notarial matters; non-litigious matters, including arbitration and mediation – except if done by a justice center.

Other legal aid providers

Civil society organizations

One of the powers provided to LASA is to enter into “co-operation agreements’ with non-government organizations to carry out legal aid work. The conditions of the cooperation agreements include that the funds must be used directly to benefit the poor. The NGO’s must be legally registered, be regularly audited and make full disclosure of all funds and resources. The full list of conditions is set out in the Legal Aid Guide.141

140 Legal Aid Guide para 4.9.1(a)-(j).
141 The Legal Aid Guide 2014. P 137
Candidate attorney public defenders

Law school graduates in South Africa are required to attend a practical skills legal training course or undertake articles under an experienced lawyer. In These candidate attorneys may complete this requirement through working in a state funded university legal clinic. A broad range of university law schools in South Africa have established legal clinics where up to ten candidate attorneys can be supervised by one experienced lawyers. Many of these clinics have now been linked to the Justice Centers. Each year the Justice Centers employ over 1,000 candidate attorney public defenders. In addition to the services provided to the poor this system provides many young lawyers with experience in ethical social justice law that will stay with them throughout their professional career and make a significant contribution to an ethical legal profession.142

Fully qualified public defender lawyers deal with criminal cases in the regional courts and high courts.143 Law clinic interns do both civil and criminal work in the district courts.144

Paralegals

A broad variety of paralegals from paid professionals of volunteers provide legal aid services to the poor in South Africa. There are diploma programs in some universities to provide qualifications to paralegals but there is no compulsory system of certification. Many of the satellite offices of the Justice Centers are very small offices in remote areas staffed by perhaps only two paralegals. These paralegals liaise with police and prosecutors, provide clients with advice and refer them to Justice Centers, social workers etc.

Beneficiaries

In the South African legal aid system legal aid may only be provided to a person who cannot pay for the legal services he or she needs. The Legal Aid Guide states:

“legal aid may not be granted to a person if the JCE (Chief Executive) is satisfied that the applicant has sufficient disposable capital or assets to raise sufficient finance to pay for the required legal aid himself/herself.

A means test is provided for applicants for legal aid, based on their monthly disposable income. This means their monthly income after deductions for their spouse, children, rent etc have been made. The test is not how much a person has at the beginning of a case but whether they can afford to pay for their lawyer we must look at other things. For example, a person may have

142 David McQuoid Mason Affordable Legal Services in South Africa Conference Paper 2010
143 Regional courts can impose fines of up to R300 000 (about $46 000) and imprisonment of up to 25 years (Magistrates' Courts Act 32 of 1944).
144 District courts can impose fines of up to R100 000 (about $15 333) and imprisonment of up to 3 years (Magistrates' Courts Act 32 of 1944).
some money but if the case is in a superior court and is expected to run for several years then they will not be able to afford to pay for it.

The Chief Executive has a discretion to grant legal aid in a case where the applicant may have a disposable monthly income that is greater than the set limit, but this discretion can only be applied if the amount over the limit is within a small range and the merits of the case are strong.

If refused legal aid an applicant may request the reasons for the refusal be given in writing. An appeal against the decision to a body different to the decision makers and an answer on the appeal must provide the reasons for the refusal in writing, within three months.145

Legal aid beneficiaries in criminal cases

The Constitution requires that legal aid be provided to any person where otherwise a “substantial injustice” would take place. The Constitution also states that the rationale for receiving legal aid is affordability- that is the question is ‘can the person afford to pay for the legal services?’

The definition of “substantial injustice” is not defined by statute but LASA has provided an interpretation that a lawyer will be provided in any criminal case where a poor person faces imprisonment for at least three months. This decision is not based on the maximum sentence but rather the likelihood that someone may be imprisoned for at least three months. The decision will take into account the nature of the charge, the facts, previous record and the likely sentence if the person is convicted.

Children in criminal cases

For legal aid under section 35(3)(g) of the Constitution, a child will not have to qualify for legal aid through any means test if the child needs legal representation for a criminal case.146

Beneficiaries in civil cases

To qualify for legal aid in a civil case, the applicant’s case must have, on a balance of probabilities prospects of success and where applicable, prospects of enforcement. 147

The lawyer involved in an application for legal aid must prepare a ‘merit report’ that gives an estimate of the chances of success of the civil case. In the following cases a merit report is not required before legal aid can be granted in a civil matter.

146 The Legal Aid Guide 2014 Ibid p 86
147 The Legal Aid Guide 2014 Ibid p 85
A merit report for civil legal is not required in the following cases:

- simple divorces;
- eviction cases, where assistance can be granted to negotiate with the owner to allow the clients some time in the property;
- uncontested divorce;
- domestic violence to protect the best interest of the child;
- administration of estates.\textsuperscript{148}

Lessons learned from the South Africa legal aid case study

- A purely \textit{judicaire} system was found to be too expensive and not cost effective. It is much better to have a mixed model.
- The requirement in the Constitution for those charged with crimes to be provided with a lawyer where the interests of justice demand has driven the government to provide independent lawyers in a large number of criminal cases.
- The Justice Centers ‘one-stop-shop’ approach is highly effective. People can come to the Centre with a range of problems and will be dealt with by a paralegal, junior lawyer, chamber lawyer or senior lawyer depending on the need.
- The small satellite offices of the Justice Centers allow the reach to extend and are connected to the much greater resources of the Centers.
- Having a significant number of staff lawyers in one office makes a strict system of performance management possible.
- Legal aid lawyers should spend most of their time in the court acting for legal aid clients.
- Paralegals and law students can make a major contribution to legal aid if they are supervised by experienced lawyers.
- Civil society organizations can provide a significant contribution to legal aid.
- University legal clinics where senior lawyers supervise students can make a significant contribution to legal aid services, but perhaps more importantly experience in social justice issues influence young lawyers and will continue to influence them through their careers.

CONCLUSION AND RECOMMENDATIONS

Vietnam is currently undertaking a review of the national legal aid system including revisions to legislation dealing with the provision of legal aid services.

Each country must, of course, design legal aid mechanisms that are appropriate to the legal, cultural and economic framework in which they will operate. There are many lessons that can be drawn from the manner in which the legal aid mechanisms in the eight country case studies above have developed. Among those that are most relevant are the following:

\textsuperscript{148} Ibid
• Most of these countries have adopted a mixed model of legal aid service delivery in which a core service of full time staff lawyers, particularly dealing with criminal cases is complemented by _judicaire_ arrangements in which private lawyers are sub-contracted to conduct cases. Other providers such as paralegals, legal interns, paralegals and civil society organizations should not be excluded from the legal aid mechanism as they can also make a significant contribution. However, paralegals and civil society legal aid organizations are not usually regulated in legal aid systems except for the work that they undertake on a contractual basis. Their general activities outside the formal legal aid system are not regulated by legal aid laws.

• The system in which courts appoint lawyers to act in a ‘dock brief’ system is often very problematic as the lawyers selected are close to judges and prosecutors and do not provide a strong independent representation to their clients.

• The non-appearance of police witnesses in criminal cases is a major challenge to maintaining a cost effective legal aid system. An approach in which all relevant stakeholders are involved can succeed in addressing this problem.

• Legal aid in criminal cases usually demands at least half of the total legal aid budget. The resources for criminal case legal aid representation can be largely wasted unless care is taken that the lawyers in those cases are independent both de jure and de facto, from the opposing party in the case: i.e., the government agent prosecutors and police.

• All cases cannot be covered by legal aid so a strict approach to a ‘means and merits’ test needs to be included in the legal aid mechanisms. Criminal cases should be included, and other high priority cases such as those where custody of children is at stake, or land ownership for the poor etc. Care should be taken that legal aid is not available to any general categories that are not poor or marginalized groups.

• It is a duty of the government to supply adequate funding for legal aid services. It is also an integral part of funding for a criminal justice system, just as the other components of police services, prosecutors and courts are funded.

• Legal aid offices at every court, staffed by independent service providers are an effective component of cost efficient legal aid systems.