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STRENGTHENING THE NATIONAL LEGAL AID SYSTEM: LESSONS LEARNED FROM PRINCIPLES AND PRACTICE

ADVICE PAPER ON THE AMENDMENT OF VIETNAM'S NATIONAL LEGAL AID LAW

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ABBREVIATIONS

ASEAN:	Association of South East Asian Nations
BPHN:	National Law Development Agency (Indonesia's Ministry of Law and Human Rights)
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW:	Convention on the Elimination of All Forms of Racial Discrimination against Women
CERD:	International Convention of the Elimination of all forms of Racial Discrimination
CRC:	Convention on the Rights of the Child
CRPD:	Convention on the Rights of Persons with Disabilities
HIV:	Human immunodeficiency virus
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
LANSW:	Legal Aid New South Wales
MDGs:	Millennium Development Goals
NLAA:	National Legal Aid Agency
PAO:	Public Advocates Office
PLACs:	Provincial Legal Aid Centers
SDGs:	Sustainable Development Goals
UDHR:	The Universal Declaration on Human Rights
UN:	United Nations
UN PnGs:	The UN General Assembly Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

INTRODUCTION AND BACKGROUND

Vietnam's 2006 Law on Legal Aid (the legal aid law) provided the base for a legal aid system supervised by the National Legal Aid Agency (NLAA) within the Ministry of Justice (MOJ) and Provincial Legal Aid Centers (PLACs) operate within the provincial departments of justice in all of Vietnam's 63 provinces.

After ten years of implementation of the Law on Legal Aid, the MOJ led the review and drafting of an amended legal aid law, which began being considered by the national Parliament in the last quarter of 2016.

At the request of the NLAA, USAID's Governance for Inclusive Growth (GIG) Program was asked to provide advice on Vietnam's international legal obligations concerning legal aid, and for a consultant to provide a presentation around these issues at a workshop in Vietnam in June 2016. This was followed by additional requests by the NLAA for more detailed guidance on particular aspects of legal aid systems, the models adopted by other countries, the strengths and weaknesses of each of those models, and provisions in the draft of the amended legal aid law.

This report is the combination of the material provided in response to those series of requests by the NLAA. The material included in this report was presented and discussed in workshops organized by the NLAA in Hanoi on June 6-7, 2016, and Nha Trang on June 13-14, 2016.

EXECUTIVE SUMMARY

Vietnam's international obligations relating to legal aid include both binding "hard law" and guiding "soft law" provisions in a range of international instruments.

Included in the binding "hard law" obligations are:

- The duty to provide free legal assistance to persons arrested for criminal offences "in any case where the interests of justice so require" (International Covenant on Civil and Political Rights (ICCPR) Article 14)
- The duty to provide appropriate legal assistance to all children taken into custody (Convention on the Rights of the Child (CRC), Articles 37 and 40)
- The duty to provide legal aid in appropriate cases of forced evictions (International Covenant on Economic, Social and Cultural Rights (ICESCR), e.g., Article 11)

The "hard law" obligations are complemented by guidance from a range of international "soft law" instruments that relate to the provision of legal aid, including:

- Universal Declaration of Human Rights (UDHR)

- United Nations (UN) Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UN PnGs)
- UN Standard Minimum Rules for the Treatment of Prisoners
- UN Rules for the Protection of Juveniles Deprived of Their Liberty (JDL)
- Sustainable Development Goals (SDGs)

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[1]

In December 2012, Vietnam was among the member states of the UN General Assembly that approved unanimously the UN PnGs. This document is the first comprehensive international instrument dealing with the issue of legal aid, although it is limited to the criminal justice aspect, and not the whole range of legal issues that should be covered by a legal aid system. Of particular relevance are the following sections:

- States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process. (Article 20)
- States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process. (Article 27)
- States should, where appropriate, engage in partnerships with non-State legal aid service providers, including non-governmental organizations and other service providers. (Article 70)
- Persons urgently requiring legal aid at police stations, detention centers or courts should be provided preliminary legal aid while their eligibility is being determined. Children are always exempted from the means test. Article 41(c)
- States should take applicable and appropriate measures to ensure the right of women to access legal aid. (Article 52)
- States should ensure special measures for children to promote children's effective access to justice and to prevent stigmatization and other adverse effects as a result of their being involved in the criminal justice system. (Article 53)
- States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should… Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority. (Article 59)

Structures of effective legal aid systems

Effective legal aid systems include a national "peak" body that is given the legal responsibility for making policy, monitoring and reporting, and

[1] The SDGs are officially known as Transforming our world: The 2030 Agenda for Sustainable Development.

supervising the delivery of legal aid services. This national body may establish sub-national offices, and the responsibilities may be shared between those different tiers of legal aid bodies. The peak body will oversee the operation of legal aid service delivery mechanisms, which may be based on the following models:

- *Judicaire*: private lawyers or civil society organizations are subcontracted to conduct cases and other legal aid work
- *Public defenders*: full-time lawyers and other staff work for the national legal aid system
- *Mixed model*: *judicaire*, public defenders and civil society organizations, as well as university clinics, paralegals and other providers, all contribute to providing legal aid services

The kinds of legal aid services provided by these models should include:

- Legal representation
- Providing information in both criminal and civil cases about the relevant law and legal processes, and assisting with alternative dispute resolution
- Advising on legal issues
- Assisting with the drafting of documents
- Referring matters to legal practitioners
- Other kinds of assistance

The legal aid providers of these legal aid services should not be unduly limited and may include the following:

- Lawyers
- Legal consultants
- Paralegals
- Law students
- Private lawyers
- Bar Associations
- Civil society organizations
- University legal aid clinics
- Pro bono lawyers
- Trained staff
- Volunteers

Legal aid is the provision of legal services to those who cannot afford to pay for them. However, there will be an insufficient budget to cover all such cases. To determine who may be a legal aid beneficiary, it is necessary to develop and publish a “means and merits test.” The meaning of these terms is the following:

- *Means:* Can the individual afford to pay for legal services?
- *Merits:* Does the legal problem have sufficient merit? Is it included in the identified priorities of the legal aid body?

Other categories of vulnerable persons such as women, children, those living with the human immunodeficiency virus (HIV), those in police custody, displaced persons, etc. may be specifically included in the categories of legal aid beneficiaries. This is because, for various reasons, it will be more difficult or impractical for them to provide proof and documentation that they are unable to pay for legal service, or they need legal aid immediately and cannot wait for their application to be processed.

There are significant advantages and challenges of the *judicaire* and public defender models. In the author's opinion a mixed model of legal aid service delivery is more likely to be effective. A model that includes full-time public defenders will be able to address the massive scale of criminal cases in which accused persons should be represented. Where groups of lawyers work together the organizations are better able to manage performance standards, ethical behavior, effective budgeting, case management systems, etc. However, even where there is an effective system of public defenders, private lawyers will be needed to provide assistance as caseloads change, or for serving remote areas where there is no public defender office, etc. In addition, paralegals, civil society organizations, and law students should also provide services according to their capacity and experience. A mixture of these elements will be the most effective model for providing legal aid.

The experience of other countries, particularly in the region, provides a base for discussion and recommendations relating to the current draft amendment of Vietnam's Law on Legal Aid.

SECTION 1: VIETNAM'S INTERNATIONAL OBLIGATIONS RELATING TO LEGAL AID

Vietnam's international legal obligations can be examined in the light of both "hard law" and "soft law." The term "hard law" refers to the requirements that must be complied with because of the country's accession to international conventions that require certain actions to be taken. The larger body of "soft law", i.e., non-binding international law that serves to provide guidance and assistance to Vietnam in designing and implementing its national legal aid system, includes a broad range of instruments such as declarations, and principles and guidelines of the United Nations (UN) General Assembly, which Vietnam has signed but which are not legally binding as they do not have the force of international conventions.

As with all international law, there is some overlap between "hard law" obligations and "soft law" principles. The interpretation and application is not static or settled, but evolves with changes of practices of states and international bodies. But the enforceable legal duties of the government in respect to legal aid focus on a number of areas where there are specific binding obligations. The most important of these include, in general terms:

- The duty to provide free legal assistance to persons arrested for criminal offences “in any case where the interests of justice so require” (ICCPR, Article 14)
- The duty to provide appropriate legal assistance to all children taken into custody (CRC, Article 37 and 40)
- The duty to provide legal aid in appropriate cases of forced evictions under the (ICESCR, as interpreted by the UN Committee on Economic, Social and Social Rights, General Comment 12)
- The duty to ensure that all persons are treated equally before the law and have equal access to justice. This includes a duty to ensure equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status (ICCPR, Article 26; and these duties are reinforced in other conventions ratified by Vietnam, including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), International Convention of the Elimination of all Forms of Racial Discrimination (CERD), and the Disability Convention)

In addition to these binding legal duties there are “soft law” international instruments that Vietnam is a party to, but which do not create binding international obligations. These include the Universal Declaration on Human Rights (UDHR), the UN Standard Minimum Rules for the Treatment of Prisoners, and the UN Rules for the Protection of Juveniles Deprived of Their Liberty. Extremely important in this regard is the UN PnGs, which was signed by Vietnam and all other members of the UN General Assembly in December 2012. The UN PnGs provide detailed guidance on best practices of providing legal aid in criminal justice systems. Although they do not cover civil or non-criminal aspects of legal aid, more general international best practices of governments include non-criminal aspects of law in their national legal aid system.

The UN PnGs provide guidance in relation to a broad range of issues relevant to a national system of legal aid. These include the duty to provide legal aid to those arrested, including vulnerable groups, through all stages of the criminal process as well as during police detention. Other important principles are:

- Legal aid is an essential element of a fair, humane and efficient criminal justice system. It is not an “add on”, but an integral part of criminal justice systems and should be budgeted for accordingly
- Legal aid providers should include lawyers, civil society organizations, paralegals, lawyers’ associations and university clinics, to ensure coverage to all those in need, including those in remote areas
- Victims, women victims, children, and marginalized groups should be specifically included as legal aid beneficiaries
- Special mechanisms need to be included to deal with the needs and situation of women victims
- State funding for legal aid should recognize that effective legal aid will provide savings in the criminal justice budget
- Data collection and monitoring of service provision should be prioritized

- Technical assistance for strengthening legal aid systems should be provided by donors and international non-governmental organizations

The right to free legal aid under international law

It is being increasingly accepted that there is a right to free legal aid recognized by international law, particularly for criminal cases. In 2013, Ms. Gabriela Knaul, the UN Special Rapporteur on the Independence of Judges and Lawyers, included the following conclusions in a report to the UN Human Rights Council in Geneva:[2]

> *"Legal aid is an essential component of a fair and efficient justice system that is founded on the rule of law," and is also "a right in itself."*
>
> *"States bear the primary responsibility to adopt all appropriate measures to fully realize the right to legal aid for any individual within its territory and subject to its jurisdiction."*
>
> *"Beneficiaries of legal aid should include any person who comes into contact with the law and does not have the means to pay for counsel."*

Vietnam's international legal obligations ("hard law")

Vietnam has ratified the following international conventions which have a relevance to the provision of legal aid:

- International Covenant on Civil and Political Rights (ICCPR) (1982)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (1982)
- International Convention of the Elimination of all Forms of Racial Discrimination (CERD) (1982)
- Convention on the Rights of the Child (CRC) (1990)
- Convention on the Elimination of All Forms of Racial Discrimination Against Women (CEDAW) (1982)
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (2015)
- Convention on the Rights of Persons with Disabilities (CRPD) (2015)

There are a number of binding "hard law" legal obligations relating to the provision of legal aid that apply to Vietnam. The clearest of these are the requirements under Article 14 of the ICCPR, and for the protection of children under Articles 37 and 40 of the CRC.

International Covenant on Civil and Political Rights

ICCPR Article 14(3) establishes a clear right for every person charged with a criminal offence to have legal assistance. They must be informed of that right

[2] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13382&

and to be provided with free legal assistance “in any case where the interests of justice so require.”

> *“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it.”*

This raises the question of when do the interests of justice require free legal aid to be provided.

International law does not provide a specific answer on the circumstances in which the interests of justice require free legal aid to be provided, but there are some indicators or guidance in international law and practices accepted by other nations. The UN Human Rights Committee has stated that the right to legal aid in criminal cases at least extends to all death penalty cases and that, in determining what other cases are covered by the right to legal aid, the seriousness of the offence is a relevant factor.

Many national legal systems have interpreted their international obligation to provide legal aid where “the interests of justice require” by establishing clear criteria to determine the right to free legal aid in criminal cases. Therefore, Vietnam as well should develop clear criteria relating to who has the right to legal aid in criminal cases. The criteria developed should be clear, not arbitrary, lawful, and well publicized. The criteria developed can draw from those used in other countries, which include:

- The seriousness of the crime
- The length of maximum sentence
- The complexity of the case
- Ability of the accused to provide their own defense (including language, age, capacity, disability, etc.)
- Whether the person is a member of a vulnerable group
- Whether the person is in custody
- The circumstances of the person’s life and the effect that imprisonment would have on them

In some countries, such as the UK, a maximum sentence of three months has been found to be sufficiently serious to be “in the interests of justice” to provide free legal counsel.[3] In South Africa, the test has been applied to include cases where the maximum sentence may have been greater than three months, but where a three-month sentence was considered likely. In Indonesia, the Criminal Procedure Code requires a lawyer to be provided in any case where the maximum sentence is five years. In the Philippines, every

[3] Benham v. UK (1996) Benham -v- United Kingdom; ECHR 8 Feb 1995 ... 24-Jun-1996, Independent 08-Feb-1995, 19380/92, [1996] ECHR 22, [1996] 22 EHRR 293.

person under investigation has the right to legal aid; the Philippines 1987 Constitution requires that:

> *"… any person under investigation for the commission of an offence shall have the right to be informed of his right to remain silent, and to have competent and independent counsel, preferably of his own choice; if the person cannot afford the services of counsel, he/she must be provided with one; and these rights cannot be waived, except in writing and in the presence of counsel, to overcome a challenge that often occurs where individuals are pressured to sign a letter stating that they do not want to be represented by a lawyer."*

In Vietnam, the Criminal Procedure Code guarantees the right to legal counsel for death penalty cases and for cases involving juveniles. However, this category alone likely would be considered too narrow to satisfy the international legal obligation of the state under the ICCPR to provide legal assistance "where the interests of justice" require. To satisfy the obligations under the ICCPR, the categories of crimes where legal aid is available should be expanded. Decisions on which cases are included within the duty to provide legal aid should be made according to the criteria listed above.

Vulnerable groups

Article 14's requirement that free legal aid should be provided "where the interests of justice so require" also extends to vulnerable groups charged with criminal offences. Jurisprudence from the European Court of Human Rights provides guidance that this duty includes providing free legal aid in criminal cases to vulnerable groups, including juveniles, mentally ill, foreigners and refugees.[4]

The right to legal aid in criminal cases

The right to legal aid in criminal cases, according to international law, is more broadly accepted than for civil cases, largely because it is very clearly set out in ICCPR Article 14. The combination of the fact that there are many thousands of serious criminal cases in a country, and that the ICCPR creates a duty to provide legal assistance in those cases in which the "interests of justice" require, creates a major challenge for all national legal aid systems.

The required solution is the establishment and maintenance of a criminal justice legal aid mechanism that is capable of providing effective and independent representation in a large number of cases.

The right to legal aid in civil cases

There is a growing acceptance that the right to legal aid extends to civil cases. A careful reading of ICCPR Article 14 reveals that the clearly established right

[4] http://www.legalaidreform.org/european-court-of-human- rights/item/39-european-court-of-human-rights-jurisprudence-on-the- right-to-legal-aid-by-open-society-justice-initiative-and-the-public-interest- law-institute.

to equality before the law and the right to a fair and impartial hearing extends to both criminal charges, and also to any case in which issues of a person's rights or obligations are to be determined in a suit at law.

Non-discrimination

The risk of discrimination or inequality before the law occurs not only in criminal but also civil cases. Most advanced legal aid systems include the provision of legal assistance in both criminal and civil cases based on criteria on the means to pay and the comparative merits of the case.

The ICCPR provides that access to justice should be equal for all, without discrimination, e.g., ICCPR Article 14(1) provides that:

> *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [emphasis added]."*

And ICCPR Article 26 provides that:

> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all person equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

Convention on the Rights of the Child

Vietnam's obligations under the CRC require free legal aid to be provided to every child who is taken into custody or charged with a criminal offence.

This requirement is not subject to whether they have the means to pay for legal assistance or not.

CRC Article 37(d) requires that:

> *"States Parties shall ensure that: Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance."*

And CRC Article 40.1(ii) provides that children:

> *"To be informed promptly and directly of the charges against him or her and to have legal or other appropriate assistance."*

Convention on the Elimination of All Forms of Racial Discrimination

The CERD provides for equal protection for persons before tribunals and other justice sector entities at Article 5(1)(a):

> *"In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*
>
> *(a) The right to equal treatment before the tribunals and all other organs administering justice..."*

Convention on the Elimination of All Forms of Discrimination Against Women

There are implied rights to free legal aid for women in the CEDAW, as well as in the ICESCR, both of which have also been ratified by Vietnam. At Article 15(1) the CEDAW provides that:

> *"State parties shall accord to women equality with men before the law."*

In addition, CEDAW Article 2 provides:

> *"State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, to undertake:*
>
> * * *
>
> *(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination*.

A practical application of the duties under CEDAW includes cases in which discrimination may result in a woman not having access to family funds to pay for legal assistance. In such cases, the family's ability to pay for legal services is different from the woman's ability to pay. In such situations, CEDAW requires that the state establish the legal protection for the woman, which would include providing her with free legal assistance.

International Convention on Economic, Social and Cultural Rights

Vietnam has ratified the ICESCR. The body responsible for the implementation of that convention, the UN Committee on Economic, Social and Cultural Rights, has stated that:

"The Committee considers that the procedural protections which should be applied in relation to forced evictions include:

* * *

(g) provision of legal remedies; and
(h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts."[5]

Vietnam's "soft law" obligations

In addition to binding international legal obligations, there is a range of "soft law", i.e., non-binding principles and guidelines, which should:

- Influence and provide a source for drafting national laws
- Raise awareness
- Provide guidance for states

There is a broad range of international instruments that provide guidance for states in providing legal aid to the poor and vulnerable, but they do not establish enforceable international legal obligations. These include:

- Universal Declaration of Human Rights (UDHR)
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UN PnGs)
- UN Standard Minimum Rules for the Treatment of Prisoners
- UN Rules for the Protection of Juveniles Deprived of Their Liberty
- Sustainable Development Goals (SDGs)

The two most directly relevant as guidance for legal aid systems are the UDHR, adopted by the UN General Assembly in 1948, and the UN PnGs, which was agreed upon by all members of the UN General Assembly, including Vietnam, in December 2012.

Useful guidance is also available in the UN SDGs.

<u>Universal Declaration on Human Rights</u>

The following articles provide guidance on the right to be protected by the rule of law:

> *"Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law.*

[5] Par 12. Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003).

Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

* * *

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.

Article 11.
(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."

Sustainable Development Goals

The Millennium Development Goals (MDGs) were a set of goals that were agreed upon by the largest gathering of world leaders in history in 2000. The MDGs were designed to address extreme poverty by 2015. The SDGs are the successor to the MDGs. They set the goals for sustainable development to be achieved by 2030, as agreed upon by the leaders of 193 countries, including Vietnam. The SDGs' official name is: Transforming our world: The 2030 Agenda for Sustainable Development. The goals are set out in a UN Resolution.[6]

Each of the 17 SDGs has a number of targets identified, totaling 169 targets. Progress towards each target will be monitored through indicators of progress. A total of 241 indicators have been identified, but regions and individual countries are encouraged to make their own indicators.

The SDGs are universal in a way that the earlier MDGs were not. They apply to all countries, not just to developing countries. The SDGs also include a focus on partnerships. They involve governments, civil society, business, and other sectors, all working together to move towards achieving the 17 stated goals.

The SDGs accept that sustainable development cannot take place unless there is progress on providing equal access to justice for all. Access to justice is, for the first time, specifically included in SDG 16:

SDG 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

* * *

Target three: Promote the rule of law at the national and international levels and ensure equal access to justice for all.

[6] Paragraph 54 United Nations Resolution A/RES/70/1 of 25 September 2015.

Vietnam, like other countries, will be developing national indicators to measure and report on progress in achieving SDG 16. This will include indicators for measuring progress on providing equal access to justice for all. As there are a great number of people in Vietnam who cannot afford to pay for legal assistance, the development of legal aid services will likely be one of the indicators that will be reported.

One of the indicators that has been agreed upon for all countries is the number of pre-trial detainees. A major focus area of legal aid is to provide legal assistance to those held in pre-trial detention. This can significantly reduce the number of persons in pre-trial detention. Lawyers can help to establish whether there are valid reasons for detention, and ensure that the pre-trial procedures move quickly. It has been demonstrated in many country contexts that providing a lawyer at the pre-trial detention stage will also significantly assist in reducing the incidence of torture and mistreatment, as recognized by the UN PnGs.

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

The UN PnGs is the first major international instrument dealing specifically and comprehensively with legal aid. It was developed during a three-year process that involved contributions from a range of the world's top experts in legal aid. The UN PnGa have been widely supported as providing excellent guidance to nations seeking to establish more effective systems of legal aid in relation to criminal justice issues.

Although the UN PnGs deal only with legal aid and criminal justice, this does not mean that legal aid should be limited to criminal cases. International best practices include a range of legal issues covered by legal aid, and in years to come there may be developed a more comprehensive set of UN principles that also cover civil and other legal issues.

The major purpose of the UN PnGs is to guide member states by setting out the fundamental principles and outlining the essential elements for an effective and sustainable legal aid system.[7] The principles include:

- Legal aid is an essential element of a fair, humane, and efficient criminal justice system. It is not an "add on" but an integral part of criminal justice systems
- Legal aid is a foundation of and precondition to exercising other rights such as the right to a fair trial
- Accessible legal aid ensures fundamental fairness and public trust in the criminal justice process
- Effective legal aid improves the performance of criminal justice personnel

[7] UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Par. 7.

The following are selected key provisions of the UN PnGs.

The right to legal aid

Article 14 of the UN PnGs provides:

> *"Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution."*

The responsibility of the state to provide legal aid

Article 15 of the UN PnGs further provides that:

> *"States should consider the provision of legal aid their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system."*

But Article 15 notes that:

> *"This does not mean that it is only the state that should provide the legal aid services. The state is responsible for the creation of an effective and accountable legal aid system, which should include a range of service providers such as civil society organizations, private lawyers, paralegals and university legal clinics."*

Legal aid during police investigation and detention

The following articles of the UN PnGs relate to the need for legal aid during police investigation and detention:

> *"Article 20: States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process*
>
> * * *
>
> *Article 23: It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid*
>
> * * *

Article 27: States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process

Article 28: Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defense

* * *

Article 36: States should ensure that legal aid providers are able to carry out their work effectively, freely and independently…without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files

* * *

Article 42: In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that:

* * *

(c) Police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned or detained inform unrepresented persons of their right to legal aid and of other procedural safeguards

Article 43: States should introduce measures:

(a) To promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent; his or her right to consult with counsel or, if eligible, with a legal aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or legal aid provider while being interviewed and during other procedural actions

(b) To prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer, unless the person gives his or her informed and voluntary consent to waive the lawyer's presence, and to establish mechanisms for verifying the voluntary nature of the person's consent. An interview should not start until the legal aid provider arrives

* * *

(d) To ensure that persons meet with a lawyer or a legal aid provider promptly after their arrest in full confidentiality; and that the confidentiality of further communications is guaranteed

* * *

(h) To make available in police stations and places of detention the means to contact legal aid providers

* * *

(j) To ensure that persons are informed of any mechanism available for filing complaints of torture or ill-treatment"

Legal aid at the pretrial stage

The following articles of the UN PnGs relate to the necessity of legal aid at the pretrial stage:

"Article 44: To ensure that detained persons have prompt access to legal aid in conformity with the law, States should take measures:

(a) To ensure that police and judicial authorities do not arbitrarily restrict the right or access to legal aid for persons detained, arrested, suspected or accused of, or charged with a criminal offence, in particular in police stations

(b) To facilitate access for legal aid providers assigned to provide assistance to detained persons in police stations and other places of detention for the purpose of providing that assistance

(c) To ensure legal representation at all pretrial proceedings and hearings

(d) To monitor and enforce custody time limits in police holding cells or other detention centres, for example, by instructing judicial authorities to screen the remand caseload in detention centres on a regular basis to make sure that people are remanded lawfully, that their cases are dealt with in a timely manner and that the conditions in which they are held meet the relevant legal standards, including international ones

(e) To provide every person, on admission to a place of detention, with information on his or her rights in law, the rules of the place of detention and the initial stages of the pretrial process"

Legal aid providers

Provisions in the UN PnGs on legal aid providers are:

“Article 39: States should recognize and encourage the contribution of lawyers’ associations, universities, civil society and other groups and institutions in providing legal aid

* * *

Article 55: In order to encourage the functioning of a nationwide legal aid system, States should, where it is appropriate, undertake measures:

* * *

(d) To establish partnerships with bar or legal associations to ensure the provision of legal aid at all stages of the criminal justice process

(e) To enable paralegals to provide those forms of legal aid allowed by national law or practice to persons detained, arrested, suspected of, or charged with a criminal offence, in particular in police stations or other detention centres

* * *

Article 65: Where there is a shortage of qualified lawyers, the provision of legal aid services may also include non-lawyers or paralegals. At the same time, States should promote the growth of the legal profession and remove financial barriers to legal education

* * *

Article 67: States should, in accordance with their national law and where appropriate, recognize the role played by paralegals or similar service providers in providing legal aid services where access to lawyers is limited

Article 68. For this purpose, States should, in consultation with civil society and justice agencies and professional associations, introduce measures

(a) To develop, where appropriate, a nationwide scheme of paralegal services with standardized training curricula and accreditation schemes, including appropriate screening and vetting

* * *

Article 70: States should, where appropriate, engage in partnerships with non-State legal aid service providers, including non-governmental organizations and other service providers

* * *

Article 72: States should, where appropriate, also take measures:

(a) To encourage and support the establishment of legal aid clinics in law departments within universities to promote clinical and public interest law programs among faculty members and the student body, including in the accredited curriculum of universities

* * *

Article 45: States should introduce measures:

* * *

(e) To request bar or legal associations and other partnership institutions to establish a roster of lawyers and paralegals to support a comprehensive legal system for persons detained, arrested, suspected or accused of, or charged with a criminal offence; such support could include, for example, appearing before the courts on fixed days

(f) To enable, in accordance with national law, paralegals and law students to provide appropriate types of assistance to the accused in court, provided that they are under the supervision of qualified lawyers"

Pro bono lawyers

Article 56 of the UN PnGs provides that: "States should also take measures:

(a) To encourage legal and bar associations to support the provision of legal aid by offering a range of services, including those that are free (pro bono), in line with their professional calling and ethical duty"

Coordination with law enforcement agencies

Two articles of the UN PnGs relate specifically to essential law enforcement coordination in support of an effective system of legal aid:

"Article 45: States should introduce measures:

* * *

(g) To ensure that unrepresented suspects and the accused understand their rights. This may include, but is not limited to, requiring judges and prosecutors to explain their rights to them in clear and plain language

* * *

Article 55: In order to encourage the functioning of a nationwide legal aid system, States should, where it is appropriate, undertake measures:

* * *

(c) To promote coordination between justice agencies and other professionals such as health, social services and victim support workers in order to maximize the effectiveness of the legal aid system, without prejudice to the rights of the accused"

Victims

Regarding victims in legal disputes, the UN PnGs provide the following guidance:

"Article 24: Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime

* * *

Article 48: States should take adequate measures, where appropriate, to ensure that:

(a) Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization

* * *

(d) Victims are promptly informed by the police and other front-line responders (i.e., health, social and child welfare providers) of their right to information and their entitlement to legal aid, assistance and protection and of how to access such rights"

Marginalized groups

Article 32 of the UN PnGs provides the following protections for marginalized groups:

"Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures"

The means test for legal aid

Whenever states apply a *means test* to determine eligibility for legal aid, Article 41 provides that they should ensure that:

> *"(b) The criteria for applying the means test are widely publicized*
>
> *(c) Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined. Children are always exempted from the means test*
>
> *(d) Persons who are denied legal aid on the basis of the means test have the right to appeal that decision*
>
> * * *
>
> *(f) If the means test is calculated on the basis of the household income of a family, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test"*

Women

Article 52 of the UN PnGs provides protections for women:

> *"States should take applicable and appropriate measures to ensure the right of women to access legal aid, including:*
>
> *(a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programs and practices relating to legal aid to ensure gender equality and equal and fair access to justice*
>
> *(b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims*
>
> *(c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required"*

Children

Article 53 of the UN PnGs also provides specific protections for children:

> *"States should ensure special measures for children to promote children's effective access to justice and to prevent stigmatization and*

other adverse effects as a result of their being involved in the criminal justice system, including:

* * *

(f) Promoting, where appropriate, diversion from the formal criminal justice system and ensuring that children have the right to legal aid at every stage of the process where diversion is applied"

Independence of the legal aid system and providers

Article 59 of the UN PnGs seeks to ensure the independence of legal aid providers:

"To ensure the effective implementation of nationwide legal aid schemes, States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should:

(a) Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure"

Funding for legal aid services

Articles 60-61 of the UN PnGs provides guidance on the funding of legal aid:

"Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.

Article 61: To this end, States could take measures:

(a) To establish a legal aid fund to finance legal aid schemes, including public defender schemes, to support legal aid provision by legal or bar associations; to support university law clinics; and to sponsor non-governmental organizations and other organizations, including paralegal organizations, in providing legal aid services throughout the country, especially in rural and economically and socially disadvantaged areas

(b) To identify fiscal mechanisms for channeling funds to legal aid, such as:

(i) Allocating a percentage of the State's criminal justice budget to legal aid services that are commensurate with the needs of effective legal aid provision;
(ii) Using funds recovered from criminal activities through seizures or fines to cover legal aid for victims"

Monitoring legal aid services

Article 73 guides states on monitoring their legal aid services:

> *"States should ensure that mechanisms to track, monitor and evaluate legal aid are established and should continually strive to improve the provision of legal aid"*

Technical assistance

Article 75 of the UN PnGs encourages technical assistance in support of the development of legal aid in all states:

> *"Technical assistance based on needs and priorities identified by requesting States should be provided by relevant intergovernmental organizations, such as the United Nations, bilateral donors and competent non-governmental organizations, as well as by States in the framework of bilateral and multi- lateral cooperation, with a view to building and enhancing the national capacities and institutions for the development and implementation of legal aid systems and criminal justice reforms, where appropriate"*

SECTION 2: EFFECTIVE SYSTEMS OF PROVIDING LEGAL AID SERVICES

A national legal aid system should be accessible, responsive, affordable, effective and transparent. Effective legal aid systems require a "head, heart, hands, and feet."

The head is a national peak body to decide on policy, make regulations, and be responsible for the overall functioning of the system. It is important that institutional expertise is encouraged, supported and maintained, and that the peak national legal aid body receives adequate funding, technical assistance and support. The peak body is responsible for the performance of the legal aid service. It should have a duty to monitor and report on its performance at least annually and to publish details of performance and budget expenditures. This duty also should be delegated to sub-national offices.

The heart is all those who are part of the "legal aid family," who contribute to try to help in improving access to justice for the poor and marginalized, and who should be involved in developing policies and implementation mechanisms. When developing legal aid policy and designing implementation mechanisms, it is important to include all groups contributing to legal aid, including legal aid providers and representatives of the poor and

marginalized. All of these are part of the “heart” needed to drive improvements.

The hands are those involved in providing legal aid services, including regional offices of the national body, civil society organizations and private contracted lawyers, etc. There are four models of providing legal aid that are followed in many jurisdictions: *judicare*, public defenders, civil society implemented, and a mixed model. These models are explained further below.

The feet are spreading legal aid services to remote areas, and not limiting them to cities and population centers. However, there often are not enough lawyers to service remote areas, so others such as paralegals and law students may be needed as legal aid representatives.

To establish and maintain a just and effective legal aid system, the national law that must address the following questions:

- Structure of the legal aid system (How should the mechanism be managed?)
- Beneficiaries of legal aid (Who should receive legal aid?)
- Legal aid services (What kinds of legal help should be given?)
- Legal aid providers (What lawyers or others should provide legal aid?)

Structure of the legal aid system

A peak national legal aid body

An effective legal aid system needs a ‘peak body’ that is responsible for policy and provides funding for the legal aid mechanisms that carry out the legal aid work. In most developed countries, and a number of developing countries that have recently established legal aid systems, this peak legal aid body is an independent commission or board. Optimally, the commission or board will be established by a legislative act, e.g., Act of Parliament, and receive an allocation of funding from the national budget that is managed by a ministry. The commission or board should provide financial records to the ministry and be required to submit to regular financial audits by an independent auditor. However, the body should be independent and not report to the ministry in a technical or substantive sense. Therefore, it will not be under the control of a ministry, but it will be responsible to fulfill the responsibilities given to it by the enabling law.

The UN PnGs encourage the establishment of an independent national body to manage legal aid, stating that it should be:

> *“free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions.”*

In other systems, the peak body responsible for legal aid is established within a ministry or government department. For example, in Indonesia the Ministry of Law and Human Rights delegates responsibility for implementation of the national Legal Aid Law to one of its directorates, the National Law Development Agency (BPHN). In Singapore, the Ministry of Law delegates its authority to the Legal Aid Bureau, but that office does not handle criminal cases; criminal legal aid cases are managed under a separate independent scheme managed by the Singapore Law Society. In a smaller number of jurisdictions, including India and more recently Myanmar, responsibility for policy and implementation of legal aid services is given to the courts.

The model of an independent board or commission is followed in South Africa, the UK, Australia, and a range of other countries. The advantages of an independent board or commission include increased public confidence that the legal aid is being provided independently, and protection for the government from claims of interference in cases in which it may be a party, including all criminal cases.

The board or commission should be composed of individuals of high integrity, who have a long history of involvement with legal aid issues. Those individuals should serve a fixed term, perhaps of five years, which may be extended. In this way, the peak body is led by experts who are committed to effective provision of legal aid, and who serve in their position for a fixed period. When legal aid services are led by government employees, who may be selected based on non-legal aid criteria and/or promoted or transferred, thereby leaving a gap leadership, vacancies may be difficult to fill.

The model in which courts administer legal aid provides a greater degree of independence than those implemented by government departments. However, it raises questions on the appropriate role of the courts. Court administered legal aid also has the potential to add extra stress to an overloaded judicial system.

Sub-national legal aid bodies

The peak national body responsible for legal aid will often be provided with the power to decide on the establishment of sub-national bodies, where they will be, what their delegated powers should be, etc. In South Africa, for example, Legal Aid South Africa delegates power to a series of Justice Centers around the country. Each of these also establishes a smaller satellite office in a more remote area of their region.[8]

In Indonesia, the Ministry of Law and Human Rights delegates its authority to monitor, evaluate and make payments for legal aid to its regional offices across the country. The legal aid services are not provided by the Ministry, but through accredited civil society organizations.

[8] Legal Aid South Africa is an independent statutory body established by the Legal Aid South Africa Act 39, 2014.

The 2016 Myanmar Legal Aid Law[9] establishes three levels of "Legal Aid Bodies": national, region/state, and township levels. As there are 330 townships in Myanmar, the new law has provoked a great deal of criticism based on the challenges of establishing legal aid bodies in so many places and considering that the level of anticipated budget and experience of legal aid personnel is low.

Range of financial support for legal aid

It is important for the national budget to allocate a reasonable and realistic amount of funds for the operation of the legal aid system. This may be allocated at the national or sub-national level.

It is preferable for budget allocations to be provided to the national body that is responsible for coordinating legal aid so that appropriate decisions can be made on the regional allocation of funds. For example, some regions may be: significantly larger; more remote, and therefore more difficult to access; have fewer lawyers; or have a large legal aid caseload due to local conflicts, environmental issues, migrant populations, etc.

However, it is also important that funding for legal aid is allocated for services across the entire country and not be "blocked up," at the national level. For this reason, it is advisable to include a duty for the national body to provide an annual plan for regional allocation of funds in the empowering legal aid law.

There is a great range of amounts of funding allocated to legal aid in different countries. For example, in the U.K., until recent significant cuts, more than USD 50 per person was allocated to the legal aid budget. In the U.S., the figure in various states has varied between USD 15-20 per person. In South Africa, the legal aid allocation is around USD 2 per person. In the Philippines, with a population of around 100 million persons, the total legal aid budget is approximately USD 50 million or USD .50 per person. In Indonesia, the new legal aid system and the court operated legal aid posts combined have a budget of around USD 6 million for a population of around 250 million or around USD .25 per person.

Independence

Independence is crucial to any legal aid system. In practice, achieving an adequate level of independence often means ensuring that the process of selecting which cases receive legal aid and of determining who will be the lawyers or others providing the services, etc., should be separated from interests that are contrary to those of the person receiving the legal aid. For example, the legitimate goals of the police and prosecutors pursuing a criminal case on behalf of the government may be the opposite of the goals of a defense lawyer who must try to the best of their ability to protect the interests of the accused. Both sides should pursue these goals in a rigorous and fair manner. Recognizing that the two sides in a criminal case must be separated in every possible way contributes a great deal to building an

[9] Myanmar Legal Aid Law. Law No 10/2016

effective legal aid system. Similarly, in cases involving regional government administrators or business interests versus poor individuals, such as in land claim cases, the goals of the two sides may be different. Keeping in mind the principle of independence when designing the law and implementing regulations therefore provides a foundation that greatly assists the practical implementation of legal aid.

The regional legal aid offices in Vietnam should establish procedures that accept these principles as an integral part of the challenges they face.

Beneficiaries of legal aid (Who should receive legal aid?)

Supply and demand: balancing available resources to need

In a perfect world, governments would provide excellent quality and free legal aid services to every individual. However, in reality, all legal aid systems face a similar challenge; there is a massive demand for legal assistance, but very limited funds available to pay for the services.

If the available resources cannot meet the need, how can we try to rebalance this equation? One part of the answer is to seek increased funding for legal aid. Another is to ensure that the system that delivers legal aid is cost effective, with as little spent on administration as possible and the maximum amount possible spent on direct service provision.

A target of many legal aid systems is to allocate approximately one-third of their budget for administration and support, and two-thirds on direct service providers. In South Africa, approximately 30 percent of the budget for Legal Aid South Africa is spent on support staff; the remaining 70 percent is allocated to funding direct service providers. In Australia, Legal Aid New South Wales usually allocates around 50 percent of its budget to legal aid support for criminal cases.[10]

Who receives legal aid: the “means and merits” tests

Taking steps to try to increase the legal aid budget, and to ensure that the mechanisms are lean and cost effective, will help rebalance the supply-to-demand imbalance. However, they will not solve it. No legal aid system can provide for all the needs of the poor and marginalized. How then do we decide which of those needs will be accepted and which will be rejected? To answer this question, legal aid systems create procedures and criteria for guiding their decisions about who gets legal aid in which cases. Such procedures must answer the following questions:

- “Who is sufficiently poor or marginalized to receive legal aid,” and
- “Is the legal problem sufficiently important to warrant legal aid”

Many legal aid systems have developed a “means and merits” test to answer these questions, with the meaning of the terms respectively as follows:

[10] Interview with Mr. Stephen O Connor, Deputy Chief Executive Legal Aid NSW, Dec 2015.

- *Means:* Whether the individual has the means to pay for legal services
- *Merits:* Whether the legal problem has sufficient merit to be included as a priority for legal aid

In general terms, the beneficiaries of legal aid should be those who cannot pay for legal assistance, and who are facing high-priority legal challenges. This should be decided according to clear, pre-determined criteria (i.e., the means and merits) that are transparent and publicly available.

The criteria must be applied fairly, with procedures to ensure that resources are used most effectively. If too many people expect that they will receive legal aid but are then refused, they will become disappointed with the decision-makers and may believe that the decisions are arbitrary and without basis. For this reason, it is best to manage the expectations of the community about who should receive legal aid, and in what cases, by publishing the criteria of the means and merits test.

The means test

A very common approach for commencing the legal aid process is for the individual seeking legal aid to fill out an application for legal aid. A lawyer, paralegal, student, or other person will often assist the individual to complete the form. Included in the form will be questions, the answers to which will guide the decision-makers in relation to the means of the person, as well as the merits of the case.

The capacity of an individual to pay for legal services is calculated in different ways according to each context. In principle, the calculation should be based on an assessment of all the assets and income of a person, taking into account their liabilities, such as dependent spouse and children, rent or mortgage, school fees, and other payments.

In developed countries, the process is relatively easy. In Australia, for example, an applicant for legal aid will fill in a form that includes a statement of assets, income and liabilities, which can be cross-checked with the electronic records from the Department of Taxation and the Department of Social Security.

In the context of developing countries, the task of determining who can pay for legal services becomes more complex. In some countries there is a system that already records those who are “poor” to determine who should receive food or other forms of government assistance. Such records can be used to inform the decision on “means.” In contexts where the village head is the administrative leader, he or she can issue a letter acknowledging that the person is sufficiently “poor” and unable to pay for legal services. In South Africa, a calculation of income or amount that the person is able to earn is balanced against the number of persons living in the family:

“The ceiling at present is R600 a month for single or estranged

persons, R1,200 for married couples, plus R180 for each child. For example, a family of six, with a husband, a wife, and four children would be entitled to earn a monthly income of up to R1,920, or R1,200 + (4 x R180).”[11]

The merits test

As stated above, a legal aid service will not have sufficient resources to assist every person who is unable to pay for legal services. Therefore, an assessment must be made about the “merits” of the need. Making such a decision includes a combination of objective factors and a more subjective assessment per case. To increase transparency and objectivity, a set of criteria should be created. These criteria can include general factors, such as the severity of the crime and length of potential fine or sentence, the importance of the case to a significant number of people, etc. The criteria may also include very specific elements. For example, legal aid may be excluded from minor cases such as traffic offences and civil disputes for small amounts of money. In many countries, most civil cases are excluded from legal aid, as the system would otherwise be overburdened. Some degree of guidance without strict restrictions may also be provided; for example, some divorce cases may be supported while others are excluded depending on the basis for the divorce. In some jurisdictions, family law matters are excluded except for those involving the custody of children.

Criteria help the decision-makers to decide on the merits of a legal aid application, but there is still a need for a decision-making process. Optimally, more than one person should be involved in making the decision whether legal aid should be granted or not. In addition, there should be the right to appeal against a decision, with the appeal decided by a body other than the original decision-makers and within a short timeframe. For example, in some contexts where legal aid applications are received at a legal aid office, a meeting is held once per week to consider all applications received that week. If a person is refused legal aid they may lodge an appeal, and a decision on the appeal must be made within two weeks by a body different than the original decision-makers.

In all country contexts, those who are arrested by the police are predominately the poor. For this reason, in many contexts every person who is arrested by the police is presumed to be eligible for legal aid until such time as they can apply for legal aid and a formal decision is made. This ensures that persons arrested are provided with legal aid during the critical investigation and pre-trial stages.

Some criteria that can assist in determining the merits of a case to be supported with legal aid include:

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[11] David Mc Quoid-Mason “The Legal Aid Board and the Delivery of Legal Aid Services in South Africa.” P 3 Par A 2.2, www.legalaidreform.org/.../356_7737a670ae8c11f0ec1df7f8e11742e3

Is it a criminal case?

Has the person been detained or threatened with detention? Criminal cases are usually included as the highest priority. When a person is deprived of their liberty, they lose a whole range of other fundamental freedoms, and they are unable to work and provide for their family. This may have follow-on effects if money is not available for medicine, housing, etc. It is therefore a high priority to provide legal representation to all persons investigated, arrested, or charged by police.

Does the case affect the rights or well-being of a large number of poor people?

Sometimes cases are called “strategic litigation.” Others may be “class actions,” i.e., involving a group of individuals as parties to an action. The rationale for granting legal aid in such cases is that a single case may have a larger impact on a significant number of people. For example, a case by a worker concerning their rights in the workplace may relate to the rights of hundreds of other workers in the same factory and other workplaces. Another example may be a challenge brought on behalf of a villager for an environmental threat caused by a company pouring waste into a river. The damage will affect not only the villager but his community and other communities downstream. Such cases of public interest may be seen as a high priority for legal aid.

Categories entitled to legal aid

A law on legal aid does not need to set out every category of person who may need legal aid. Most legal aid laws define the beneficiaries of legal aid as those who cannot afford to pay, but specific categories of persons or cases may be mentioned so that they are not overlooked.

When groups of people find it difficult because of discrimination or other reasons to establish that they cannot pay for their legal services, they may be included in the list of beneficiaries. For example, some groups may find it difficult to obtain the required documents to prove they are sufficiently poor because they cannot access the documents from those who have them, or they will face difficulties in getting proof because of discrimination. In such cases, it would be fairer, easier and more efficient to include such persons in the list of beneficiaries.

Women

Women who claim that they have been the victims of violence should be included as beneficiaries without being tested for means and merits. This is because it is often difficult for women victims to have access to funds, particularly if the alleged perpetrator is another member of the family. Women victims also require specialist treatment to ensure that their cases are dealt with sensitively and confidentially; this is an expertise that is often developed

by legal aid centers and civil society organizations to deal with such kinds of cases.

Children

Children should be included in the list of beneficiaries and not be subjected to a means and merits test. Children have their own legal rights distinct from the legal rights of their parents; in many cases the interests of the child will be different from the parents.

Disabled

The disabled should be included in the list of beneficiaries, as they also represent an important public interest and cannot easily prove that they are unable to pay.

HIV and other diseases

Other categories that may be considered for inclusion in the list of beneficiaries include those HIV-positive individuals because such persons suffer from widespread discrimination. For that reason, it may be difficult to get documents and to establish that they cannot pay for legal aid.

Suspects in a criminal case

All persons investigated, arrested or taken into custody by police should be immediately entitled to legal aid. If a country wishes to apply a means and merits test to persons that have been arrested, then legal aid should be automatically granted to them until they have had time to complete an application and a decision on their entitlement to legal aid has been made.

Others

It is important to remember that when some groups are included on a list as entitled to legal aid, that does not necessarily reflect an intention to exclude other groups. Subject to the assessment of means and merits, and exceptions thereof, members of other groups should be entitled to legal aid if they cannot pay for their legal services.

Distinguishing between advice and assistance

A thorough assessment is necessary for complex legal disputes where legal representation is required. If a person requests to be represented in a complex case, such as a legal dispute in court, they should be approved through the means and merits process.

However, a way to manage the demands and expectations of a broad population is to provide general, basic legal aid advice free of charge to everybody who can give some basic evidence that they are poor or marginalized. Any person deemed sufficiently poor, or a member of one of the

relevant categories, based on readily available evidence or even oral answers to questions, should receive basic advice and assistance without having to complete an application and without having to be assessed as to whether they should be granted legal aid.

Assistance

As an illustrative example of a case requiring legal representation: Farmer X is arrested and detained by police who suspect he/she has stolen a cow. Farmer X should immediately be informed by the police of his/her right to a lawyer and the availability of legal aid services if he/she cannot pay for a lawyer. If a legal aid lawyer or a paralegal is available, they should visit Farmer X where detained and continue to represent him/her. Farmer X may be required to fill out an application for legal aid, and the legal aid lawyer or paralegal should assist him/her to do this.

When a decision is made by the director of the legal aid center to approve the application for legal aid after a meeting with the center's team, Farmer X will be represented throughout the entire process of the criminal case. If the application is rejected, e.g., because Farmer X does not seem to be poor or cannot prove that he/she is unable to pay, Farmer X will not be represented by a legal aid lawyer or paralegal and must hire a private lawyer.

Farmer X can appeal this decision to a different section of the department or another appeals mechanism. The decision on the appeal will be made in a very short timeframe. If the appeal is upheld, then Farmer X will be granted legal aid and a legal representative will be appointed for him/her.

Advice

As an illustrative example of a case requiring only legal advice: Farmer Y presents himself at a legal aid office and states he/she has not received local government services as he/she should. Farmer Y will be asked to show evidence that he/she is poor. In response, he/she presents a letter from the village chief to the local authorities requesting clarification why the local government service has not been supplied. A lawyer or paralegal from the legal aid center will accompany Farmer Y to the local authorities to assist. There is no need to fill out a formal application for legal aid, as the service provided is classified as "advice and assistance."

However, if the local government representative refuses to assist Farmer Y, and he/she wishes to take the matter to court, then he/she would need to fill out an application for legal aid, specifically for "legal representation." This would take longer as it would require additional legal aid resources to be assessed on its merits.

The following is an example of a national law on legal aid beneficiaries. The 2012 Sierra Leone Legal Aid Act is a leading example of a practical legal aid system for a developing country in which there are few lawyers, a large demand and the challenges of providing assistance to remote areas. The Act

deals with legal aid beneficiaries by adopting the term “indigent person,” which is also used in a range of other legal aid laws.

SECTION 3: PROVISION OF LEGAL AID

Definitions, Section 1:

"indigent" means a person who cannot afford to pay for legal services;

"legal aid" means the provision of legal advice, assistance or representation to indigent persons;

"legal advice and assistance" means providing information in both criminal and civil cases about the relevant law and legal processes, assisting with alternative dispute resolution, advising on legal issues, assisting with the drafting of documents other than instruments prohibited under section 24 of the Legal Practitioners Act, 2000, referring matters to legal practitioners, and doing other things that do not constitute legal representation;

"legal representation" means a representation in court by a legal practitioner or pupil barrister;

Definitions, Section 20:

Where the interests of justice so require, an indigent who is arrested, detained or accused of a crime shall subject to this Act, has access to-

(a) legal advice and assistance

(b) legal representation where the indigent’s application for legal representation has been approved by the Board from the moment of his arrest until the final determination of the matter and subject to section 28, the appellate process.

(2) Where the interests of justice so require, an indigent who wishes to bring or defend a civil matter shall have access to-

(a) Legal advice and assistance

(b) Legal representation where the indigent’s application for legal representation has been approved by the Board

Legal aid services

Legal aid covers a broad range of services. For example, legal aid services in Sierra Leone’s 2012 Legal Aid Act include:

- Legal representation
- Providing information in both criminal and civil cases about the relevant law and legal processes, and assisting with alternative dispute resolution
- Advising on legal issues
- Assisting with the drafting of documents
- Referring matters to legal practitioners
- Other kinds of assistance

In countries such as South Africa, Australia, the U.K., and the U.S., legal aid systems have been established to provide immediate telephone advice to anyone who wishes to call about issues that are most likely to affect the poor. Although not all of those who call may be poor or marginalized, it is impossible to check this over the phone. On balance, it is more cost effective simply to provide advice to all. However, advice is limited to certain basic areas of the law that are most likely to affect the poor, such as criminal law, housing, refugees, etc.

Another important area of work often undertaken through Sierra Leon's Legal Aid Act is educational services to communities on legal rights and laws.

It is unwise to limit the types of legal aid services that may be provided in the provisions of a national legal aid law. Of course, the legal aid services the law establishes cannot be provided to all poor and marginalized. However, the number and type of cases can be focused through regulations and the application of the "means and merits" test for each potential dispute for which legal aid is requested.

In this way, a dynamic and changeable caseload can be addressed in an appropriate way. For example, a large amount of advice and representation concerning land claims may suddenly arise in a region in response to a particular development or development plan. If the kinds of legal aid services are not limited in the law, then local legal aid authorities can adjust their means and merits criteria to take into account the changes in the local needs and caseload.

Legal aid providers

There will always be a smaller amount of resources available for legal aid services than the demand for those resources. All those who can assist in providing these services should be included in a "legal aid family" working together to provide this assistance. This family of legal aid providers may include:

- Lawyers
- Legal consultants
- Paralegals
- Law students
- Private lawyers
- Bar Associations
- Civil society organizations
- University legal aid clinics
- Pro bono lawyers
- Trained staff
- Volunteers

A legal aid law should not limit the categories of providers of legal aid advice, assistance, education, mediation, representation, etc. The needs of the poor are varied, and all of those available to help are needed.

The question of who should provide legal aid is different from the question of which organizations should be able to receive funds from a national legal aid budget. For example, a national legal aid law may provide for private lawyers to receive funding under that law. This does not mean that only private lawyers should be able to conduct legal aid work. A broad range of other legal aid service providers will be able to continue their work, funded from other sources and not bound by the provisions of a legal aid law which relates to those who receive funding under its provisions.

However, if a legal aid system establishes that civil society organizations, lawyers, etc. may be funded by that system, then there should be a mechanism through which organizations and individuals are accredited or added to an accredited list of those who are authorized to receive funding. Any work undertaken under this arrangement and funded under the provisions of the law must comply with the law.

Models of providing legal aid services

The major components of most legal aid systems are drawn from the following components:

- *Judicaire*: private lawyers or civil society organizations are subcontracted to conduct cases and other legal aid work
- *Public defenders:* full-time lawyers and other staff work for the national legal aid system
- *Mixed model: judicaire*, public defenders and civil society organizations all contribute, as well as university clinics, paralegals and other providers

As Vietnam moves forward in amending its national legal aid law and designing the most effective and appropriate legal aid system for the years ahead, each of these models should be considered carefully. Vietnam already has a broad range of provincial legal aid offices, a strong service provided by national bar associations, and the wealth of experience of ten years of operation of the legal aid service to inform the process of change.

It is clear that some elements of legal aid services have developed more strongly than others. For example, there has been a deep focus on spreading information and advice while the percentage of criminal cases in which there are legal aid lawyers assisting the poor and marginalized is relatively low. In most legal aid systems criminal representation accounts for at least 50 percent of the annual budget allocation. Changes in the focus in relation to criminal cases may be required in the future.

Each of the models listed above has both strengths and weaknesses. It is the author’s opinion that a mixed model is usually the most appropriate approach,

as it includes all of the possible contributors to help balance the supply-demand equation of legal aid.

Each country's legal aid system must be designed according to the national context, including the needs of the population, strengths and weaknesses of the court system, the maintenance of rule of law, common practices of law enforcement officials, ethics and practices of the bar and lawyers, etc. Consideration should also be given to demand, i.e., the kind of cases that commonly require help for the poor and marginalized, and what kind of legal aid services already exist.

The *judicaire* model

In the *judicaire* model the legal aid governing body, such as an independent Legal Aid Commission or the Ministry of Justice, will not directly provide legal aid services. Instead, it will subcontract the legal aid services out to private lawyers or organizations.

Under a *judicaire* system private lawyers are contracted to conduct cases or perform legal aid services. Depending on the jurisdiction, *judicaire* lawyers are paid by the hour, the day, or per case. In others, they receive a payment to work on all legal aid cases in a particular region for a period of time, such as a week or a month.

Three ways in which *judicaire* lawyers are contracted are through:

- "Dock briefs"
- Direct contracting of private lawyers
- Contracting of civil society organizations

Judicaire through the dock brief system

The term "dock brief" has become commonly used in criminal cases where an accused person who requires legal aid appears in the court, i.e., is placed in "the dock" in the court, and the brief to provide representation must be quickly arranged.

In a number of countries where there is no general system for providing legal aid there are constitutional or legislative provisions that require every person charged with an offence of a certain severity to be provided with a lawyer. For example, in Myanmar the constitution requires every person charged with a capital offence to be represented. In Indonesia, a person charged with an offence carrying the death penalty or a punishment of more than 15 years[12] must be provided with free legal aid.

In these situations where a "dock brief" system has been established, a lawyer is appointed for accused persons charged with the relevant category of

[12] Indonesian Criminal Procedure Code KUHAP (1981), Art 56(1)

crime at the time they appear in court. If the accused does not have a lawyer the judge may instruct the clerk of the court to arrange for a private lawyer to represent the accused person. The lawyer will be hired and usually will be paid a relatively low fee for this representation.

In theory, the practice of “dock briefs” is appealing. It does not require a large legal aid infrastructure to manage legal aid offices, and the costs will be relatively low as the lawyers are paid relatively low fees. However, experience in many countries, including Myanmar, Indonesia and Thailand, shows that, particularly where the rule of law is not very strong, this system provides little justice. In this sense, rather than saving money it can be a waste of resources. Unless strictly controlled, such a system can make justice more difficult to achieve because it provides an illusion of justice, thereby protecting the flawed system from review and change.

In dock brief systems in developing countries, the budget for payment of lawyers is usually very low and some of it is “skimmed off” through corruption in the court or other body that administers the scheme and chooses the lawyers who receive cases. In some systems such as Myanmar the lawyers who will accept these cases are the very young and inexperienced; more experienced lawyers may not want to accept complex cases for a very low fee. The cases are extremely challenging, mostly murder trials. The lawyers are not equipped to defend clients charged with the most serious classes of cases. They do not have the moral strength, support or knowledge to be able to stand up to the pressures of the prosecutor and police who are seeking a conviction. The defense these young lawyers are able to offer in many cases is grossly inadequate; it merely provides the illusion that the accused has been given a fair trial. Moreover, the sentences for the accused in these complex cases are severe.[13]

In other systems, such as Indonesia, practices around the “dock brief” have developed in which a collaborative network is established that includes the court clerk, the prosecutor and police and defense lawyers who have close relationships with them. Cases that require a lawyer to represent an accused are provided to one of these defense lawyers who receive the small fee for the case. In many of these cases the lawyer does not appear at all in the court, but only provides a “paper defense”. In other cases, the lawyer will appear but the goal of all concerned is to provide a speedy end to the trial; not to provide a strong defense to the accused. This cadre of “defense lawyers” also help to broker bribes from their clients to police, particularly in larger drug cases where funds are available.[14]

These lawyers also do not usually contest or raise with the court cases in which an accused person signs a form waiving their right to a lawyer. Many police would prefer that the individual is not represented by a lawyer and a routine practice of pressuring individuals to sign a waiver of their right to a lawyer has developed. The accused are often physically pressured to sign the

[13] Interviews with staff of the Myanmar Justice Center, January 2016.
[14] Information from interviews conducted by the author with lawyers from the Criminal Defense program of LBH Jakarta and LBH Makassar in May 2015.

waiver, or told that their case will be longer and that they will get a longer sentence if they have a lawyer.[15] Judges also do not 'look behind' these forms, even though hundreds or even thousands of them may be presented to the court annually.

Judicaire through private contracts

Another common way in which *judicaire* is implemented is through the legal aid provider contracting with private lawyers to conduct cases. This may also appear to an inexperienced eye to be a simple and relatively inexpensive methodology, compared with establishing a full infrastructure of a public defender or mixed legal aid model. It is true that subcontracting to private lawyers can provide a substantial contribution to a legal aid system. However, a *judicaire* system can also lead to very high costs, manipulation by unethical private lawyer and corruption. The following challenges need to be addressed in establishing an effective *judicaire* system:

- Which lawyers will be able to be hired?
- How can we be sure that they are skilled and committed to their clients?
- How much should the lawyer be paid? Each case is different, some require much preparation and others very little
- How can payments be calculated fairly?
- How do we make sure that the lawyers do a good job and not just try to finish the job quickly if they are paid a lump sum?
- How do we make sure they do not extend a case longer than necessary if they are paid per hour or per day?
- How can we make sure that they only invoice to be paid for work they have done and don't add on extra hours, or extra days, etc.?
- What kind of monitoring and quality control system needs to be set up?
- What will be done when complaints about a lawyer's performance are received or if it seems that they are charging inappropriately?

The contracting process can be undertaken by the legal aid service directly to the individual lawyers. It may also be through a relationship between the legal aid service and the bar association or a non-government organization that can be contracted to do a "block" of cases or other work. For example, a lawyer in a remote region could be subcontracted to do all of the legal aid cases in that region, and be paid a fixed fee for that. Or a lawyer may be paid by case, or according to a daily or hourly rate. The bar association may be contacted to supply lawyers in cases and be reimbursed per case, or through another contractual arrangement, such as an annual fee. Civil society organizations can also be contracted to pay lawyers or to be funded per case (see the section on the Indonesian system later in this section of the report).

Judicaire through subcontracting to civil society organizations

[15] Interviews by the author with members of LBH Jakarta Criminal Defense Lawyers program, Jakarta June 2015.

Many legal aid systems include an element not only of subcontracting to private lawyers but also of establishing contractual relationships with civil society organizations. These organizations may be small or large. They may employ only a few or a large number of lawyers, paralegals and other staff, and may focus on different areas of law.

The challenges relating to civil society organizations, in many ways, are similar to those relating to *judicaire* through private lawyers:

- How is a list of reliable organizations established?
- How can we ensure that the services provided are of a good quality?
- How much should the organization be paid, and how to prove the work has been completed satisfactorily?

In many advanced models a system of accreditation of civil society organization, like community justice centers that provide a range of services, has been established. Where financial regulations allow, these organizations may submit a proposal for funding with a range of budget lines and activities, and they may be provided with annual funding for those activities. At the end of the budget period they must report that they have completed at least the required number of cases, advices, mediation, etc. Specialist organizations that provide high quality services for the poor, such as on housing, children's rights, women's rights, migrant workers, environmental protection, etc., can make a major contribution to a legal aid system in such areas when the central legal aid provider cannot build up or service that technical area of expertise.

In the Indonesian model the government financial regulations will not allow for a proactive grant to be made to civil society organizations. Only services that have already been delivered can be reimbursed. This has resulted in major challenges in the payment for services completed. Initially 14 hard copy documents were required to prove that a case had been adequately finalized. This quickly clogged up the system so that payments were blocked. An Android phone based application was eventually developed so that more than 400 accredited civil society organizations can now lodge their claims through a tablet or phone.

In the Indonesian system a set amount of around USD 400 is allocated for every case, regardless of complexity. This is paid through reimbursements after the case is concluded. However, in the Indonesian model private lawyers are not included; they must work for civil society organizations.[16]

Some advantages of civil society participation in legal aid are the following:

- Civil society organizations play a vital role in legal aid service provision, and they should be encouraged and supported. Their constant challenge is funding. A means should be found to guarantee funding so

[16] Interview with Mr. Christomo, head of information systems, legal aid section of BPHN, Department of Law and Human Rights, Jakarta, September 20, 2016.

that they can operate from a base of institutional certainty
- Civil society organizations are often very committed and of high integrity, with staff who have worked for years on social justice issues. They can provide a high degree of integrity and are also used to working with the poor and marginalized. Those working with women victims, children, ethnic groups, the disabled, etc., have built an expertise in dealing with these groups
- Civil society organizations have a broad geographical spread and can be the representatives of a legal aid service in remote areas
- Civil society organizations often have close links to community groups and can play a productive role in alternative dispute resolution processes such as mediation and in referral to the appropriate services. They also often have developed networks of paralegals at the community level

Challenges of the *judicaire* model

Some of the major challenges in a *judicaire* system include the following:

Selecting lawyers

In order to establish an effective *judicaire* system, a list of lawyers that have the demonstrated technical skills and ethical practices must be compiled. This may be done by collaboration with the bar association or through another system within a legal aid mechanism that evaluates the lawyers according to set criteria.

If the lawyers are to be contracted in criminal cases, for example, they should be expert criminal lawyers; the same for civil cases etc. A major problem has emerged in many systems where it has been difficult to control which lawyers are contracted. This leads to corruption with the persons in charge of the contracts receiving “kick-back” percentages of the payments.

Another major problem has emerged where a legal aid system is not independent of the courts, and prosecution and defense lawyers are personally close to the prosecutors; they do not put up a strong defense, but they become the ones who are usually briefed. This has led to a situation in many countries in which, through a collaborative arrangement, convictions are much more likely, disposed quickly, and payments are made quickly. This lessens the workload of the police, the prosecutors and the court. Everyone benefits, except the accused person. The population also loses trust in the legal system, and in the government which provides the services.

Contracting

Lawyers can be contracted for an individual case. A significant challenge is to calculate how much should be paid for the case. Although in some systems this has been done by payment of an hourly or daily rate, such systems have proven to be very expensive and difficult to control. For example, unethical lawyers may not try to finish cases quickly if they are being paid for every day in court.

A better result has been achieved through calculating a “lump sum” for each case prior to the contract being signed. If the case takes longer than expected only the lump sum will be paid, unless a change to the contract is negotiated.

Monitoring and performance standards

It is difficult to monitor and compile accurate information on the performance of individual lawyers under a *judicaire* model. A legal aid service cannot supervise independent lawyers. However, the lawyers must act in accordance with their bar association’s standards; they could be disciplined through the professional standards division of their bar association.

Administration

Although a *judicaire* system may seem appealing because it does not require hiring lawyers and support staff for them, it is still necessary to establish a mechanism that can identify sufficiently skilled lawyers, estimate the amount to be paid, arrange payments and deal with complaints and disciplinary issues.

Advantages of *judicaire*

The advantages of a *judicaire* system include the following:

- Lawyers and support staff do not need to be hired and managed
- If care is taken in selection, high quality lawyers can be involved, drawing from the large pool of the legal profession
- The legal profession is likely to support the system as it provides work for lawyers
- Individuals may be able to choose their own lawyers, if those lawyers are on the approved list

Disadvantages of *judicaire*

The disadvantages of a *judicaire* system include:

- Standards and quality of service are hard to standardize and maintain
- It is difficult to ensure that the choice of which lawyers get contracts and the payment under the contracts is not affected by corruption
- *Judicaire* can be very expensive, as paying private lawyers costs can be significantly higher than in-house lawyers
- Lawyers act individually and there is little potential for group collaboration, mentoring and collective experience contribution. This is very important in criminal justice legal aid in which mentoring and support of a group is a crucial element in building sufficient strength to realistically balance the power of the state’s police and prosecution services
- The number of contracts will be high, as one is needed for every case or group of cases, so a significant administration and bureaucracy is

needed to support it
- When lawyers' fees are less than they usually charge, they may not provide a full defense or representation, particularly if the case goes longer than expected

In many countries a reliance on *judicaire* for a smaller proportion of cases has been relatively successful, but when *judicaire* is the only mechanism to deliver services to a large numbers of cases, it becomes unmanageable, open to corruption, too difficult to control quality and too expensive. The South African experience is a good illustration.

The public defender model

Public defender models are systems in which legal aid services are provided by lawyers who are full-time employees of the legal aid service, which may be a legal aid commission, a government department or the courts. Many Latin American countries have significant public defender models. Australia has operated public defender systems for almost 100 years. However, in almost all instances, the public defender model does not supply all the legal aid services. Rather, it is complemented by work subcontracted out to private lawyers, or the *judicaire* model.

<u>Advantages of a public defender model</u>

- When the provision of services is under the control of a single institution; strategies, plans, targets, etc., can be made. The achievement of those targets is controlled by that institution
- The quality of the services can be maintained by providing ongoing training, monitoring, evaluation, and professional advancement for those who perform well, and recruitment is targeted to those who have demonstrated a commitment to social justice work, etc.
- Providing services through the work of a relatively large number of lawyers, paralegals, etc., who work in the same institution, allows for the development of strong mentoring, as well as emotional and professional support
- A larger institution provides a strong base for advocacy to the courts, government and other bodies on behalf of groups of clients with particular legal needs. For example, a public defender office that has many cases involving farmers can advocate on behalf of the legal rights of the farmers, etc.
- The public defender office can have a range of different lawyers with different skills and levels of seniority. It can therefore handle a range of complaints and kinds of cases, and it can refer particular legal issues to persons in the institution with expertise in those areas
- Public defenders develop a high level of specialization in their area of expertise. This leads to them being able to deal with more cases in a more professional and timely manner

Disadvantages of a public defender model

- Many public defender systems are overloaded with cases, as there are a high number of cases, particularly criminal, in which individuals should be represented. The institution must attempt to provide services in all those cases. Thus, the target number of cases is high, the workload is high, and the salaries are relatively low. This can lead to lawyers being "burned out" or lowering their performance and focus
- If there is not sufficient independence between the Office of the Public Defender and the offices responsible for prosecution, the goals of providing a strong and independent representation can be seriously compromised. If this happens the public will lose confidence in the legal aid provider
- If the salary level of public defenders is too low it will only attract mediocre-level lawyers, and those who develop their skills will leave the service for private practice. A balance must be achieved between the salary level and the available budget
- Public defender systems are expensive to establish. Start-off costs are relatively high

Country examples

Australia

In New South Wales, Australia, a combination of *judicaire* and public defenders is utilized by an independent commission, Legal Aid New South Wales (LANSW). There are a number of divisions or sections within LANSW, including the criminal law section, which is allocated about 50 percent of the total budget of the commission. LANSW uses "in house" criminal specialists, who do the majority of the legal aid work. However, LANSW also compiles a list of "expert lawyers" who may be subcontracted to provide *judicaire* services. There is a list of expert criminal lawyers, and another list of experts in civil law and other areas of law. The internal rules forbid a contract being provided to a lawyer who is not on those lists. Contracts are negotiated before each case, and a "lump sum" payment is calculated according to the expected number of days or hours that the case will take.

South Africa

In South Africa, the initial legal aid system, established in 1969, was able to deliver relatively effective legal aid in a small proportion of the total number of cases through *judicaire*. However, after the collapse of the apartheid regime, the new Constitution guaranteed legal representation for every person charged with a serious criminal offence "where the interests of justice demanded." This required a sudden shift to large numbers of lawyers being hired on contracts for criminal cases. Within a short period of time the legal aid service faced bankruptcy. A contributing factor to this problem was the inability to control the manner in which lawyers charged for their services, and the quality of their work, e.g., lawyers who worked three days charged for five, and the contract system was too expensive.

In response to the crisis, pilot projects were established to determine whether full-time lawyers working as public defenders would be more effective and less expensive. The conclusion was that public defenders were at least one-third cheaper, often even more than that, and the quality of the work was higher. This led to the change in South Africa, from an emphasis on *judicaire* to the establishment of justice centers, each with full-time public defenders and other lawyers working on civil matters, etc.

The "South African Justice Centers" provide a good example of how to address many of the identified problems of *judicaire* through a public defender and mixed model. The system is similar to those in Australia, many U.S. states, and other developed systems. In the South African system, public defenders receive a good level of salary, not as high as private lawyers, but enough for those who are motivated by social justice to select a career as a legal aid lawyer. Lawyers attend court four days per week full-time. Magistrates at the courts require each person charged with a serious offence to be represented by a legal aid lawyer if they cannot pay; they refer the cases before them to the legal aid lawyers. On the fifth day, Friday, the lawyers remain in the office to catch up on their paperwork and preparation.

A room at every court is set aside so legal aid lawyers can work there and see clients seeking legal aid. Every month each lawyer has a performance target of a number of cases, and a supervisor checks the files to see that there have not been any undue delays or quality issues. Each lawyer has an annual target of cases; if they achieve or exceed the target they receive a cash bonus.

Because there is a significant number of criminal lawyers working at each justice center, e.g., 20 or more, the senior lawyers mentor the younger ones. If there is a problem with a prosecutor, police, or court official, the justice center and the senior lawyers have the professional leverage to address that challenge. The number of lawyers also provides the human capital needed to handle difficult criminal cases, to discuss challenges and to share solutions with peers involved in similar cases. These benefits do not exist in *judicaire* systems unless there are firms of criminal lawyer specialists or civil society organizations with many criminal lawyers working together.[17]

Ukraine

An interesting example to inform the choices in Vietnam is the relatively new system in the Ukraine. In that context, a clear division is recognized between "primary legal aid" and "secondary legal aid." Primary legal aid means advice and assistance at the community level, which is provided by 32 legal aid community centers funded by regional and provincial governments. In addition, there are 27 regional offices that provide criminal representation services, or "primary legal aid," through private lawyers subcontracted on a *judicaire* basis. Over 2,500 lawyers have been accepted on the list of those

[17] Information from consultations by phone with staff of Durban Justice Centre and Professor David McQuoid Mason June 2016.

who may be hired to provide these services.[18] When a person is arrested, the legal aid center should be immediately contacted and a lawyer appointed to represent them.

On its face this appears to be a design that covers many of the needs of the poor and marginalized, and the system has grown to a capacity to provide representation in a large number of cases. However, a paper published by the Ukraine Bar Association provided information that the system is also facing many of the predictable problems referenced above:

> *"the legal aid system has currently no criteria for granting legal aid to low-income persons, and no set time-frames to determine a person's financial status, and as a result legal aid is offered to anyone who chooses, without regard to his financial means."*
>
> *"there are numerous reports where the current system has led to corruption and abuse, including delays in receiving legal aid counsel, forceful assignment of legal aid, attorneys demanding side payments and selective assignment of cases by state officials."*[19]

Malaysia

A relatively effective example of *judicaire* can be found in Malaysia, but only because in that context there is a long history of a relatively ethical bar association that has invested in legal aid and pro bono work for several decades. The criminal legal aid system in Malaysia was originally commenced through members of the bar providing their services to those arrested on a "pro bono," or without payment, basis. The current system involves a partnership between the government and the bar, in which the government provides the largest part of the funding and the system is managed by a committee of both government and bar association representatives; legal aid is implemented by the bar association. Private lawyers must each pay about USD 40 per year to a legal aid fund. The total of approximately USD 500,000 combines with the government funds to support fifteen legal aid centers that administer *judicaire* services; the bar association administers these centers.

In the Malaysian system the payment to lawyers for criminal cases is relatively low, but it is not so low that no experienced lawyer will take them. Some lawyers are now finding that they can make a sufficient amount of money doing only legal aid cases, and a group of specialist legal aid criminal lawyers is emerging.[20]

[18] See http://en.unba.org.ua/assets/uploads/news/novosti/2016-05-23.legal.aid.report.pdf
[19] Legal Aid System in Ukraine unba.org.ua/assets/uploads/.../2015.11.30-unba-report-legal-aid-eng.pdf
[20] Interview with Mr Ravin Singh, Director Malaysia Legal Aid Centre January 2016.

Philippines

In the Philippines, the Public Advocates Office (PAO) was provided with the authority to be the principal office providing legal aid.[21] It has grown to be the leading example of an effective legal aid system in the Association of South East Asian Nations (ASEAN) region. As of April 2016, the PAO operated 18 regional offices, with 1,652 lawyers and 1,023 support staff. The agency has managed to significantly increase its allocation from the national budget through statistics and data to demonstrate its effect.[22] Between 2012 to 2015, the PAO recorded:

- 112,000 acquittals
- 1,068,000 favorable dispositions
- 1,180,890 acquittals or favorable judgments[23]

Similar to the South African, Australian and other systems, the Philippines PAO places a strong focus on capacity-building of in-house lawyers, with regular training and an organized professional development course. In addition, each lawyer must undergo an assessment every six months to demonstrate the numbers of cases finalized, etc. Each lawyer is supervised by a more senior lawyer, who will check the documents that are to be submitted to the court in every case. Disciplinary procedures are enforced over attorneys who have not met the standards.

Argentina

Argentina is a federal system with a variety of mechanisms, including the public defender model led by a Federal Defender General, who has the same administrative status as a Supreme Court judge. Within the Office of the Defender General are a number of sub-divisions, including the Prison Commission, Follow-up Commission of Institutional Treatment of Children, Program on Social Issues and Community Relations, Program on Cultural Diversity, Commission on Gender Issues, Migrants Commission, Refugees Commission, and Program on Torture Prevention. This approach addresses the challenges of providing public defenders in criminal cases, while also paying special attention to vulnerable groups.[24]

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[21] Republic of the Philippines Act NO 9406

[22] One of the challenges in gaining meaningful data to support legal aid in criminal cases has been data definitions. For example, when the efforts of a lawyer, representing the accused, do not result in an acquittal, but have a positive effect on the sentence, such as the prosecution lowering the charges, etc., such cases are recorded as providing a "positive disposition", although the details are also required.

[23] Presentation power point of Dr Persida V Rueda da Costa, Chief Public Attorney Republic of the Philippines Workshop on Access to Justice in ASEAN countries, hosted by the Thailand Institute of Justice, Government of Thailand, January 2016.

[24] Presentation by Mr Nicolas Laino, Head of the Institutional Violence program of the Federal Public Defender's Office of Argentina. Presented to Association of Southeast Asian Nations (ASEAN)Regional Consultation on Sustainable Development Goals, Access to Justice and Legal Aid *Jakarta, May 26-27, 2016*

Regional lessons on legal aid, court efficiency

Recent experiences in the Southeast Asia region provide valuable lessons concerning the need to take a practical and honest approach in considering contextual factors. For example, pilot projects of criminal justice centers in both Indonesia and Myanmar over the past two years have found that it is impossible for legal aid lawyers to achieve similar numbers of case representation that their counterparts in developed systems regularly record because their respective system does not allow for it. For example, lawyers have no separate room at the court house, which is usual in developed systems; or the lawyers are routinely and repeatedly required to travel to court, remain all day and travel back to their offices without their case being heard due to a non-appearance, such as a crucial police witness.

In Myanmar, criminal cases in which a police witness does not appear are reported weekly. In some examples from the Yangon Justice Centre, the adjournments have continued weekly for a year, while the accused has remained in custody. The length of pre-trial custody is a factor manipulated to pressure accused persons to confess to crimes. Following a confession, the same police witness who previously and repeatedly failed to appear in court, may suddenly appear in court so the accused's confession can be recorded as the basis for the conviction.[25] If an accused person faced unreasonable delays in a trial in a more developed system, the judge would be required by law to release them and would usually issue a bench warrant requiring the necessary police or other witness to be brought to the court.

Faced with similar challenges in the Philippines, the Office of the Public Defender entered into a formal agreement with the courts and national police service regarding the nonattendance of police witnesses. This resulted in a process whereby, if a required police witness does not appear, a judge will immediately authorize an email be sent to police headquarters. The email triggers an administrative sanction against the relevant police officer, thus affecting his or her career advancement. This practical arrangement has resulted in an attendance rate of over 95 percent for police witnesses.[26]

Ensuring that witnesses appear as scheduled provides a level of certainty for the courts, legal aid lawyers, and accused persons, concerning their hearing dates, and fulfills the necessary conditions for legal aid lawyers to schedule and appear at multiple cases in a single day. These practices are similar to advanced systems like those in Australia, the U.K. or the U.S., allowing for cost effective legal aid.

In most developed legal systems, individuals are required to be brought before a judge within 24 hours (or up to 48 hours) so that the independent representative of the judiciary can decide if the executive branch's decision to deprive a person of their liberty is legal. As most persons arrested are from poor or marginalized groups, this process acts as a "funnel," bringing all

[25] Interviews with Yangon Justice Centre staff, Yangon Myanmar January 2016.
[26] Interview witih Dr Persida V Rueda da Costa, Chief Public Attorney Republic of the Philippines, Jakarta May 26, 2016.

potential legal aid clients to one place (i.e., the court) within 24 hours. At the court, on the day of the arrested persons' hearing, legal aid lawyers make contact with those who do not have lawyers and cannot afford to pay for one. They often represent them on that first day for bail applications or other short hearings. Because of this "funneling" effect, legal aid lawyers in New York, or London, or Sydney, can deal with many cases in a single day. This is essential for a cost-effective legal aid system in criminal cases.

However, in Indonesia, for example, the Criminal Procedure Code allows for many extensions to the detention order of an individual, up to a total of 110 days, before they are required to be physically brought to court.[27] The person may be brought at any time during that period, so legal aid lawyers will often need to visit the court many times for even the first hearing of a single case. The police witnesses may not appear, so the legal aid lawyers will have to travel back to their office, in effect not achieving any work in that day. This can be repeated many times.

The same inefficient effect is produced in Myanmar. Even though individuals must be brought to court within 24 hours, police and prosecutors do not allow legal aid lawyers to have access to individuals at that time. This illustrates another reason why the context and manner in which judicial services are implemented is highly important for developing a cost-effective legal aid system. It is impossible to design and implement a just and cost-effective legal aid system without the close cooperation of the courts, prosecutors, and law enforcement officials.

A mixed system

Legal aid systems should be holistic in their approach, based on a practical assessment of the needs of the legal aid beneficiaries. The system needs to be cost effective. To achieve cost effectiveness, it is necessary to take advantage of all resources available, and in an appropriate manner. This includes utilizing the benefits of:

- Full-time lawyers as employees
- Subcontracting with private lawyers and civil society organizations to supplement the support from full-time lawyers
- Utilizing paralegals as the "feet" of the system to reach remote communities
- Including law students as an inexpensive source of support, which also injects into the legal system practical experience of ethical legal work for the poor at early stages in lawyers' careers

As stated above, most legal aid systems include a mix of the public defender and *judicaire* or contract system models. Very few systems in the world rely solely on *judicaire* and, of those that have attempted it, like South Africa's early experiment, have often found that, though it may appear cheaper in the short-term, it eventually becomes more expensive and difficult to ensure quality control and effectiveness.

[27] Criminal Procedure Code of the Republic of Indonesia (KUHAP.) 1981 Chapter IV Part I.

Public defender systems are easier to control because the lawyers are subject to institutional guidelines, salary scales, performance standards, etc., and the institutional system can build up the morale and strong structure necessary to conduct legal aid work, particularly when there is a high number of cases. However, in planning public defender systems, flexibility is essential as the number and type of legal aid work are not constant. Sometimes a new class of cases will suddenly appear, such as in response to a particular event, conflict, etc., and there are always inconsistencies in case volume due to the ebb and flow of legal aid needs. The amount of resources available for legal aid will also fluctuate, taking into account the need to provide buildings and infrastructure and to cope with changes in government funding from year to year. Despite changes in costs and funding, it is very difficult to discontinue the services of full-time staff in response to such fluctuations.

It is very challenging to plan for all fluctuations in legal aid needs, and to cover for them purely with staff and resources from the public defender system. The experience of many systems has shown that it is more effective to hire a core complement of public defenders, and to supplement with a variety of resources, including subcontracted private lawyers, non-governmental legal aid organizations, paralegal organizations, and university legal clinics. Data on demand, caseloads, complexity of cases, amount of available resources from a variety of sources and other factors can be taken into consideration to decide how much funding should be allocated for full-time staff and subcontracted services.

While relying on *judicaire* alone is not recommendable, including *judicaire* as a component of a flexible legal aid system brings the strength of the private legal profession and bar associations into the system, thus strengthening advocacy on legal rights of the poor and the legal aid system in general. Not including private lawyers runs the risk that they will come to oppose the system, thereby hindering its effectiveness.

As stated above, civil society organizations often provide low-cost ethical legal aid services. They can contribute in a major way to areas of legal aid in need of particular expertise, such as women, children, housing, the disabled, etc.

There are good reasons why many legal aid systems are not limited to one approach, but include contributions from a range of legal aid providers. Legal aid is a challenging field; the available budget will always be less than needed, and demands and resources will vary. A mixed model draws on the strengths of each source of legal aid, helps compensate for the negatives of each source, and provides flexibility to adapt to changing circumstances.

SECTION 4: ANALYSIS OF THE LATEST DRAFT OF THE LEGAL AID LAW WITH REFERENCE TO INTERNATIONAL EXPERIENCE

The comments in this section of the report are arranged according to the chapters of the latest draft of the legal aid law, and are informed by the

experiences of a range of other legal aid systems. Due to uncertain elements of the translation, it is not possible to offer suggestions on individual terms and words in the draft law. International standards as they relate to Vietnam have been covered in Section 1 of the report, so will not be dealt with comprehensively in this section, but they are referred to where they have a particular relevance. The following analysis is focused on the core issues identified in recent consultations and workshops.

Structure of the draft law

National legal aid laws should be drafted according to local custom and context. Otherwise, they are unlikely to be effective. In a very general sense, legal aid laws are often arranged around a small number of key issues in a logical sequence:

- Definitions
- Principles and objectives
- The body with overall responsibility for legal aid, its powers and functions
- Who are the beneficiaries of legal aid?
- Who are the legal aid providers?
- How is legal aid to be provided?
- Offences against the legal aid law
- Miscellaneous

Definitions

In the latest draft of Vietnam's law there is no specific section on definitions, but some definitions are provided in different sections of the draft. For example, the definition of "legal aid" is in Article 3. International practice often provides a definitions section, including "legal aid," "legal aid providers," "legal aid beneficiaries," etc., at the beginning of the law, so that the terms can be repeatedly used throughout the law with a precise legal meaning, and also making it relatively easy to find those meanings at the beginning of the law. Consideration should be given to including a definitions' section, depending on the customary drafting practices in Vietnam.

Principles and objectives

The draft law includes a section on principles in Section 4; this section should appear earlier in the law. The current draft is very limited in its list of principles and does not include many international standards as principles. Consideration should be given to adding principles, such as: that legal aid is an essential element of a fair, humane, and efficient criminal justice system; that legal aid must be administered in a non-discriminatory manner; etc., as further detailed below.

The body responsible for legal aid

In the draft law the body responsible for legal aid is covered in Chapter VI; this should be set out earlier in the law. Placing this issue early will establish up front which body is responsible for implementation, and its powers and functions. This should be followed by sections dealing with the manner in which the powers and functions are exercised, including beneficiaries, legal aid providers, and the methodology of delivery of services. As stated above, this suggestion needs to be considered in light of the customary drafting practices in Vietnam.

Beneficiaries, or who will receive legal aid

In the draft law beneficiaries are covered in Chapter II, thus reflecting the need to clarify this issue early in the law. Consideration should be given to drafting a definition of “legal aid beneficiaries” in a definitions section. In many other legal aid laws the definition of a legal aid beneficiary is someone who has received a grant of legal aid following a formal application; persons who receive initial advice or assistance before filling an application would not be included in that term. In the alternative, a different term may be used to distinguish persons receiving legal advice or assistance before a formal application. This challenge is dealt with in more detail below.

Legal aid providers

In the draft law legal aid providers are dealt with through Chapter IV and V, which divide provisions dealing with organizations that provide legal aid from individuals who provide legal aid. This division can be an effective way to draft. As with a variety of legal aid beneficiaries, provisions on legal aid providers often can be addressed through a combination of defined “legal aid providers,” “paralegals,” “accredited civil society organizations,” etc. These can be defined in the definitions’ section and elaborated on later in the law in the section on legal aid providers.

How legal aid or legal aid services are provided

Legal aid services are dealt with in Chapter V of the draft law. Chapter V is divided into a section on the scope and form of legal aid (Section 1), and how the legal aid services are delivered (Section 2). In the draft law there is a lot of detail concerning exactly how documents such as legal aid dossiers, etc., should be maintained. This is not usually included in a legal aid law, but left to regulations and directions on practice of the legal aid service. These sections could be revisited to determine if they need to be in the law, as discussed further below.

Offences

Legal aid laws often include a section setting out offences and penalties, including the criminal penalty. Chapter I of the draft law deals with Prohibited Acts, but how these violations are to be dealt with appears much later.

Consideration should be given to combining these two sections. These sections also do not include a criminal sanction. Usually if an offence is created by a law, the criminal sanction will be listed in the Offences section.

Miscellaneous

This section is often used to deal with issues that do not fit neatly into any of the substantive chapters. For example, if there were to be provisions requiring information to be kept confidential, they would often appear in this section.

Priority issues identified in the workshops

The following questions have emerged as priorities from the consultations on the draft law. Each will be dealt with in the following analysis, as they appear in the chapters of the draft law.

Structure and management

Who is responsible for the implementation of the legal aid mechanism? Is it the central government (vertical), or the provincial government (horizontal), or a combination of the two (mixed), with responsibilities shared between national and provincial authorities? If the mixed model is chosen, how will the different responsibilities be shared?

Legal aid providers

There will always be a shortage of resources available for legal aid. All possible contributors to providing legal aid services should be included, but the quality of service also needs to be guaranteed. How can the law be drafted to reflect an appropriate mechanism for accrediting and contracting legal aid providers, and not hampering the contribution of those who are willing to help without requiring payment from the government budget?

Legal aid beneficiaries

As in all legal aid systems, available resources will be less than needed. How can we ensure that the resources available are used for those who need them? A principle that helps to stay focused on the context of practical implementation is to remember that every person assisted who can pay for legal aid services means that legal assistance will be denied to one person who cannot pay.

Legal aid services

What legal work should be covered by legal aid? How can the limited budget and resources be allocated so that the highest priority legal needs are met rather than resources allocated and spent on lower priorities? How can the law differentiate between the way low-level “advice and assistance” is provided, as opposed to legal representation in high-priority cases?

Criminal cases

How is the law going to reflect Vietnam's international obligations, national legal requirements and best practices? Currently only a small percentage of criminal cases receive legal aid, and these are largely limited to capital cases and juveniles as strictly required by law. What model and provisions would provide a basis for significantly extending the number of criminal cases that receive legal aid?

Chapter 1: General Provisions

The latest draft of the law includes in Chapter 1 some important principles that are part of the emerging international best practices of legal aid, including the following:

- The state is responsible for providing legal aid
- Funding for legal aid is guaranteed by the state, but can also include inputs from regional budgets and donors
- The state is not the only provider of legal aid, and those who can also contribute by drawing on funds outside the state budget are encouraged to do so

Application

Article 2 is an important section, as it is necessary to clearly state that this law applies only to those individuals and organizations that will receive funding under this law. The language used needs to be very clear to avoid any future issues with interpretation.

Principles

Article 4, Principles of legal aid, is a good place to include specific reference to some of the important underlying principles. The following should be considered to be included in the draft law, drawing from international best practice:

> *"Legal aid is a fundamental right and a vital element of a justice system based on the rule of law and respect for fundamental human rights, as well as an essential condition for the full realization of the right to a fair trial."* (UN PnGs preamble)

Right to be informed

> On the right to be informed:
>
> "*Anyone who is charged with a criminal offence is entitled 'to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.'"* (ICCPR, Article 14)

Or alternate language on the right to be informed:

> *"Anyone who is arrested, detained, suspected or accused of, or charged with a crime has the right to be promptly informed of his or her procedural rights, including the right to legal aid and of the process to obtain legal aid and of the consequences of waiving such right in a way and language that is clearly understandable to them prior to any interviewing and at the time of deprivation of liberty." (UN draft Model Law on legal aid in criminal justice systems*, Article 6.1, hereafter referred to as "the UN Model Law")

Nondiscrimination

The provision of legal aid shall be ensured on the grounds, and in accordance with, the procedures established under this Law, with no discrimination based on age, race, color, gender, sexual orientation, language, religion or belief, political or other opinion, national, ethnic, or social origin, or property, citizenship or domicile, birth, education, or social status or other status. (UN draft Model Law Art 5.1.) Vulnerable people have the right to be informed of their right to legal aid in a way that is appropriate to meet their special needs.

Special treatment for certain groups

The UN PnGs which were adopted unanimously by member states of the UN General Assembly, including Vietnam, can be drawn on to assist in drafting these provisions:

> *"Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures."*[28]

Legal Aid Funds

Article 6, on Legal Aid Funds, reflects good practice to include a clear provision that helps to protect or "ring fence" legal aid funds so that they cannot be diverted to other uses. Experience in some countries has been that legal aid funding within a ministry budget can be diverted to provide legal services to those who are not poor. For example, in Indonesia it was found that funds allocated for legal aid were being provided for legal assistance to current and former civil servants; the new legal aid law prevented this by providing a clear definition that "legal aid" means legal assistance provided to those who were poor and unable to pay.

[28] United Nations General Assembly Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Guideline 3.

The draft law should specifically state that funds allocated by the government for legal aid may only be used for the purposes of providing legal aid services in accordance with this law.

Suggested language for Article 6, on funding, is: “Funding provided for the purposes of legal aid shall only be used to provide legal aid to legal aid beneficiaries in accordance with the provisions of this law.”

Prohibited Acts

As referred to above, consideration should be given to combining the content of Article 7 with Article 45 so that offences and the sanctions are in one place. If criminal offences are created, a criminal penalty should be included. If one of these crimes is committed it will be proceeded with as with other crimes, according to the Criminal Procedure Code. The nature and placement of this section, of course, depends on the custom of drafting in Vietnam.

Chapter 2: Legal Aid Beneficiaries

The issue of who should be the beneficiaries of legal aid was a major topic of discussion in the recent consultations and workshops. For this reason, a number of country examples indicating a variety of approaches are presented in this section.

A significant challenge is that Article 8 of the draft law provides a list of groups that are included as legal aid beneficiaries. However, it is difficult to gain consensus on what groups should be included, and what groups are not.

The country examples provided below illustrate an international practice that, in basic terms, focuses on the right to legal aid by those who cannot afford to pay for legal services. This is then expanded to include some specific groups that have special needs, but it is done in a way that will not include a large range of groups as a whole. Rather, it requires “special attention” to be provided to members of those groups and provide guidance on whether members of the groups should receive legal aid. This is preferable to guaranteeing that all members of a large number of groups will receive legal aid, and for all legal challenges they face. Some of these may not need free legal aid.

High quality, private, legal services are freely available in Vietnam in return for payment of appropriate fees. These services are provided by lawyers and law firms that are a legitimate and beneficial contribution to society. Everyone who needs legal services and can afford to pay for them should do so.

The basic principle that informs who should be a beneficiary is that legal aid should only be concerned with helping those who need these services and cannot pay for them. Providing free legal aid to those who can pay lowers the integrity of the system and contributes to a lack of trust towards the system.

The challenge is: how can the law be drafted to take into account the special needs of certain groups, and also maintain the underlying determinant of the inability to pay for legal services?

A number of other legal aid laws have employed terms to solve this challenge. They provide, often in the definitions section, that legal aid means "free legal assistance to those who cannot pay." In addition, the law includes a section stating that "special consideration" should be provided to vulnerable groups. A third aspect can be added, specifically guaranteeing that some vulnerable groups, such as children or persons detained by police and not yet able to lodge a legal aid application form, receive legal aid irrespective of whether they can pay or not.

Guidance from international standards and experience

UN Model Law

The UN Model Law has been produced by a group, including many of the world's foremost legal aid experts. The draft is now almost complete. Its primary purpose is to provide assistance and guidance to those who are involved in drafting national legal aid systems. The draft UN Model Law is limited to criminal justice systems, basically because it is based on the UN PnGs, which is also limited to criminal justice systems. It is hoped that an extension, or separate project, that includes civil and other areas of legal aid will be produced in the near future. However, the UN PnGs and the UN Model Law provide a broad range of examples of international best practice that can be adapted equally well to criminal and other aspects of legal aid.

The UN Model Law provides the following:

> *"4.1. Subject to the procedures established under the present Law, an individual is entitled to legal aid, regardless of his or her financial means, when he or she:*
> *4.1.1 is arrested, detained, suspected or accused of, charged, or sentenced with a crime punishable by a term of imprisonment [or the death penalty];*
> *4.1.2. is arrested, detained, suspected or accused of, charged, or sentenced with a non-imprisonable crime, when the interests of justice so require, due to the urgency of the circumstances, the complexity of the case, or the severity of the potential penalty.*
> *4.4. A refugee; an internally displaced person; an asylum seeker; a victim of human trafficking; a person with disabilities; or a child, who would otherwise be subjected to a means test by virtue of article 4.2, shall always be granted legal aid, regardless of his or her financial status or the type or severity of the potential penalty."*

Examples of legal aid beneficiaries in other national legal aid laws

Myanmar

In the new Myanmar law a list of vulnerable groups is included but it does not state that all members of those groups are entitled to legal aid, but rather that they are entitled to seek legal aid. This draws attention to the fact that these groups will often require legal aid.

> *"Person entitled to seek Legal Aid" means the poor, children, women, those in need of special care, elderly, disabled, HIV patients and those with other infectious diseases, the stateless, asylum seekers, foreigners, migrants, migrant workers, the refugees, crime victims who are accused, detained, arrested, prosecuted, punished and imprisoned due to an offense, and criminal witnesses who seek aid because of a specific reason;"* [29]

Indonesia

The legal aid system established by the 2011 legal aid law[30] established a system in which government funding for legal aid, managed by the Ministry of Law and Human Rights, is used to reimburse accredited Legal Aid Organizations for both litigation and non-litigation work. In this law, like a number of others, the definition of legal aid beneficiaries is set out in the definitions section at the beginning of the law. The only determinant of who will be a legal aid beneficiary under this system is the ability to pay and whether a person is poor.

> *Article 1: Definitions. "Legal Aid is legal services provided by Legal Aid Provider for free to Legal Aid Recipients."*[31]
> *Legal Aid Recipients are poor individuals or a group of poor people.*
> *Legal Aid Providers are the legal aid agency or community organizations that provide legal aid services under this Law.*
>
> * * *
>
> *Article 5 (1): Recipients of Legal Aid as referred to in Article 4 paragraph (1) includes any person or a group of poor people who cannot fulfill their basic rights appropriately and independently.*
>
> *Article 5 (2): Basic rights referred to in paragraph (1) includes the right to food, clothing, health services, education services, employment and enterprise, and/or housing.*

Australia, New South Wales

In this system, the law establishes a legal aid commission as the peak body responsible for legal aid, and it provides the commission with the duty to determine who are the legal aid beneficiaries, who are the legal aid providers,

[29] Myanmar Law on Legal Aid, January 2016, Article 1.
[30] Law on Legal Aid, Indonesia, Law No *16/2011*
[31] Ibid.

and to specify the principles and implementation methods of the “means test” for selection of beneficiaries. Thus, the identity of the beneficiaries is not included in the law, but the legal aid commission is given the duty to determine the “means and merits.” This allows these tests to be changed easily, as required.

The definitions section provides:

> *“legally assisted person means a person to whom legal aid is provided.*[32]
> *“legal aid means legal aid under this Act."*
>
> *Section 10 (2): The Commission in the exercise of its principal function may:*
> *(a) determine:*
> *(i) the persons or classes of persons in respect of whom legal aid may be granted, and*
> *(ii) the matters or classes of matters in respect of which legal aid may be granted,*
> *(b) determine priorities in the provision of legal aid as between:*
> *(i) different persons or different classes of persons, and*
> *(ii) different matters or different classes of matters,*
> *(c) (Repealed)*
> *(d) specify principles, including the imposition of means tests, to be applied in determining applications for legal aid,*
> *(e) specify the circumstances, if any, in which contributions shall be paid by legally assisted persons and the means of calculating any such contributions,*
> *(f) establish and conduct such local offices as it considers appropriate,*

South Africa

The approach in South Africa is similar to New South Wales. The Legal Aid Act establishes Legal Aid South Africa as the peak body responsible for legal aid, and gives the commission the power to:

> *(i) Do all things and perform all functions necessary for, or incidental to, the attainment of the objects of Legal Aid South Africa.*[33]

In the South African model, the details of legal aid beneficiaries, legal aid providers, etc., are not set out in the act, but must be drafted as regulations implementing the act. The South African Legal Aid Law requires the minister to pass regulations to implement the recommendations from the independent commission, Legal Aid South Africa.

> *23. (1) The Minister must, after receipt of recommendations of the Board, make regulations relating to:*
> *(a) the types of matters, both civil and criminal, in respect of which Legal Aid South Africa:*

[32] New South Wales Legal Aid Commission Act 1979 s 4(1).
[33] Legal Aid Act South Africa s 4(1)(ii)

(i) provides legal aid;
(ii) does not provide legal aid; and
(iii) provides limited legal aid and the circumstances in which it does so;
(b) the requirements or criteria that an applicant must comply with in order to qualify for legal aid, as well as the terms and conditions on which such legal aid is made available to the applicant;
(c) the policy relating to the approval or refusal of legal aid, the termination of legal aid and appeals against such refusal or termination of legal aid; and
(d) any matter which it is necessary or expedient to prescribe for the proper implementation or administration of this Act.[34]

Sierra Leone

The Sierra Leone legal aid law, drafted with the assistance of international expertise, is a good example of an effective legal aid law for a context in which there are limited resources and high demand. The definitions section includes both "indigent person" and "legal aid," which are connected. The South African law, that of Sierra Leone and others adopt the requirement that legal aid in criminal cases must be provided "where the interests of justice so require." This terminology is taken directly from the obligations set out in the International Covenant on Civil and Political Rights (ICCPR), which also apply to Vietnam. By adopting the exact wording of the convention in the national laws, drafters can ensure that they are in line with international obligations and best practice. The laws can then set out criteria, such as the likelihood of imprisonment, the seriousness of the criminal offence, etc., that will guide decisions as to which cases fall within "the interests of justice" to provide legal aid.

The Sierra Leone legal aid law provides the following definitions:

Section 1 "indigent" means a person who cannot afford to pay for legal services;
"legal aid" means the provision of legal advice, assistance or representation to indigent persons;[35]

(1) Where the interest of justice so requires, an indigent who is arrested, detained or accused of a crime shall, subject to this Act, have access to–
(a) legal advice and assistance;
(b) legal representation, where the indigent's application for legal representation has been approved by the Board from the moment of his arrest until the final determination of the matter and subject to section 28, the appellate process.
(2) Where the interest of justice so requires, an indigent who wishes to bring or defend a civil matter shall have access to-
(a) legal advice and assistance;

[34] Legal Aid Act South Africa s 23(1)
[35] The Legal Aid Act 2012, Sierra Leone s1.

(b)legal representation, where the indigent's application for legal representation has been approved by the Board.[36]

Beneficiaries

Article 9.1 of the draft law provides that legal aid beneficiaries can receive a broad range of legal services, with the exception of business and trade. However, it is preferable not to specifically set out the kinds of cases that will be covered. It is better to provide the duty to the national legal aid service to set out, and to publish criteria to guide decisions on the cases that receive legal aid (i.e., a "means and merits" test). It may be that a poor person actually does need help in a case that could involve a small business. For example, there are many cases in other countries where poor individuals have a problem with "loan sharks" who have lent money in an unethical and illegal manner. Likewise, there may be a range of other kinds of issues and cases which are not a priority for legal aid. The law should provide the flexibility for these decisions to be made on a case-by-case basis, and not to raise expectations of potential legal aid beneficiaries for cases that are unlikely to be granted legal aid, nor close the door on classes of cases, such as small scale commercial cases, which may in fact be a high priority in certain circumstances.

In South Africa and other contexts, the national legal aid body is required under the law to establish and publish the criteria for making decisions on which cases are covered.

Article 9.2 of the draft law provides that the area of criminal cases requires more detailed treatment to comply with Vietnam's binding legal obligations under the ICCPR and CAT, and to take advantage of guidance provided by the UN PnGs and the UN Model Law. As discussed below, it is suggested that a separate section deal with criminal cases be included in the law.

It is positive that the draft law includes a requirement that legal aid beneficiaries must be informed of their right to legal aid. However, the right to be informed of legal aid and the right to legal aid should be both included, in separate sections. In addition, the context in which those taken into custody must be informed of their right to legal aid should be included separately and in a detailed fashion.

Chapter III: Legal Aid Providing Organizations

Legal aid clinics

Regarding Article 12 of the draft law, it is recommended that university legal clinics should be included in the list of legal aid providers, as they can make a cost-effective contribution to providing legal aid. In future years, more university clinics may develop.

[36] Ibid s 20.

Legal aid organizations

Regarding Article 15, on selection of legal aid organizations, the law should provide a clear power to the central National Legal Aid Agency to not only select but to accredit legal aid providers, including organizations and individuals providing legal aid services. Establishing a system whereby organizations must fulfill specific criteria to be accredited can make a significant contribution to ensuring that only high-quality organizations receive funding. There is a danger that organizations that do not usually provide legal aid services, or who do not have the kind of staff necessary dedicated to legal aid work, can be given grants of legal aid, and that this process can be corrupted for personal reasons. Establishing minimum requirements for accreditation avoids this situation.

Legal aid contracts

Article 16 of the draft law details the kind of contracts that will be entered a between the central agency and legal aid providing organizations. Such a provision is not usually part of a legal aid law.

In some countries the primary legal aid service provider has the power to provide grants to civil society organizations to conduct a broad range of services, including representation. This power is included in the law but the details are not usually included; they are left to the drafters of the contracts for civil society organizations and to internal regulations. The following example is drawn from the law in New South Wales, Australia:

> *"The legal aid commission has the power to make grants to either organizations or individuals.*
> *(h) give assistance and make grants, on such terms and conditions as it thinks fit, to persons or bodies within New South Wales for the provision by those persons or bodies of legal aid,"*[37]

"Primary" and "secondary" legal aid

Some countries make a distinction between "legal aid advice and assistance" and "legal aid representation." Lawyers are the primary providers of legal representation, but law students, interns, and paralegals, are sometimes added to be able to provide low-level criminal representation when supervised by a lawyer. Sometimes the difference between legal aid "advice and assistance" and "representation", is referred to as "primary" (representation) versus "secondary" (advice and assistance). Countries that have adopted this distinction include Croatia, Kosovo and Lithuania. Paralegals, students and interns can be authorized to provide "secondary" legal aid, but not "primary". Secondary legal aid can also include low-level criminal representation, which is included in the definition of the term.

Civil society organizations may be authorized to deal with legal aid advice and assistance (secondary legal aid), but not representation (primary). Legal aid

[37] The Legal Aid Commission Act 1979, s 1.

organizations that are accredited to receive funding from the state budget in many countries are primarily involved in providing legal aid advice and assistance, and not legal representation. This can be very effective, particularly as organizations can develop specialist capacities to deal with women, children, land, housing and refugees, etc.

The Indonesia model of legal aid

Some legal aid models such as Indonesia fund organizations, including lawyers working for those organizations, to carry out legal representation. This too can be recognized in the law. In Indonesia, all legal aid law is carried out by civil society organizations. The Indonesian Legal Aid Law provides the Minister for Law and Human Rights with the duty to implement the legal aid system, and to:

> *"Conduct verification and accreditation of legal aid or community organizations to meet the eligibility as a Legal Aid Provider under this Law.*[38]
>
> *In order to perform verification and accreditation as referred to in paragraph (1) letter b, the Minister shall form a committee of which its elements shall consist of:*
> *a. the government ministry in the field of law and human rights;*
> *b. law professors;*
> *c. prominent public figures, and*
> *d. institutions or organizations that provide legal aid services.*
>
> * * *
> *Article 8*
> *(1) The implementation of legal aid shall be done by the Legal Aid Providers who are qualified under this Law.*
> *(2) The requirements for the Legal Aid Providers as referred to in paragraph (1) include:*
> *a. having a legal entity;*
> *b. having been accredited under this Law;*
> *c. having an office or a permanent secretariat;*
> *d. having a board of management; and*
> *e. having a legal aid program.*

For Indonesia's initial round of verification and accreditation of organizations, to meet the requirement of "having a legal aid program", organizations were required to provide evidence of an operational program from before and after the law was passed. This was included in the implementing regulation to prevent new organizations with no legal aid experience from applying for accreditation. Approximately 600 organizations applied to be verified and accredited. Each one was visited during the verification process, which was carried out by a committee including government, civil society, academics and lawyers. Approximately 300 organizations were initially accredited, and 100

[38] Indonesian legal aid law, Art 7(1)(b).

more were added since that time, for a total of approximately 400 civil society organizations accredited “Legal Aid Organizations.”

The manner in which each of the organizations is funded is not included in the legal aid law; this is set out in a series of implementing regulations. They establish a system in which organizations are funded according to the work completed and their level of accreditation. Each case carried out by an accredited legal aid organization is paid after the work is completed approximately 5 million rupiah (or approximately USD 400) per case.

In addition, “bundles” of a specified amount of “non-litigation” legal aid work are reimbursed; nine different types of non-litigation work are identified in the regulations. The type of non-litigation package is paid at different rates. For example, a bundle of mediation work will be paid a set rate different from a bundle of advisory work. They were grouped in this way to provide a payment method that differentiates non-litigation work, which is easier to manage, and it avoids an open-ended payment system such as hourly rates, etc.

Organizations that fulfill the basic requirements under the law may be accredited at one of three categories:

Category A:
Must have:
- At least 10 advocates and 10 paralegals
- Demonstrated that the organization can conduct 7 of the 9 kinds of non-litigation listed (negotiation, mediation, investigation, education, etc.)

General limits of reimbursement funding for Category A organizations:
- Up to 60 cases per year
- Up 60 non-litigation packages

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:
Must have:
- 5 advocates and 5 paralegals
- 5 of the 9 non-litigation programs

May be reimbursed for:
- Up to 30 litigation cases
- Up to 5 bundles of non-litigation work

Category C:
Must have:
- 1 advocate and 3 paralegals
- 3 of the 9 non-litigation programs

May be reimbursed for:
- Up to 10 litigation cases
- Up to 3 bundles of non-litigation work

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

The following rules apply to legal aid organizations reviewing and implementing an application for legal in Indonesia:

> *"Article 19:*
> *(1) In the event of the application for Legal Aid having fulfilled the requirements, the Legal Aid Provider is mandatory to deliver the certainty of Legal Aid provision in writing within a period of no longer than three (3) days.*
> *(2) In the event of the application for Legal Aid being declined, the Legal Aid Providers concerned shall provide reasons for their refusal in writing within a period of no longer than three (3) working days upon receipt of the application for legal aid.*
>
> *Article 20: The Legal Aid Providers as referred to in Article 18, has a right to ask for a power of attorney from the legal aid recipient within a period of no longer than three (3) days."*

Chapter IV: Legal Aid Providing Persons

Lawyers

Regarding Article 20, consideration should be given to adding language stating that private lawyers have a duty to comply with the terms of the contract, which defines their relationship with the legal aid agency. Private lawyers are not "supervised" by the legal aid agency, but they must carry out their work according to the professional standards of their legal profession and their contract.

The draft law states at Article 21.3 that legal aid interns may not represent parties in court. In comparison, some other systems allow those who are not fully qualified to represent parties in criminal cases in the lower courts in some instances such as preliminary hearings, etc. if they have the written authorization of their supervisor. Such a system was established in the legal aid law in Sierra Leone to increase resources for conducting criminal cases.

As the needs for legal aid are great, and the supply of persons and organizations that can supply the services are very limited, it is important to try to include a broad range of individuals that can provide legal aid services. The UN draft Model Law includes such a focus:

> *"Article 13: Legal aid providers. Legal Aid Providers shall include legal practitioners; [apprentice legal practitioners;] organizations, including non-governmental organizations, community-based organizations and faith-based organizations; law clinics; and paralegals."*

The legal aid system should not restrict contributions by persons who are capable and responsible. However, the legal aid system should ensure that

legal aid services are provided in an ethical manner and according to minimum quality standards.

The law can specifically set out limits on the kinds of legal aid services that may be provided by each category of individual. For example, in some places paralegals and law students may only provide legal advice and assistance. In other contexts, where there is a shortage of lawyers, the paralegal or law student can provide legal representation in low-level criminal cases, but only if they are accredited and supervised by a qualified legal practitioner. These distinctions can be included in the law, or left to the legal aid service to determine. For example, in South Africa the legal aid commission may make regulations determining these roles.

It would be preferable for all persons facing serious criminal charges to be represented by a lawyer. However, where this is not possible, due to a shortage of lawyers and/or restricted resources, alternate measures can be taken as long as they do not fall below established minimum standards. Including law students or paralegals as legal aid providers for low-level criminal cases in contexts where there are an insufficient number of lawyers is a way of balancing the need to provide representation to all persons facing serious criminal charges in criminal cases with the need to ensure a minimum level of quality of service provided.

Paralegals

Although the role of paralegals is not yet well developed in Vietnam, consideration should be given to including them in the law. There is growing international practice in relation to paralegals, as reflected in the UN PnGs:

> *"67. States should, in accordance with their national law and where appropriate, recognize the role played by paralegals or similar service providers in providing legal aid services where access to lawyers is limited."*

Paralegals also play a major role in traditional systems, alternate dispute resolution and restorative justice. They can play different roles. In Australia, for example, paralegals help to prepare legal cases, interview witnesses, etc., and attend court with lawyers. In South Africa the paralegals work in the justice centers and are the first person most clients see. They record the stories and statements of clients and pass them on to lawyers. Under the Sierra Leone legal aid law, paralegals can appear in court in certain circumstances.

Community-based paralegals

One form of paralegal work is "community-based paralegals," which exist in many countries, including South Africa, Indonesia, Sierra Leone, Malaysia, and Hungary. In these programs, individuals who are trusted by communities can be identified and provided with basic legal training and supplied with simple language legal materials for distribution. Members of their communities

who face a problem can go to them for low-level advice, and often be referred to the appropriate government body, civil society organization, social worker, or legal aid center for more intensive legal aid assistance.

Public defenders

A number of jurisdictions include a public defender component in their categories of legal aid providers. Public defenders are usually lawyers that work primarily providing defense services in criminal cases. The advantages of having public defenders include:

- There are often thousands of legal aid criminal cases, so a streamlined system capable of dealing with a large number of cases is required. Without a dedicated criminal justice legal aid program, the number of cases is usually small
- Full-time criminal lawyers develop an expertise in the area, allowing for the professional and efficient defense of clients
- Opposing police and prosecutors, who seek convictions in court, is an onerous task, and it requires experienced practitioners confident in their task of defending the accused
- Working in groups allows for effective mentoring and is more cost effective; cases can easily be transferred between lawyers, as communication is open and they are aware of each other's skills
- Within one system junior lawyers can provide representation for the lower level cases, mid-level lawyers for medium to complex cases, and senior lawyers' can focus on appeals, capital cases, etc.

Examples of public defender services with offices throughout their respective country include: Chile, Georgia, Moldova, Mexico, Argentina, Paraguay, Peru, the Philippines, and South Africa.

The following countries have established a system of public defenders that is supplemented by private lawyers working on a *judicaire* basis: Israel, Brazil, Hungary, Australia, South Africa, and Lithuania.

A public defender's office may be established as a separate independent office in Argentina or the Philippines.

Alternatively, a legal aid provider may establish a criminal law division within the legal aid service for lawyers in that division to focus on criminal cases. This model is practiced in South Africa and Australia.

Rights of legal aid providers

In addition to the rights of the accused, the legal aid law should clearly set out the rights of legal aid providers and the obligations of law enforcement officials. In particular, the law could contribute to avoiding common conflicts in the provision of legal aid by clearly setting out the law enforcement officials' obligations in respect to persons who are in police custody. The law should state that legal aid providers have the legal right to act independently, without

intimidation or interference, to: access clients who are in police custody at the earliest opportunity; consult with them in confidence; and be present during any questioning and at critical stages of court proceedings, (i.e., all events that may affect the right to a fair trial or the preparation of a defense).

Chapter V: Scope, Form and Activities of Legal Aid

Inclusion of two key terms should be considered in the Legal Aid Law:

- Legal aid advice and assistance
- Alternate dispute resolution

Regarding Article 25, other countries have found it useful to use the term "legal advice and assistance" as an umbrella term to cover a broad range of legal aid work, including drafting, legal education, helping clients to liaise with government, mediation, etc. Alternatively, the law could just refer individually to the work of advice and assistance. "Assistance" can provide the power to do all legal aid work that is required. This can then be limited through the use of a "means and merits" test for legal aid applicants.

In Myanmar's new legal aid law, the terms advice and assistance are provided separately, thus bringing meaning of each of the two words:

> *"S 2 'Legal Aid' means hiring of a lawyer, providing legal knowledge, giving advice, providing assistance and giving information to the persons who are entitled to seek legal aid;"*[39]

In other systems, the combined term "advice and assistance" has been defined to include a broad range of legal aid services. If the term is defined then it is not necessary to list all of those kinds of legal aid services again in the law. Law students working for an accredited university legal clinic may also be qualified to do "advice and assistance," and the whole list will not need to be repeated.

The UN draft law takes another approach by referring to a range of different kinds of legal aid services.

> *"Article 11 – Types of legal aid*
> *11.1. Legal aid services shall include the following:*
> *11.1.1. The provision of legal advice;*
> *11.1.2. The provision of legal assistance;*
> *11.1.3. The provision of legal information;*
> *11.1.4. The provision of legal representation in national, regional and international courts, for adults or juveniles, as well as in customary and informal systems of justice;*
> *11.1.5. Legal education, as to the rule of law and the legal system;*
> *11.1.6. Legal drafting;*
> *11.1.7. Legal advocacy."*

[39] The Legal Aid Law of Myanmar, Jan 2016 Ch. 1 s2.

Mediation

There was some discussion during the consultations concerning the use of the term “mediation” in the Vietnam legal context. It is not necessary to use this word if it creates uncertainty. Many legal aid laws use the term “alternative dispute resolution.” If this term were included in the law, it would give power for legal aid to be provided in a broad range of traditional processes, mediation and other approaches that are often used by the poor.

Criminal justice systems

Most legal aid systems include a major focus on providing legal aid to those who are charged with criminal offences, particularly if they are detained or face the threat of imprisonment. As explained in detail in Section 1 of this report, Vietnam has the duty to comply with binding legal obligations under the ICCPR, as well as the CRC and a range of other non-binding instruments that can provide guidance and best practices.

An important role of a legal aid law is to provide a clear legal basis for the rights of individuals to be informed about their right to legal aid and representation under certain conditions, the rights of children to be represented, etc. The law can play a major role advance legal aid by clearly stipulating the duty of law enforcement officials in relation to legal aid for persons. The current draft of the law could be strengthened to make these rights and responsibilities clearer. Consideration should be given to including specifically a section on legal aid in criminal cases.

Myanmar, like Vietnam, is a party to the UN PnGs on Access to Legal Aid in Criminal Justice Systems. Myanmar’s new legal aid law, passed by its national parliament in January 2016, is focused on providing legal aid in criminal cases and on legal aid education. The UN PnGs is specifically included in Myanmar’s law, bringing a whole range of international best practices in relation to criminal cases:

> *“1. The objectives of the law are as follows:*
> *(h)To operate in criminal cases according to the legal aid basic principles and guidance of the UN General Assembly.”*[40]

The UN PnGs was developed with the assistance of many of the world’s foremost experts on legal aid. Their work was the basis for drafting the UN Model Law which, although not yet formally adopted, is in final draft form. The following sections appear in the latest draft UN Model Law and can be drawn on to assist in ensuring that the obligations of Vietnam in relation to criminal cases are satisfied. The provisions can also play a major role in persuading police that they must inform persons investigated or detained of their rights, and to provide access to legal aid from the earliest opportunity.

[40] The Legal Aid Law of Myanmar January 2016 s 1.

The UN draft Model Law includes the following explanatory note:

> "Article 4.4 provides that legal aid is to be granted at all stages of the criminal Justice process, including pretrial, trial and post-trial stages. Early access to legal aid, in particular, is essential in the fair administration of justice, as decisions that materially affect a person's ability to effectively defend him- or herself are made during the early stages of the criminal justice process. This is also the time when suspects and accused persons are at the greatest risk of torture or other forms of ill-treatment, such as coerced confessions and unlawful detention. The provision of legal aid is equally important at the post-trial stage, particularly in safeguarding the right to appeal and in ensuring that fundamental human rights are respected in custodial settings."

A common approach in setting the eligibility criteria for legal aid, as in England, Wales, and Kenya, is to require both financial eligibility criteria and a consideration of the interests of justice. A challenge that is commonly faced in many countries is the determination of the interests of justice, as this concept may be subject to different interpretations. The UN PnGs suggests a consideration of urgency or complexity of the case, or the severity of the potential penalty. In England and Wales, the law indicates the factors that must be taken into account in determining what the interests of justice consist of.

Some relevant sections of the UN draft Model Law provide guidance on persons' entitlement to legal aid:

> *"4.1. Subject to the procedures established under the present Law, an individual is entitled to legal aid, regardless of his or her financial means, when he or she:*
> *4.1.1 is arrested, detained, suspected or accused of, charged, or sentenced with a crime punishable by a term of imprisonment [or the death penalty];*
> *4.1.2. is arrested, detained, suspected or accused of, charged, or sentenced with a non-imprisonable crime, when the interests of justice so require, due to the urgency of the circumstances, the complexity of the case, or the severity of the potential penalty.*
>
> * * *
> *4.5. Legal aid shall be granted, in accordance with the provisions of this article, at all stages of the criminal justice process, before, during and after trial, from the moment an individual is notified or otherwise made aware by the competent authorities that he or she is suspected or accused of having committed a criminal offence until the conclusion of criminal proceedings, including, where applicable, sentencing, resolution of appeal, and during the serving of a sentence. In any event, legal aid shall be available for suspects or accused persons from whichever of the following points in time is the earliest:*
> *4.5.1. before they are interviewed or questioned by the police or any other investigating authority;*

4.5.2. upon the carrying out by any investigating authority of an investigative or evidence-gathering act;"

Witnesses and victims of crime should also be provided with legal aid where appropriate.

Right to information

UN Model Law

The UN Model Law states that Article 6 is based on principle 8 of the UN PnGs, which provides:

> "States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights.
>
> * * *
>
> 43. States should introduce measures:
> *(a)* To promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent; his or her right to consult with counsel or, if eligible, with a legal aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or legal aid provider while being interviewed and during other procedural actions."

International Covenant on Civil and Political Rights

Article 14.3 of the ICCPR provides that,

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> * * *
>
> *(d) … to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it;"*

"Interests of justice"

UN Model Law

Article 4 of the UN Model Law sets out a test for determining "the interests of justice" that is more liberal than a two-condition test adopted by the ICCPR, described below. Article 4 of the UN Model Law provides:

"4.1. Subject to the procedures established under the present Law, an individual is entitled to legal aid, regardless of his or her financial means, when he or she:
4.1.1 is arrested, detained, suspected or accused of, charged, or sentenced with a crime punishable by a term of imprisonment [or the death penalty];
4.1.2. is arrested, detained, suspected or accused of, charged, or sentenced with a non-imprisonable crime, when the interests of justice so require, due to the urgency of the circumstances, the complexity of the case, or the severity of the potential penalty.
4.4. A refugee; an internally displaced person; an asylum seeker; a victim of human trafficking; a person with disabilities; or a child, who would otherwise be subjected to a means test by virtue of article 4.2, shall always be granted legal aid, regardless of his or her financial status or the type or severity of the potential penalty."

International Covenant on Civil and Political Rights

Article 14(3)(d) of the ICCPR recognizes the right to legal assistance when the interests of justice so require, and to free legal aid when the interests of justice so require and a person does not have sufficient means to pay for it. In other words, the "interests of justice" is normally satisfied when the crime is serious and triggers a severe penalty, the case is complex, or the applicant is particularly vulnerable. To verify whether the interests of justice require the provision of free legal aid for indigent people, a number of national laws require a "merit test" in addition to the "means test" to verify financial eligibility for legal aid.[41]

Obligations of law enforcement officials

UN Guidelines and Principles on Access to Legal Aid in Criminal Justice Systems

The UN PnGs sets out the responsibilities of states in relation to police investigations and detention:

> "Principle 3. Legal aid for persons suspected of or charged with a criminal offence
>
> * * *
> Article 23. It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid.
>
> * * *
> Principle 7. Prompt and effective provision of legal aid
>
> Article 27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.

[41] See explanatory notes to Article 4 of the UN Model Law.

Article 28. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defense.

* * *

Guideline 1. Provision of legal aid

Article 42. In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that:

* * *

(c) Police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned or detained inform unrepresented persons of their right to legal aid and of other procedural safeguards;

* * *

Guideline 3. Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence

Article 43. States should introduce measures:
(a) To promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent; his or her right to consult with counsel or, if eligible, with a legal aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or legal aid provider while being interviewed and during other procedural actions;
(b) To prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer, unless the person gives his or her informed and voluntary consent to waive the lawyer's presence, and to establish mechanisms for verifying the voluntary nature of the person's consent. An interview should not start until the legal aid provider arrives;

* * *

(d) To ensure that persons meet with a lawyer or a legal aid provider promptly after their arrest in full confidentiality; and that the confidentiality of further communications is guaranteed;

* * *

(h) To make available in police stations and places of detention the means to contact legal aid providers;

* * *

(j) To ensure that persons are informed of any mechanism available for filing complaints of torture or ill-treatment;

* * *

Guideline 4. Legal aid at the pretrial stage

Article 44. To ensure that detained persons have prompt access to legal aid in conformity with the law, States should take measures:
(a) To ensure that police and judicial authorities do not arbitrarily restrict the right or access to legal aid for persons detained, arrested, suspected or accused of, or charged with a criminal offence, in particular in police stations;"

Chapter VI: Responsibilities of Agencies and Organizations in Legal Aid Activities

There is a great deal of detail in Vietnam's draft Legal Aid Law setting out the specific steps required in relation to an application for legal aid, etc. The advantage of including more detail at the level of legislation is that it provides clear legally binding obligations. The disadvantage is that the law cannot easily be amended and procedures may turn out to be cumbersome, or not to work well in certain places or conditions, or the context changes from year to year. These changes cannot be easily dealt with if there is a lot of detail in the legislation.

For these reasons, many legal aid laws include provisions that explain a number of basic requirements, but do not include details on how they will be implemented. The law can simply set out the following points:

- There shall be a process whereby an individual can make an application for legal aid
- The decision whether to grant legal aid or not shall be made in a timely manner (time limits may be set down)
- The decision whether to grant legal aid must be made according to set criteria. These criteria may include the "means" of an individual to pay and the "merits" of the case
- There is a right to appeal against a decision refusing legal aid and this appeal needs to be undertaken in a timely manner

Consideration should be given to deleting much of the detail in the draft law relating to the application for legal aid. Implementation can be left to be defined in regulations and internal procedures. This is the method followed in South Africa and a number of other systems

The distinction between advice and assistance and legal representation

It would be useful to distinguish in the law between those who receive assistance without filling out a formal application for legal aid, and those who receive a grant of legal aid after filling out such a form. The definitions section at the beginning of the legal aid law could assist in making the distinction clear, or the definitions could be included elsewhere.

The process in some legal aid systems is as follows:

Initial advice and assistance is provided, without needing an application for legal aid

It is not practical for persons arrested to immediately be able to apply for legal aid. They need this assistance immediately, without waiting for review and a decision on whether they will get a grant of legal aid. For the many people who visit the legal aid center, they too will only need relatively quick advice and assistance; it is not practical to require them to complete a full application for legal aid and to wait for a decision.

Therefore, the legal aid mechanism should provide free legal aid advice and assistance to every person who is arrested by the police, or who comes to the legal aid office, before they make an application for legal aid.

Application for a grant of legal aid

For other forms of legal aid, they may require more intensive legal assistance. To ensure that resources are properly allocated by the legal aid system's priorities, each of these cases should be considered on its merits, and a decision made as to whether legal aid should be granted.

Often a paralegal can be assigned to assist persons to fill in their application for legal aid. In the two pilot "Justice Centres" in Myanmar, paralegals also are permitted to visit the police detention cells, speak to those detained, inform them of their rights and assist them to fill in the legal aid application. It has taken considerable to work with the police to understand and apply this legal aid function, but they accept it now and, in fact, often call the justice center to inform them when a new person has been detained. This legal aid application process for persons in detention is similar to processes in other countries.

If legal aid is granted, a lawyer or other person working for the legal aid body will be assigned to the case, or the case will be subcontracted to a private lawyer working on a judicaire basis.

The legal aid application will include enough information to enable the legal aid service provider to make an informed decision whether the person has the "means" to pay for legal aid, and their case "merits" receiving legal aid resources.

Consideration and decision on legal aid

The application will be considered by a group at the legal aid center, according to a pre-determined process. For example, the process may occur twice weekly, and the decision may be required to be signed by the director of a legal aid center.

If the application is successful the applicant will be provided with a reply within a few days of filing the application. The reply will state that they have been granted legal aid and clearly state what is covered by the grant of legal aid.

An applicant who is refused legal aid may appeal to a different body within the legal aid structure. The body will consider the appeal and provide an answer within a short timeframe.

Chapter VII: Handling Violations and Settling Complaints, Denunciations and Disputes

Many legal aid laws do not mix the issue of violations of the legal aid law with the manner in which disputes over legal aid services may be settled. These should be kept separate, as they are different issues.

Consideration should be given to a separate section setting out the offences created by the legal aid law, and the penalties for such offences.

A different section of the law should deal with the manner of dealing with disputes, (e.g., denial of legal aid). As with the previous section of this report, the details of the dispute resolution mechanism should be minimized in the law, leaving the responsibility to the National Legal Aid Agency to detail the procedures in the implementing regulations. However, it is recommended to specify clearly that there must be a mechanism for resolving disputes, and its broad points.

Independence

Independence is one of the core principles recognized in all international standards on legal aid. Of course, there are complex contextual questions in relation to independence that will be applied differently in each country. However, the principles and rationale of independence should be understood and adopted in the legal aid law and its implementation framework.

Obviously, independence must be preserved between the two sides of any legal conflict (i.e., both sides should not be represented by the same lawyer). Otherwise, the interests of the client(s) could not be fairly pursued.

Similarly, when the dispute relates to institutional relationships (i.e., the opposing party is the police, prosecutor or other government official), the legal aid provider must act in the interests of their client and not be influenced by the interests of the opposing party. The clearest example is a criminal case in which the accused pleads not guilty. It is the duty of the police and prosecutors to try to convict the individual, but it is the duty of the defense lawyer to try to avoid the conviction. Both of these duties and obligations (i.e., of the state and the legal aid attorney, are important and legitimate). However, if the relationships between those two interests are too close, there is potential for a conflict of interest.

Providing a clear statutory duty for legal aid providers to act independently helps to prevent interventions or efforts to influence which cases are

prioritized for legal aid and/or which lawyers are assigned to them. This can be particularly important at the local level of legal aid implementation, where close relationships and influences are difficult to avoid.

In the draft UN Model Law the importance of the independence of a legal aid body or authority is recognized in Guideline 11, "Nationwide legal aid system," which provides in paragraph 59(a) that such a body or authority should:

> *"Be free from undue political or judicial interference, be independent of the Government in decision making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure."*

In New Zealand, the Legal Aid Services Commissioner in the Ministry of Justice is responsible for the legal aid system. However, the law provides a duty for the commissioner to act independently when determining legal aid applications, assigning providers, and managing salaried lawyers. This means that, although the commissioner is in a position within the ministry, he or she may not be directed by any other person when making those decisions.

In relation to the principle of independence and impartiality of Legal Aid South African, its Legal Act provides at Article 5:

> *"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, favor, bias or prejudice."*[42]

CONCLUSIONS AND RECOMMENDATIONS

The Vietnam Ministry of Justice and National Legal Aid Agency should be commended for the intensive process they have undertaken to review and revise Vietnam's 2006 Law on Legal Aid, taking the opportunity of the ten-year anniversary of the passage of the original law as a stimulus for reform in legal aid.

This review, led by the government, includes consideration of different models of delivery of legal aid, their effectiveness and lessons learned from their practical application, particularly in the Southeast Asia region.

Some of the key lessons learned from these examples are the following:

- Independence is a key principle in the provision of legal aid. Optimally, an independent national body funded through a government ministry should oversee legal aid services. Where this model is not acceptable, regulations and operational procedures are necessary to ensure the independence of legal aid providers from those who represent the opposing party in legal cases and disputes. This includes the manner

[42] South Africa Legal Aid Law s 5.

in which the legal aid services are established, their operations and procedures, as well as the practices of law enforcement agencies.

- Providing representation for individuals charged with serious criminal offences is a core aspect of developed legal aid systems, and usually demands at least half of the total legal aid budget. The reasons for this emphasis stem from the fact that, when an individual is deprived of their liberty, their right to work, associate, travel, etc., are also curtailed, as well as the flow-on effects of supporting a family, continuing employment etc. In addition, members of a society should be very confident that they will not be taken into custody by agents of the state without a valid legal reason and that, if they are arrested, they will be assisted by a competent and independent legal counsel.
- Because of the large number of criminal cases involving the poor and marginalized, it is important to establish a legal aid system that can manage cost-effectively a major ongoing and recurring caseload. Because the state is a party to each criminal case (i.e., through the police and prosecutors), it is important that there is a significant degree of independence between the legal aid defense counsel and the prosecution. This can be achieved through a variety of measures, including ensuring that all individuals are provided with access to legal aid at the earliest opportunity following their arrest, monitoring of pre-trial detention periods, and monitoring and ensuring the transparency of the lists of lawyers appointed by legal aid offices.
- Beneficiaries of legal aid should be those who cannot afford to pay for legal services. Optimally, nobody who can afford to pay for legal services should be included in the list of beneficiaries, as this will erode the confidence of the public and ethical foundation of the legal aid service.
- However, some categories of marginalized populations should be included in the list of beneficiaries, such as displaced persons and migrants who have difficulty demonstrating that they cannot pay for services, those whose identity and nature of their case should remain confidential or are likely to be discriminated against, including women victims, children, those living with HIV, persons deprived of their liberty and therefore with reduced ability to prove their right to legal aid and other categories of persons with a specific reason for inclusion as beneficiaries.
- Legal aid providers should not be limited. They should include lawyers, legal consultants, paralegals, law students, civil society organizations, law students and volunteers. The kinds of legal aid provided should also not be unduly limited in the law and should include all the kinds of legal assistance that are likely to be required by the poor and marginalized.
- A mixed model including both *judicaire* and full-time public defenders is recommended as a model for legal aid in Vietnam. A mixed model can combine the strengths of these two models.
- While a *judicaire*-only model can provide flexibility, and it does not require building up a set of public defender offices and institutions, a number of country contexts have demonstrated that *judicaire*-only models are unduly expensive and, where private lawyers or

organizations are individually contracted, there is a lack of controls over performance standards and ethics underlying the supply of legal aid services.

- When public defenders work in significant groups together under an institutional framework, their institution has more weight to engage effectively with the courts, police and prosecutors. Also, public defenders' offices can implement regular and effective training, mentoring and monitoring of their lawyers and staff.
- Civil society organizations are an integral part of any legal aid system and they should be subcontracted for their legal aid services as part of a mixed model system.
- Paralegals and university law students should also be included as part of a mixed model system, as they can provide significant contributions on low-level legal assistance.

More specific recommendations relating to the issues reflected in the latest draft of the Vietnam legal aid law have already been included in Section 3 of this report.

EPILOGUE

The draft Law on Legal Aid was revised and submitted to the National Assembly for its first hearing in October 2016, and was passed by Vietnam's National Assembly on June 20, 2017.

The USAID GIG Program did not provide direct support to the writing of the revised law, but supported needs assessment, comparative studies of international practices, policy analyses, recommendation papers, and consultations on different versions of the draft law, including this report by Patrick Burgess.

The National Assembly held a number of discussions on the draft revised Law on Legal Aid, including a group discussion on October 27, 2016 (report issued on November 9, 2016, with 40 issues noted in the discussion); an official reading of the draft law by the National Assembly on November 10, 2016 (report issued on December 9, 2016, with 21 issues in discussion); discussion by the Standing Committee of the National Assembly on January 9, 2017; review by National Assembly Deputies; and review by the Committee on Legal Affairs of the National Assembly in April 2017, focusing on five major issues of controversy, including people eligible to receive legal aid, criteria to be certified as a legal aid official, legal aid collaborating officials, forms of legal aid, and branches of government legal aid centers.

Regarding legal aid beneficiaries, the National Assembly recommended that the revised law be extended to include accused soldiers, those who migrate to build new economic zones, and those suffering from severe diseases (in addition to the six traditional groups defined by the 2006 Legal Aid Law: poor people; people with meritorious service to the revolution; single elderly; disabled; children without anyone to care for them; and ethnic minorities permanently residing in areas with exceptionally difficult socio-economic conditions).

Regarding the criteria on certification as a legal aid official, the National Assembly suggested that more strict criteria, compared to the 2006 law, should be applied to assure the quality and professionalism of the service. Some National Assembly representatives even suggested applying the same criteria required for lawyers. However, the National Assembly Standing Committee suggested increasing the number of legal aid officials, especially in remote, ethnic minority and poor provinces, and that this group provide legal counselling services only. It was suggested that people can also access legal counselling services as stipulated by Decree 77/2008/ND-CP, on Legal Counselling Centers, which are separate from the legal aid providers covered under the Legal Aid Law. Regarding the branches of government legal aid centers, the Vice Chair of the National Assembly suggested that branches should be established in areas with special needs, such as poor areas with transportation difficulties.

The GIG Program provided technical assistance to the drafting process through:

- Surveys and analyses on the implementation of the 2006 Law on Legal Aid, led by consultants Patrick Burgess and Nguyen Thi Mo
- Comparative analysis of international best practices on legal aid from eight countries
- Cooperation with the Bureau of Legal Aid to organize three national consultative workshops to disseminate findings of those reports as well as to gather recommendations for the draft revised Legal Aid Law; and to organize two consultation workshops to discuss solutions and provide inputs to improve the draft law as required by National Assembly delegates after the first reading, on February 27-28, 2017, in Hanoi; and March 7, 2017, in Ho Chi Minh City. The workshops included a comparative analysis of international best practices
- Cooperation with the Vietnam Lawyers' Association on May 12, 2017, in Hanoi to facilitate a consultative workshop to gather inputs and recommendations from people with a legal background and civil society organizations to improve the draft Law on Legal Aid
- Discussion of the draft decree on July 12, 2017, to guide on the implementation of the revised Law on Legal Aid
- A training program for provincial legal aid officials on September 6-7, 2017, to improve the understanding of the new legal framework as well as the skills to provide legal aid to vulnerable groups
- International consultant's inputs to the 4th draft of the decree in October 2017, to guide implementation of the Legal Aid Law

Ultimately, the revised Law on Legal Aid extended types of legal aid beneficiaries to 14 types, compared to the six groups in the 2006 Law on Legal Aid. The revised Law made a big progress in better protection of children and women by extending legal aid services to teenagers between 16 to 18 years old, victims of domestic violence, and victims of human trafficking (who are mostly women and children).