



ASEAN Intergovernmental Commission  
on Human Rights (AICHR)

# Thematic Study on Legal Aid







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## **Thematic Study on Legal Aid**

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. The Member States of the Association are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

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# ACRONYMS

AA	Appropriate Adult
AAM	Asylum Access Malaysia
ABIM	Angkatan Belia Islam Malaysia Muslim Youth Movement of Malaysia
ACMI	Archdiocesan Commission for the Pastoral Care of Migrants and Itinerant People
ADHOC	Cambodian Human Rights and Development Association
ADR	Alternative Dispute Resolution (Indonesia)
ADWLE	Association for Development of Women and Legal Education (Lao PDR)
AEC	ASEAN Economic Community
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
AIM SWAT	Agape International Mission
ALG	Alternative Law Groups
AMS	ASEAN Member States
APHR	ASEAN Parliamentarians for Human Rights
APLE	Action Pour Les Enfants
ASEAN	Association of Southeast Asian Nations
AWAM	All Women's Action Society
BAKC	Bar Association of the Kingdom of Cambodia
BPHN	National Legal Harmonization Body (Indonesia)
CCHR	Cambodian Center for Human Rights
CCM	Companies Commission of Malaysia
CDC	Community Development Council
CDP	Cambodian Defender Project
CDRC	Commune Dispute Resolution Committee (Cambodia)
CED	Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CHRC	Cambodian Human Rights Committee
CJC	Community Justice Centre (Singapore)
CLAS	Criminal Legal Aid Scheme (Singapore)
CLEC	Community Legal Education of Cambodia
CLG	Catholic Lawyer's Guild (Singapore)
CMC	Community Mediation Centre
COLGIS	College of Law, Government and International Studies, Northern University of Malaysia
CPC	Capital and Provincial Cadastral Commission (Cambodia)
CPF	Central Provident Fund
CRC	Convention on the Rights of the Child
CrCF	Cross Cultural Foundation
CSO	Civil society organization
CSR	Corporate social responsibility
CRPD	Convention on the Rights of Persons with Disabilities
CWCC	Cambodia Women Crisis Center
DOJ	Department of Justice
DSSA	Divorce Support Specialist Agencies

DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECT	Employment Court Tribunals
EEZ	Exclusive Economic Zone
EGPS	Enhanced Guidance for Plea Scheme
EU	European Union
FAST	Foreign Domestic Worker Association of or Social Support and Training (Singapore)
FIDReC	Financial Industry Disputes Resolution Centre Ltd.
FLAG	Free Legal Assistance Group
FLIP	Friends of Litigants-in-Person
FOMCA	Federation of Malaysia Consumer Associations
GDP	Gross domestic product
HDB	Housing and Development Board (Singapore)
HEI	Health Equity Initiatives
HELP	Helping to Empower Litigants in Person
HOME	Humanitarian Organisation for Migration Economics
IBJ	International Bridge of Justice
IBP	Integrated Bar of the Philippines
IRR	Implementing Rules and Regulations
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IUM	International Islamic University Malaysia
IPC	Institution of Public Character
JERIT	Jaringan Rakyat Tertindas Oppressed People Network (Malaysia)
JOAS	Jaringan Orang Asal Semalaysia The Indigenous Peoples Network of Malaysia
KUHAP	Kitab Undang-Undang Hukum Acara Pidana Criminal procedure code (Indonesia)
LAA	Legal Aid Act (Malaysia)
LAB	Legal Aid Bureau (Philippines)
LAC	Legal Aid of Cambodia
LAC	Legal Aid Centre (Malaysia)
LAD	Legal Aid Department (Malaysia)
LASCO	Legal Assistance Scheme for Capital Offences (Singapore)
LAW	Law Awareness Week
LBA	Lao Bar Association
LBH	Legal Aid Institute (Indonesia)
LICADHO	Cambodian League for the Promotion and Defense of Human Rights
LINKS	Legal Information and Knowledge Services
LIP	Litigants-in-person
LFTU	Lao Federation of Trade Unions
LPRP	Lao People's Revolutionary Party

LSCW	Legal Support for Children and Women (Cambodia)
LSM	Legal Sector Master Man (Lao PDR)
LSPBS	Law Society Pro Bono Services Limited (Singapore)
LSPBSO	Law Society Pro Bono Services Limited Office
LWM	Lao Women's Union
MAC	Muslim Attorney Center Foundation
MCCHR	Malaysian Centre for Constitutionalism and Human Rights
MDKCC	Municipal/District/Khan Cadastral Commission (Cambodia)
MDG	Millennium Development Goals
MINDS	Movement for the Intellectually Disabled of Singapore
MKM	Brunei Council on Social Welfare
MOM	Ministry of Manpower
MOU	Memorandum of Understanding
MTUC	Malaysian Trade Union Council
MWC	Migrant Workers' Centre
NAC	National Arbitration Center (Cambodia)
NCC	National Cadastral Commission
NCSS	National Council of Social Services
NGO	Non-governmental organization
NIMA	Non-injury motor accident
NLAF	Legal Aid Foundation (Malaysia)
NPA	Non-Profit Association
NPS	National Prosecution Service
NSEDP	National Social-Economic Development Plan of Lao PDR
NSI	North South Initiative
NTUC	National Trades Union Congress
NUS	National University of Singapore
OSLAS	On-Site Legal Advice Scheme
PACOS	Partnership of Community Organisations, Sabah
PAO	Public Attorneys Office
PAP	People's Action Party
PAVE	Centre for Promoting Alternatives to Violence
PDRM	Royal Malaysia Police
PERARDI	Perhimpunan Advokat Indonesia Indonesian Bar Association
PPIM	Pertubuhan Pengguna Islam Malaysia Islamic Consumer Organisation
PPP	Purchasing Power Parity
PWID	Person with intellectual or mental disability
P2TP2A	Pusat Pelayanan Terpadu Pemberdayaan Perempuan dan Anak The Center of Integrated Service for Women and Children Empowerment
RA	Republic Act (Philippines)
RGC	Royal Government of Cambodia
RLPD	Rights and Liberties of the Protection Department



RPP	Rancang Peraturan Pemerintah Government regulation (Indonesia)
SDG	Sustainable Development Goals
SIGAB	Sasana Inklusi & Gerakan Advokasi Difabel Institute for Inclusion and Advocacy of Persons with Disabilities
SILE	Singapore Institute of Legal Education
SIS	Sisters in Islam
SISHA	Anti-Human Trafficking and Exploitation
SMU	Singapore Management University
SNEF	Singapore National Employers Federation
SPLSMP	Support Project to the Implementation of the Legal Sector Master Plan (Lao PDR)
SUARAM	Suara Rakyat Malaysia
SUSS	Singapore University of Social Sciences
TADM	Tripartite Alliance for Dispute Management
UDHR	Universal Declaration of Human Rights
UKM	National University of Malaysia
UM	University Malaya
UN	United Nations
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNTAC	United Nations Transitional Authority in Cambodia
UPR	Universal Periodic Review
USAID	United States Agency for International Development
USIM	Science Islamic University Malaysia
UU KDRT	Undang-Undang Anti Kekerasan Dalam Rumah Tangga Law on Elimination of Domestic Violence (Indonesia)
UUM	Universiti Utara Malaysia Northern University of Malaysia
VMU	Village Mediation Unit (Lao PDR)
VOC	Voice of the Children
WAO	Women's Aid Organisation
WTO	World Trade Organization
YLBHI	Yayasan Lembaga Bantuan Hukum Indonesia Indonesia Legal Aid Foundation

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ASEAN Intergovernmental Commission on Human Rights (AICHR)

## **Thematic Study on Legal Aid**

# FOREWORD



The ASEAN Human Rights Declaration affirms that every person is entitled, without discrimination, to equal protection of the law and the right to defence. In effect, legal aid, a right in itself, is an important precondition for the exercise and enjoyment of a number of human rights in ASEAN.

The ASEAN Community Vision 2025 further envisions an inclusive and responsive community that ensures our peoples enjoy human rights and fundamental freedoms. It also underlines the importance of building a just, democratic, harmonious and gender-sensitive environment in achieving peace, stability and the Sustainable Development Goals, with access to justice for all as one of its objectives.

The AICHR Thematic Study on Legal Aid is one of the ASEAN Intergovernmental Commission on Human Rights (AICHR)'s initiatives on the promotion and protection of human rights in ASEAN, which showcases the efforts of ASEAN Member States in developing their legal framework and appropriate measures to ensure access to legal aid as an essential component of a fair and efficient justice system. The Thematic Study also offers policy recommendations to the elimination of obstacles and barriers that impair access to legal aid for mostly the poor and vulnerable groups who come into contact with the law, thus improving their access to justice.

I would like to congratulate the AICHR, under the auspices of AICHR Thailand, on the publication of this Thematic Study, and hope the recommendations would contribute towards further measures on ensuring access to legal aid and justice for all.

A handwritten signature in black ink, which appears to be 'Lim Jock Hoi'. The signature is fluid and cursive, written in a professional style.

**Dato Lim Jock Hoi**  
*Secretary-General of ASEAN*

## INTRODUCTION



The right to legal aid is an essential entitlement and an imperative step toward effective enjoyment of other fundamental rights, especially those pertaining to the justice system. Equal access to justice for all is also a key component of the sustainable development goals. The ASEAN Charter explicitly espouses rule of law, democracy, human and fundamental rights as well as social justice as integral parts of the purposes and principles of ASEAN. More pertinently, in 2012 the ASEAN Leaders adopted the ASEAN Human Rights Declaration that was drafted by the ASEAN Intergovernmental Commission on Human Rights (AICHR). The ADHR recognises that victims of human rights violations have the right to an effective and enforceable remedy and the accused have the right to defence. These provisions reaffirm the principles already enshrined in the Universal Declaration of Human Rights that celebrated its 70<sup>th</sup> anniversary in 2018. In addition to the AICHR that is the overarching human rights institution for ASEAN, the Community has established a number of sectoral bodies whose mandate concerns legal policy and social welfare, including the ASEAN Senior Law Official Meeting (ASLOM), the Senior Official Meeting on Social Welfare and Development (SOMSWD), and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The ASEAN Vision 2025 also aligns substantively with the SDGs. Fulfilment of the right to legal aid is thus a common interest and goal of ASEAN and its Member States.

The AICHR Thematic Study on Legal Aid is the first regional study of the subject for ASEAN. It aims to present a systematic survey of the legal aid system of the ten ASEAN Member States and conduct a regional analysis of the common characteristics of the ten systems, as well as to propose recommendations for future coordination and cooperation that will further enhance the effectiveness of legal aid at the national and regional level. The study was planned in tandem with two other studies related to access to justice, namely the Thematic Study on the Right to Life: Treatment of Persons Convicted with the Death Penalty and the Thematic Study on Child Justice: Interrogation Practices of Children in Conflict with the Law. Among the three, the legal aid study is the first to be concluded. A regional consultation of the draft study was conducted in 2017—coinciding with the 50<sup>th</sup> Anniversary of ASEAN—and its final key findings were presented at the AICHR Access to Justice Forum held from 17-18 December 2018 in Bangkok, Thailand.



Regional Consultation on Legal Aid 11-12 December 2017 (Bangkok, Thailand)

This paper is divided into two parts: the regional analysis and reports of the legal aid system of each of the ten ASEAN Member States. Each of these is executed by two groups of researchers. As the AICHR representative leading the study, I appointed five researchers to undertake the regional analysis while each AICHR representative appointed a researcher to produce a national report. In 2016 a new methodology for thematic studies was adopted by the AICHR, according to which each AICHR representative would be responsible for the approval of their national report and the AICHR would examine and give consensus only on the regional part. This departs from the previous approach that required consensus of all AICHR representatives for the whole study, which explains why the legal aid project could conclude within a relatively short timeframe. We also agreed that since the national reports were the responsibility of the country/national researcher and the respective AICHR representative, the reference and citation of each national report is to be made to the respective author.

A major element of this study is on the ‘classical’ legal aid in the criminal justice system. However as researchers we are mindful that legal aid is a highly dynamic subject and standards are emerging in response to the system’s increasing complexity and evolving priorities. Two key documents that serve as a benchmark in this study are the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted by the General Assembly in 2012 and the Report of the Special Rapporteur on the Independence of Judges and Lawyers (Gabriela Knaul) focusing on legal aid, adopted by the General Assembly of the United Nations in 2013. During the deliberation of the regional team to set the scope and parameter of the study, we came up with a number of questions/issues that were provided to guide the direction of the national reports. These include:

- The framework for legal aid (constitution/ legislation/ policy instruments),
- Beneficiaries of legal aid (persons who are charged with a criminal offence/ victims of crime/ limitation or qualification of beneficiaries, for example only the indigent or nationals of the host country),
- Types of legal aid (consular service/ legal advice/ appointment of lawyers/ funds to hire lawyers),
- Types of cases in which legal aid is provided (criminal/ civil/ administrative cases),

- Legal aid for specific groups (victims of human trafficking/ children in conflict with the law/ etc.),
- Providers of legal aid (public agencies/ private organisations/ CSOs) and their coordination, and
- Quality of legal aid,

The above topics and the content of the report clearly illustrate the multidimensional characteristics of legal aid and its challenges.

As a human right, legal aid should be provided with no condition. In practice, two main conditions are created to determine the recipients or beneficiaries. More often than not these two are combined in the same system. The first and more prevalent of the two is the ‘means test’ according to which only those who are certified, generally by a social work agency, as indigent or poor will be entitled to the government provided legal aid. The second is the nationality requirement. Many states limit legal aid provision to their citizens. This has rendered vulnerable non-citizens who require legal aid, especially migrant workers and their family members.<sup>1</sup> Amidst the increasing connectivity of ASEAN that includes movement of peoples, non-nationals of a host country who require legal aid—either as an accused or a victim—only have recourse to consular services of their home country, which cannot always provide timely and systematic assistance.



The AICHR Forum on Access to Justice, 11-12 December 2018 (Bangkok, Thailand)

As a survey and a strategy for further actions, this study should pave the way for concrete enhancement of legal aid and the justice system in general in ASEAN. Already two positive developments in legal aid have taken place regionally and among ASEAN countries. Firstly, in 2015 the ASEAN Leaders adopted the ASEAN Convention against Trafficking in Persons, especially Women and Children (ACTIP) which at the end of 2018 was ratified by nine ASEAN Member States. Among the measures it creates to protect victims of human trafficking, the ACTIP includes ‘counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand’ (Art.

<sup>1</sup> As of March 2019, only two AMS—Indonesia and the Philippines—are parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, whose Article 18(3)(c) provides as a minimum guarantee to migrant workers and their family members who are charged with a criminal offence the right to have legal assistance assigned to them where the interest of justice so require and without payment by them.

14(10)(b)) and establishment of ‘national trust funds’ for the care and support of victims of trafficking in persons (Art. 14(10)(14). For its effective implementation, the ACTIP is supplemented by the ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children (APA) and the ASEAN Multi-Sectoral Work Plan, referred to as the Bohol TIP Work Plan 2017-2020. In the part that aims at improving prosecution of trafficking crimes, the Bohol TIP Work Plan seeks to create an output of ‘inventory of pro bono lawyers providing free legal assistance in TIP cases’. Secondly, there are initiatives at member state level to establish bilateral cooperation to provide legal aid to the nationals of the other. For example, Thailand—whose legal aid system has no nationality requirement—has started discussion and negotiation with Malaysia, and more recently Indonesia, to introduce bilateral legal aid arrangement for their citizens in the other country.

ASEAN has already shown regional commitment to provide legal aid to victims of human trafficking and reaffirmed the alignment of its vision with the SDGs. I am hopeful that this study will serve as a first step toward a robust regional policy framework of legal aid for every ASEAN citizen. This will help ASEAN to be a truly people-centred Community.



**Dr. Seree Nonthasoot**

*The Representative of Thailand to the AICHR (2013-2018)*



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# REGIONAL INTRODUCTION

## I. Legal Aid, Access to Justice and Rule of Law

Legal aid is commonly defined as “aid provided by an organization established especially to serve the legal needs of the poor.”<sup>1</sup> Legal aid has traditionally been linked to judicial proceedings, particularly on the right to counsel and right to a fair trial of a person. Legal aid is seen as the provision of assistance to people who are unable to afford legal representation in order to access the court or judicial system.

However, legal aid goes beyond legal assistance in judicial proceedings. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provides that “the term ‘legal aid’ includes legal advice, assistance and representation.” It also includes the concepts of “legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.”

### But Why the Need for Legal Aid? Why Should Legal Aid Matter?

Legal aid is recognized as an “essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial.”<sup>2</sup> It fosters access to justice of the persons seeking it by having their voices heard, allowing them to exercise their rights, creating opportunities to challenge discriminatory policies and practices, and holding decision-makers accountable.<sup>3</sup>

Furthermore, legal aid promotes Goal 16 of the United Nations Sustainable Goals, which is to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” More particularly, it fosters the following under Goal 16:

- 16.3 Promote the **rule of law** at the national and international levels and ensure **equal access to justice for all**;
- 16.10 Ensure public access to information and **protect fundamental freedoms**, in accordance with national legislation and international agreements.

The United Nations has given emphasis on the need for it in under criminal jurisdictions through the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, including the principles of a “Right to legal aid” and the “Responsibilities of the State.” The document pointed out that aside from legal aid being an “essential element of a fair, humane and efficient criminal justice system that is based on the rule of law,” legal aid “ensures fundamental fairness and public trust in the criminal justice process.”

<sup>1</sup> [https://www.merriam-webster.com/dictionary/legal%20aid?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriam-webster.com/dictionary/legal%20aid?utm_campaign=sd&utm_medium=serp&utm_source=jsonld), last accessed on 25 September 2017.

<sup>2</sup> UN General Assembly, United Nations Principles and Guidelines on Access to **Legal Aid** in Criminal Justice Systems: **resolution** / adopted by the General Assembly, 28 March 2013, A/RES/67/187.

<sup>3</sup> <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>, last accessed on 25 September 2017.

Quite notably, the rule of law is “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”<sup>4</sup> It espouses the following principles:

- Supremacy of law
- Equality before the law
- Accountability to the law
- Fairness in the application of the law
- Separation of powers
- Participation in decision-making
- Legal certainty
- Avoidance of arbitrariness
- Procedural and legal transparency<sup>5</sup>

But what are the norms and standards that have to be adhered to? This is where international law, particularly human rights law, provides the framework on why legal aid is important. We shall examine the Universal Declaration of Human Rights (UDHR), as well as other international human rights declarations and conventions that all ASEAN Member States are party to.

## Universal Declaration of Human Rights

The UDHR recognizes the “inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” More particularly:

- All human beings are born free and **equal in dignity and rights**. (Article 1)
- Everyone has the right to life, liberty and security of person. (Article 3)
- Everyone has the right to recognition everywhere as a person before the law. (Article 6)
- 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 8)
- Everyone is entitled in **full equality to a fair and public hearing** by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. (Article 10)
- 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 defence**. (Article 11[1])

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<sup>4</sup> <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>, last accessed on 25 September 2017.

<sup>5</sup> Guidance Note of the Secretary-General; UN Approach to Rule of Law Assistance.

## Convention on the Elimination of All Forms of Discrimination Against Women

The CEDAW emphasizes that the term "discrimination against women" shall mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>6</sup> As such, the States Parties shall "accord to women equality with men before the law."<sup>7</sup>

## Convention on the Rights of Persons with Disabilities

The CRPD likewise emphasizes that "all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law."

## Convention on the Rights of the Child

The CRC requires that States Parties shall ensure that: "(d) Every child deprived of his or her liberty shall have the right to **prompt access to legal and other appropriate assistance**, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."<sup>8</sup> Furthermore, State Parties should "recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the **promotion of the child's sense of dignity and worth**, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"<sup>9</sup> by ensuring that every child alleged as or accused of having infringed the penal law has at least the following guarantees:

- a. To be **presumed innocent** until proven guilty according to law;
- b. To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and **to have legal or other appropriate assistance** in the preparation and presentation of his or her defence; and
- c. To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.<sup>10</sup>

Furthermore, the rights extended to the child include the right to participate in certain proceedings, and not only proceedings within the criminal justice systems.

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<sup>6</sup> Article 1, UN Convention on the Elimination on all forms of Discrimination Against Women.

<sup>7</sup> Article 5, UN Convention on the Elimination on all forms of Discrimination Against Women.

<sup>8</sup> Article 37, UN Convention on the Rights of the Child.

<sup>9</sup> Article 40, UN Convention on the Rights of the Child.

<sup>10</sup> Article 40 (2)(b), UN Convention on the Rights of the Child.

## Legal Aid for All

Is the provision of legal aid only for the accused? The UN Principles and Guidelines clarified that the term legal aid “includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require.”

Legal aid also includes the concepts of “legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.”

This, therefore, clarifies that although legal aid may sound more relevant to the accused in criminal justice systems, what legal aid really aims to provide is access to justice for all, including victims of crimes and human rights violations.

## Legal Aid in ASEAN

The framework of the rights that are protected and promoted with the provision of legal aid is also reflected in the Association of Southeast Asian Nations (ASEAN)<sup>11</sup> although the term “legal aid” is not explicitly mentioned.

One of the purposes of ASEAN is to “strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN.”<sup>12</sup> The ASEAN Charter provides that ASEAN and its Member States shall act in accordance with the following Principles, among others:

- Adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; and
- uphold the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.

Notably, the ASEAN Human Rights Declaration has guaranteed the following, consistent with the UDHR:

- All persons are born free and equal in dignity and rights. (Article 1)
- Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status. (Article 2)
- Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law. (Article 3)

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<sup>11</sup> ASEAN is composed of 10 member states: Brunei Darussalam, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

<sup>12</sup> Article I (7), ASEAN Charter.

- Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law. (Article 5)
- Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence. (Article 20[1])

It is worth mentioning that aside from an explicit reference to the Universal Declaration of Human Rights and on civil, political, economic and cultural rights in general in the ASEAN Human Rights Declaration, all 10 Member States of ASEAN have also ratified the UN CEDAW, CRC and CRPD.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (Cebu Declaration) mandates the provision to “migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states” and to “extend assistance to migrant workers of ASEAN Member Countries who are caught in conflict or crisis situations outside ASEAN in the event of need and based on the capacities and resources of the Embassies and Consular Offices of the relevant ASEAN Member Countries, based on bilateral consultations and arrangements.” In addition, the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (ASEAN Consensus) also note that “the Receiving State will facilitate migrant workers with access to legal recourse and assistance, including language interpretation if necessary, when they become victims of discrimination, abuse, exploitation and/or violence in accordance with the national laws, regulations, and policies”.

On the other hand, the Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN provides the need to “strengthen a holistic, multi-disciplinary approach to promote the rights of women and children and adopt a gender responsive, child sensitive, and age-responsive approach to eliminate violence against women and violence against children in the region which includes effective laws, legislations, policies and measures to:

- Investigate, prosecute, punish and, where appropriate, rehabilitate perpetrators;
- Protect women and children victims/survivors and witnesses;
- Provide victims/survivors with access to justice, legal assistance, protection, social welfare services, education, and health services, including counseling and peer-to-peer support mechanisms, rehabilitation, recovery, and reintegration into the community, and consider provision of programme for families to properly give support to victims/ survivors.”

Finally, the ASEAN Convention Against Trafficking in Persons, Especially Women and Children identifies areas of cooperation, including on further strengthening regional cooperation in the investigation and prosecution of trafficking in persons cases, and in ensuring that any person who perpetrates or supports trafficking in persons is brought to justice. The Convention provides for the protection of victims of trafficking in persons, including communicating information on the nature of protection, assistance and support to which they are entitled to under domestic laws, and under the Convention, and the provision, where applicable, of care and support to victims of trafficking in persons, including in appropriate cases, counselling and information, in particular as regards the victims’ legal rights. In order to combat offences of trafficking in persons which are transnational in nature, the Convention further mandates that state parties shall, subject to their respective domestic laws, afford one another the widest possible measure of mutual legal assistance in criminal investigations or criminal proceedings in relation to such offences established in accordance with the Convention.

Although the framework which allows legal aid is not new within the ASEAN context, its application may vary with the region and among the member states of ASEAN. This study, therefore, would look into good practices, as well as challenges, with the goal of improving the legal aid systems of the different ASEAN Member States through mutual cooperation and assistance among them.

The study will also look into the various legal aid systems as discussed and elaborated by the country researchers with a view to further understanding their respective frameworks.

## **II. Legal Aid for Specific Groups amongst ASEAN Member States**

All ASEAN Member States (AMS) subscribe to the principle that everyone is to be equal before the law. This principle is enshrined in the legal framework of all AMS through one or more of a combination of constitutional law, municipal/domestic law, and governmental or judicial policies and practices. This means that all persons, regardless of individual circumstances, are to be treated equally vis-à-vis their interaction with the legal and administrative system of their country.

However, it cannot be denied that certain groups would require some form of assistance. It should be clarified at this point that in dealing with the legal system within a particular country, different needs may arise depending on which particular area of the legal system is involved. For example, equality in terms of access to justice may have to have specific expressions when dealing with the criminal justice system. Likewise, when it comes to the needs of the public in terms of civil justice or administrative law, those expressions may take on a different form.

What is clear is that in their specific national contexts, the AMS have given particular attention to certain groups in order to ensure that a “level playing field” is accorded to these groups. This may have arisen out of their historical trajectories, national peculiarities and/or specificities. This section will look at the issue of what groups have been granted or would require some form of assistance, and what can be learnt from them.

### **Criminal Justice - Individuals Facing the Death Penalty**

The 8 out of the 10 AMS still provide for the use of capital punishment in criminal law.<sup>13</sup> Given the enormity of the risk at stake, and in order to ensure that an individual is not deprived of his/her life under such grave circumstances without being accorded the protections of due process of the law, legal aid is granted in cases where an accused person faces the possibility of the death sentence if convicted of the offence for which she/he is charged.

This has been set forth in AMS in constitutional law, municipal/domestic law, or by governmental or judicial policies and practices. In all cases where this is recognised, legal aid is available regardless of the individual circumstances of the accused. The state bears the cost of legal representation, usually in the form of a scale-payment or honorarium to legal counsel, while ensuring that it is free to the accused.

One question that is often raised in the provision of legal aid in general is, at what point is legal aid to be provided? Regardless of the nature or characteristics of the legal system within AMS, there are at least 2

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<sup>13</sup> The exceptions are Cambodia and the Philippines.



parts to criminal proceedings, the first being the investigation stage, whether by the police or an investigative prosecutor or magistrate or some other judicial official, and the second the trial itself. At what point does the provision of legal aid commence? In some AMS, since the requirement is to ensure provision of legal aid at a trial where the punishment includes the possibility of capital punishment, there may be no or insufficient legal aid provided during the course of investigation which, in most cases, includes interrogation of the accused, because at that point in time, it is not certain whether the investigation will result in a charge in relation to an offence that will carry capital punishment.

Some national reports contain comments that because of this uncertainty, accused persons may not have been legally represented during the investigation and interrogation stages, leading to possible due process violations having occurred unchecked. Another observation has been that since the provision is for legal aid at trial, the defence counsel for an accused person is not able to fund the defence's own investigation work prior to or in preparation for trial, either because no legal representation was appointed at that stage or that the moment for the grant of legal aid had not yet been triggered. There were some observations that the lack of legal representation was only noted when the actual trial was about to begin, and not at any earlier remand or pre-trial proceeding. Thus, this could place the accused person at a significant disadvantage.

One suggestion would therefore be to ensure that all efforts are made to ensure that legal representation is both recognised and given full force and effect at the earliest appropriate opportunity.

A further observation to be made would be in respect of appeals for clemency. If within the legal framework of the AMS there is provision for a pardon or clemency, some AMS allow for the application for pardon or clemency to be covered within the system of legal aid of that AMS.<sup>14</sup>

## **Criminal Justice – Individuals Facing Long Terms of Imprisonment**

A separate category of persons for whom legal aid is provided is individuals facing long terms of imprisonment. The provision of legal aid takes into consideration the fact that a long term of imprisonment is also a grave issue, and an accused person should be afforded legal aid.

The period of incarceration that would constitute a long term of imprisonment may vary from one AMS to another.<sup>15</sup>

Not all AMS have this provision. Of course, where legal aid is provided to all persons facing a criminal charge that would lead to a deprivation of liberty, regardless of the duration, this issue does not arise. However, for those AMS for which legal aid by way of paid legal representation is provided only for accused persons facing the death penalty, the possibility of extending the provision of legal aid in these circumstances should be considered.

Whether it be in relation to offences that attract the punishment of the death penalty, or any other form of deprivation of liberty for a period, however long or short, the State could consider the provision of legal aid and for legal representation to be extended to cover:

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<sup>14</sup> This has been implemented in Malaysia and in Singapore under the Legal Assistance scheme for Capital Offences (LASCO).

<sup>15</sup> For example, Indonesia mandates the provision of legal aid to individuals facing potential terms of imprisonment of 15 years or more.

- attending at the remand hearing;
- conducting bail applications;
- conducting criminal defence; and
- conducting appeals at various levels of the legal system.

## Children

One common specific group that is focused upon in all AMS in the context of the provision of legal aid is children. Children come into contact with the law in several situations: as persons in conflict with the law; as objects of civil litigation/disputes; or as victims of or witnesses to crimes.

In the case of a child being accused of a criminal offence, the issue of legal aid to ensure that the child is legally represented is important on the ground that a child on his or her own may not be able to appreciate the nature and consequence of the proceedings being faced. It is a paramount duty of the state to protect the most vulnerable.

In cases where a child comes into conflict with the law, all AMS provide for legal aid for defence counsel. Some do so because legal aid is mandated for all accused persons regardless of age. Others have, sometimes additionally, specific provisions to provide legal aid for accused persons who are children.

All AMS are signatories to the United Nations Convention on the Rights of the Child (“CRC”). Article 12 of the CRC states:

- “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. or this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Article 12 of the CRC anticipates other circumstances in which children ought to be heard in judicial and administrative proceedings affecting the child, and it is to these circumstances that we must focus attention in respect of the issue of legal aid.

Primary amongst these would be where custody of a child is to be decided in divorce proceedings between the parents of the child. Article 3 of the CRC reads as follows:

- “1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Some AMS already have provisions in place that in such cases, a guardian ad litem can be appointed by the court to represent the interest of the child, which is acknowledged to be separate and possibly different from the interests of the other parties involved in the litigation before the courts.

Some AMS have mandated, or are beginning to mandate, legal aid in cases of domestic violence in general<sup>16</sup>, and/or sexual offences where the victim is a child.<sup>17</sup> This reflects a victim-centred approach to justice, where the rights of the (child) victim are articulated before a court when determining sentencing of the accused person, and the possibility of payment of compensation or reparation can be considered and ordered, if appropriate.

## Poor/Indigent

In pursuit of the principle of equality in respect of access to justice, all AMS have taken measures to ensure that the poor/indigent are granted legal aid.

An associated issue in this regard would be the definition of “poor” or “indigent”. Some countries, or certain legal aid providers within countries, have adopted a “means test” to determine eligibility for legal aid. This “means test” may comprise a reference to income, or a reference to mixed income and assets.

In some instances, an individual who has exceeded the financial thresholds could still qualify for legal aid subject to a pre-determined monetary contribution to offset the cost of the provision of legal aid.

In cases where a “means test” is employed, it would be important to ensure that there is a mechanism to periodically review such “means test” criteria, so that such criteria are both relevant and contemporary, reflective of the changing economic situation present in each country.

At least two AMS have adopted a mechanism whereby the incidence of poverty/ indigence is combined with another factor in order to create another category of legal aid recipient.<sup>18,19</sup>

## Marginalised Communities

Closely associated with the concept of providing legal aid to the poor/indigent is the grant of legal aid to inhabitants of marginalised and/or remote communities. Not all the AMS utilise this categorisation in considering eligibility to legal aid. The nature of the marginalisation differs from one AMS to another depending on local conditions.<sup>20,21,22</sup> This approach takes into account the need for the provision of legal aid to members of certain communities due to specific considerations.

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<sup>16</sup> Indonesia and Viet Nam. In Singapore, a person involved in family violence proceedings against a spouse or ex-spouse, or any family proceedings involving children, is granted additional deductions under the legal aid means test.

<sup>17</sup> In August 2017, the two houses of the Parliament of Malaysia passed an amendment to the Legal Aid Act 1971 to provide for “legal companions” to assist child victims of sexual offences and their families in the course of criminal proceedings against the accused.

<sup>18</sup> In Indonesia, a person facing a criminal charge which carries a minimum sentence of 5 years in jail and who is poor/indigent is entitled to legal aid.

<sup>19</sup> In Viet Nam, a 2017 legal aid law has extended eligibility to legal aid to include people who are facing financial difficulty and who are the father, mother, wife, husband, and offspring of people with meritorious service for revolutionary martyrs, or harmed people in criminal cases from 16 years old to under 18 years old.

<sup>20</sup> In Viet Nam, pursuant to a 2006 legal aid law, ethnic minorities residing in poor districts, communes and hamlets and mountain villages are eligible for legal aid.

<sup>21</sup> In Viet Nam, a 2017 legal aid law has extended eligibility to include people from poor households and ethnic minorities permanently residing in areas with exceptionally difficult socio-economic conditions.

<sup>22</sup> In Thailand, the “underprivileged” also enjoy access to legal aid by law.

## **The nature of the marginalisation or specific considerations includes:**

### **Women**

Some AMS place women amongst the categories of persons for whom legal aid is specifically provided, appreciating the fact that equality in itself may be insufficient to guarantee access to justice, and that of greater concern would be the issue of substantive equality. By placing women in a special category, the deficiencies with respect to women having equal and effective access to legal aid and legal representation can be addressed. Placing women in a special category may also be a reflection of the recognition that women are especially prone or subject to being victims of certain types of criminal offences, for example, sexual abuse or domestic violence, which would necessitate more specific legal attention.

At least one AMS is considering the extension of legal aid to situations where interim protection needs to be granted in cases of domestic violence, to help care and protect a potential victim.<sup>23</sup>

### **Elderly**

The special vulnerability of the elderly who are poor/indigent has also been considered sufficient by some AMS to create a specific group entitled to legal aid.<sup>24</sup>

### **Persons with disabilities**

Some AMS classify persons with disabilities as a special category of persons eligible for legal aid.<sup>25</sup>

### **Medically infirmed**

At least one AMS has made the combination of financial difficulty and being diagnosed with certain medical conditions or suffering from epidemic diseases as deserving of legal aid, in order to pursue treatment.<sup>26</sup>

### **Mental disorders**

An area that is not well covered in terms of the provision of legal aid in ASEAN appears to be with respect to mental health. It would appear that only one AMS recognises persons with mental illness as a special category of persons eligible for legal aid.<sup>27</sup> In predominantly western countries, the issue of mental health status regularly comes before tribunals for determination, especially in relation to the grant of community treatment orders. Legal aid for persons being brought before such tribunals constitutes an important element of access to justice. This area does not seem to be well developed in the ASEAN region.

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<sup>23</sup> [www.malaysianbar.org.my/speeches/speech\\_by\\_tan\\_sri\\_abdul\\_gani\\_patail\\_attorney\\_general\\_of\\_malaysia\\_at\\_the\\_opening\\_of\\_the\\_legal\\_year\\_2014\\_dewan\\_sri\\_siantan\\_perbadanan\\_putrajaya\\_11\\_jan\\_2014.html](http://www.malaysianbar.org.my/speeches/speech_by_tan_sri_abdul_gani_patail_attorney_general_of_malaysia_at_the_opening_of_the_legal_year_2014_dewan_sri_siantan_perbadanan_putrajaya_11_jan_2014.html); accessed on 30 September 2017.

<sup>24</sup> In Viet Nam, a 2017 legal aid law has extended eligibility to legal aid to include those who are facing financial difficulty who are elderly people. In Singapore, an elderly person is granted an additional deduction under the legal aid means test.

<sup>25</sup> In Singapore, a person who suffers from a physical disability which permanently and severely restricts his ability to earn an income is granted additional deductions under the legal aid means test.

<sup>26</sup> In Viet Nam, a 2017 legal aid law has extended eligibility to legal aid to include people who are facing financial difficulty and who have HIV/AIDS or are victims of "Agent Orange". This was the chemical used by the United States military in some of their bombardment during the Vietnam War.

<sup>27</sup> Lao PDR. In Singapore, a person who suffers from a mental disability which permanently and severely restricts his ability to earn an income is granted additional deductions under the legal aid means test. The Law Society also administers an Appropriate Adult Scheme to provide assistance to persons with intellectual or mental disability who are required to give a statement to the Police during investigation.

## Other Specific Group

We have hitherto looked at certain specific groups that, either under a provision of constitutional law, domestic/municipal law or government or judicial policy or practice, are singled out as being entitled to or eligible for legal aid.

At this stage we should further consider whether there are other categories of specific groups of persons who ought to be considered for entitlement or eligibility to legal aid. An underlying principle of legal aid has been to assist persons who might have difficulty gaining access to justice, for one reason or another. As such, we should consider whether, for these reasons, other groups face such challenges.

## Labour Disputes/Migrant Workers

One of the reasons why difficulty is encountered in accessing justice may well be the lack of familiarity with the legal system of AMS. This in turn could be due to the unequal bargaining power between litigants, coupled with the inability to understand the legal system due to language.

Given the increasing mobility of the citizens of AMS to travel and work in another AMS, the position of migrant workers, especially in relation to labour or wage disputes, should be seriously considered. Migrant workers often are at high risk of exploitation due to a lack of knowledge of labour laws in their host countries, such laws being in a language with which they have little to no comprehension or familiarity.<sup>28</sup>

Whether as litigants in a civil dispute concerning pay and working terms and conditions, or as victims/witnesses in a criminal prosecution by the state for labour violations, the fact that migrant workers as a class of persons are deserving of legal aid is hard to dispute.

## Victims of Human Trafficking

Due consideration should be accorded to assisting victims of human trafficking in situations where they require assistance to lodge complaints and subsequently need to attend court as complainants and/or witnesses. The situation with respect to victims of sex trafficking may be more obvious, and equally deserving of protection by way of legal aid for legal representation.<sup>29</sup>

## Stateless Persons, Refugees, and Asylum-Seekers

Only one AMS is a signatory to the 1954 Convention relating to the Status of Stateless Persons<sup>30</sup> whilst no AMS is a signatory to the 1961 Convention on the Reduction of Statelessness. Two AMS are signatory to the Convention relating to the Status of Refugees.<sup>31</sup>

Only one AMS has recently enacted legislation to provide for legal aid to be available to stateless persons, refugees and asylum seekers.<sup>32</sup> Otherwise, stateless persons, refugees and asylum seekers are only eligible

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<sup>28</sup> In Lao PDR, legal aid is provided to those who do not know the Lao language.

<sup>29</sup> In Viet Nam, a 2017 legal aid law has extended eligibility to legal aid to include those facing financial difficulty who are victims of human trafficking in accordance with the 2011 Law on Anti-Human Trafficking. Lao PDR has also extended legal aid to victims of human trafficking.

<sup>30</sup> The Philippines.

<sup>31</sup> Cambodia and the Philippines.

<sup>32</sup> Myanmar.

to legal aid if they fall within the general provision for legal aid for accused persons, regardless of immigration status, or if they come within one or more other categories of specially-recognised groups.

Given their uncertain immigration status, stateless persons, refugees and asylum seekers are clearly members of an extremely vulnerable class of persons who would seek assistance by way of legal representation. This is especially so in cases where domestic/municipal law does not formally recognise, and government practice or procedure does not accept informally, stateless persons, refugees and asylum seekers as residents and who are therefore prosecuted, if caught, for violation of immigration law in AMS.

### **The Citizen/Non-Citizen Distinction**

This brings us to the distinction with respect to eligibility for legal aid between citizens and non-citizens. Some AMS restrict the availability of certain types of legal aid to only their own citizens. While this is understandable from one perspective, it may be worth considering the lifting of such restrictions, where they exist.

In terms of crimes that carry the death penalty as punishment, no such distinction exists in AMS. This is appropriate, since the main concern is to ensure effective legal representation of the accused in a situation where a person's life is at stake.

However, this principle is not equally accepted in situations involving a lesser punishment. In these situations, some AMS restrict the provision of legal aid only to citizens. For example, in some AMS, legal aid in criminal cases is only available to citizens.

### **Legal Aid for Victims of Crime and Witnesses in Criminal Trials**

Adopting a victim approach in criminal prosecutions achieves more just outcomes, as an offender receives a sentence that is more commensurate with the crime committed, and there is a greater possibility that a victim can be compensated for the loss incurred or harm suffered.

For this to occur, legal aid to allow victims of crime to be represented in criminal proceedings could be expanded. Whilst several AMS already have provisions for the participation of victims of crime (including as witnesses) in criminal proceedings, their participation is hampered by the lack of legal aid for legal representation in those proceedings.

The provision of legal aid for victims of crime and witnesses may also contribute to better conviction rates. This could be so in cases where victims and witnesses are vulnerable to intimidation, or are foreigners, migrant workers, stateless persons, refugees and asylum seekers, whose participation may not be ensured without some form of assistance for their attendance at the trial.

### **The Need for Safeguards in the Provision of Legal Aid**

If legal aid is enshrined in constitutional law, the assumption may well be that legal aid is strongly protected, given that the provisions of the constitution are meant to form the core or basis of the legal foundation of a particular society or nation. Checks and balances are instituted normally to ensure that such basic structures of a nation cannot be changed, either at all, or only with the agreement of various national stakeholders or through broad-based legislative support.

The legal aid that is provided by regular municipal/domestic law is normally subject to the rules of the legislative body of a particular country in terms of the ease/difficulty of amending existing legislation. Legal aid that is granted by way of governmental and/or judicial policies and practices would be subject to the ease/difficulty of altering such policies and practices.

Steps could be taken to ensure that the provision of legal aid itself, and the categories of persons who are entitled to legal aid, are not easily changed to the prejudice of that entitlement. This is of particular concern when limitations to financial resources are considered. Budgetary cuts have a way of affecting the provision of legal aid by the state.

## Other Providers of Legal Aid

The discussion and examples hitherto presented have taken into account only the provision of legal aid by the state itself. However, in many AMS, legal aid is also provided by other entities.

One of the main providers of legal aid in many AMS is the legal profession itself. Some do so out of their own funds, while others offer legal aid funded by the state itself but operated by or in conjunction with members of the legal profession. Other AMS may also have more than one scheme in place.

In addition to the legal profession, civil society organisations (CSOs) and non-governmental organisations (NGOs) in some AMS also provide legal aid, or at least fund legal aid that is provided by another entity or organisation.

Depending on the nature and ethos of these CSOs and NGOs, they may have a specific or targeted constituency or focus as the beneficiary(ies) of the legal aid provided or funded by them, together with their own specific eligibility criteria, which may be different from schemes funded or operated by governments. Often, the ambit or areas covered by legal aid from CSOs and NGOs are more extensive than those provided for by state legal aid schemes, reflective of the greater diversity of issues and areas of concern of these CSOs and NGOs.

The plurality of legal aid providers should be welcomed since these service providers are invested and involved in their respective communities, and may be more effective at connecting with and supporting members within their community.

## Matters for Consideration

Moving forward, the following situations/scenarios could be considered for the extension of legal aid:

- To ensure that, in furtherance of legal representation for persons facing the death penalty, efforts should be made to ensure that legal aid is both recognised and given full force and effect at the earliest appropriate opportunity.
- For those AMS for which legal aid by way of paid legal representation is provided only for accused persons facing the death penalty, the possibility of extending the provision of legal aid to those facing long terms of imprisonment could be considered.
- AMS could consider whether criminal proceedings against a child should be allowed to take place until and unless a child is afforded legal representation.
- AMS could also consider whether to provide legal aid for a child to engage legal counsel in non-criminal matters in which the child is involved.

- The state could also consider providing legal aid in cases such as domestic violence in general, and/or sexual offences, to reflect a victim-centred approach to justice. In this way, the rights of the victim are articulated before a court when determining sentencing of the accused person, and the possibility of payment of compensation or reparation can be considered and ordered, if appropriate. Adopting a victim-centred approach to justice by expanding the provision of legal aid to victims and witnesses may also improve justice outcomes in legal proceedings and further contribute to respect for the domestic/municipal legal process.
- In cases where a “means test” is employed to determine eligibility for legal aid, it would be important to ensure that there is a mechanism to periodically review such “means test” criteria, so that such criteria are both relevant and contemporary, reflective of the changing economic situation present in each AMS.
- Sufficient flexibility should be built into the eligibility criteria for legal aid such that in situations where the deciding authority is satisfied that in any particular case of hardship it is in the interests of justice so to do, legal aid can be given. Additionally, in cases where the area of legal dispute is not covered, but that it is desirable in the interests of justice that legal aid should be nonetheless supplied, a similar mechanism to exercise flexibility should be put in place.
- A closer study could be undertaken to understand the costs and benefits arising from the extension of legal aid to the various marginalised groups mentioned in the national reports and undertaken by certain AMS. AMS could consider the overall impact of this provision in improving law and order outcomes, and whether positive lessons could be gleaned from them and applied in other AMS.
- Closer consideration could be given to extending the provision of legal aid to the other specific groups mentioned where possible, namely labour disputes/migrant workers, victims of human trafficking, and stateless persons, refugees and asylum seekers. The increased nature and extent of cross-border movement of people create greater opportunities for organised and syndicated crime. The provision of legal aid for these groups of persons may help to stem the tide of such criminal activities, and close the loopholes that currently allow perpetrators to escape justice due to a lack of evidence or non-attendance or non-participation of those who suffer at the hands of unscrupulous employers, those who are victims of crimes and their witnesses.
- Extending legal aid to non-citizens where possible may improve respect for law and order in AMS by increasing understanding of laws, rules and regulations that bind citizens and non-citizens alike. While ignorance of the law is no excuse, familiarity with the legal environment may result in better appreciation for the rule of law and the administration of justice in AMS.
- Ensuring that the provision of legal aid would not be easily amended in order to respect and protect judicial independence and confidence in AMS.
- Enhancing the environment for and encouraging the growth of other legal aid providers would improve the overall reach of legal aid and improve access to justice, as well as strengthen legal institutions in line with Sustainable Development Goal 16.
- Apart from the provision of legal aid for actual legal representation before judicial, administrative or other quasi-judicial tribunals or bodies, should legal aid be provided for other aspects associated with the legal systems in AMS? For example, legal aid could be provided for public education programmes that are designed to promote attitudinal change in terms of respect for the rights of accused persons. Legal aid could also perhaps be provided for work on proposals in relation to law and public policy reforms in order to uphold fundamental liberties and human rights in the areas of access to justice and access to legal representation.



# ISSUES OF LEGAL AID SERVICES IN THE ASEAN COUNTRIES

**Table 1: The Good Practices of Legal Aid in ASEAN**

Country	State Support	Effective Legal Aid	Legal Aid For the groups with special needs	The Role of CSOs	Legal Aid Schemes
<b>Brunei Darussalam</b>	Providing financial resource, for example: B\$7000 (getting up fee); B\$300 (pre-trial reviews) B1,300 (brief fee for 1st day of trial); B\$700 (refresher for each day after 1st day of trial)		Persons in poverty	Various legal aid providers (Law Society, MKM)	Chief Justice's Practice Direction Circular No. 10 of 1997; supreme court Circular ref SC/AD/G/42; Chief Justice's Circular No. 3 of 2001
<b>Cambodia</b>	Providing financial resource to the Bar Association 600 million riels per year		Persons in poverty, land disputes	Various legal aid providers (NGO, the Bar Association, paralegal, university legal clinic)	The Criminal Code
<b>Indonesia</b>	Providing financial resource IDR 7 million per case (criminal, civil, and administrative case) by the central government. The local governments also provide financial resource to the legal aid providers.  Supreme Court providing court-appointed lawyers. Providing a monitoring and assessment system for the legal aid providers.	Mandatory Periodical and final reports of the legal aid providers to ensure the quality of legal aid services.	Persons in poverty	Various legal aid providers (NGO, paralegal, law professors)	Legal Aid Law in 2011, Penal Procedure Code, the Supreme Court Decree

Country	State Support	Effective Legal Aid	Legal Aid For the groups with special needs	The Role of CSOs	Legal Aid Schemes
<b>Myanmar</b>			Persons in poverty, children, women, persons who need special cure, elderly person, persons with disabilities, HIV-affected persons and persons affected with epidemic diseases, stateless persons, asylums, foreigners, migrant workers, refugees, criminal victims, witnesses.		Legal Aid Law 2017 and the Law Amending the Legal Aid Law 2017
<b>Malaysia</b>	<p>LAD (Legal Aid Department) providing financial resource RM 23,894,983 in 2015</p> <p>LAD appointing a panel of solicitors to assist in civil and shariah matters.</p> <p>The court providing a court-appointed counsel.</p> <p>The government providing a financial resource to NLAF.</p>		Persons in poverty	Legal Aid Center (LAC), National Legal Aid Foundation (NLAF), legal clinics, NGOs/ CSOs.	Legal Aid Act in 1971

Country	State Support	Effective Legal Aid	Legal Aid For the groups with special needs	The Role of CSOs	Legal Aid Schemes
<b>Lao PDR</b>			Children, women, people with disabilities, the death penalty case	The Donors and The Ministry of Justice promote the legal aid centers at provincial levels, NGOs, legal clinics and the Bar Association.	Criminal Procedure Law in 2012
<b>Philippines</b>	The State providing financial resources to the Public Attorneys Office in the General Appropriations Act. The Supreme Court also subsidizes the Legal Aid Program of the Integrated Bar of the Philippines.	There is a Public Attorneys Office which caters to all legal aid requirements of indigent clients. There are other legal aid providers coming from the Integrated Bar, law schools, NGOs and pro bono practice.		Various legal aid providers.	Right to legal assistance and counsel is mentioned in the Constitution, other legislation and in the Rules of Court.
<b>Singapore</b>	<p>Providing SGD 7.54 million to fund its civil legal aid program provided by the Legal Aid Bureau in financial year 2017-2018.</p> <p>Providing funding support to the Law Society of Singapore's Criminal Legal Aid Scheme (CLAS) up to SGD 3.5 million annually.</p> <p>Administering the Legal Assistance Scheme for Capital Offences.</p> <p>Providing facilities and incentives for the Alternative Dispute Resolution (ADR)</p>		Persons of limited means.	Law Society of Singapore, various NGOs, volunteer lawyers and law firms.	Legal Aid and Advice Act.

Country	State Support	Effective Legal Aid	Legal Aid For the groups with special needs	The Role of CSOs	Legal Aid Schemes
<b>Thailand</b>	<p>Providing remuneration for the state-appointed lawyer (500-2000 THB) at the stage of investigation.</p> <p>Providing remuneration for the state-appointed lawyer at trial.</p>		Human trafficking victims, the death penalty cases, drug cases.	NGOs, the Thai Bar, the Lawyer Council.	The Justice Fund Act 2015
<b>Viet Nam</b>	<p>Providing financial resource to the legal aid providers</p> <p>Providing monitoring and assessment of the legal aid providers.</p>	Periodical preliminary reports, overall report, and assessment to measure the quality of legal aid service.	Ethnic minorities, persons in poverty.	The Bar Association.	<p>Decision No.32/2016/QD-TTg of the Prime Minister</p> <p>The 2016 and 2017 Legal Aid Law</p>

## A. The Issues of Legal Aid Services in ASEAN

### a. The Legal Aid Beneficiaries

Whether legal aid can be granted to persons in poverty is an issue of legal aid services in ASEAN. To provide answers to the issue, there will be an elaboration of the issue according to the good practices of legal aid in ASEAN and the existing international legal aid standards. Some countries in ASEAN have initiated the expansion of the legal aid beneficiaries from persons in poverty to vulnerable/marginalized groups such as women, children, people with disability, HIV-affected persons etc. Legal aid law in Myanmar has recognised children, women, persons who need special care, elderly person, disabilities, HIV-affected persons and persons affected by epidemic diseases, stateless persons, asylums, foreigners, migrant workers, refugees, criminal victims, and witnesses. Also, the legal aid regulation in Viet Nam has recognised ethnic minorities as one of the legal aid beneficiaries. In Thailand, the victims of human trafficking are also recognized as one of the legal aid beneficiaries.

According to Principle 10 of the UN Principles and Guidelines on Legal Aid in Criminal Justice Systems, there is mention of special measures 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, people with mental health problems, 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. There is mention that such measures should address the special needs of these groups including gender-sensitive and age-appropriate measures.

Moreover, the UN Principles and Guidelines mentions more detail on whether a state-funded counsel can be granted to an indigent. Not only the severity of penalty, but also the complexity of the case is a requirement of the legal aid beneficiaries.

Accordingly, the legal aid beneficiaries could be expanded and recommended for vulnerable/marginalized groups such as people with disabilities, children, women, and victims of human trafficking.

## **b. Alternative Dispute Resolution (ADR) and Access to Justice**

Goal 16 of the Sustainable Development Goals (SDGs) has recognized access to justice as one of the SDGs.

In Singapore, the state has established facilities and incentives for ADR and made them accessible as the first port-of-call for the settlement of the disputes. The courtroom is usually the forum of last resort (ultimum remedium). On the other hand, ADR benefits the disputing parties because of cost-effectiveness and efficiency, while a dispute settlement through a court room is a long and costly process.

## **c. The Sustainability of Legal Aid Fund**

Principle 2 of the UN Principles and Guidelines on Legal Aid In Criminal Justice Systems deals with enacting specific legislation and regulation so that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. It also deals with the necessary human and financial resources to the legal aid system. Furthermore, Guideline 12 of the UN Principles and Guidelines on Legal Aid in Criminal Justice System recognizes that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, and that States should, where appropriate, make adequate and specific provisions for legal aid services that are commensurate with their legal needs, including by providing a dedicated and sustainable funding mechanism.

The UN Principles and Guidelines on Legal Aid in Criminal Justice Systems explicitly mentions the sustainability of the national legal aid fund. In ASEAN, there are the countries that have annual legal aid funds, such as Singapore, Indonesia, and Myanmar. In Singapore, the government provides SGD 7.54 million to fund its civil legal aid program in the financial year 2017-2018. In Indonesia, the government provides IDR 19.1 billion (US\$ 1.5 million) in the financial year 2016-2017. In Myanmar, there is also a legal aid fund according to the legal aid law in Myanmar where a legal aid budget shall be established under the budget of the Union Supreme Court.

Having an annual legal aid budget from the public fund will make the legal aid system sustainable and independent. At the same time, the legal aid program is not driven by the donors or the outside needs. But at a certain level, for example, to develop the capacity building of the legal aid practitioners, there may be a need for technical assistance where the donors can provide assistance to make it happen. In Myanmar, according to the legal aid law, the relevant legal aid body should receive the donation directly from the donor. This body should be able to allot funding for academic training in its budget.

There is a need to consider allocating necessary human and financial resources for the national legal aid scheme according to Principle 2 of the UN Principles and Guidelines on Legal Aid in Criminal Justice Systems. Whether the existing legal aid fund in the ASEAN countries is necessary depends on the context and needs of the countries and may not be generalized amongst the countries.

#### **d. The Competence and Accountability of the Legal Aid Providers;**

Principle 13 of the UN Principles and Guidelines on Legal Aid in Criminal Justice Systems clearly mentions a mechanism to ensure that all legal aid providers possess education, training, skills, and experiences that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs. Furthermore, disciplinary complaints against legal aid providers should be promptly investigated and adjudicated in accordance with professional codes of ethics before an impartial body and subject to judicial review.

To ensure the quality and good governance of the legal aid providers, there is an evaluation and monitoring system. In Myanmar, according to the legal aid law in 2016, there is an institutional supervision which consists of internal and external supervisions. Internal supervision is granted to the legal aid body, including supervising the services of the different levels of legal aid body to conform with the law. The Union Body has the power to supervise the legal aid providers to ensure that they do not ask for some remuneration and fees from the concerned persons, to supervise the concerned persons to ensure non-corruption, and to investigate the legal aid providers in the case of corruption and if they requested some remunerations and fees. Furthermore, the Union Body can grant the accreditation letter to the legal aid providers.

In Indonesia, according to the legal aid law, the accredited legal aid providers should comply with the monitoring and evaluation requirements where they shall send periodical and annual reports of their legal aid services to the BPHN (the National Legal Harmonization Body) under the Ministry of Justice and Human Rights. Also, the BPHN can issue the accreditation letter to the legal aid providers which has met the minimum requirements. At a certain level, the accreditation process of the legal aid providers may result in the proper quality of the legal aid providers in order to prevent misuse of the legal aid services, such as the prevention of using a fake lawyer. However, at a certain level, the accreditation process may result in difficulties for a legal aid provider in meeting the minimum requirements, such as the legal status of the legal aid provider.

#### **e. The Role of the Non-State Legal Aid Providers including Community Paralegals, Civil Society Organizations (CSOs) and Legal Clinics.**

Under Principle 16 of the UN Principles and Guidelines on Legal Aid in Criminal Justice Systems, States should, where appropriate, engage in partnerships with non-State legal aid service providers including non-governmental organizations and other service providers. The CSOs and the legal clinics can be part of the recognized legal aid providers via the national legal aid scheme. This would further boost the morale, credibility, and capacities of paralegal communities, especially at the local level. To this end, States should take measures, in consultation with civil society and justice agencies and professional associations:

- To recognize in their legal systems the role to be played by non-State actors in providing legal aid services to meet the needs of the population;
- To set quality standards for legal aid services and support the development of standardized training programmes for non-States legal aid service providers;
- To establish monitoring and evaluation mechanisms to ensure the quality of legal aid services, in particular those provided at no cost;
- To work with all legal aid service providers to increase outreach, quality and impact and facilitate access to legal aid in all parts of the country and in all communities, especially in rural, economically and socially disadvantaged areas and among minority groups;

- To diversify legal aid service providers by adopting a comprehensive approach, for example, by encouraging the establishment of centres to provide legal aid services that are staffed by lawyers and paralegals and by entering into agreements with law societies and bar associations, university law clinics, and non-governmental and other organizations to provide legal aid services.

Almost all countries in ASEAN have recognized non-state actors including the Bar Association and Civil Society Organizations in favor of providing legal aid services to marginalized/vulnerable groups. The following examples of the recognition of non-state legal aid providers:

- According to the Thai Lawyer Act 1985, the lawyer council is legally obligated to provide free legal aid services to those who are poor and facing injustice.
- In Malaysia, the Legal Aid Center (LAC) is established by deriving one of the purposes of the Malaysian bar to make provision for or assist in the promotion of a scheme whereby impecunious persons may be represented by advocates and solicitors.
- In Singapore, according to the Legal Profession Act, one of the purposes of the Law Society is to make provision for or to assist in the promotion of a scheme whereby impecunious persons on non-capital charges are represented by advocates.

Principle 16 of the UN Principles and Guidelines on Legal Aid In Criminal Justice Systems also mentions to encourage and support the establishment of legal clinics in law departments within universities to promote clinical and public interest law programs among faculty members and the student body including the accreditation curriculum of universities; to encourage and provide incentives to law students to participate under proper supervision and in accordance with national law or practice in a legal clinic or other legal aid community as part of their academic curriculum or professional development; and to develop, where it does not already exist, student practice rules that allow students to practice in the courts under supervision of qualified lawyers or faculty staff, providing such rules are developed in consultation with and accepted by competent courts or bodies that regulate the practice of law before the courts. With respect to law students being required to undertake legal internship, rules and guidelines should be developed so that they will be able to practice efficiently in court under the supervision of a qualified lawyer.

Among the ASEAN countries, there are a number of countries that have a clinical legal education program: Indonesia, Malaysia and the Philippines. In the Philippines, the Supreme Court issued Rule 136-A of the Rule of the Court entitled the “Law Student Practice Rule”. The Rule allows students to appear without compensation in any civil, criminal or administrative case before the lower court, tribunal, board or officer, to represent indigent clients accepted by the legal clinics of their law school, provided that they have successfully completed their third year of a regular four-year law curriculum and are enrolled in the law school’s clinical legal education program recognized by the Supreme Court.

According to Guideline 14 of the UN Principles and Guidelines on Legal Aid in Criminal Justice Systems, States should, in accordance with their domestic 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. Very few countries in ASEAN including Indonesia and the Philippines have recognized the role of community paralegals in providing legal aid services in certain areas where there is a limited number of practicing lawyers. The community paralegals provide legal advice and even in a certain area where there is no lawyer, the community paralegal may represent the indigent before the court.

## B. Summary

- In general, the States in ASEAN have provided legal aid funding, but there are differences in the allocation for legal aid fund. Sustainability and the insufficient funding of legal aid are additional issues as well. That is why there must be an annual legal aid fund. There must also be actual legal needs, so the States can calculate whether the legal aid fund is sufficient.
- Almost all countries in ASEAN provide legal aid services to persons in poverty, but few countries provide legal aid services to other groups such as children, women, and people with disabilities. Therefore, it is suggested that the beneficiaries of legal aid services should be extended to these vulnerable groups.
- All countries in ASEAN have tried to provide a high quality of legal aid services, but there is also a need to ensure competence and accountability of the legal aid providers. Developing an evaluation and monitoring system and enforcing laws and code of ethics when there are violations will strengthen the accountability of the legal aid providers. At the same time, to ensure the quality of the legal aid provider in providing legal aid services, there must regularly be capacity building for the legal aid providers, and fair and transparent accreditation of the legal aid providers.
- Almost all countries in ASEAN have recognized the role of non-state legal aid providers. The Bar Association, CSOs, legal clinics and community paralegals have an important role of providing legal aid services to vulnerable groups.

# REGIONAL FINDINGS (ANALYSIS)

Among ASEAN countries, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Viet Nam have specific legal aid laws while Brunei Darussalam, Lao PDR, Thailand, have provisions on some laws relating to legal aid. Information on the common challenges, issues and the situations of each country was collected. The following section details the situations that ASEAN countries are facing so far.

## I. Legal Aid for Migrant Workers and Their Families

In the ASEAN region, Indonesia and the Philippines have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (2003), while Cambodia has signed, but not yet ratified it. According to Article 18 of the Convention, migrant workers and members of their families are entitled to have legal assistance in any case where the interests of justice so requires, and there is no payment required of them in any such case if they do not have the sufficient means to pay. The Cebu Declaration and the ASEAN Consensus (adopted in the Philippines, 2007 and 2017 respectively) call on both sending and receiving countries to protect and promote the rights of migrant workers in the region. However, migrant workers, both documented and undocumented, are still abused and exploited. ASEAN needs to strategize common principles for receiving and sending countries to address migrant workers issues regionally.<sup>33</sup> Recently, some ASEAN countries have introduced legal frameworks in which migrant workers are eligible for legal aid, such as the Legal Aid Law in Myanmar and Justice Fund in Thailand.

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<sup>33</sup> ASEAN Parliamentarians for Human Rights (APHR) 2017, Examining Human Rights in the Context of ASEAN Regional Migration, Summary Report of Findings from APHR Fact-Finding Mission to Malaysia (p.2).



In other countries, non-government-organizations (NGO) mainly focus on specific vulnerable groups such as migrant workers. In Singapore, various NGOs, such as the Migrant Workers' Centre, Foreign Domestic Worker Association for Social Support and Training (FAST), HealthServe and the Catholic Lawyer's Guild (CLG) provide legal aid to migrant workers. In fact, to ensure the rights of migrant workers, the stakeholders of both sending and receiving countries play an important role in terms of pursuing legal redress against errant employers and providing assistance to workers.<sup>34</sup>

The United Nation Principles and Guidelines on Access to Legal Aid in Criminal Justice System recognizes the special needs of vulnerable populations including migrants and migrant workers, and it calls on States to ensure legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and to persons who are members of economically and socially disadvantaged groups.

## II. Legal Aid for Victims of Human Trafficking

Within ASEAN, about 1.6 million people are trafficked each year.<sup>35</sup> Regarding human trafficking issues at the regional level, ASEAN adopted the Convention Against Trafficking in Persons, which entered into force in March 2017 after six ASEAN Member States, Myanmar, Cambodia, the Philippines, Singapore, Thailand, and Viet Nam, have ratified it.<sup>36</sup> The objectives of the Convention are to prevent and combat trafficking in persons, to protect and assist victims of trafficking in persons and to promote cooperation among the Parties. Moreover, Article 18 mentions the duty of the State parties to provide mutual legal assistance in criminal investigations. Human trafficking victims usually face many challenges at the destination countries and difficulty to voice their hardships due to the language barrier, fear of repatriation, and lack of trust and information. Thus, legal aid should be available for the highest priority cases such as human trafficking in both criminal and civil matters. Moreover, the victims of human trafficking need legal assistance to claim compensation against their traffickers. At the national level, the Myanmar Legal Aid Law allows legal aid to victims of crime. Laos has drafted a new legal aid law, and victims of human trafficking are eligible for legal aid under this law. In the rest of the countries, it is possible for the victims to receive assistance from charity organizations, INGOs and NGOs that mainly focus on specific disadvantaged groups.

## III. Quality and Quantity of Legal Aid Lawyer

The majority of the ASEAN countries lack legal aid lawyers, especially at the rural level and in remote areas. Cambodia suggests developing a target for increasing legal aid lawyers after collecting data on the need for more legal aid lawyers. Subsequently, the State could identify the means and ways to address the shortage of legal aid lawyers.

Incentives for legal aid lawyers are also important to increase the number of legal aid lawyers. One of the good practices is the public defender scheme in the Philippines where the Public Attorney's Office increases the salaries and other benefits of the lawyers who have good results in terms of effective performance.

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<sup>34</sup> Ibid, (p.4).

<sup>35</sup> ASEAN Parliamentarians for Human Rights (APHR) 2017, Examining Human Rights in the Context of ASEAN Regional Migration, Summary Report of Findings from APHR Fact-Finding Mission to Malaysia (p.10).

<sup>36</sup> Philippines News Agency 2017, Asean convention against trafficking in persons enters into force in March <https://businessmirror.com.ph/asean-convention-against-trafficking-in-persons-enters-into-force-in-march/>

This practice advocates increasing the national budget on legal aid. Setting up accountable and transparent performance appraisal systems could also control the quality of legal aid providers as well as giving rewards for good results. At the same time, introducing codes of conduct for legal aid providers could reduce conflicts of interest. United Nations Principles and Guidelines, Principle 15, paragraph 69(b) calls the States to ensure that “legal aid providers are subject to applicable professional codes of conduct, with appropriate sanctions for infractions”.

Another strategy to address the lack of legal aid lawyers is a compulsory mechanism, on pro bono basis, for law graduates to be admitted to enter the bar. Malaysia is one of the countries where the Bar Council plays an important contributing role in addressing the needs of legal aid in the country in respect to criminal matters.

Furthermore, to overcome the lack of legal aid lawyers especially in remote areas, some countries such as Indonesia and the Philippines have developed a community of paralegals such that they are able to use paralegals as substitutes in areas when there are needs for legal aid lawyers. The advantage of having paralegals is that they know the people in the community; however, the monitoring and quality control mechanisms are critical. The United Nations Principles 14 calls for States to recognize and encourage the contribution of lawyers’ associations, universities, civil society and other groups and institutions in providing legal aid.

## **IV. Sustainability**

Among the ASEAN countries, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam and have state-sponsored legal aid schemes, although Myanmar still needs to develop rules and regulations for the implementation process. However, budget allocation for legal aid is a major challenge to meet the high demand in every country. Thailand enacted the Justice Fund Act 2015 which is under the supervision of the Ministry of Justice. This Act does not apply to individual legal aid providers. It does apply to matter of litigation, the temporary release, the violation of human rights or the effect of human rights violation, promoting legal knowledge and other relevant costs. According to section 7, the fund includes (a) money or asset transferred per Section 40, (b) financial support from the government or annual budget, (c) income earned per Section 8, (d) money or asset donated to the Fund, (e) earning from the money or asset of the Fund, (f) other money or asset received by the fund in whatsoever circumstance. In order to overcome inadequate funding, the State may collaborate with UN agencies, international organizations and donors rather than depending on a single source of funding. UN Guidelines 12 calls for the State to make adequate and specific budget provision for legal aid services. Thus, the State has the responsibility for fund allocation for legal aid; however, the Model Law on Legal Aid in Criminal Justice Systems mentions that other sources should be taken into account based on the State’s budgetary and legal system for potential sources of funding from foreign, regional and international donors.



ASEAN Intergovernmental Commission on Human Rights (AICHR)

## **Thematic Study on Legal Aid**

# **ASEAN Member States**

Country Reports  
on  
Legal Aid

# BRUNEI DARUSSALAM

## I. Country Background

### A. Country Profile

Brunei Darussalam achieved its full independence on 1 January 1984. It is situated on the north-west coast of the island of Borneo with a total area of 5,765-sq. km. and a coastline of about 161-km along the South China Sea. Brunei Darussalam is divided into four districts, namely Brunei-Muara, Tutong, Belait and Temburong. Bandar Seri Begawan is the capital city that covers an area of about 16 sq. km.

As of 2015, the country has a total population of 417,200, including 86,900 temporary residents, with an average growth of 1.3 per cent per annum.<sup>37</sup> Brunei Darussalam is a multi-ethnic society with 65.8 percent Malays<sup>38</sup>, 24 percent other Indigenous groups<sup>39</sup> and 10.2 percent Chinese. Islam is the official religion of Brunei Darussalam while other religions are also practised.<sup>40</sup> Although Malay is the official language, English is widely spoken. Other languages, which are also spoken by the respective communities, include Mandarin (as well as various Chinese dialects such as Hokkein, Hakka and Cantonese), Dusun, Iban, Hindi and Tamil.

### B. The Government and the State

#### (i) The Constitution

Brunei Darussalam's first written Constitution came into force on 29 September 1959, enabling it to achieve self-government. It also formed the initial step towards the country achieving full independence in 1984. Since then, the Constitution has been subject to several amendments, particularly in 1984 and 2004. On 15 July 2003, a Committee was established to review the Constitution and the laws of the country to keep abreast of the changing environment. The amendments, among others, were aimed at improving the effectiveness of the relationship between the Government and the people as well as ensuring good governance.

#### (ii) Authorities

- (a) **Executive Authority:** The executive authority shall be exercised by His Majesty. In the discharge of such executive authority, His Majesty may appoint any number of Ministers or Deputy Ministers, who shall be responsible solely to His Majesty for the exercise of executive authority and who shall assist and advise His Majesty in the discharge of His Majesty's executive authority. His Majesty is the Prime Minister, the Minister of Defence, Minister of Finance and Minister of Foreign Affairs and Trade.

<sup>37</sup> National Statistics – Economic Planning and Development Department Prime Minister's Office at <http://www.depd.gov.bn/SitePages/National%20Statistics.aspx>

<sup>38</sup> According to the Brunei Nationality Act, there are 7 groups of indigenous peoples namely Belait, Bisayah, Brunei, Dusun, Kedayan, Murut and Tutong.

<sup>39</sup> Bukitans, Dayaks (sea), Dayaks (land), Kalabits, Kayans, Kenyahs, Kajangs, Lugats, Melanaus, Penans, Sians, Tagals, Tabuns and Ukits.

<sup>40</sup> Article 3 of the Constitution of Brunei Darussalam.

- (b) **Legislative Council:** The Legislative Council represents the country's formal consultative structure, which allows its people to communicate and consult with the Government on various areas on the development of Brunei Darussalam. This Council is one of the platforms in which the interests of the people and the country are safeguarded and preserved.
- (c) **Judicial Authority:** Brunei Darussalam's dual legal system is based on the English Common Law, with a parallel Syariah legal system. The Supreme Court comprises of the Court of Appeal and the High Court. The Subordinate Courts comprises of the Courts of Magistrates. These courts have competence over all criminal and civil matters, commercial matters such as bankruptcy and companies' winding up, as well as over matters of personal status of non-Muslims. The Syariah Courts consists of Syariah Appeal Court, the Syariah High Court and the Syariah Subordinate Court. These courts have such jurisdiction, powers, duties and authority as are conferred by the Syariah Courts Act (Cap 184) as well as any other written law. The Syariah Courts have both criminal and civil jurisdiction. In its criminal jurisdiction, the Syariah High Court has the power to try any offence punishable under any written law creating Syariah criminal offences, relating to Islamic family law or conferring on the Syariah High Court jurisdiction to try any offence. In its civil jurisdiction, it hears and determines all actions and proceedings relating to Islamic matrimonial and family matters, including maintenance of dependents, guardianships, wills and any other matters in respect of which jurisdiction is conferred under any written law.

## C. Human Rights Instruments to which Brunei Darussalam is Party to

### Brunei Darussalam is party to the following human rights conventions:

- (1) Convention on the Rights of the Child (CRC)<sup>41</sup>
- (2) Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>42</sup>
- (3) Convention on the Rights of Persons with Disabilities (CRPD)<sup>43</sup>
- (4) Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography<sup>44</sup>
- (5) Optional Protocol to the CRC on the Involvement of Children in Armed Conflict<sup>45</sup>

Articles 37 and 40 of the Convention on the Rights of the Child guarantee the right of the child to access to justice and legal assistance. The right of access to justice for women is also essential to the realization of all the rights protected under Convention on the Elimination of Discrimination Against Women. Article 13 of the Convention on the Rights of Persons with Disabilities guarantees the rights of persons with disabilities to effective access to justice on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

As a member state of the United Nation and ASEAN, Brunei Darussalam also adheres to the United Nations Declaration on Human Rights (UDHR) and the ASEAN Human Rights Declaration (AHRD).

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<sup>41</sup> Brunei acceded to CRC on 27 December 1995

<sup>42</sup> Brunei acceded to CEDAW on 24 May 2006

<sup>43</sup> Brunei ratified the CRPD on 11 April 2016

<sup>44</sup> Brunei acceded to the Optional Protocol on 21 November 2006

<sup>45</sup> Brunei acceded to the Optional Protocol on 17 May 2016

## II. Legal Aid in General

### A. Background

Similar to most countries, legal aid in Brunei Darussalam is solely funded by the State and administered by the civil court. Currently, legal aid is provided to defendants facing capital charges regardless of their citizenship status. This is in pursuant to the Chief Justice's Practice Direction Circular No. 10 of 1997. Capital charges in Brunei Darussalam include the offences of murder, drug trafficking and possession of firearms.

Under the Practice Direction issued by the Chief Justice, all legal aid are administered and managed by the Chief Registrar of the Supreme Court. As such, any approval for legal aid shall be granted by the Chief Registrar.<sup>46</sup> Any person appointed by the Chief Registrar to defend in a capital case is personal to him/herself and therefore, should not be assumed by other persons even within the same law firm. In order to ensure that the defendants are fairly represented, such appointed person will have at least more than five years practice, whether in Brunei Darussalam or elsewhere.<sup>47</sup> Under the Practice Direction, no member of the legal profession shall refuse such appointment made by the Chief Registrar to defend in a capital case, except for good reason and to his/her satisfaction.<sup>48</sup>

If a defendant is committed on a capital charge, the person appointed will continue to represent the defendant (and receive the appropriate fee thereof) even if the charge is reduced to one which is not capital. Appointment to defend in a capital charge will include any charges which are tried with it.<sup>49</sup>

However, the provision of legal aid is subject to certain conditions and legal representation. Defendants when applying for legal aid have to undergo an examination of their financial means and if it is assessed that the defendants clearly could not afford their own counsel, legal representation would be appointed for them by the court.<sup>50</sup>

Based on statistics gathered for the past 10 years, 19 applications were granted for legal aid with a sum of about \$318,170.00 having been paid out to legal representatives under the scheme.<sup>51</sup>

### B. Payable Fee under the State-Funded Legal Aid

The following fees will be payable to lawyers engaged in defended an accused person who is in receipt of legal aid<sup>52</sup>:

#### High Court

Getting up fee	-	B\$7,000.00
Attending Pre-Trial Reviews	-	B\$300.00
Brief fee for first day of trial	-	B\$1,300.00
Refresher for each day or part of a day after the first	-	B\$700.00

<sup>46</sup> Supreme Court Circular ref SC/AD/G/42 to all Practising Advocates in Brunei Darussalam.

<sup>47</sup> Chief Justice's Practice Direction Circular No. 10 of 1997

<sup>48</sup> Chief Justice's Practice Direction Circular No. 10 of 1997

<sup>49</sup> Chief Justice's Practice Direction Circular No. 10 of 1997

<sup>50</sup> The Honourable Chief Justice Dato Seri Paduka Haji Kifrawi bin Dato Paduka Haji Kifli's speech at the Opening of Legal Year 2016.

<sup>51</sup> Ibid.

<sup>52</sup> Supreme Court Circular No. 3 of 2001 to all the Members of the Legal Profession in Brunei Darussalam.

### Court of Appeal

Getting up fee	-	B\$2,500.00
First day of Appeal	-	B\$1,300.00
Refresher for each day after the first	-	B\$700.00
Petition for Clemency	-	B\$700.00

Although there is no cap on the amount liable to be claimed, remuneration for counsel appointed on legal aid is governed by Circular No.3 of 2001 issued by the then Chief Justice. The assigned counsel is paid in accordance with fixed tariffs. Appearance fees for a trial day, for example, are set at a maximum of \$700.

As the remuneration paid by the State is relatively modest compared to the rates usually charged in non-legal aid cases, taking cases on legal aid is usually perceived as a public service.<sup>53</sup>

**Table 2: Statistics of Legal Aid for Capital Cases**

Year	2000	2001	2002	2003	2004	2005	2006	2007
Granted	6	1	0	3	1	7	0	5

Year	2008	2009	2010	2011	2012	2013	2014	2015
Granted	2	2	1	3	3	3	Nil	Nil

The total number of legal aid cases from 2000-2015 is 37.<sup>54</sup>

### C. Court Assistance in Undefended Cases

As the availability of legal aid is limited only to capital cases, defendants in serious criminal cases which imposes hefty penalties, such as lengthy imprisonment and corporal punishment, the Court may in its discretion, at the close of the evidence of any prosecution witness or at any stage prior to the closure of the case for the prosecution, assist the accused person and question the accused as to his defence and as to whether or not he wishes to challenge or supplement any part of the prosecution evidence.<sup>55</sup>

## III. Legal Aid Service Providers

Other than State-funded legal aid, there is currently two avenues to obtain free legal advice as well as subsidized or pro-bono legal service made available from non-government organisations, namely the Law Society of Brunei Darussalam and the Majlis Kesejahteraan Masyarakat (MKM) or Brunei Council on Social Welfare.

- a) **Law Society of Brunei Darussalam** was established in 2003 in accordance with the Legal Profession (Law Society of Brunei Darussalam) Order. Its objectives, amongst other things, are to maintain and

<sup>53</sup> Junaidi, Y (2016). Should Legal Aid be extended to non-capital criminal cases in Brunei Darussalam?

<sup>54</sup> <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Statistics.aspx>

<sup>55</sup> Section 220 of the Criminal Procedure Code



improve the standards of professional conduct and learning within the legal profession, to facilitate the acquisition of legal knowledge by members of the legal profession, to assist the Government and the Courts in all matters relating to the law and to establish a library housing law books and reports to help facilitate knowledge building within the profession.<sup>56</sup>

The Law Society members consist of all advocates and solicitors in private legal practices who possess a valid practicing certificate, and they will remain as members for as long as they hold one. As of 2016, there were 35 law firms in Brunei Darussalam.<sup>57</sup> A total of 107 advocates are currently issued with a Practising Certificate by the Supreme Courts.<sup>58</sup>

The Law Society launched their Legal Clinic in 2012 where the public can seek legal consultation on civil, criminal and Syariah (Islamic Law) matters. The legal clinic operates every first Saturday morning of the month. Free legal advice is being offered to those whose monthly income is below B\$750 threshold. The monthly legal clinic is conducted on rotation between the law firms.<sup>59</sup>

- b) **Majlis Kesejahteraan Masyarakat (MKM) or Brunei Council on Social Welfare** (a registered society) launched its Legal Advice and Advisory Clinic on 8 March 2013.<sup>60</sup> This clinic is a community outreach program for socially and economically disadvantaged members of the community to help promote and protect their legal rights and enhance their access to justice.

MKM's Legal Advice and Advisory Clinic aims:

- To provide free legal advice to victims and in deserving cases to provide subsidized legal service or whenever possible on a pro bono (free) basis.
- To promote better protection for victims or survivors of unfair treatment.
- To educate the disadvantaged members of the community about their legal rights and how to protect and claim for breaches of those rights.
- To educate the disadvantaged members of the community how to gain access to Government Welfare Services and other agencies offering such services.

The Clinic offers the following services:

- (i) **Legal Advice:** Two (2) free consultations and legal advice per client will be given to deserving clients who meet MKM's eligibility criteria. The lawyer attending to clients will also, in appropriate cases, advise MKM to write to those person or persons who have breached the client's rights to cease the breaches and to make compensations. The lawyer will also provide a brief opinion to MKM on the merit of the client's case to commence legal proceedings. The areas in which MKM will assist clients are:

- i. Domestic Violence
- ii. Divorce and Settlement
- iii. Property Legal Disputes

<sup>56</sup> Section 4 of the Legal Profession (Law Society of Brunei Darussalam) Order

<sup>57</sup> <http://judiciary.gov.bn/SJD%20Images/Law%20Firms%202016.pdf>

<sup>58</sup> <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Practising%20Certificates.aspx>

<sup>59</sup> Borneo Bulletin website at <http://www.brudirect.com/index.php/Local-News/legal-advice-clinic-by-the-law-society-of-brunei-darussalam-for-the-year-2012-2013.html>.

<sup>60</sup> <http://www.mkmborneo.com/#!about1/c1vcd>

- iv. Sexual Assault
- v. Salary Disputes

(ii) **Legal Services:** In deserving cases, MKM will appoint a lawyer from their panel of lawyers to take up cases to the Syariah or Civil Courts on a subsidized or pro bono (free) basis as determined by the MKM Legal Committee.

(iii) **Advisory:** MKM members will provide assistance to deserving clients in the following matters:

- Access to Government welfare and religious services
- Forms (obtaining, filling-in)
- Access to counsellors
- Access to legal aid and litigations (for cases requiring more than what are offered by the Clinic)
- Access to education welfare for the children. Eligibility requirements set by the Law Society of Brunei Darussalam is that the person must have a monthly income of less than B\$560.

Socially and economically disadvantaged members of the Community are the target clients of the Legal Clinic. MKM Officers will assist in determining the status of women through a preliminary screening prior to meeting the legal expert. The eligibility guidelines for legal advice provided by the MKM are as follows:

(a) For Free Advisory Services

Clients must be a resident of Brunei Darussalam who is in need of advisory services that is provided by MKM.

(b) For Free Legal Consultation and Advice

- a. Clients must be a resident of Brunei Darussalam and
- b. Client's total family income divided by the total member of the family shall not be more than B\$400.00 per family member.

(c) For Subsidized or Pro Bono Legal Services

MKM's Executive Members shall consider, in their monthly meetings, on a case to case basis, the cases in which the lawyers had given their opinion as deserving of commencing legal proceedings. MKM will be guided by the means of the client to commence legal proceedings and the merits of the case in deciding if MKM is willing to assist in the form of a pro bono basis or on a subsidized basis. MKM, where applicable, will also determine the amount of subsidy that will be given.

**Table 3: Statistics of cases received by MKM<sup>61</sup>**

Since its launching in 2013, MKM has received quite a number of cases, some of which have proceeded to court. However, most of the cases were resolved through consultations with the relevant stakeholders.

Year	2013	2014	2015	2016	2017
Cases received	40	44	108	89	64
Legal Proceedings	13	5	12	8	6

## IV. Analysis

### Issues and Challenges

The present state of legal aid presents many issues and challenges which includes the following:

- **Legal aid available at trial stage only.** Since legal aid is only made available at trial and appeal stages, this may result in the lack of representation during the pre-trial stage. Eventually, it may lead to the defendant to make incriminatory admissions to the disadvantage of his subsequent defence or even to make a guilty plea.<sup>62</sup> The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (“UN Principles and Guidelines”) require states to ensure “that effective legal aid is provided promptly at all stages of criminal process including all pre-trial proceedings and hearings.”<sup>63</sup>
- **Legal aid for capital offences only.** Since legal aid representation does not include non-capital offences, it is dependent on the private lawyers to contribute voluntarily to take up such cases. However, the extent to which they are willing to contribute is only to offer legal advice and not represent the defendant in trial proceedings. Since the bulk of the cases received by the MKM Legal Clinic are from women in matrimonial disputes, it is evident that a large proportion of vulnerable women face obstacles in obtaining redress for violation of their rights.
- **Shortage of lawyers providing legal aid service.** The current president of the Law Society has always championed for private lawyers to provide legal aid as many could not afford to pay the lawyer’s fee.<sup>64</sup> However, he acknowledged that implementing legal aid will be a challenge owed to the fact that only a handful of private lawyers specialise in criminal practice. With such a small number, plans of expanding legal aid to cover other serious cases would indeed pose a challenge. Furthermore, due to their limited experience in criminal practice, it may also affect the quality of the legal advice.
- **Lack of public awareness.** There is also a lack of a formal structure to the existing legal aid system. The lack of publicity on legal aid services results in “people not knowing where to find legal aid.” There is no clear information available to the public who wish to seek free legal advice. Private firms who provide a legal aid clinic will conduct such services in their own office space.

<sup>61</sup> Based on interview with Datin Paduka Hjh Intan Bin Haji Mohd Kassim on Monday, 9th October 2017

<sup>62</sup> Junaidi, Y (2016). Should Legal Aid be extended to non-capital criminal cases in Brunei Darussalam?

<sup>63</sup> [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

<sup>64</sup> <https://www.raradvocates.com/single-post/2016/01/11/Law-society-pushes-for-legal-aid>

- **Limited funds for legal aid.** Although there is no cap on the amount that lawyers can claim for their services on legal aid cases, such remuneration is still subject to the availability of funds allocated by the State for legal aid cases at the beginning of each financial year.
- **Indemnity issues** seem to also play a part in the unwillingness of private lawyers to grant legal aid. As non-government practitioners, private lawyers would be more vulnerable to litigation for wrongful advice given. Thus, it seems best for them to just avoid providing legal aid or clinics for fear of being caught in such situations.

With the increasing number of court cases by the year, these factors seem to pose further challenges to the current legal aid system. Providing legal aid services within the current structure would pose a challenge to legal services in Brunei Darussalam.<sup>65</sup>

## V. Conclusion

The success of any legal aid service depends largely on the participation of lawyers and motivation for them to offer their services. Increasing the budget allocation for legal aid in order to match the legal fees, which private lawyers would typically charge to paying clients, is not a viable solution in the long term as it would financially burden the State. Another approach is to encourage private lawyers to take on legal aid cases on a voluntary basis by introducing various incentives for legal aid practitioners.

Imposing a mandatory requirement on private lawyers to provide a minimum number of man hours of legal pro-bono work as a pre-condition for the issuance of practicing certificates could also be considered as an option. This may involve reviewing the current laws in order to ensure legal aid is mandatory and also to address the scope of applicability of legal aid and thereby ensure it is readily available to persons with limited means as is present in some countries.<sup>66</sup>

Alternatively, the Government may also wish to consider engaging in partnerships with other non-State legal aid providers.<sup>67</sup> The role of non-State actors, such as universities, in providing legal aid services to meet the needs of the population should be recognised. For example, the local university<sup>68</sup> can weave pro-bono legal work into its law syllabus, through introducing it as one of the optional modules or basing their dissertations on issues arising from the real-life cases upon which they have advised. This, in itself also gives a chance for these law students to gain valuable experience and bolster their CVs. However, a monitoring and supervisory mechanism needs to be put in place to ensure the quality of the legal aid service is not to be compromised at any cost.

As highlighted earlier, the legal aid is currently being administered and managed by the Chief Registrar of the Supreme Court; another plausible consideration is for the establishment of a separate body that oversees, administers and funds the legal aid. They may also coordinate with the stakeholders such as non-governmental organisations or the Law Society. With the establishment of such a body it may also be possible to expand the scope of legal aid to other offences or even to other private actions such as family law cases.

<sup>65</sup> Interview conducted with Haji Rozaiman, President of the Law Society of Brunei Darussalam on 8th September 2017.

<sup>66</sup> For example, in Singapore and Malaysia

<sup>67</sup> Guideline 16 in the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

<sup>68</sup> Universiti Islam Sultan Sharif Ali, Brunei Darussalam

## I. Country Background

Cambodia is a country located in the South East Asia with the total land area of 181,035 square kilometers which divided into one Capital and 24 Provinces, 26 cities, 12 khan, 159 districts, 227 sangkat, 1406 communes and 14119 villages. The population is 15.84 million people.<sup>70</sup> It has the borders with Thailand and Laos in the north, with Viet Nam in the east and southeast and with the Thailand Ocean in the west.

After receiving independence from the French Colony in November 9, 1953, Cambodia has passed through its history as follows:

- From 1953 to 1970: Cambodia was ruled by the constitutional monarchy, with Preah Bat Norodom Sihanouk Varamana as the king and the head of State.
- From 1970 to 1975: Prince Sihanouk was deposed by coup d'état led by Marshal Lon Nol in March 18, 1970, which was backed by the United States of America. Lon Nol turned Cambodia into the Khmer Republic. However, the country was under civil war between Lon Nol's government and Khmer rouge communist rebel; then, it fell down during the Indochina war with the United States.
- From 1975 to 1979: The Khmer Rouge defeated Lon Nol's regime in April 17, 1975 and established a communist state, Democratic Kampuchea, led by the Khmer Rouge Regime/Genocide Regime, which destroyed the country's economy, culture, religion and legal court system. Moreover, under its harsh dictatorship, more than 2 million innocent people were killed during a period of 3 years, 8 months and 20 days.
- From 1979 to 1991: the Khmer Rouge regime fell down to the Cambodian Liberation Front troops with support by Vietnamese troops in January 7, 1979. The People's Republic of Kampuchea regime was established. This regime changed into the State of Cambodia after the withdrawal of Vietnamese troops from Cambodia in 1989. Since 1979, Cambodia was ruined by civil war between the Phnom Penh Administration and the triangle party guerrillas consisting of the Khmer Rouge and two other non-communist guerillas.
- October 23, 1991: The Paris Peace Agreement was signed by 20 countries including Cambodia. The United Nation Transitional Authority in Cambodia (UNTAC) was set up in Cambodia in 1992 in order to monitor the implementation of the agreement and helped organize the national election in Cambodia on May 23-28, 1993, even though it did not have the participation of the Khmer Rouge group.
- September 24, 1993: a new constitution was adopted by a Permanent Committee of the National Assembly in the first session on 30 June 1993. This constitution was promulgated in public by the King through Royal Kram on 24 September 1993. The Kingdom of Cambodia was established. In the same year, UNTAC withdrew from Cambodia after the successful preparation of the national election. Cambodia still experienced fighting with the Khmer Rouge rebels until 1998.
- 1998: the civil war in Cambodia ended through the win-win policy of Samdach Techo Hun Sen, Prime Minister of the Kingdom of Cambodia.

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<sup>69</sup> Research was prepared by H.E. Katta Orn, Member of Cambodian Human Rights Committee of the Royal Government of Cambodia.

<sup>70</sup> Summary report on the major achievements of the Royal Government of Cambodia in 2012-2016.

## A. Administrative Division

### 1. Political System

Cambodia is a Kingdom with a King who shall rule according to the constitution and to the principals of liberal democracy and pluralism. Cambodia adopts a policy of permanent neutrality and non-alignment, and follows a policy of peaceful co-existence with its neighbors and with all other countries throughout the world.<sup>71</sup> Khmer citizens are the masters of their country. They choose their representatives through free and fair elections. Citizens exercise their powers through the Senate, the National Assembly, the Royal Government and the Court.

### 2. The Senate

The Senate was established in 1999 which exercises its legislative functions to approve a draft law passed by the National Assembly. After the Senate approves the draft law, the draft law is submitted to the Constitutional Council for constitutional review; afterwards, the Constitutional Council submits that law to the King for signing to promulgation. The senate has 61 senators in the senate election in 2012 and will increase to 62 senators in the Senate election in January 2018. Two senators are nominated by the King and 2 others are nominated by the National Assembly. Those in the Senate are elected every six years through indirect suffrage by representatives of the National Assembly and members of the commune/sangkat council.

### 3. The National Assembly

The National Assembly was established in 1993 after the first national election in Cambodia. The National Assembly exercises its legislative functions in doing draft laws and in adopting laws submitted by the Royal Government. After the National Assembly adopts a draft law, the National Assembly submits that law to the Senate. In the case that the Senate disapproves that law, the Senate sends it back to the National Assembly to reviewing that law again, and then submits it to the Constitutional Council.

The National Assembly has 123 representatives in the national election in 2013 and will increase to 124 representatives in the national election in July 2018. Representatives come from the victorious political parties in the national election and who are elected by citizens who are at least 18 years and every five years through universal and direct suffrage.

### 4. The Royal Government

The Prime Minister heading the Government is a member of the National Assembly coming from the victorious political party in the national election. Others governmental members are chosen from among the National Assembly members or from outside of the National Assembly. They are all appointed by the King after receiving the confirmation vote from the National Assembly.<sup>72</sup> All members are collectively responsible to the National Assembly for the general politics of the government. Each member is also individually responsible to the Prime Minister and National Assembly for their own personal conducts.<sup>73</sup>

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<sup>71</sup> Article 1 of the Constitution of Cambodia.

<sup>72</sup> Article 116 (new) of the Constitution of Cambodia

<sup>73</sup> Article 121 (new) of the Constitution of Cambodia

The territory of the Kingdom of Cambodia is divided into the capital city, provinces, municipalities, districts (srok/khan) and communes (khum/sangkat)<sup>74</sup> which shall be governed by the law on the administrative management of the commune and the law on administrative management of capital, province, municipality and district. The central administration of government is called the national administration (ministries and other national institutions located in the capital), and the lower administration of government is called the sub-national administration (capital, provinces, municipalities, districts and communes). The capital, provinces, municipalities, and districts are administered by the governor commission and either capital, provincial, municipal, district, or khan council.

The governor commission has one governor and some vice governors who are nominated by the Minister of the Ministry of Interior and by the Prime Minister every four years. Members in the Capital Council, Provincial Council, Municipal Council and District Council are elected every five years by members of the commune council.

The commune is administered by a commune council whose members are elected every five years by inhabitants of the commune. The commune council is a centralized local administration which has the power to govern the territory under its jurisdiction provided by law.<sup>75</sup>

The village is the lowest administrative unit of the country. The village is administered by the chief-of-village who is elected by the commune council.

## 5. The Judiciary

The judiciary is one of the three supreme state bodies and is a sole body that exercises judicial power. The judiciary is an independent power that shall be impartial and protects the rights and freedom of citizens. The judiciary shall consider all legal cases including administrative cases.<sup>76</sup> This power shall be vested in the Supreme Court and in all courts of all sectors and levels. Only judges shall have the rights to adjudicate. A judge shall fulfill this duty wholeheartedly and conscientiously, with strict respect for the laws. The judicial power shall not be granted to any legislative or executive body. The King is the guarantor of the independence of the judiciary, and the Supreme Council of Magistracy shall assist the King in this matter.

## B. Population

According to the report on the major achievements of the Royal Government of Cambodia in 2016, the population of Cambodia in 2016 is 15.848 498 million people. In 2013, the total population of Cambodia was 14.68 million compared to the census count of 13.40 million in 2008. In absolute terms, Cambodia's population has increased by 1.28 million during the half decade from 2008 to 2013.<sup>77</sup>

The population growth rate is 1.54 percent. According to a study of the Ministry of Planning in 2013, the proportion of the poor in the general population is 17.9%, with 15.3% living in Phnom Penh, 13.5% living

<sup>74</sup> Article 30 and 31 of the Law on the administrative management of Commune/Sangkat

<sup>75</sup> Article 1, 4 and 9 of the Law on the administrative management of Commune/Sangkat

<sup>76</sup> Article 128 (new) of the Constitution of Cambodia

<sup>77</sup> Cambodia Inter-Censal Population Survey 2013 Final report, March 3-6, 2013, available at [http://countryoffice.unfpa.org/Cambodia/drive/CIPS\\_Report\\_English\\_Final.pdf](http://countryoffice.unfpa.org/Cambodia/drive/CIPS_Report_English_Final.pdf). (last accessed November 26, 2015)

in other urban areas, and 19.0% living in rural areas. The population living under the poverty line is less than 5%.<sup>78</sup>

The population of Cambodia is composed of 19 ethnic groups living in various provinces. The Khmer is the predominant population, comprising 98.66% of the total population. The rest, 1.34% of the total population, is indigenous minorities composed of 18 ethnicities living in 15 provinces located in the mountainous areas and coastal areas.<sup>79</sup>

### C. Justice Actors

The judicial system in Cambodia has changed and evolved with different regimes over the past six decades. During the period of French colonization from 1863 to 1953, the Cambodian Judiciary was structured based on the French civil law system. Then in 1975, the communist Khmer Rouge took over the country. During that time, the old legal system was abolished and the country was ruled by terror. There was no legal education, no court system and no lawyers. People were arbitrarily sentenced by the communist cadres at their will in all levels of administration, from the local up to the national administrations in which intellectuals were among those targeted by the regime for elimination. Cambodia lost the majority of its legal professionals during this period. After the collapse of Khmer Rouge regime on 7 January 1979, there were only 6 jurists who had survived from the killing fields.

From 1979 to 1993, in setting up the state of Democratic Kampuchea (DK), which was reestablished following the toppling of the DK regime, the country's legal institutions are still in the process of transition.<sup>80</sup> The legal system was reinstated by the government. The provincial court (the court of first instance) was established in 1983 by the law on the organization of the court and the office of the public prosecutor. Under this law, a network of courts was extended to each province and municipality, and the People's Supreme Court was created as the highest court of the land.<sup>81</sup> The Supreme Court and the prosecution office at the Supreme Court were established in 1985.<sup>82</sup> There were no lawyer to defend the accused during trials, but a group of lay people formed to assist the accused in court.

The courts were re-organized into three-tier courts with the arrival of the United Nations Transitional Authority in Cambodia (UNTAC) in 1992. The three-tier courts consist of the court of first instance (provincial/municipal court and the military court), the appeal court and the Supreme Court.<sup>83</sup> Currently, the total number of judges and prosecutors in the whole country is 600 people.<sup>84</sup>

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<sup>78</sup> Poverty line is defined as affordable daily consumption expenditure per person at national average of 3,871 riels (or US\$ 0.96). "Poverty in Cambodia." Ministry of Planning Cambodia, April 2013. Available at <http://www.mop.gov.kh/Projects/tabid/148/Default.aspx>. (last accessed November 26, 2015)

<sup>79</sup> The Rights of Indigenous Peoples in Cambodia. "United Nations Committee on the Elimination of Racial Discrimination, 76<sup>th</sup> session 2010. available at <http://www.elaw.org/system/files/Society+submission>"

<sup>80</sup> Holligan, Jennifer, Abdulhak, and Tarik. "Overview of the Cambodian History, Governance and Legal Sources." Globalex available at <http://www.nyulawglobal.org/globalex/cambodia.htm> (last accessed November 26, 2015)

<sup>81</sup> Ibid.

<sup>82</sup> Ministry of Justice, Collection of Legal Texts, Law on the Establishment of the People's Supreme Court and the People's Prosecution at the Supreme Court, (1985). (6, 1987)

<sup>83</sup> Holligan, et. al., supra note 13.

<sup>84</sup> The Annual Report of the Ministry of Justice in 2016.



**Table 4: The number of judges and prosecutors in the whole country**

Year	1993	2003	2013	2017
Judges and Prosecutors	100	200	400	600

### **1. The Supreme Council of Magistracy**

The Supreme Council of Magistracy is a constitutional body that guarantees the independence of the judiciary. According to the Article 4 of the law on the organization and functioning of the Supreme Council of Magistracy<sup>85</sup>, the composition of the Supreme Council of Magistracy has 11 members under the royal presidency of His Majesty the King who consist of: Minister of the Ministry of justice, President of the Supreme Court, Prosecutor General of the Supreme Court, one member elected by the Senate, one member elected by the National Assembly, one member elected by the Constitutional Council, one member designated by the Minister of Justice, one member elected by all judges of the high court, one member elected by all prosecutors of the high court, one member elected by all judges at the court of first instance, and one member elected by all prosecutors at the court of first instance. All members of the Supreme Council of Magistracy shall be appointed by the royal decree of the King.

The Supreme Council of Magistracy shall decide and submit requests to His Majesty the King regarding appointments, transfers, discharges, suspensions, and removals of title for all judges and also of title for all prosecutors upon request from the Minister of Justice. The Supreme Council of Magistracy shall have a General Secretariat under the central administration of the Ministry of Justice to serve in support of its function.

### **2. The Supreme Court**

There is only one Supreme Court located in Phnom Penh. The Supreme Court is divided into two sections, which are the Supreme Court and the General Prosecution office attached to the Supreme Court. The Supreme Court shall be comprised of president, vice-president, judges, court clerks, administrative official and other legal experts. The General Prosecution office attached to the Supreme Court shall be comprised of the prosecutor general, deputy prosecutor general, prosecutor, court clerks, administrative official and other legal experts.

The General Administrative Secretariat of the Supreme Court was established by the Ministry of Justice in order to support administrative works for the Supreme Court and the General Prosecution office attached to the Supreme Court. The Supreme Court shall be comprised of specialized chambers such as Criminal Chamber, Civil Chamber, Commercial Chamber and Labor Chamber. If necessary, other specialized chambers may be established by Royal Decree. Each chamber shall be comprised of president of the chamber, judges, and court clerks. Each chamber issues decisions shall be made by a panel of five judges, one of whom is the president.

The Supreme Court has competencies to precede hearings of the grievance complaints against the judgment of the appeal court by considering only the erroneous standard of law, but not facts. In case

<sup>85</sup> The Law on the Organization and Functioning of the Supreme Council of Magistracy, which was approved by the National Assembly on 23<sup>rd</sup> May 2014.

of the lawsuit where there is a second grievance complaint submitted, such court shall proceed with a hearing in a joint group by considering at the same time both erroneous standard of law as well as of facts. The decision of the Supreme Court has an absolute power, which means further complaints could not be made, except in the case of revised complaints in crime cases.

### **3. The Court of Appeal**

The Appeal Court is the Court of second degree. There is currently only one Appeal Court located in Phnom Penh. The Royal Government has been working to establish some regional Appeal Courts in some provinces. The Appeal Court is divided into two sections, which are the Appeal Court and the General Prosecution office attached to the Appeal Court. The Appeal Court shall be comprised of president, vice-president, judges, court clerks, administrative official and other legal experts. The General Prosecution office attached to the Appeal Court shall be comprised of the prosecutor general, deputy prosecutor general, prosecutor, court clerks, administrative official and other legal experts.

The General Administrative Secretariat of the Appeal Court was established by the Ministry of Justice in order to support the administrative works for the Appeal Court and the General Prosecution office attached to the Appeal Court. The Appeal Court shall be comprised of specialized chambers such as Criminal Chamber, Civil Chamber, Investigating Chamber, Commercial Chamber and Labor Chamber. If necessary, other specialized chambers may be established by Royal Decree. Each chamber shall be comprised of president of the chamber, judges, and court clerks. Each chamber issues decisions which shall be made by a panel of three judges, one of whom is the president.

The Appeal court has competency to hear appeals against judgments of the court of first instance by opening access for grievance complaints on further facts and laws.

### **4. The Court of First Instance**

The Court of First Instance is the first-level court which is situated in Phnom Penh and all provinces. The Court of First Instance is divided into two sections which are the Court and the Prosecution office attached to the Court of First Instance. The Court of First Instance shall be comprised of president, vice-president, judges, court clerks, administrative official and other legal experts. The Prosecution office attached to the Court of First Instance shall be comprised of the prosecutor, deputy prosecutor, court clerks, administrative official and other legal experts.

The Administrative Secretariat of the Court of First Instance was established by the Ministry of Justice in order to support administrative works for the Court of First Instance and the Prosecution office attached to the Court of First Instance. The Court of First Instance shall be comprised of specialized Courts such as Criminal Court, Civil Court, Commercial Court and Labor Court. If necessary, other specialized Court of First Instance may be established by Royal Decree. Each specialized court shall be comprised of president, judges, and clerks, and can independently issue decisions in its jurisdiction in the name of the Court of First Instance to which it belongs.

The Court of First Instance is a general court, which has jurisdiction to adjudicate all cases, except where a case is under the jurisdiction of a special court or extraordinary court, which is established by separate law.

The following are criminal and civil cases resolved by the Court of First Instance from 2012-2016.<sup>86</sup>

**Table 5: Criminal cases resolved by municipal/provincial courts from 2012 to 2016**

Year	2012	2013	2014	2015	2016	Total
Old	4904	6062	6957	7337	9172	34432
New	6724	8274	5552	11446	15237	47233
Resolved	5292	8079	5012	10172	12588	41143
Resolving	6336	6257	7497	8611	11821	40522

**Table 6: Civil cases resolved by municipal/provincial courts from 2012 to 2016**

Year	2012	2013	2014	2015	2016	Total
Old	6736	6876	6481	7178	9004	36275
New	3920	4419	5850	5120	17237	34546
Resolved	3780	4814	5153	3294	12420	29461
Resolving	6876	6481	7188	9004	11821	41360

## 5. The Military Court

The Military Court is located in Phnom Penh and is a court of first instance that has exclusive jurisdiction over cases committed by military personnel involving military offences (violation of duties, misconduct, etc.) and any offenses affecting the property of the armed forces. Ordinary offences (such as murder, robber, etc.) committed by military personnel are under the regular jurisdiction of the provincial and municipal courts. The military court is administratively, financially and logistically under the Ministry of Defense.

## 6. Extraordinary Chambers in the Courts of Cambodia (ECCC)

The ECCC is a hybrid court and was established by the law on the establishment of the ECCC on 10 August 2001 and supplemented by the international agreement between the Royal Government of Cambodia and the United Nations on 6 June 2003. Thus, the ECCC is a domestic court with the participation of the international community, both in terms of human resources and budget. It has exclusive jurisdiction to bring to trial all the offences committed during the period from 17 April 1975 to 6 January 1979. The ECCC's mandate is to bring to trial senior leaders of the Khmer Rouge and those who are most responsible for the crimes and serious violations of Cambodian panel law, international humanitarian law and custom as well as violations of international conventions recognized by Cambodia.

The ECCC started its operation in 2006, focusing on issues relative to functioning and procedures before commencing with the hearing of case 001. Currently, ECCC has ended the jurisdiction in case 001 and case 002/01, and has been continuing its jurisdiction process in case 002/02, case 003 and case 004.

<sup>86</sup> Summary report on the major achievement of the Royal Government of Cambodia in 2012-2016.

## II. Legal Aid in General

### A. Legal Basis

Article 31 of the Constitution<sup>87</sup> stated that “the Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nation Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women’s rights and children rights. Khmer citizens shall be equal before the law, enjoying the same rights and freedom and obligation regardless of race, color, sex, language, religious, belief, political tendency, national origin, social status, wealth, or other status. The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law.. Through this article, Cambodia has signed nine international conventions and covenants on human rights in which eight international conventions and covenants were ratified.

Article 149(3)(d) of the International Covenant on Civil and Political Rights<sup>88</sup> stated that “to be tried in his presence, and to defend him/herself in person or through legal assistance of his/her own choosing; to be informed, if her does not have legal assistance, of this rights; and to have legal assistance assigned to him/her, in any case where the interests of justice so required, and without payment by him/her in any such case if he/she does not sufficient means to pay for it.”

Article 38, paragraph 7 of this constitution also provides the basic rights of an accused person to defend him/herself in court. It means that any person who is charged in acriminal case or in dispute in a civil case has the right to defend his/her case in court.

According to Article 301 of the Criminal Code<sup>89</sup>, the assistance of a lawyer is compulsory if:

- The case involves a felony;
- The accused is a minor.

If the accused has not selected a lawyer, a lawyer shall be appointed upon the initiative of the court president in accordance with the provisions of the law on the bar.

Due to the provision above mentioned, Cambodia has the obligation to set up an appropriate system to provide legal aid service to the accused person or in criminal case if he/she could not afford to hire a lawyer to defend him/herself. This means that Cambodia has to have adequate law, lawyers and budget to provide legal services to the poor who are charged in criminal cases.

According to the law on the Bar, the accused person may be assisted by a lawyer chosen by him/her, and he/she may also request to have an appointed lawyer for him/her. In addition, minors and accused of crimes may not appear in court without the assistance of a lawyer. In case where the accused person is unable to pay for a lawyer, the Government or the Bar Association must provide them one.

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<sup>87</sup> The Constitution of Cambodia was adopted on 24 September 1993.

<sup>88</sup> ICCPR was ratified by Cambodia on 26 August 1992.

<sup>89</sup> The Criminal Code was adopted On 30 November 2009.

The Bar Association's Fund was established under Article 29 of the Law on the Bar<sup>90</sup>, and this fund is held by the Bar Association of the Kingdom of Cambodia (BAKC), herein after called "BAKC Contribution." For practical purposes, the Bar Fund is divided into three parts: (1) The member of the Bar Association are required to contribute each year to the Bar Fund, (2) The Royal Government of Cambodia allocates a legal aid budget each year, and (3) Other sources of legal aid are provided by the private sector, NGOs or foreign governments. The Bar Fund is dedicated for Bar Association activities, such as providing income to lawyers who defend poor people. Because of the increasing demand for legal aid, on 12 May 2014, the Bar Association adopted a policy requiring its lawyers who were under one year internship, to defend at least 3 poor accused persons per year free of charge.

There are some state institutions and NGOs that employ Cambodian lawyers to protect and promote human rights or to provide legal aid to vulnerable persons. Likewise, this legal aid may be used to prevent mistreatment during detention and to reduce wrongful conviction.

## **B. Evolution of Legal Aid Service**

After the collapse of the Khmer Rouge regime on 7 January 1979, there were only 6 jurists who survived the killing fields. The new government re-established all infrastructures including the judiciary system. In 1983, the court system was reconstructed even though there were no lawyers at that time. However, in criminal cases, especially felony cases, the court appointed lay people to defend the accused. These lay people were called "defenders."

In each provincial court, a list was made of people selected from various sectors of the government to become defenders even though they did not have a law background. These defenders were teachers, government officers, and members of women's associations and youth associations. Before trial, the defenders were called to the court to get the case file with instructions that she/he had to speak before the court. This was a kind of defense arrangement provided. There was no real concept of professional defense or even a legal concept. This method was practiced until UNTAC arrived in Cambodia in 1992.

Based on the principle provided under the UNTAC criminal justice system, especially in felony cases, it was hard to find lawyers to defend the accused in court. There were two reasons: first, there were not any lawyers available and second, the government did not allocate any budget for the legal aid program as required.

In 1994, after seeing this gap, civil society and human rights organizations formed a group of 25 people who were knowledgeable in law and human rights in order to defend the poor who were charged before the courts<sup>91</sup>. This was the first group of activists who later on became lawyers. They received training on both domestic and international laws in criminal defense and provided legal aid service to the poor. This practice operated under the financial support of the United States Agency for International Development (USAID) within the project framework called the Cambodian Defense Project.

One year later, in 1995, a number of lawyers was admitted to the Bar Association of Cambodia under the law on the Bar Statute. The concept of legal aid service became clearer in practice. This law required the Bar Association to provide legal service to the poor free of charge. However, the Bar Association could not fulfill

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<sup>90</sup> Law on the Bar Statute was adopted in 1995. This law regulates legal profession in Cambodia. Only lawyers who are registered in the Bar list has the right to practice law in Cambodia.

<sup>91</sup> "CDP's History." Cambodian Defender Project (CDP). available at <http://www.cdpcambodia.org/content.php?id=48>. (last accessed November 26, 2015).

this obligation because it had no budget and furthermore, the government did provide an adequate budget for this purpose. During that time, most legal services were provided by NGOs.

Currently, legal aid is not specifically defined in any law or regulation. However, legal service providers have usually created their own policies on free legal services including the type of cases they would accept for providing legal services and defining the poor who would qualify for such services.

### III. Legal Aid in Service Providers

There are many legal aid service providers either in public institutions and NGOs in Cambodia, in which most of legal aid services are provided by non-governmental organizations. However, their activities are unstable and limited due to funding constraints. The number of legal aid providers is different every year, as some of legal aid providers are dissolved due to the lack of funding while some others are started. The following are legal aid in service providers who are providing legal services in Cambodia:

#### 1. Ministry of Justice

In the implementation of legal aid service, the Ministry of Justice has provided legal aid to the poor people by the cooperation with the Bar Association through increasing the national budget from 200 million riels in 2013, to 300 million riels in 2014, to 600 million riels in 2017, and to 900 million riels in 2018. In reality, in 2016 the lawyers gave legal aid assistance to poor people in defense cases at all level of courts; there are an average of 1000 cases per year, and legal advice is provided to the poor on an average of 200 cases per year. The Ministry of Justice also created a legal advice mechanism and alternative dispute resolution for people in rural areas and communities by establishing 50 Judicial Service Centers in the grassroot areas in 10 provinces. As a result, it gave the legal advice for 1017 cases in 2014 and 1408 cases in 2015, and conciliated disputes in 1411 cases in 2014 and 2555 cases in 2015.

**Table 7: Criminal complaints resolution of the Ministry of Justice from 2012 to 2016**

Year	2012	2013	2014	2015	2016	Total
Old	34	20	27	52	146	279
New	210	209	192	151	94	856
Resolved	224	202	167	57	95	745
Resolving	20	27	52	146	145	390

**Table 8: Civil complaints resolution of the Ministry of Justice from 2012 to 2016**

Year	2012	2013	2014	2015	2016	Total
Old	36	27	34	68	32	197
New	137	131	177	183	258	886
Resolved	146	124	143	219	206	838
Resolving	27	34	68	32	84	245

## 2. Cambodian Human Rights Committee (CHRC)

The Cambodian Human Rights Committee of the Royal Government of Cambodia was established in 2000.<sup>92</sup> This committee has the following roles and duties:

- Protecting, upholding and developing human rights and democracy in Cambodia by monitoring all acts of human rights violations and processing complaints.
- Investigating the cases or making an assessment of any investigation conducted by the competent institutions or cooperating with the competent institutions, then documenting the investigation and in turn, disseminate the reports to the public, Prime Minister, the courts and relevant institutions.
- Giving advice and draw up action plan on the condition of human rights to the Royal Government of Cambodia in order to improve the respect of the constitution, national laws and international laws.
- Giving legal advice and lawyers, on behalf of the Royal Government, to the poor people or those whose cases have been refused by lawyers.<sup>93</sup>

CHRC has received complaints from 30 to 50 cases per year. In fact, in 2016, CHRC has received 35 complaints, of which 15 were criminal cases, 18 civil cases and 7 cases that are not related to human rights violations.

## 3. Cadastral Commissions

Three levels of land dispute resolution, under the Ministry of Land, are applied including: Municipal/District/Khan Cadastral Commission (MDKCC), Capital and Provincial Cadastral Commission (CPCC), and National Cadastral Commission (NCC).

- MDKCC has duties to conciliate conflicts arising outside adjudication areas, and the conciliation shall be conducted based on customary rules along with cadastral technique.<sup>94</sup> The duration of the investigation is a maximum of 6 months.
- CPCC has duties to conciliate disputes that are outside the MDKCC's jurisdiction and cannot be resolved. If the parties do not agree on the decision of CPCC, parties can appeal to the NCC within 30 working days.
- NCC makes decisions on all cases that cannot be conciliated at lower levels and has full jurisdiction to decide on who is the lawful possessor/owner of land.<sup>95</sup> There are 30 days of judicial review by NCC if the parties disagree with NCC's decision.

## 4. Authority for Land Disputes Resolution

The Authority for Land Disputes Resolution was established in 2006 by the Royal Decree of the King. It has the role to resolve complaints submitted from the National Cadastral Commission and receive any complaints from various institutions and the public. In 2016, the authority has received 86 complaints of which 38 complaints have already been resolved.

<sup>92</sup> CHRC was established by a Royal Decree number NS/RKT/0100/008 on 18 January 2000.

<sup>93</sup> Article 3 of the Royal Decree No. NS/RKT/0100/008 on 18 January 2000.

<sup>94</sup> Article 6 of the Sub Degree on Organization and Functioning of the Cadastral Commission No. 47 ANK.BK. 2002

<sup>95</sup> Ibid. Article 19 and 20.

The member composition of the authority were nominated from line ministries, in addition to 30 volunteer lawyers.

## **5. Civil Office**

The Civil Office, under the Ministry of Interior, was established by sub-decree dated on 8 February 2017. It has the objective to receive and conciliate complaints at the sub-national level (province and district). The Civil Office is led by one chairman and one vice chairman who are elected by the election committee. This Office is divided into two sections: complaint receiving and administration section; and legal and investigation section.

The Civil Office has the roles to:

- Collect and receive complaints
- Control and evaluate complaints
- Resolve complaints by conciliation
- Investigate administrative complaints and raise recommendations to resolve these complaints
- Give back the result of resolution complaints to people
- Disseminate a mechanism of resolving the complaints to the public

## **6. Commune Dispute Resolution Committee (CDRC)**

CDRC, under the Ministry of Interior, was established in all communes and sangkats to deal with civil disputes. The Government of Cambodia has provided a substantial level of autonomy to sub-national levels, so they can better represent the interest of the people. CDRC gives advice and resolve disputes, as well as manage and decrease local conflicts:

- To mediate and conciliate arguments if the parties agree to this
- To disseminate legal information to the local people
- To assist commune councils in the ADR process

## **7. Alternative Dispute Resolution (ADR)**

There are 2 major arbitration institutions in Cambodia: 1) Arbitration Council, for the resolution of collective labor disputes and 2) the National Arbitration Center. A valid arbitration clause, in the context of law, can bar access to the court; however, arbitrating parties have to rely on the judiciary to implement the arbitral award in the event that one of the parties refuses to comply.

On March 2013, Cambodia launched the National Arbitration Center (NAC) with the hope that NAC would boost both local and international investor confidence. A key objective in setting up the NAC is to offer the business community an alternative to the Cambodian court for the resolution of disputes, solving them more quickly, inexpensively and fairly.



## 8. The Bar Association of the Kingdom of Cambodia (BAKC)

BAKC has more than 1000 lawyers. BAKC has received 400 to 500 cases per year, funded by the Ministry of Justice in the project for legal general aid. BAKC has provided legal aid only to the accused in criminal cases in general. They provide advice, counseling, defense and representation in court free of charge. These services are provided in all stages of the criminal proceedings. Their full-time lawyers receive a salary between 600 to 1000 USD. The Bar Association is more restrictive though in that it does not accept human rights and political cases.

BAKC usually gets to represent a client when the judge of a court writes to the president of BAKC requesting that a lawyer be provided to represent the accused. This request is based on a certification made by local authorities that the accused is an indigent. It does not have, therefore, its own policy or criteria for accepting cases.

For legal aid service provided to the poor in 2016, BAKC had 179 lawyers (75 volunteered lawyers and 104 internship lawyers) who gave legal advice in 268 cases, defended the poor at court in 1596 cases, of which 1559 were criminal cases and 37 were civil cases. In total, there were 2321 clients (2131 males, 190 females and 435 minors)<sup>96</sup>.

**Table 9: The number of lawyers in the whole country**

Year	2003	2016
Lawyers	350	1054 (209 women)
Lawyers to the poor		179
Legal aid service		1864 cases

## 9. Non-Governmental Organizations

### a. Action Pour Les Enfants (APLE)

APLE has 2 lawyers, funded by Australian People, in the project for cases involving rape and trafficking cases (minors). APLE has received 20 to 30 cases per year.

### b. Agape International Mission (AIM SWAT)

AIM SWAT has 2 lawyers, funded by USA People in the project for cases involving rape and trafficking (minors). AIM SWAT has received 30 to 40 cases per year.

### c. Cambodian Defender Project (CDP)

CDP has 2 lawyers, funded by Germany, in the project for victims of Khmer Rouge cases at ECCC. CDP has received 5 to 10 cases per year.

<sup>96</sup> Annual Report on the Activities of the Bar Association, October 2016.

**d. Cambodian Center for Human Rights (CCHR)**

CCHR has 12 lawyers, funded by USA through EWMI&TAF, in the project for human rights cases. CCHR has received 5 to 10 cases per year.

**e. Legal Aid of Cambodia (LAC)**

LAC has 24 lawyers, funded by USA through EWMI, Germany through GIZ, Australian people through the Wheeler Foundation, Sweden through PLAN International, England and Demark in the project for human rights cases. CCHR has received more than 1300 cases per year.

**f. Cambodian League for the promotion and Defense of Human Rights (LICADHO)**

LICADHO has 7 lawyers, funded by Diokonia, USA and BMZ in the project for human rights issues, including children's rights, women's rights, land rights and illegal detention (cases related to politics). LICADHO has received 30 to 40 cases per year.

**g. Cambodian Human Rights and Development Association (ADHOC)**

ADHOC has 4 lawyers, funded by EWMI/TAF, Novib, Dikonia, Danida, and DCA in the project for human rights, land rights, women's and children's rights. ADHOC has received 80 to 100 cases per year.

**h. Community Legal Education of Cambodia (CLEC)**

CLEC has 6 lawyers, funded by USA and Australian Aid in the project for human rights, land rights, women's and children's rights. CLEC has received 10 to 15 cases per year.

**i. Cambodia Women Crisis Center (CWCC)**

CWCC has 4 lawyers, funded by EU and USA in the project for women's and children's rights. CWCC has received 200 to 250 cases per year.

**j. International Bridge of Justice (IBJ)**

IBJ has 12 lawyers, funded by EU, USA through EWMI, UN human rights and Australian Aid in the project for general legal aid. IBJ has received 1200 to 1400 cases per year.

**k. Legal Support for Children and Women (LSCW)**

LSCW has 3 lawyers, funded by EU and USA in the project for legal aid lawyers assisting victims of rape, human trafficking and domestic violence. LSCW has received 100 to 150 cases per year.

**l. Anti Human Trafficking and Exploitation (SHISHA)**

SHISHA has 2 lawyers, funded by Australian Aid in the project for rape and trafficking cases (minors). SHISHA has received 30 to 40 cases per year.

The above listed legal aid providers are NGOs that share similar profiles. For instance, Action Pour Les Enfants (APLE), International Mission (AIM SWAT), Cambodia Women Crisis Center, Legal Support for Children and Women (LSCW), and the Anti-Human Trafficking and Exploitation (SHISHA) provide legal advice, counseling, and legal representation free of charge in criminal and civil proceedings, except that APLE and AIM SWAT largely focus on criminal proceedings. The recipients of their services are women and minors, except that SHISHA focuses on minors while CWCC and LSCW both provide legal aid to the accused. The cases that they handle involving women and minors are usually rape and trafficking cases, except that LSCW focuses additionally on domestic violence cases. These services are provided in all stages of the proceedings as requested by the victim-survivors or the accused as the case may be.

Meanwhile, the Cambodian Center for Human Rights (CCHR), the Legal Aid of Cambodia (LAC), the Cambodian League for the Promotion and Defense of Human Rights (LICADHO), the Human Rights and development Association (ADHOC), the Community Legal Education of Cambodia (CLEC) focus on providing legal aid to various criminal and civil cases involving both the accused and the victims with a leaning towards human rights cases, including women's and children's rights. However, CCHR focuses on the victim, particularly on human rights defenders, and focuses more on public interest litigation. They provide advice, counseling and case representation free of charge in all stages of the proceedings at the request of the victims or the accused as the case may be.

The Cambodian Defender Project (CDP) is an NGO which is uniquely set up to provide legal services to victims and civil plaintiffs before the Khmer Rouge Tribunal (ECCC). However, it also handles general legal aid cases involving the accused in criminal cases. It provides advice, counseling and case representation free of charge in all stages of the proceedings.

Each organization interviews the accused or victim to see whether his/her case meets the requirements set up in its case intake policy. This "merit test" varies per organization. If all requirements stated in the policy are met, then, the case is accepted and handled for free charge. All lawyers in these NGOs work full time and they usually receive a salary between 600 to 1000 USD per month.

## IV. Analysis

### 1. Current Environment

The amount of finance available from external donors for legal aid has been in a steady decline for several years. The result is that the number of legal aid lawyers available for general legal aid has been declining and the funds available for new positions are insufficient to entice the more competent lawyers to work in provincial locations. A number of advertisements for the available positions for legal aid lawyers has remained unfilled due to the low salaries. As the global economic changes affect the budgets of all the main donor countries, it is envisaged that this trend of decline will not reverse in the short to medium term.

The Royal Government of Cambodia (RGC) has only a very limited amount of national funds allocated for legal aid service. These funds have been allocated to the Bar Association (BAKC) and relevant ministries. In the year 2017, the RGC provides to BAKC a legal budget, especially for criminal cases, which is approximately 600 million riels (or 150.000 USD) per year to cover costs required for access to justice in all provinces.<sup>97</sup>

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<sup>97</sup> The Annual Report on the Ministry of Justice in 2016.

The limited number of legal aid lawyers is mirrored by the limited number of lawyers in the country, particularly in provincial locations. While most members of the BAKC felt there was a sufficient number of lawyers in the country, this sentiment was not echoed by the majority of non-lawyers who were interviewed. The lack of lawyers has created space for 'fake' lawyers to ply their trade and defraud less educated and less experienced people of their money.

Despite this, there is a high demand for legal aid services. This is partially due to the requirement under the law for persons accused of a felony or a minor accused of any crime to have representation; without representation, such cases are unable to be heard under the Cambodia Criminal Code of Procedures.

Awareness and understanding of the role of lawyers in rural communities appears limited. It has been reported in all the provinces visited that the right to legal representation has been waived on occasions, because the accused either did not understand what a lawyer is or did not believe that a free service exists. Through interviews, people have shown a tendency to use of the services of those who claim to have connection within the justice system. This practice has further increased the number of fake lawyers.

The Royal Government has not yet created a law on legal aid services, even though it plans to do so. The Ministry of Justice, in the name of the Government, is in the process to set up a policy on legal aid services by cooperating with donor countries and relevant stakeholders through holding seminars or workshops.

## **2. Current Practices**

### **NGO Representation**

Most legal aid representation in the country is provided via specialist NGOs. These NGOs rely exclusively upon funding from foreign donors in order to provide legal aid services. The services provided by these NGOs vary, however, and include representation, education, mediation and paralegal services.

Due to the reduced funding from donors, legal aid service providers are required to limit services to pre-identified target groups. This has resulted in a skewing of legal aid services towards areas of interest to donors and away from non-specific legal aid services. This has also the unfortunate side effect of legal aid lawyers being unable to assist clients who do not meet the stipulated criteria, even if the legal aid lawyers are unengaged at the time.

Reduced funding has also impacted the quality of work that NGOs are able to perform. The amount of finance available for investigation and case preparation has declined and often the only service provided is representation at the hearing. This is exasperated by the tendency of provincial courts to request assistance for accused persons when the case is ready to be heard. There have been some concerns raised as to the commitment and professionalism of some legal aid lawyers.

### **Bar Association of the Kingdom of Cambodia Representation (BAKC)**

The BAKC has been handicapped by a lack of funding from the Royal Government of Cambodia (RGC) even if the government has increased the budget from year to year. The BAKC is generally viewed as unresponsive by the provincial court. It is also seen as being an expensive option as appointed lawyers are usually based in Phnom Penh and require extra financing for their time and travel. As a result, it is not being used as a first choice referral mechanism for legal aid services.

The BAKC has shown an interest in hastening the increase in the number of lawyers in the country, particularly, in provincial locations; however, such moves are not supported by the Bar Council. The BAKC has also shown interest in promoting the use of paralegals and non-lawyer alternatives. It was noted by BAKC that problems in accessing finance through the Council of Ministers contributed to the slow rate of expenditure of funds allocated for legal aid.

### **Paralegals**

The use of paralegals in Cambodia is constrained by the uncertainty surrounding the ability of non-lawyers to provide legal advice. Paralegals have generally been used to assist clients through the legal process, particularly at the earlier stages. Paralegals have also been used to divert clients away from formal judicial proceedings when minor incidents or civil disputes have occurred and alternative resolution mechanisms exist.

Some NGOs have been promoting the use of paralegals, particularly in rural communities where no lawyers are present; however, the geographical reach of this service is still limited due to financing constraints. Paralegals have generally been drawn from existing respected and educated members of communities. There have been concerns raised as to knowledge of paralegals and the need for a consistent approach to their engagement with the formal justice sector.

### **University Legal Clinics**

Whilst the principal of University Legal Clinics and the use of students as legal assistants or paralegals have wide support, there is less certainty as to how this would operate. Primary concerns iterated to the team surround the knowledge base of students and issues surrounding client confidentiality. The team did find that a number of provincial centers have university campuses with law students, although the education level and the number of students available at each were not explored.

### **Judicial Police**

The Law requires that after 24 hours of detention a detained person must be offered legal representation. All judicial police interviewed expressed their concern at the inability to access any sanctioned legal services in rural arrears after this period, though in general they remained cautious as to whether the presence of a lawyer assisted or detracted from the smooth processing of detainees. All judicial police raised the issue of the lack of understanding among many detainees of the role of a lawyer. Judicial police posts are generally devoid of referral information, while referrals that do occur are either initiated by the detainee's family or are made to NGOs which with the judicial police has an established relationship.

### **Provincial Prisons**

The role of the provincial prison in facilitating legal aid is one of access and information. The prisons visited had separate interview rooms for lawyers which were viewed favorably by the prison management.

The access to inmates by lawyers appeared to vary between prisons and was dependent upon the management style of the prison commissioner. This was not an issue in any prison for inmates who had approved representation confirmed by the provincial court. No prison actively promoted legal aid or supplied information to inmates on legal aid service options.

## **Court and Prosecution**

The requirement for all cases involving a felony or a minor having legal representation places an obligation upon courts to ensure that such representation is present before a hearing can commence of the hearing. This has resulted in legal aid lawyers being requested at the point of the hearing so that trials may proceed, leaving lawyers with little time to prepare and research the case. This practice means that in many cases legal aid amounts to little more than a lawyer being present at the hearing with very little actual legal assistance being provided. There appears to be few incidents of the courts containing legal aid institutions at the investigation stage of a case.

Courts have found that the lack of lawyers in the province, and the thematic constraints of legal aid layers, has limited their options for legal aid referrals. Complaints as to the lack of responsiveness and the cost of BAKC representation were also made.

## **V. Conclusions and Recommendations**

Even though Cambodia has a new constitution in 1993 that led the country to democracy pluralism, this country has still faced the civil war with the Khmer Rouge rebel until 1998. Cambodia has been building up the country in all sectors as well as legal sectors. Currently, the Ministry of Justice has been continuing to do the judiciary reforms by establishing the three laws such as law on the organization and functioning of the courts, law on the statute of the judges, and law on the organization and functioning of the supreme council of magistracy; in addition, there is also a Committee for Legal and Judicial Reform under its ministry which is responsible for legal and judicial reforms.

Relating to the main challenges in term of access to legal aid services in Cambodia, the issue of data collection is an urgent need for statistics on the number of people in need of legal aid services, specified by provinces. Data should also be collected on the number of criminal cases and civil cases and information to determine if somebody is poor is needed. The definition of poorness should also be clarified and included in the law.

The lack of funding might lead to the poor quality of legal aid services as lawyers do not have enough time to meet their clients and conduct investigations. In addition, there is no specific legal aid policy to address these issues. Policy options for the Government to address this could be to increase the legal aid budget and provide a more holistic strategy in order to ensure a strong legal aid program that delivers a valuable service to those who need legal assistance.

In Cambodia, there is only one Bar Association in Phnom Penh that covers the national territory. Thus, lawyers prefer to work in the city rather than in the provinces. The lack of lawyers in provincial rural arrears is almost challenging. There is only one lawyer for every 25,000 people and 80% of the lawyers are crowded in Phnom Penh. The Ministry of Justice and the Bar Association should establish legal aid offices at the 24 municipal courts in order to provide legal services free of charge for a certain number of cases per year. Hearings in cases that are represented by a legal aid lawyer should take place on the same day, or when needed, two or three days successively. This will save time and expenses for the lawyer and will contribute to the access of legal aid for the poor.

To address the unawareness of benefits of having a lawyer and the possibility of legal aid, law students should be encouraged to engage in legal aid work. Students should go into their own village to educate people about

human rights and laws. Awareness raising and education on legal aid should be the focus. There should be an emphasis that legal representation can be given free of charge. A lesson on human rights can be included in the school curriculum.

All police stations should be provided a list of legal aid lawyers in order for them to call a lawyer when needed from inmates. The prison department should find lawyers for inmates who are not represented by any lawyer and allow lawyers to meet their clients inside the prison. Moreover, if a suspect asks for a lawyer, the police should provide information about NGOs which are providing legal aid and give the suspect the means to get in touch with a lawyer in order to make sure legal aid services are provided at the start of a case, not only at the trial stage.

**Furthermore, the Royal Government, the Bar Association and NGOs should:**

- Develop a target for lawyer growth (quantity, quality and location).
- Explore the possibility of a system of paralegals to provide legal advice and develop monitoring mechanism to monitor the quality of paralegal and legal assistant services.
- Establish working group to review the existing legal aid hotline.
- Coordinate funding programs with donors to prevent overlap and make sure the rights target are reached.
- Increase capacity of judicial police, especially informing the detained person about their rights and availability of legal aid.

# INDONESIA

## I. Country Background & Legal System in Indonesia

### 1. Country Background

Indonesia is an archipelagic country in the form of a republic, as it is stated in Article 1 Paragraph (1) of the 1945 Constitution that "the State of Indonesia is a Unitary State in the form of Republic". As the largest archipelago country in the world, Indonesia has 17,499 islands from Sabang to Merauke. The total area of Indonesia is 7.81 million km<sup>2</sup> consisting of 2.01 million km<sup>2</sup> of land, 3.25 million km<sup>2</sup> of ocean, and 2.55 million km<sup>2</sup> Exclusive Economic Zone (ZEE).<sup>98</sup> Indonesia currently has a total of 34 provinces.<sup>99</sup>

Indonesia ranks fourth with the largest population in the world after China, India and America.<sup>100</sup> Currently the population in Indonesia has the composition of male population of 50.34% and female population of 49.66%. Indonesia's male population is 119,630,913 inhabitants, while the female population is as many as 118,010,413 inhabitants. The sex ratio is 101, meaning there are 101 men for every 100 women.<sup>101</sup>

In carrying out its government, Indonesia uses a presidential government system and multi-party system<sup>102</sup>, as stated in Article 4 paragraph (1) of the 1945 Constitution that "the President of the Republic of Indonesia holds the power of government according to the Constitution". As the largest archipelagic country in Southeast Asia, Indonesia is also the largest democracy in ASEAN.

### 2. Ratification on Human Rights Convention

Indonesia has ratified most of the international treaties on human rights including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>103</sup> Indonesia has also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 13 September 1984 and the Convention on the Rights of the Child (CRC) on 5 September 1990.<sup>104</sup> Some examples of international conventions that have been ratified by Indonesia is the following:

<sup>98</sup> <http://kkp.go.id/artikel/2233-maritim-indonesia-kemewahan-yang-luar-biasa>

<sup>99</sup> <http://www.kemendagri.go.id/pages/data-wilayah>

<sup>100</sup> <https://www.kemenkopmk.go.id/artikel/jumlah-penduduk-indonesia-terbesar-ke-empat-dunia-setelah-china-india-dan-amerika>

<sup>101</sup> <http://sp2010.bps.go.id/>

<sup>102</sup> See Indonesia, Act No. 2 of 2011 on Political Party.

<sup>103</sup> Indonesia's Status of Ratification of U.N. Human Rights Treaties, available at <http://tbinternet.ohchr.org/layouts/TreatyBodyExternal/Treaty.aspx?CountryID=80&Land=EN>

<sup>104</sup> United Nations Treaty Collections, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en)



**Table 10: Ratified international human rights treaties in Indonesia**

Ratified international human rights treaties	
<ul style="list-style-type: none"> <li>• The United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish</li> <li>• The Convention on the Rights of Persons with Disabilities, in 2011</li> <li>• The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in 2012</li> </ul>	<ul style="list-style-type: none"> <li>• The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, in 2009</li> <li>• The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in 2012</li> </ul>

Source: <http://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/indonesia>

### 3. Legal System in Indonesia

The judicial System is composed of several types of courts, all of which are under the oversight of the Supreme Court.<sup>105</sup> Indonesia adopted the civil law tradition of the Netherlands, which colonized it for more than three centuries. Thus, Indonesian courts do not subscribe to the doctrine of *stare decisis*, which is the heart of judicial making in the courts of common law countries.<sup>106</sup>

As enunciated in the 1945 Constitution (Undang-Undang Dasar 1945), the government has three branches – the executive, the legislative, and the judiciary – suggesting that Indonesia adopted the *trias politica* doctrine.<sup>107</sup> The power of the executive branch rests in the office of the President that acts as the central government.<sup>108</sup> It has the power to manage national affairs and, under the 1945 Constitution, it is responsible for Indonesia’s foreign relations.<sup>109</sup>

The legislative branch comprises of two bodies: The House of Representatives (Dewan Perwakilan Rakyat/ DPR) and the Regional Representatives Council (Dewan Perwakilan Daerah/ DPD). Indonesian citizens through general elections directly vote for the members of both houses every five years.<sup>110</sup> Both houses form the People’s Consultative Assembly (Majelis Permusyawaratan Rakyat/ MPR)<sup>111</sup> which has roles in inaugurating and impeaching the President as well as amending the Constitution. It is, however, not involved in the formulation of national policies.

The judicial branch is composed of the Judicial Commission, the Constitutional Court and the Supreme Court.<sup>112</sup> The Constitutional Court and the Supreme Court are the highest judicial bodies in Indonesia.<sup>113</sup>

<sup>105</sup> ASEAN Law Association, Judicial System, available at <http://www.aseanlawassociation.org/papers/JudicialSystem.pdf>

<sup>106</sup> *Ibid.*

<sup>107</sup> Undang-Undang Dasar Republik Indonesia (The 1945 Constitution of the Republic of Indonesia, Arts 1-25)

<sup>108</sup> Princeton University, Politics and Government of Indonesia, available at [http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Politics\\_of\\_Indonesia.html](http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Politics_of_Indonesia.html) (last accessed Nov. 8, 2015).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*, See also, INDONESIA CONSTITUTION, arts.19-22 B on the House of Representatives and arts. 22C-22D. The House of Representatives hold legislative, budgeting and oversight functions. DPD may propose to DPR on Bills related to regional autonomy, relations between central and local government, formation, expansion and merger of regions, management of natural resources and other economic resources, and Bills related to financial balance between the center and the regions.

<sup>111</sup> *Id.*, arts. 2-3

<sup>112</sup> *Id.*, arts.24, 24 A, 24 B, 24 C, and 25.

<sup>113</sup> ABC, Indonesia’s Political System, available at [http://www.abc.net.au/ra/federasi/tema1/indon\\_pol\\_chart\\_e.pdf](http://www.abc.net.au/ra/federasi/tema1/indon_pol_chart_e.pdf) (last accessed Nov. 8, 2015).

The Constitutional Court acts as the guardian of the Constitution and is vested with the power to adjudicate impeachment proceedings against the President.<sup>114</sup> The Supreme Court is the apex of the judicial system. The Judicial Commission is tasked to nominate the Supreme Court justices and to monitor the judges' conduct in judicial processes at all levels.<sup>115</sup>

## 4. Justice Actors

The legal profession in Indonesia can be divided into two categories, namely (i) a public legal profession (judges and prosecutors) and (ii) a private legal profession (advocates). Aside from the judiciary, other important justice actors in Indonesia are the Public Prosecution Office of Indonesia and Perhimpunan Advokat Indonesia (PERADI), as the Indonesian Bar Association.

The Public Prosecution Office is vested with exclusive state powers to prosecute offenders. Hence, there is no prosecution handled by private prosecutors under the Indonesian criminal justice system.<sup>116</sup> The Public Prosecution Office has the authority by law to implement and execute prosecutorial activities and other duties as described in the law. The hierarchy of the Public Prosecution office is as follows:<sup>117</sup>

- (a) *Kejaksaan Agung* (The Office of the Attorney General). The Attorney General is the highest-ranking authority. The head office is located in Jakarta and there are representative offices throughout Indonesia and its jurisdiction is inclusive of all the sovereign territory of Indonesia.
- (b) *Kejaksaan Tinggi* (State Attorney) has jurisdiction at the provincial level to prosecute cases. The offices are located in the capital city of the province.
- (c) *Kejaksaan Negeri* (District Attorney) has jurisdiction at the regional level to prosecute cases. The offices are located in almost all regional centers.

The other actors on legal aid are as follows:

### 1. Prosecutor

Prosecutors are involved in the whole trial process, from the investigations (in certain cases such as corruption), to trial proceedings and the execution of punishment. At the investigation stage, the prosecutor supervises the police's investigations. Law No.16 of 2004 on the Public Prosecution Service, Article 2 Paragraph (1) stipulates that "the Attorney General of the Republic of Indonesia is a government institution that exercises state power in the field of prosecution and other authorities under the law".

### 2. Advocates / Counsel

Advocate is a person who has legal service profession both inside and outside the court that meets the requirements under the provisions of this law. Advocates should form an association. (Article 1 of Law No. 18 of 2003):

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<sup>114</sup> *Id.*

<sup>115</sup> Indo. Const. Arts. 24 A (3-4) And 24 B.

<sup>116</sup> Tabajulan, supra note 25.

<sup>117</sup> ASEAN Law Judicial System, Supra Note 21.

“. . . that in order to ensure that judicial powers are free from all outside interference and intervention, an independent, autonomous and accountable Advocates’ Profession is required to ensure justice, honesty and legal certainty for all seekers of justice, as well as to uphold the law, truth, justice, and human rights;

“. . . that the independence, autonomy and accountability of the Advocates’ Profession in upholding the law needs (sic) to be guaranteed and protected as part of the effort to uphold the supremacy of law.”

## II. Introduction to Legal Aid

Legal aid is commonly defined as “aid provided by an organization established especially to serve the legal needs of the poor.”<sup>118</sup> Legal aid has traditionally been linked to judicial proceedings, particularly on the right to counsel and right to a fair trial of person. Legal aid is seen as the provision of assistance to people who are unable to afford legal representation in order to access the court of judicial system.

However, legal aid goes beyond legal assistance in judicial proceedings. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System provides that “the term ‘legal aid’ includes legal advice, assistance and representation”. It also includes the concept of “legal education, access to legal information and other services provided for persons through alternative dispute resolutions mechanisms and restorative justice processes.”

Although Legal aid is not mentioned in the constitution of Indonesia, it is recognized as a constitutional right embedded in the principle of fair trial and rule of law.<sup>119</sup> This right is reflected in the various rules and regulations for example The Criminal Procedure Code (Act Number 8/1981) which has recognised the right to legal aid to criminals. Furthermore, access to legal aid for criminals, victims, and witness is considered as Human Rights(Act Number 39 Year 1999).

In 2011, a new legal aid law was passed (Act Number 16 Year 2011). This law grants constitutional rights to everyone to obtain recognition, guarantee, protection, legal certainty, and equality before the law for the protection of human rights. Furthermore, the law also requires the state to secure legal aid. As one of the efforts to implement the law, the Supreme Court issued a Supreme Court Decree Number 1 Year 2014 on the guidance of legal service for the poor. This decree requires district courts under the supervision of the Supreme Court to establish legal aid center (so-called the Posbakum) where legal aid seekers can get help from the center.

Implementing regulations include stipulates the following as the possible forms of legal aid:

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<sup>118</sup> [https://www.merriam-webster.com/dictionary/legal%20aid?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriam-webster.com/dictionary/legal%20aid?utm_campaign=sd&utm_medium=serp&utm_source=jsonld)

<sup>119</sup> Constitutional Court Decision Number 006/PUU-II/2004

**Table 11: Possible forms of Legal Aid**

Litigation
<ul style="list-style-type: none"> <li>a. A criminal case;                             <ul style="list-style-type: none"> <li>a.1 trial process;</li> <li>a.2 Final decision</li> </ul> </li> <li>b. A civil case;                             <ul style="list-style-type: none"> <li>b.1 Trial process;</li> <li>b.2 Final decision.</li> </ul> </li> <li>c. An administrative case;                             <ul style="list-style-type: none"> <li>c.1 Trial process;</li> <li>b.2 final decision.</li> </ul> </li> </ul>
Non-Litigation
<ul style="list-style-type: none"> <li>a. Legal literacy;</li> <li>b. Legal consultation;</li> <li>c. Legal research;</li> <li>d. Mediation;</li> <li>e. Negotiation;</li> <li>f. Legal empowerment;</li> <li>g. Witness and/or victims protection;</li> <li>h. Legal drafting.</li> </ul>

At the sub-national level, there have been initiatives from local governments to ensure that their jurisdiction provides legal aid for the local residents in conflict with law. The areas include South Sumatera, West Sumatera, Central Sulawesi, Central Java, and East Java.<sup>120</sup> Also, at district/municipality levels there are local legal aid laws such as in Musi Bayuasin, Palembang, Semarang, Makassar, and Sinjai.<sup>121</sup>

### III. Beneficiaries

Legal Aid can be granted to the following beneficiaries:

**Table 12: Beneficiaries of Legal Aid**

No	Beneficiaries	Legal Basis	Court Category
1.	Person facing death penalty	Article 56 of law number 18/1981 on criminal procedure court	Criminal
2.	Person facing minimum punishment of 15 years imprisonment	Article 56 of law number 8/1981 on criminal procedure court	Criminal

<sup>120</sup> YLBHI, *Legal Aid is not granted-right*, (Jakarta: YLBHI, 2013), p.19-47.

<sup>121</sup> *Ibid.*,55-78.

No	Beneficiaries	Legal Basis	Court Category
3.	Person being charged with minimum punishment in 5 years	Article 56 of law number 8/1981 on criminal procedure court	Criminal
4.	Children in conflict with law	Article 64 of law number 35/2014 on Child Protection, article 3 of law number 11/2012 on Juvenile Justice System.	Criminal, administrative and civil
5.	Person with Disabilities	Article 29 of law number 8/2016 on Person with Disability.	Criminal, administrative and civil
6.	Women	Some local regulations, such as: Jawa Timur Local Regulation No. 16 Year 2012, Gorontalo Local Regulation No. 1 Year 2016, Badung Local Regulation No. 15 Year 2013 on Protection of Women and Children Victims of Violence, etc.	Criminal, administrative and civil, religion
7.	Victims of domestic violence	Article 10 of law number 23/2004 on Elimination of Domestic Violence.	Criminal
8.	Witness	Article 5 and 12A of law number 31/2014 on Witness Protection.	Criminal, administrative and civil, religion
9.	Victims of sexual crimes	Some local regulations, such as: Jawa Timur Local Regulation No. 16 Year 2012, Gorontalo Local Regulation No. 1 Year 2016, Badung Local Regulation No. 15 Year 2013 on Protection of Women and Children Victims of Violence, etc.	Criminal
10.	Victims of human trafficking	Article 35 and 39 of law number 21/2007 on Combating human Trafficking.	Criminal, administrative and civil

## IV. Providers

Providers of legal aid may include private and public institutions as long as it meets the following minimum requirements:

- a. To have legal status;
- b. To have been accredited by the government;
- c. To have a permanent office/secretariat;
- d. To have staff;
- e. To have legal aid program.

The state body responsible for overseeing and accrediting institutional legal aid providers is the National Legal Harmonization Body (BPHN). Accredited institutions may receive state's financial support for providing legal aid. The classification for accredited legal aid providers is the following<sup>122</sup> :

## 1. Category A

### Meet the following requirements:

- a. shall at least handle 60 cases annually;
- b. shall at least have 7 non-litigation programs;
- c. shall at least have 10 lawyers and 10 paralegals;
- d. shall at least have minimum education in bachelor degree for a lawyer and a paralegal training for a paralegal;
- e. shall have the scope of legal aid service both at provincial and district/municipality levels;
- f. shall have own office;
- g. shall have an organization structure;
- h. shall have the constitution of the organization;
- i. shall have an audited financial report;
- j. shall have a registered tax payer number;
- k. shall have a network.

## 2. Category B

### Meet the following requirements:

- a. shall at least have 30 cases annually;
- b. shall at least have 5 non-litigation programs;
- c. shall at least have 5 lawyers and 5 paralegals;
- d. shall at least have bachelor degree for a lawyer and paralegal training for a paralegal;
- e. shall at least have the scope of legal aid service both at provincial and district levels;
- f. shall at least have own office;
- g. shall have own staffs;
- h. shall have a constitution of the organization;
- i. shall have a registered tax payer number;
- j. shall have a network.

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<sup>122</sup> BPHN Ministry of Justice and Human Rights, *The Implementation of Legal Aid Law Number 16 Year 2011*, (Jakarta: BPHN,2013), 26-28.

### 3. Category C

#### Meet the following requirements:

- a. shall at least have 10 cases annually;
- b. shall at least have 3 non-litigation programs;
- c. shall at least have 1 lawyer and 3 paralegals;
- d. shall at least have bachelor degree for a lawyer and paralegal training for a paralegal;
- e. shall at least have the scope of legal aid service both at provincial and district levels;
- f. shall at least have own office;
- g. shall have own staffs;
- h. shall have a constitution of the organization;
- i. shall have a registered tax payer number;
- j. shall have a network.

Actually a law firm cannot be categorized as a legal aid provider since a law firm can do their own pro bono work under their law firm program. Furthermore in 2016, there are 405 legal aid organizations which have been accredited by the BPHN.<sup>123</sup> Although some universities, parties and mass organizations have LBH, but not all of them are accredited and the data are not yet clear. Meanwhile, according to the legal aid, law students, law professors and paralegals can be partly accredited legal aid providers.<sup>124</sup> Paralegals are people who have no legal background but are trained to assist in seeking justice and under the supervision of legal aid organizations. Law students and lecturers can be paralegals under the Institute of Consultation and Legal Aid at their university. The government regulation on paralegals is set out in Permenkumham No. 1 of 2018 on Paralegal in Legal Aid signed by the Minister of Justice and Human Rights, Yasonna H. Laoly on January 17, 2018.

Law students who want to join as an accredited legal aid provider shall pass a certain law course/subject in the law school, such as criminal procedure law, civil procedure law, and administrative law, and a legal aid training.<sup>125</sup> The Ministry of Justice is drafting a Ministry of Justice and Human Rights Decree on paralegals, which means that a paralegal shall meet a certain minimum standard to be part of an accredited legal aid provider.<sup>126</sup> This minimum paralegal standard is intended to keep the quality work of paralegal in doing/running legal aid both in non-litigation and litigation areas.

Paralegals, law lecturers/law professors and law students are focused on non-litigation activities such as legal literacy, legal consultation, legal research, etc.<sup>127</sup> But in a certain situation where the number of available lawyers in an accredited legal aid provider is insufficient, an accredited legal aid provider may recruit paralegal, law students and law professors/lecturers in doing litigation.<sup>128</sup> Such paralegals, law professors/law lecturers and law students shall provide written approval from the lawyer who is working for an accredited legal aid

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<sup>123</sup> Interview with Kristomo head of legal aid body at the National Legal Harmonization Body (BPHN)

<sup>124</sup> Article 9 Legal Aid Law Number 16 Year 2011, article 13 paragraph 4 the Government Regulation on the requirements and governance of legal aid delivery Number 42 Year 2013.

<sup>125</sup> Article 13 paragraph 3 the Government Regulation on the requirements and governance of legal aid delivery Number 42 Year 2013.

<sup>126</sup> Discussions on the matter with the BPHN, and YLBHI.

<sup>127</sup> Article 16 paragraph 1 the Government Regulation on the Requirements and Governance of Legal Aid Delivery Number 42 Year 2013.

<sup>128</sup> Article 13 paragraph 2 the Government Regulation on the Requirements and Governance of Legal Aid Delivery Number 42 Year 2013.

provider. But in practice very few legal aid providers include paralegals, law students and law professors in litigation works.

While individuals may provide legal aid, they will not qualify getting reimbursement for the service from the government. An individual is also a pro bono lawyer which an advocate owns. Advocate organizations may only run mandatory pro-bono services, but do not qualify for receiving reimbursement of legal aid service from the government.

## V. Legal Aid Budget

The accredited legal aid provider may submit a legal aid budget proposal to the provincial office of the Ministry of Justice and Human Rights.<sup>129</sup> In this instance, the provincial office will send the proposed legal aid budget to the Ministry of Justice and Human Rights through the National Legal Harmonisation Body (the BPHN). Sub-national governments may provide additional legal aid budget in addition to the national one.

### 1. Best Practice on Legal Aid in Indonesia

**Table 13: Best Practices on Legal Aid in Indonesia**

<b>Best Practices 1: Person with Disabilities in Conflict with the Law and Model Assistance from SIGAB</b>
<p><b>About SIGAB:</b></p> <p>Inclusion and Dissemination Advocacy (SIGAB) is a non-governmental organization formed with a mandate to promote inclusion of and the mainstreaming of rights of persons with disability. SIGAB consists of Disabled and non-disabled activists. In addition to programs related to the provision of legal aid and advocacy of access to justice for Disabled, some of the programs that SIGAB does include:</p> <ol style="list-style-type: none"><li>1. Promotion and advocacy of inclusive governance by piloting 'DesaInklusi' (Inclusive Village) in Sleman and Kulonprogo (both are parts of Yogyakarta province);</li><li>2. Campaigns and Education of affected communities through the management of online portals <a href="http://www.solider.or.id">http://www.solider.or.id</a>;</li><li>3. Independent research and publication of 'Journal of Disabled'</li></ol>

<sup>129</sup> Article 42 paragraph 2 Ministry of Justice and Human Rights Decree Number 22 Year 2014 on the Implementation of the Legal Aid Service Requirements and Legal Aid Budget Distribution.



## Best Practices 1: Person with Disabilities in Conflict with the Law and Model Assistance from SIGAB

### Summary of Best Practice

SIGAB, in the context of person with disability in conflict with the law, is consistent in urging systemic legal change, including:

1. Encouraging the realization of new and favorable legal norms for disabilities, both material law (such as the Criminal Code, Criminal Code, Marriage Law) and procedural law (KUHAP, Standard Operating Procedures) which normally becomes the basis of law enforcement when processing cases of persons with disability in conflict with law
2. Encouraging the strengthening of law enforcement capacity
3. Encouraging the creation of facilities and infrastructure friendly to the disabled.

SIGAB is also supporting the Ministry of Law and Human Rights in drafting a Government Regulation (RPP) on decent accommodation for person with disability in conflict with law.

An important program by SIGAB is to assist of disability in conflict with law, both before the judicial process (non-litigation) and during the judicial process (litigation).

To undertake the facilitation work, SIGAB does the following actions:

1. Establish paralegal teams in 5 areas of Yogyakarta. Paralegals are provided with case-facilitation training, finding cases, identifying cases, recording cases, up to working on knowledge-building with network models.
2. In each case, SIGAB always conducts assessment profiles of the person with disability. The assessment profile has always been the foundation of SIGAB to fight for the right to fair trial, both in the process of investigation, prosecution and trial.
3. In case advocacy, SIGAB is almost certainly involved with a wider network of legal aid networks, academics, non-governmental organizations, community organizations and self-employed organizations.

SIGAB's Assistance to persons with disability in conflict with law begins in 2012, when a rape case was experienced by an intellectually and severely disabled person in Sukoharjo, Central Java. He became a victim of immoral acts committed by his own teacher. Through a number of very complex facilitation, SIGAB can finally facilitate the process of victims in seeking justice, and by 2013 the victim won his case. The mentoring process has been documented in the short film 'Seek of Justice', see at [https://www.youtube.com/watch?reload=9&v=wn\\_OH-QOrFU](https://www.youtube.com/watch?reload=9&v=wn_OH-QOrFU).

Thus far, SIGAB has assisted more than 20 cases of persons with disability each year where mostly involved cases of person with disability as victims of sexual abuse.

## Best Practices 2: LBH Jakarta (Jakarta Legal Aid Institute) in Criminalization Case (Andro, Nurdin, etc)

### About LBH:

Legal Aid Institute (LBH) Jakarta is an Institution under the Indonesian Legal Aid Foundation (YBHI). The work of LBH targets the citizens of Jakarta who are less able in the economy. This institution helps in the effort of the community to fight for their rights in various law violations such as evictions and layoffs. This institution is important for the pro-democracy movement because LBH Jakarta uses human rights and democracy values as a foundation in the pillar of the legal aid movement in Indonesia.

Based on his vision, LBH Jakarta attempted to establish a legal system of society which is more aware of law. Based on its mission, LBH Jakarta attempted to realize an Indonesia which is known as a state law by instilling and disseminating the values embedded in the state law and democracy as well as social justice.

### Summary of Best Practice

The case started on June 30, 2013; at that time Andro, Nurdin and other four friends were street singers in Cipulir who became victims of misconduct and torture committed by the police. They found a wounded person under the Cipulir bridge, in Kebayoran Lama, South Jakarta. Then these six street singers took the initiative to report the findings to the police. However, the police ended up accusing them as the perpetrators of the raid that led to death. Later, it was known that the victim named Dicky Maulana was also a street singer. One of the reasons that led the police to accuse Andro and Nurdin was the typical problem of the territorial divide among street singers. Andro, Nurdin and the other four singers were forced to confess.

At first, Andro and Nurdin were found guilty by South Jakarta District Court and got a verdict of 7 years in prison. The actions of Andro and Nurdin were considered the judges as public disturbance. And then this case got attention from LBH Jakarta. Andro and Nurdin got assistance from LBH Jakarta. The trial was then presented against a street singer who allegedly was the one who killed Dicky Maulana. The judge said that Andro and Nurdin were not legally and convincingly proven to have committed murder. The judge also stated that the murderer of Dicky Maulana had also been found. On March 5, 2014, the Jakarta High Court declared Andro and Nurdin not guilty.

After the Andro and Nurdin's free verdict was upheld by the Supreme Court, on June 21, 2016 both sued the state to take responsibility for the mistake and to compensate for the mistreatment they suffered.

This compensation claim was the first case on the implementation of PP. 92 of 2015 on KUHAP. The single judge of the South Jakarta District Court, Totok Sapto Indrato, who handled Andro and Nurdin's lawsuit, had decided to accept Andro and Nurdin's petition. The state was required to pay compensation to both, amounting to 36 million rupiah. Unfortunately, to this day, the compensation money has not been given by the state through the Ministry of Finance.

In addition to providing assistance, LBH Jakarta also empowered justice seekers. Marni, Andro's mother, later became a community paralegal fostered by LBH Jakarta and has passed various legal aid training. She hopes that there will be no more street singers who will be the victims of wrongful arrest and torture like her son.

### Best Practices 3: The Complexity of Violence against Women and Legal Aid in the Perspective of Women in Indonesia

#### About Komnas Perempuan (The National Commission on Violence Against Women):

Komnas Perempuan is an independent state institution responsible for upholding of women's human rights in Indonesia. Komnas Perempuan was born from the demands of civil society, especially women, to the government to realize the responsibility of the state in responding and dealing with the issue of violence against women.

The purpose of Komnas Perempuan is to develop conditions conducive to the elimination of all forms of violence against women and the upholding of women's human rights in Indonesia, and also to elevate efforts to prevent and to overcome all forms of violence against women and to enhance the protection of women's rights.

#### Summary of Best Practice

The cases of violence against women is regularly reported and documented by Komnas Perempuan (National Commission on Violence Against Women) as one of the most complex human rights mechanisms in Indonesia. Cases of violence against women which are reported and handled by Komnas Perempuan are those of personal, communal or state violence. These cases in general are cases that have yet any legal basis, do not get access to justice and/or unfair trial, stagnant and stuck, or even involving criminalization of those defending the rights of others (Woman Human Right Defender). These kinds of work are a priority of human rights institutions such as Komnas Perempuan, because this is where the space for human rights violations is seen, not just a violation of the law.

Similarly, women's human rights are not always mentioned in the law. Before the Law on Elimination of Domestic Violence (UU PKDRT) was born, cases of violence against women were considered as private law. UU PKDRT is a tangible form of recognition in which the state is drawn to attend to prevent domestic violence and break the silence on behalf of the private law. The impact of this UU PKDRT are positive: female victims now dare to report and bring matters to legal process, although the majority of them ended up solving it through divorce. According to the data from Komnas Perempuan 2017 Annual Report (launched March 2018) there are 348,062 cases of violence against women from 34 provinces, where the average of each case between 70-80 percent of the data is domestic violence.

Legal aid in Indonesia for cases of violence against women, particularly domestic violence, become the core issue of service providers, legal aid agencies, and P2TP2A (Integrated Services for Women and Children). The role of Komnas Perempuan, as one of the women's human rights mechanisms to strengthen legal aid are the following:

- Strengthen the capacity of law enforcement officers through improved perspective on women's rights when handling cases of violence against women in the general court as well as in religious court; women-friendly justice conditions is part of an integral process to support legal aid for victims.
- Encourage initiatives for the movement and commitment to strategic institutions for service assistance including community-based legal aid, service provider partners, religious or customary institutions, feminist lawyer clubs, migrant communities, etc.
- Monitor policy implementation; see access to legal aid and recovery services in marginal areas such as in the remote islands, post-conflict areas, etc.

- Establish an integrated judicial system for the handling of violence against women in several regions in Indonesia, including Central Kalimantan, Maluku and so on.
- Become an expert witness (*amicus currae*) to defend crucial cases and layered violence.

The experience of Komnas Perempuan in negotiating justice and upholding women's human rights include:

- a. The presenting of case to Constitutional Court on raising the marriage age of children from 16 to 18 to prevent the criminalization of female victims because of the insistence of conservative groups to expand adultery, potentially threatening indigenous groups, victims of sexual violence, etc.
- b. Becoming expert witness in court to defend cases as follows:
  - The criminalization of a lesbian charged with killing her baby, a woman with disability experiencing discrimination from international airlines, an underaged domestic worker becoming a victim of sexual violence and impregnated, the relocation of ex-migrant workers with death sentence to a place that is not conducive for their psyche.
  - Providing arguments for legal process advocacy for legal aid partners, especially for cases of human rights violations such as death penalty.
  - Provide letters of support to partners providing legal aid and victims who report to Komnas Perempuan, in consideration of judges to use the perspective of women's human rights.
  - Evaluating legal processes that risk women victims, including human trafficking and drug trafficking cases handled by separate complaints channels.
  - Support the strengthening of partner institutions through women's coffers, a solidarity fund to support victims of violence against women, especially through legal aid.

## VI. Challenges to Legal Aid in Indonesia

**Challenges to legal aid in Indonesia can be documented as follows:**

1. Difficult bureaucracy and the administration for reimbursement for legal aid organizations working on supporting legal aid, which caused a low rate of state budget absorption despite many people in need for the service. It is noted, however, that the legal aid information system has changed from hardcopy to online/soft copy but it turns out that the system is still challenging and people are not yet familiar about this.
2. Insufficient financing of cases due to lack of available funding.
3. Professionalism regarding the quality of legal aid. How legal aid organizations make the quality of legal aid as a priority and not just concerned about quantity.
4. A flat budget rate for all cases and all regions while the need in each area is different, for example, varying transportation needs and assistance in different landscapes of Indonesian provinces and villages.
5. Indication of corruption.
6. Corruptors get legal aid while there are needy people who are still out of reach.

7. There is no institutional support for office rent or development for the lawyer.
8. There are many law enforcement apparatus who do not know about legal aid service. For example, the police who do not know about paralegals.
9. Lack of protection to legal aid providers (although there is immunity in the Legal Aid Act, but it is not yet respected by law enforcement officers).
10. The need to accommodate the interests of vulnerable groups, such as migrants, women and children, and asylum seekers.
11. In Indonesia, lawyers or advocates are required to provide legal assistance for at least 50 hours (PP No. 83/2008) as part of the pro bono (mandatory pro bono), but it is not effective because supervision is lacking and the advocate organizations are divided.
12. In the past, governments only focus on providing legal aid to the poor.

## VII. Way Forward

Indonesia is a robust place to generate various best models for legal aid provision that would promote and protect human rights. As we can see there are various actors and initiatives to continue improving the service, even when the state response is still not perfect. The many layers of law enforcement, legal authorities and the complex relations within a pluralistic society have presented to us the challenges that authorities must solve in order to improve fairness before the law. The existing legal aid organizations and government both give room for the provision of legal aid in its various forms which is also tailored to specific needs of vulnerable groups. The following solutions are in progress to respond to the challenges on legal aid provision in Indonesia:

1. BPHN will create an index quality legal aid to ensure the quality of legal aid.
2. BPHN will also improve the bureaucracy and administration on legal aid service so that the state budget absorption is improved.
3. The government will provide specific support to vulnerable groups (such as women, children, migrants, and asylum seekers) as beneficiaries of legal aid.

# LAO PEOPLE'S DEMOCRATIC REPUBLIC

## I. Country Background

Lao PDR is a least developed and landlocked country, situated in Southeast Asia, with a population of approximately 6 million with a total land area of 236,800 square kilometers of which two-thirds is mountainous. Lao PDR shares borders with 5 countries, namely the People's Republic of China in the north, the Kingdom of Cambodia in the south, the Socialist Republic of Viet Nam in the east, the Kingdom of Thailand in the west, and the Union of Myanmar in the northwest.<sup>130</sup>

Lao People's Democratic Republic was established in December 1975, succeeding the Kingdom of Laos, prior to which there were decades of Indochina wars<sup>131</sup>, and which resulted in abolishing the monarchy and the communist Lao People's Revolutionary Party (LPRP) instituting a one-party State.

Lao PDR is increasing its integration into the regional and global economy; in 1997 the Lao PDR joined the Association of Southeast Asian Nations (ASEAN), the World Trade Organization (WTO) in 2013 and the ASEAN Economic Community (AEC) in 2015.

Lao PDR, a lower-middle income economy with a GNI per capita of \$1,740 in 2015, is one of the fastest growing economies in the East Asia and Pacific region and the 13th fastest growing economy globally. GDP growth averaged 8 percent over the last decade. The use of the country's natural resources – mostly water, minerals and forests – contributed to one third of its growth. The construction and service industry is also expanding, with growing regional integration boosting tourism and attracting foreign investment. The macroeconomic environment remains challenging, with both domestic and increasing external risks requiring meticulous management. Growth in the country has reduced poverty to an estimated 23.2 percent of the population in 2012/13 from 33.5 percent a decade ago. However, poverty has been declining slowly compared with some regional peers.

Lao PDR has made good progress on a number of Millennium Development Goals (MDGs), including halving poverty, reducing hunger, and improving education and health outcomes. However, certain MDGs remain off track, most crucially on nutrition, with an estimated 44 percent of under-five children being stunted. Total fertility rates are high, with a high unmet demand for family planning. Lao PDR still has a high maternal mortality rate and limited skilled birth attendants and could also do more to place gender equality at the center of its national development plans. The Sustainable Development Goals (SDGs) provide a framework for the Government to monitor and evaluate the progress in its development plan implementation and commitments. Lao PDR is one of the first countries in the world to localize the SDGs into the national development plan.<sup>132</sup>

Lao PDR is a people's democratic state. All powers belong to the people, and are exercised by the people and for the interests of the multi-ethnic people.<sup>133</sup> The State protects the freedoms and democratic rights of

<sup>130</sup> Source: [https://www.upr-info.org/sites/default/files/document/lao\\_people039s\\_democratic\\_republic/session\\_8\\_-\\_may\\_2010/ahrcwg-68lao1.pdf](https://www.upr-info.org/sites/default/files/document/lao_people039s_democratic_republic/session_8_-_may_2010/ahrcwg-68lao1.pdf)

<sup>131</sup> for more information about Indochina Wars, view at [https://en.wikipedia.org/wiki/Indochina\\_Wars](https://en.wikipedia.org/wiki/Indochina_Wars)

<sup>132</sup> Source: <http://www.worldbank.org/en/country/lao/overview>

<sup>133</sup> Article 2 Of the Constitution of Lao PDR (amended in 2015)

the people. All acts of bureaucrats and harassments detrimental to the people's honor, physical well-being, lives, consciences and property are prohibited.<sup>134</sup>

The State governs and administrates the society by the Constitution and laws. All State's organizations, Party's organizations, the Lao Front for National Construction, Mass organizations, the Social organizations and all citizens must respect and obey the Constitution and laws.<sup>135</sup> The State recognizes, respects, protects and ensures the protection of the fundamental rights of all citizens by the laws.<sup>136</sup>

Lao PDR has recognized and promoted formal and informal justice systems in order to provide effective access to justice. Disputes can be settled either through customary system (informal), village mediation (semi-formal) or the court (formal). Legal access to justice has been guaranteed Article 41<sup>137</sup> (as amended in 2016) of the Constitution of Lao PDR.

The Law on the Handling Petition<sup>138</sup> was adopted in 2005, which provides the mechanism for the people to submit a request to the State's Administrative authority; or a claim to an investigation organization, the office of the public prosecutor or the people's court (the court); or a petition for justice to the National Assembly. Furthermore, the telephone hotline of the National Assembly, during its plenary sessions also provides an opportunity to Citizens to submit their complaints and seek redress.<sup>139</sup> The National Assembly received many calls and the confidentiality of the complainants are protected. The National Assembly is responsible for preparing a report which is then referred to the concerned minister or authorities to explain or reply to the question or concerns raised by public. This mechanism is considered to be part of the formal justice system.

The county had introduced and aimed to build the State of Law's country (rule of law) since 2009; the Legal Sector Master Plan (LSM) aims to strengthen the rule of law in the Lao PDR which lays out a comprehensive sectoral reform agenda to support the country on its way of becoming a State fully governed by the rule of law.<sup>140</sup>

According to the 7<sup>th</sup> NSEDP (2011-2015)<sup>141</sup> followed by the 8th Five-Year Plan (2016-2020)<sup>142</sup>, inter alia, the country affirms its reform in the direction of rule of law, ensure equality and justice in society, and fight corruption. More specifically, it aims "to focus on implementing prevailing laws, to ensure equality before the Law for the entire Lao population and further strengthen the legal framework to reflect the interests and concerns of citizens ... and **to ensure people have access to the legal and judiciary system** and gradually integrate the legal framework into the region." Despite several formal justice avenues, the general public prefer to settle their disputes through mediation. The preferred and widely used policy for resolving disputes continues to be the "Harmonious Village Policy" or "No Case Village Policy". The Village Mediation Units

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<sup>134</sup> Article 6 (new) Of the Constitution of Lao PDR (amended in 2015)

<sup>135</sup> Article 10 (new) of the Constitution of Lao PDR (amended in 2015)

<sup>136</sup> Article 34 (new) of the Constitution of the Lao PDR (amended in 2015)

<sup>137</sup> Article 41 (new) of the Constitution of the Lao PDR (amended in 2015) stipulates as follows: "*Lao citizens have the right to lodge complaints and petitions and to propose ideas to the relevant State organizations in connection with issues pertaining to the public interest or to their own rights and interests. Complaints, petitions and ideas of citizens must be examined and resolved as provided by the laws*"

<sup>138</sup> available at [https://www.wto.org/english/thewto\\_e/acc\\_e/lao\\_e/WTACCLAO22\\_LEG\\_8.pdf](https://www.wto.org/english/thewto_e/acc_e/lao_e/WTACCLAO22_LEG_8.pdf)

<sup>139</sup> People can report or make their complaints via the telephone hotline number #156 or landline +856-21-452627, or send their petitions to mail box P. O. Box 662 or email: [na\\_session@na.gov.la](mailto:na_session@na.gov.la)

<sup>140</sup> the Legal Sector Master Plan (LSMP) was adopted by the Government, the Prime Minister Decree N0 265/PM, dated 11 September 2009, for more information at [http://www.la.undp.org/content/lao\\_pdr/en/home/operations/projects/democratic\\_governance/support-project-for-implementation-of-the-legal-sector-master-pl.html](http://www.la.undp.org/content/lao_pdr/en/home/operations/projects/democratic_governance/support-project-for-implementation-of-the-legal-sector-master-pl.html)

<sup>141</sup> for more information view at [http://www.la.undp.org/content/lao\\_pdr/en/home/library/poverty/National\\_Development\\_Plan\\_2011\\_2015.html](http://www.la.undp.org/content/lao_pdr/en/home/library/poverty/National_Development_Plan_2011_2015.html)

<sup>142</sup> for more information view at [http://www.la.undp.org/content/lao\\_pdr/en/home/library/poverty/the-8th-five-year-national-socio-economic-development-plan--2016.html](http://www.la.undp.org/content/lao_pdr/en/home/library/poverty/the-8th-five-year-national-socio-economic-development-plan--2016.html)

are a creation based on the traditional village mediation systems. The Ministry of Justice established these forums as a semiformal mechanism for resolving disputes and providing compensation in civil and minor criminal matters and other sensitive cases such as family matters, including divorce where disputants might prefer to avoid using formal justice system. Village Mediation Units also served as the forum for awarding civil damages to victims of crime and restitution or other mediated settlements in civil cases, such as property disputes and car accidents.

## II. Overview of the legal aid system in Lao PDR

Traditionally, people in Lao PDR tend to consult relatives and friends, rather than lawyers, regarding legal matters. While this may be useful in small civil conflicts, it has not proven effective when confronting larger legal issues, especially those that involve criminal charges.

Although there is no universal definition on legal aid, it can be understood that legal aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system. Legal aid is relatively a new phenomenon in Lao PDR. At an early stage of the legal and judicial development in Lao PDR, the term “free legal assistance” was introduced in its legal policies, which included legal education, information dissemination on laws and procedures and legal advice.

The first pilot program on legal aid services was launched and supported by UNDP in 2004, as part of the “Enhancing Access to Justice Project” through the Lao Bar Association (LBA). This was the first time that legal aid concept and services were introduced to the Lao society. This was a six-year project which began in 2004 and ended in 2010. The general objectives of the project were to: (i) to strengthen the LBA in order to function eventually as a professional, independent institution that is able to provide a range of legal services, including, legal aid; and (ii) to review traditional system of justice and their linkages with the formal system through a study of the village mediation units.

Legal aid services are regarded as the part of strengthening and creating an enabling environment for people to access to justice effectively. In 2007, the first legal aid clinic was launched with the Lao Bar Association, to provide free legal consultation, legal representation for poor and vulnerable groups. Then, with the support of the Asia Foundation, the project was extended to other areas of Lao PDR; the legal aid clinics were opened in Pakse, Champasack Province (southern regions) and in Udomxay, Udomxay Province (northern regions). Later in 2015 and 2016, two more legal aid clinics was opened in Xayaboury, Xayaboury Province and in Phonsavath, Xiengkouang Province.

Two legal aid clinics in Champasak and in Udomxai serve as the base for nationwide mobile legal assistance and covers southern and northern regions of the Lao PDR. Coordination and oversight are conducted by the LBA in Vientiane, which also provides legal aid services to those in central region of the Lao PDR. To reach rural citizens, the LBA conducts mobile legal aid clinics where trained legal volunteers travel to villages to talk to citizens about their legal issues. These clinics and legal education efforts provide even the most rural areas with essential information about the law and legal sector.

In March 2016 an “Information Kiosk” was established at the Provincial Court in Xiengkhouang Province and a fully functional Legal Aid Center was also established at the Department of Justice in the province’s capital,



Phonsavanh. The Kiosk aims to provide the citizens more access to information regarding their rights, laws and court case as part of the enhancement of access to justice.<sup>143</sup>

Moving forward and to provide a legal basis for the above legal aid centers, the Ministry of Justice has established a drafting committee to develop a special law on legal aid and the legal aid funds in 2015. The drafting committee had been compiling good practices of legal aid in the regions and from several countries, including the Philippines and Sri Lanka in 2014 and 2016, respectively. The committee conducted a series of consultations and has been able to complete its draft which is discussed later in item 3 of this paper.

### III. Legal Framework on Legal Aid Services

As mentioned above, legal aid services have been introduced recently, although the Constitution has provisions to promote, ensure and enhance access to the justice equally, there is no specific law dealing with legal aid. However, there are several relevant laws and provisions closely linked with legal aid. They are as follows:

#### a. Criminal Procedure Law (2012)

Article 71 (amended) of the criminal procedure law (amended 2012) stipulates that in the case where the accused or defendant is a child under 18 years of age, a deaf or mute person, an insane or mentally ill person, those who does not know the Lao language, or who will be convicted the death penalty, such person must have protection. If the accused or the defendant has no lawyer or legal protector to defend his or her case, the relevant investigation organization must request the Lao Bar Association to appoint a lawyer within seven days from the date of receipt of the request.

#### b. Law on Development and Protection of Women (2004)

Article 38 of the Law on Development and Protection of Women which was adopted and promulgated in 2004 stipulates clearly that women and children have right to seek for counselling including legal advice and recommendations in order to protect their legitimate rights. In case of the victims, the Prime Minister Decree No 26 on the implementation of the Law on Development and Protection of Women, which was adopted in 2006, provides the policy and legal framework for assistance to the victims of crimes, especially the trafficking victims, including legal assistance. Article 23 of the Decree provides that the victims have rights to receive the legal assistance such as counselling, legal advice, lawyer and other protection in defending the case free of charge.

#### d. Law on Protection of the Rights of Child (2007)

Article 51(3) of the Law on Protection of Rights of Child provides that a child offender has right to receive legal assistance from a lawyer or legal protector and to have his or her parents or guardian present at stage of the criminal proceedings.

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<sup>143</sup> for more information view at [http://www.la.undp.org/content/lao\\_pdr/en/home/presscenter/pressreleases/2016/03/03/enhanced-access-to-legal-information-for-lao-citizens.html](http://www.la.undp.org/content/lao_pdr/en/home/presscenter/pressreleases/2016/03/03/enhanced-access-to-legal-information-for-lao-citizens.html)

#### **e. Law on Juvenile Criminal Procedure (2013)**

Article 19 of the law on juvenile criminal procedure stipulates that in each step of the juvenile criminal procedure, there must be a lawyer or protector to provide legal assistance to the juvenile accused of a crime. If there is no lawyer or protector, to defend his or her case the relevant investigation organization must request to the Lao Bar Association to appoint the lawyer within three days from the date of receipt of the request.

#### **f. Law on Preventing and Combatting Violence against Women and Children (2014)**

The law on preventing and combatting violence against women and children was adopted and promulgated in December 2014. The objective of the law is to prevent and combat the use of violence against women and children in all aspects. Over the past few years, the Government of Lao PDR has increased its efforts to address all forms of violence against children.

#### **g. Draft Decree on Legal Aid and Legal Aid Funds (September 2017)**

With the objective of developing a comprehensive legal aid system in Lao PDR the Ministry of Justice in collaboration with EU, UNDP, and the Asia Foundation established a drafting committee to draft a dedicated law on legal aid in Lao PDR in 2015. As a result, there are two draft laws; one on legal aid services and the other on legal aid funds have been developed. The latest draft is annexed to this report as Annex 1 and Annex 2 respectively.

The draft Decree sets out principles, regulations, approaches and measures regarding free legal aid for all people enhancing the access to justice aiming at ensuring equality before the laws and compliance with humanitarian principles, thus contributing to building a secured, just and prosperous society.

Article 2 of the draft Decree defines the legal aid as “legal services provided for the poor, disadvantage people, people with disabilities, children with special protections, condemned prisoners of death penalty, women victims of violence or human trafficking through free legal aid clinics, Lao Bar Association and lawyers for free of charge.”

Article 8 of the draft Decree defines the types of the legal aid services including providing of legal information, legal advice, legal normative documents, and legal representative (legal protector) in the judicial proceeding.

Article 9 of the draft Decree defines the persons who are entitled to receipt the legal aid as follows:

1. the poor;
2. disadvantaged people;
3. people with disability;
4. children in need of special protections;
5. condemned prisoners of death penalty;
6. women victims of violence or human trafficking.

In addition, other individuals could also receive free legal aid by providing them with information, legal advice and legal documents.

Under Article 15 of the draft Decree, there are two types of the legal aid service providers as follows:

1. Law practitioners who are assigned to provide free legal aid;
2. Lawyers.

The legal aid service providers have the following rights and duties:

1. to assist higher authorities on free legal aid;
2. to receive and examine requests for legal free aid;
3. to ensure permanent duties;
4. to provide free legal aid to those will use immobile and mobile services;
5. to interact, coordinate with relevant agencies on the eligibilities of beneficiaries of free legal aid
6. to report to the Head of provincial, Vientiane capital Justice Department to certify the provision of free legal aid;
7. to respect, protect the rights and legitimate interests of the beneficiaries of free legal aid;
8. to elaborate plans, regularly report on activities to higher authorities;
9. to maintain documents about free legal aid;
10. to exercise the rights and perform other duties as defined by laws and regulations.

The draft Decree on legal aid regulates the mechanism for application and consideration to grant the legal aid to the beneficiaries.

Likewise, the draft Decree on legal aid fund sets out principals, regulations, approaches and measures for the creation, administration, use and audit of Legal Aid Fund in order to mobilize domestic and foreign funds for free legal aid aiming at promoting the access to Justice and complying with the humanitarian principles. The Decree on legal aid fund regulates the management of fund for legal aid services which will be under the administration and supervision of a Committee on Legal Aid established under this Decree.

## **IV. Legal Aid in Specific Areas**

### **1. Domestic Violence against Children**

Over the past few years, the Government of Lao PDR has increased its efforts to address all forms of violence against children. In May 2013, the Government adopted a National Plan of Action to Prevent and Combat Trafficking in Persons (2013-2015), an extension of which is currently under discussion. In March 2014, a National Plan of Action on the Prevention and Elimination of Violence against Women and Children (2014-2020) was also adopted, prohibiting for the first time all forms of violence against women and children (physical, sexual and emotional) in all settings.

In Lao PDR, social norms generally purport the belief that violence against children in home is a private affair and that physical violence is an acceptable way to discipline and educate a child. 42 percent of Lao adults believe physical punishment is necessary to properly raise a child.<sup>144</sup> The preliminary findings of Lao PDR's first national Violence Against Children Survey report were launched in June 2016; the survey found that violence against children is common in Lao PDR. One in six children had experienced at least one form of physical violence before the age of 18. Roughly a fifth had experienced emotional violence at home, and 1 in 10 experienced some form of sexual abuse as a child. The report reveals that only 15 percent of children ever receive the support they need to recover from their experiences of sexual abuse.<sup>145</sup> Therefore, there is urgent need to provide the adequate legal assistance to the child victims of such violence in accordance to the law on preventing and combatting violence against women and children and other laws, including the Law on the Protection of the Rights and Interests of Children (2007), which defines principles, rules and measures related to the management, monitoring and inspection of implementation of the protection of the rights and interests of children in Lao PDR.

This law includes legal measures to punish those who commit offences towards children in order to ensure that children are in full physical, moral and mental health. In order to implement this law as well as the following relevant laws related to the child right's protection effectively, the referral system and child-protection network was established in the national and local levels. The members of the child protection network consist of the representatives from the Ministry of Labour and Social Welfare, the Ministry of Public Security, the Lao Women's Union and NGOs at the national and subnational level, with technical support from UNICEF.

The members of the child protection network have the responsibility to provide legal assistance, including the legal advices to the members of the child's families and the child victims; the child victims could be referred to the lawyers and prosecutors for their protection in defending the cases free of charge.

## **2. Women Right's Protection**

The Lao Women's Union (LWU) has also taken an active role in disseminating laws through its units at the local level to women in different parts of the country, and is actively raising awareness, including the establishment of a Centre for Legal Advice for victims of trafficking, sexual exploitation and violence within the home. In 16 January 2006, the LWU with support from UNICEF and other international partners, has opened Lao PDR's first shelter for women and girls who have suffered abuse through domestic violence or trafficking. It has provided consultations, psychological counseling and a temporary safe shelter, short-period of vocational training, and legal and health advise; cooperated and provided useful evidence for the case procedures; and protected the legitimate rights and interests of the survivors of trafficking and domestic violence. The LWU has improved their counseling network, organized trainings to improve knowledge, technical skills on counseling for the LWU leadership and some technical officials from the central and local levels, and established a counseling center in 5 target provinces, 16 districts and 32 villages.

## **3. Labour Disputes**

The Lao Federation of Trade Unions (LFTU) is the national trade union in the Lao PDR. The key role of the LFTU is to protect the rights and benefits of workers, to train workers and to contribute to state and social development. Trade unionism is about union members working together to meet the needs and concerns of workers: to protect their rights and represent their interests. The objectives of the LFTU are to mobilize

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<sup>144</sup> Lao Social Indicator Survey (LSIS) 2011-2012; available at <https://dhsprogram.com/pubs/pdf/FR268/FR268.pdf>

<sup>145</sup> The survey is available at [https://www.unicef.org/laos/VAC\\_preliminary\\_report\\_ENG\\_FINAL\\_-\\_30\\_May\\_2016.pdf](https://www.unicef.org/laos/VAC_preliminary_report_ENG_FINAL_-_30_May_2016.pdf)

solidarity, develop democracy, promote various professions, and work towards social equality. The LFTU has rights to protect the legitimate rights and interests of trade unionists, workers and labourers.

The LFTU has established its telephone hotline 1512 in 17 July 2017 for free counselling and consultation about the labour disputes.

## V. Legal Aid Service Providers

As mentioned above, presently there is no national legal aid agency or centre, however, the legal aid services are provided by the State's organizations and civil society organizations in the Lao PDR.

### 1. The Ministry of Justice

In terms of enhancing access to justice for vulnerable persons, the Ministry of Justice had initiatively launched more pilot programs in three targeted provinces in 2016, namely Xiengkhuang, Savahnakhet, and Xekong provinces. These Legal Aid Centers (LAC) are under supervision of the Provincial Departments of Justice and technically operate and provide their legal aid services in collaboration with the LBA. These pilot LACs have been funded by the UNDP and the Asia Foundation under the LSMP programme.

### 2. The Lao Women Union

The Lao Women's Union (LWU) was originally established in 1955 to mobilize women for the Lao People's Revolutionary Party. Over forty years later, it has a membership of some 600,000 women nationwide. In 1991 the LWU was recognized under the Constitution of the Lao People's Democratic Republic (Lao PDR) as having responsibility for: responding to women's development needs; promoting the status and role of women; and promoting unity amongst women of different ethnic groups and social strata throughout the country.

### 3. The Lao Federation of Trade Union (LFTU)

As mentioned above, the LFTU and its sub-regional and field-based committee have rights and duties to protect the workers in the factories and work-places. The trade unions in different levels have also rights to provides the free legal advices on the labour disputes.

### 4. The Lao Bar Association (LBA)<sup>146</sup>

The Lao Bar Association (LBA) was established in 1996 by the Prime Minister's Decree No64/PM. At that time, there were 29 appointed lawyers as the members of the LBA. Today, there are about 200 licensed lawyers in the country. Since 2003 until now, the legal aid programme, which had been supported by the UNDP and the Asia Foundation, run by the Lao Bar Association (LBA) in collaboration with Ministry of Justice, provides poor and rural Lao populations with greater access to legal aid through paralegals made up of volunteers from local villages.

<sup>146</sup> Lao Bar Association. 4<sup>th</sup> Floor, Vientiane Capital Court Building. Km 3. Tha Deua Road Beungkhanhong Tai Village, Siattanak Village, Vientiane, Lao PDR. Tel:+856-21-990-446; Fax: +856-21-990-445. E-mail: contract@laobar.org; website: www.lba.org.la.

Comprehensive legal aid and legal education program aims improve access to justice, particularly for poor and rural citizens, and to increase understanding of laws and rights under Lao law and the legal system among citizens and professionals in the legal field.

According to the interview with the President of the LBA, President Mr Khamsay Soulinthone<sup>147</sup> said the association wanted people with legal problems to apply to the association to receive a free consultation. According to him, free defense lawyer services will also be provided to accused poor people or poor people who have cases to go before the court but the people should be certified by local authorities at the village level as really being poor.

According to the LBA, some 600 people received free legal aid from the project to provide legal aid clinics in the last half of last year, with 70 of them having court cases found in their favour. Mr Khamsay said the legal aid provision has learned that the problems people had were mainly about disputes concerning inherited property, loans, and other civil cases.

## 5. The Association for Development of Women and Legal Education (ADWE)

The Association for Development of Women and Legal Education (ADWLE) is a Non-Profit Association (NPA). Originally called the Women's Rights Study Association, the Association was created unofficially in 2008 by a CEDAW Resource Pool, consisting of 10 women and two men, with the intention to promote gender equality and women's rights in the Lao PDR.

The legal aid clinic for vulnerable women was established in 6th November 2015 and has been deemed a success with 20 cases received so far; three cases of rape and 17 cases of physical and emotional abuse within the family.

# VI. Analysis of existing legal aid services and challenges

## 1. Good Practice

Building on the efforts of SPLSMP<sup>148</sup> significant changes has been introduced in the justice system and in particular legal aid. Overall in the justice sector improved procedures and techniques, including public consultation, have been adopted for the lawmaking process, and piloted in the case of major legislative initiatives: Major organisational changes have been initiated, while training and capacity building have become more systemic and professional. Not least, at the local level, a concerted effort has been made to improve frontline justice service delivery: including, the capacity building of village mediators, establishment of provincial legal aid clinics, and design of mobile courts as well as activities to raise awareness about the process amongst the public, local level officials, and legal aid providers.

Despite the absence of a centralized legal aid system<sup>149</sup> since 2003, the legal aid system has been developed gradually. The UN principles and guidelines on access to legal aid and in criminal justice systems has been studied and some of these principles have been incorporated in the law on criminal procedure (2012) and

<sup>147</sup> Vientiane Time Newspaper, dated 11<sup>th</sup> February 2016

<sup>148</sup> SPLSMP – Support Programme Legal Sector Master plan – was a project implemented by UNDP and funded by EU

<sup>149</sup> U.N.Econ. & Soc.Council, Commission on Crime Prevention and Criminal Justice, the United Nations Principle and Guidelines on Access to Legal Aid in Criminal Justice System, U.N Doc.No E/CN.15/2012/L.14/Rev.1 (Apr.25,2012).

has been used as reference for developing the draft law on legal aid, namely the Decree on legal aid and Decree on legal aid fund. Since 2003, legal aid services have been supported financially and technically by the international communities such as the UNDP; the Asia Foundation has also provided very significant assistance to help the country to build and develop its legal aid scheme as part of the effective access to justice system.

## VII. Challenges

Legal aid services are a key factor in helping local residents to become fully aware of their rights and to access effectively appropriate mechanisms. According to a 2011 survey on people's perspectives on access to justice conducted in four provinces in Lao PDR, particularly regarding people's awareness of judicial mechanisms and supporting institutions that will enable the people to enjoy and protect their rights, the best known mechanism was the customary system, with 78.7 per cent of respondents being aware of the possibility of recourse to it.<sup>150</sup> The Village Mediation Unit (VMU) came next at 72.2 per cent and the formal system, that is the court, ranked third at 65.5 per cent. According to the same 2011 survey, in terms of legal assistance, only 14.8 % of respondents were aware of legal aid services.

In terms of provisions of legal aid services, legal aid lawyers are very limited with only a total of 200 lawyers in the country. In the past, the legal aid lawyers had been working on a volunteer basis with financial support from projects by the UNDP and the Asia Foundation to provide services such as legal assistance, advice and legal representation in litigations. These projects are time bound and once the projects are over, there is no sustainable mechanism to continue the work.

Financial sustainability and resources for all legal aid service providers, including the government organization, the non-profit associations, and LBA, is an immense challenge. Presently legal aid activities heavily depend on the financial aid and very limited contributions by the State. It is expected that the Decree on legal aid fund, if it is passed, would open a new pathway to help to raise more adequate funds for legal aid services.

## VIII. Conclusion and Recommendations

Based on work done thus far on legal aid both by the state and development projects, the following recommendations are made to be considered during the process of further strengthening legal aid in Lao PDR.

- Firm and comprehensive support shall be given to expand the network of legal aid clinics in more provinces and districts;
- An appropriate paralegal system for Lao PDR shall be identified, along with legal and institutional framework to support the process. Initial support should be extended for the training and deployment of paralegals to pilot districts which lacks access to other legal services;

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<sup>150</sup> Source: [http://www.la.undp.org/content/laopdr/en/home/library/democratic\\_governance/publication\\_1.html](http://www.la.undp.org/content/laopdr/en/home/library/democratic_governance/publication_1.html)

- A referral system for rural residents will be designed and established between VMUs, legal aid and information centres, LBA, land registries, child welfare committees, police, prosecutors, courts – in particular, the regional administrative chambers, local administrations, and other justice institutions;
- A suitable methodology shall be identified to develop and capacity built justice services providers, including village mediation units, police, prosecutors, courts, lawyers, to better handle and support particularly vulnerable victims and witnesses: e.g., victims of sexual or gender-based violence, children, persons with mental or physical disabilities, and ethnic, religious or linguistic minorities. (Support might be augmented with support for small infrastructure improvements and equipment – e.g., victim/witness rooms – that might also be used in organised crime or trans-national cases.) so that effort shall also be made to enhance the sustainability of free legal aid, and the Legal Aid Fund, for vulnerable persons;
- Sustainable means for the provision of updated legal information, or access to such information, should be identified and piloted. These might include referral systems for village mediation committees, legal libraries, primary legal aid services – and materials – institutionalised at the district level or radio “call-in” shows.

Fund for the legal aid activities shall be raised and contributed by the society and the government in order to conduct the legal aid services in the Lao PDR more effectively.



# MALAYSIA

## I. Introduction

### 1. Background

All ASEAN Member States (AMS) have their respective and unique legal aid systems. They differ from one another on many aspects, including the legal basis for the provision of legal aid, implementation of the “means test” and the myriad of legal aid services. Voluntary, yet complementary, involvement of various non-governmental organisations (NGOs) and academic institutions in the provision of legal aid, education and awareness has further diversified the nature and operationalisation of legal aid systems among AMS. The diversity of legal aid systems and their implementation indicate that there is a pool of good practices that may be replicable among AMS. Similarly, there may also be challenges and lessons learnt that can be shared among AMS, with a view to strengthen the provision of legal aid and subsequently enhance access to justice among the people of ASEAN.

In Malaysia, the state, Bar Council, NGOs and academic institutions play equally important roles in the provision of legal aid. The state, through its Legal Aid Department (LAD), is mandated to provide various legal aid services including litigation and mediation on selected civil, criminal and Shariah matters, targeting lower income groups among Malaysian citizens. The Bar Council, in the meantime, provides legal advice, representation and intervention in select civil and criminal matters to not only Malaysians, but non-citizens including migrant workers and refugees in Malaysia. The establishment of the National Legal Aid Foundation (NLAF) in 2011 is perceived as a breakthrough in the development of legal aid schemes in Malaysia, paving the way for more robust public-private partnerships in the future provision of legal aid.

### 2. Objectives

Pursuant to the adopted concept note of the AICHR Thematic Study on Legal Aid (2016), this country-specific study on legal aid in Malaysia aims to achieve the following objectives:

- (i) reviewing legal aid schemes in Malaysia;
- (ii) identifying good practices in the provision of legal aid;
- (iii) analysing challenges faced by legal aid institutions in the provision of legal aid; and
- (iv) putting forward a set of recommendations for the consideration of the respective AMS, as well as the AICHR.

### 3. Methodology

Production of this study has gone through some basic research procedures including undertaking literature reviews that covered academic publications, proceedings and reports related to legal aid. This phase also involved reviews of relevant international laws and UN documents such as the UN Guiding Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, as well as relevant national laws and regulations. Reviews of media coverage related to the development of legal aid, as well as parliamentary debates, were also undertaken.

Despite the time limitation, an interview session was organised with LAD officials from the Prime Minister’s Department on 25 August 2017 at Putrajaya, Malaysia. This engagement permitted the study to gather insights from the LAD, in particular the latest amendment to the Legal Aid Act (1971) that was tabled between July and August 2017.

## 4. Operational Definition & Limitations

### 4.1. Operational Definition

This study refers to the universally-agreed definition of “legal aid” derived mainly from the UN Guiding Principles and Guidelines on Access to Legal Aid [Annex (A)(8)], which is as follows:

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*“... legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witness in the criminal justice process that is provided at no cost for those without sufficient means or when the interest of justice so require. Legal aid also covers the concept of legal education, legal information, alternative dispute resolution mechanisms...”*

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### 4.2. Limitations

The official embarkation of this study began on 29 July 2017 following the conclusion of the first National Researchers’ Meeting organised by the Representative of Thailand to AICHR in Bangkok, Thailand.

The time factor has been a key challenge that inevitably caused compromises in a number of aspects in the interest of completing this study. One of them was the missed opportunity, due to time constraints, to meet, consult and gather input from legal aid providers, NGOs and academic institutions. These stakeholders have been key players, sacrificing their time and professional assistance to many segments of vulnerable and underprivileged people in the country. Secondly, the time factor coupled with reporting requirements limited the potential of this study to identify more good practices on the ground.

Despite the above limitations, existing secondary sources derived mainly from a series of LAD annual reports and the Bar Council’s Legal Aid Centre (hereinafter referred to as LAC) – coupled with publicly available reports, proceedings and other forms of publications – has enabled the study to identify good practices and undertake analysis of challenges.

## II. Country Background, Legal System & Legal Aid Schemes in Malaysia

### 1. Country Background

Malaysia is a federation consisting 13 States<sup>151</sup> and three Federal Territories<sup>152</sup>. The country comprises Peninsular Malaysia (referred to as West Malaysia), as well as Sabah and Sarawak (referred to as East Malaysia) – which are separated by the South China Sea.

Based on the Population and Housing Census 2010, Malaysia's population is estimated at 32 million in 2017, with a gender ratio of 107 males for every 100 females.<sup>153</sup> Malaysia is identified as an upper-middle income economy and recorded an average growth of more than 7 percent per year for 25 years or more, according to the Commission on Growth and Development.<sup>154</sup> For the past 30 years, Malaysia has efficaciously curtailed its poverty rates and relatively reduced income inequalities – with the aim of achieving high income status by 2020.

Given the multi-cultural and multi-religious context in Malaysia, laws play a crucial but complex role in ensuring ideal inclusivity. It essentially raises paradoxes in jurisprudence to balance the legal ideal of equality and the reality on the ground where unequal treatment is needed to achieve equality, or at least some form of equity.<sup>155</sup>

As of August 2017, Malaysia has ratified three key human rights treaties – namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995, the Convention on the Rights of the Child (CRC) in 1995, and the Convention on the Rights of Persons with Disabilities (CRPD) in 2010.

Despite its strong commitment to promote, respect and protect the rights of select vulnerable population groups (i.e. women, children and persons with disabilities), the United Nations Human Rights Council (UNHRC) in its 2013 Universal Periodic Review (UPR) noted that human rights violations remain a concern in the country. In particular, the UPR report (2013) stressed that existing legal aid initiatives have not been responsive, or at least reactive in nature, to human rights violations including those committed on women, children and persons with disabilities.<sup>156</sup>

### 2. Legal System in Malaysia

As a constitutional monarchy, Malaysia operates a dual governmental system at federal and state levels, at the same time adhering to a Common law legal system. The federal law applies to all 13 states and three Federal Territories of Malaysia. Each state has its own laws. In East Malaysia, they are termed as Enactment for Sabah and Ordinance for Sarawak – both of which are published in state gazettes.

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<sup>151</sup> These states include Johor, Malacca, Negeri Sembilan, Selangor, Perak, Pahang, Penang, Kedah, Perlis, Terengganu, Kelantan, Sabah & Sarawak.

<sup>152</sup> The Federal Territories in Malaysia include Kuala Lumpur, Putrajaya and Labuan.

<sup>153</sup> Department of Statistics, Malaysia. 2017. *Key Statistics (Malaysia)*. Accessible at <https://www.dosm.gov.my/v1>

<sup>154</sup> Commission on Growth and Development. 2008. *The Growth Report: Strategies for Sustained Growth and Inclusive Development*. Accessible at <https://openknowledge.worldbank.org/handle/10986/6507>

<sup>155</sup> Azmi Sharom. 2013. *Laws and Its Implications on Inclusiveness*. In Malaysia Human Development Report (MHDR): Redesigning an Inclusive Future. United Nations Development Programme: Kuala Lumpur. p. 257. Accessible at <http://hdr.undp.org/en/content/malaysia-human-development-report-2013>

<sup>156</sup> Latham & Watkins. 2015. *Pro Bono Practices and Opportunities in Malaysia*. Paper was published for the Pro Bono Institute. p. 401. Accessible at <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-malaysia.pdf>

The Malaysian Federal Constitution (1957) is the highest law in the country. It defines the Malaysian government structure and guarantees the fundamental rights of its citizens, including the right to life, right to equality, right to liberty as well as freedom of religion.<sup>157</sup> Malaysian legislation is published in the Gazette, while state laws are published in the state gazettes. The government established the Malaysian Law Reform Committee in December 2009, with the specific task of continuously examining the relevance of Malaysian laws and their benefits to the general public at large.<sup>158</sup>

### 3. Evolution of Legal Aid System in Malaysia

In general, the Malaysian Federal Constitution (1957) does not specifically mention the provision of legal aid. However, the constitution under Article 5(3) guarantees the right to be legally represented while Article 8(1) guarantees that all persons are equal before the law.<sup>159</sup>

Essentially, the provision of legal aid in Malaysia began as early as the pre-World War 2 era through the assigned counsel scheme, specifically for the death penalty (further refer Good Practice 8). The scheme aims to provide the accused an opportunity to be represented, for the interest of justice, without the need for a means test.

While such a scheme still exists, and is presently under the purview of the Chief Registrar's Office, the country experienced an evolutionary development with the introduction of various legal aid schemes provided by the government, as well as independent entities such as the Malaysian Bar Council as well as the NLAFF (refer to **Table 14** below).

**Table 14: Evolution of Legal Aid System in Malaysia**

Years	Development
WWII - 2017	Since pre-World War II era until the present day, a legal aid scheme currently provided by the Chief Registrar's Office (Justice), namely the "Court-Assigned Counsel," offers legal advice and representation for capital offence cases.
1970	The first ever legal aid scheme, known as the Legal Aid Bureau (LAB), was established by the Government of Malaysia in 1970. In the early years of its establishment (until 1995), the LAB was placed under the Malaysian Attorney General's Chambers and the Ministry of Justice.
1971	After a few months of its inception, the Legal Aid Act (LAA) was passed in 1971 as a legislation, supporting the functions and mandate of the LAB.
1980	In 1980, the Bar Council established a Legal Advisory Centre in the state of Penang in accordance with the Legal Profession Act. This was done due to the LAB's relatively limited coverage and scope of services, as well as the fact that there were segments of society – mainly underprivileged communities – that needed legal advice and assistance during the 10-year period since its inception.

<sup>157</sup> Government of Malaysia. 1957. Federal Constitution of Malaysia (Part II – Fundamental Liberties). Accessible at [http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf)

<sup>158</sup> Sharifah Suhanah Syed Ahmad. 2014. *Introduction to the Malaysian Legal System and Source of Law*. Paper was downloaded from Hauser Global Law Programme, New York University School of Law. Accessible at [http://www.nyulawglobal.org/globalex/Sources\\_Law\\_Malaysia1.html](http://www.nyulawglobal.org/globalex/Sources_Law_Malaysia1.html)

<sup>159</sup> Government of Malaysia. 1957. Federal Constitution of Malaysia (Articles 5(3) & 8(1)).

Years	Development
1982	In 1982, the Bar Council established its first official LAC in Kuala Lumpur, with the vision to provide legal advice and services to underprivileged individuals.
1983	To ensure that the LAC would operate independently and be able to financially maintain their operations, the Bar Council passed a resolution in 1983 requiring all practicing attorneys to pay an annual contribution of RM 100 to the Bar Council.
1995	In 1995, the LAB – which was previously administered under the Malaysian Attorney General’s Chambers and the Ministry of Justice – was then attached under the Legal Affairs Division of the Prime Minister’s Department.
2011	In 2011, the LAB was renamed as the Legal Aid Department (LAD) but remained as an agency under the Legal Affairs Division of the Prime Minister’s Department.
2011	In the same year, a hybrid of government and private legal aid scheme, known as the NLAFF was founded. Among others, objectives were to fund the provision of legal aid, strengthen service delivery as well as competency among the attorneys.

Source: Various sources<sup>160</sup>

#### 4. Legal Aid Schemes in Malaysia

In general, there are three main legal aid schemes in Malaysia, differing from one another in terms of legal basis, eligibility criterion and services provided (refer **Table 15**). Academic institutions and NGOs play significant role in reinforcing the provision of legal aid by these three legal aid service providers (refer **Table 16**)

**Table 15: Key Legal Aid Schemes, Their Legal Basis, Eligibility and Services Provided**

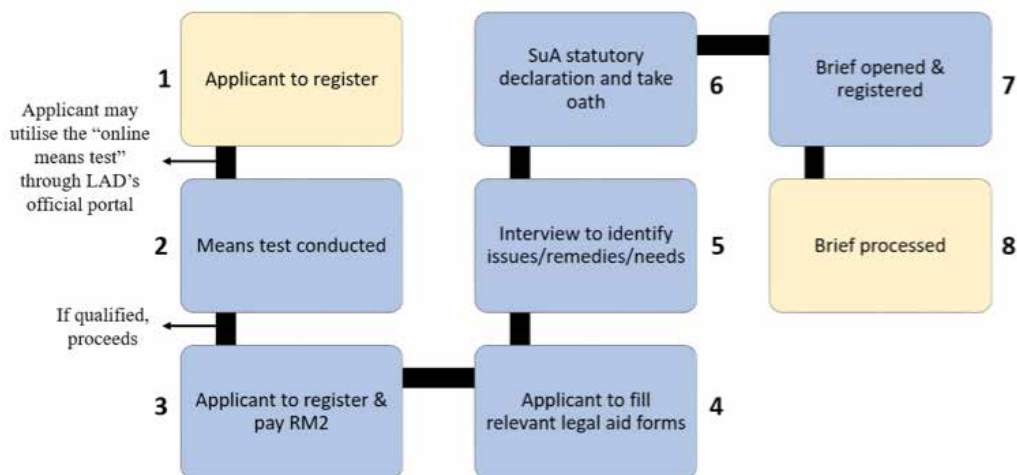
Subject	Legal Aid Department (LAD)	Legal Aid Centre (LAC)	National Legal Aid Foundation (NLAFF)
Formation & key legal basis	(i) Legal Aid Act (1971); (ii) Legal Aid & Advice Regulations (1970); (iii) Legal Aid (Mediation) Regulations (2006)	(i) Legal Profession Act 1976. <sup>161</sup>	(i) NLAFF was established (in 2011) under the Companies Commission of Malaysia (CCM).
Objectives (select few)	(i) To provide legal advice; (ii) To represent or provide legal assistance in proceedings; (iii) To provide mediation services;	(i) To provide legal representation and assistance to the marginalised, underprivileged and disadvantaged people; (ii) To promote legal aid as a fundamental human right	(i) To fund legal aid and legal advice specifically for criminal proceedings; (ii) To conduct, fund and supervise research relating to legal aid;

<sup>160</sup> Sources consist: (i) Latham & Watkins. 2015. *Pro Bono Practices and Opportunities in Malaysia*; (ii) Andrew Khoo. 2017. *Baseline Study on Legal Aid in Malaysia*. Unpublished paper for the ASEAN Intergovernmental Commission on Human Rights (AICHR); (iii) Arifin Zakaria. 2013. *Fostering an Efficient & Competent Legal Profession to Support the Court Development of Pro Bono Civil and Criminal Programs: Malaysian Perspective*. Paper was presented at Conference of Chief Justices of Asia & the Pacific. Accessible at <http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/Conference%20Of%20Chief%20Justices%20Of%20Asia%20And%20The%20Pacific%202013.pdf>

<sup>161</sup> Government of Malaysia. 1976. Legal Profession Act (refer Section 42(1)).

Subject	Legal Aid Department (LAD)	Legal Aid Centre (LAC)	National Legal Aid Foundation (NLAF)
Type of services provided	(i) Litigation (ii) Mediation (iii) Legal Advice (iv) Legal awareness and legal education	(i) Legal advice, representation and legal intervention (ii) Mitigation of sentences, remand proceedings & bail applications, & etc.	(i) Legal advice and representation
Extent of services (stages)	Mediation, proceedings & mitigation	Arrest / remand, proceedings, mitigation and hearing	Arrest, remand, charge, mitigation, bail application, hearing and appeal.
Areas of coverage	Civil matters <sup>162</sup> ; Criminal matters <sup>163</sup> and; Syariah matters <sup>164</sup>	Criminal law; family law; labour law; land law; Islamic (Syariah) family law; cases pertaining to migrant workers & refugees, juveniles, domestic violence, indigenous people, land rights;	Criminal cases including Syariah criminal
Eligibility	(i) Applicant whose annual income within RM25,000 (US\$6,000)  (ii) Applicant whose annual income between RM25,000 (US\$6,000) and RM30,000 (US\$7,500)  General procedure to access legal aid service provided by LAD (refer Figure 1)	Applicant should have monthly income not more than;  (i) Single person – RM650 (US\$150)  (ii) Married couple – RM900 (US\$225)	Applicant must have an annual income that does not exceed RM36,000 (US\$9,000)
Minimal fees	(i) Registration fee of RM2 (less than US\$1) for applicant whose annual income within RM25,000 (US\$6,000)  (ii) Contribution (fee) of RM300 (US\$75) for applicant whose annual income between RM25,000 (US\$6,000) & RM30,000 (US\$7,500)	Minimum fee of RM20 (US\$5) as an administrative fee to open a file.  Applicants are also required to pay the expenses incurred by the lawyer assigned to their case (e.g., travel, photocopy, etc.)	N/A
Achievement (services provided)	In year 2015 alone, the LAD had provided/registered/ organised a total of <sup>165</sup> :  (i) 51,478 legal advice services (ii) 19,287 litigation cases (iii) 6,610 mediation services (iv) 2,750 raising awareness programmes	In a span of five years (2012-2016), a total of 99,740 clients were served by the LAC across Peninsular Malaysia.	From 2012 to June 2017, NLAF served a total of 775,432 clients covering cases at various stages including during arrest, remand, mitigation/bail and hearing processes. <sup>166</sup>

**Figure 1: General Procedure to Access Legal Aid under Legal Aid Department (LAD) Scheme (Flow Chart)**



Source: General Procedure (Illustration) to Access Legal Aid, LAD's official portal<sup>167</sup>

<sup>162</sup> Legal aid services may be granted in civil cases for matters as set out in the Third Schedule of the Legal Aid Act (1971) which was amended in 2011. These include proceedings pertaining to Married Women and Children (Act 1950); Maintenance Ordinance 1959; Sarawak Customary Marriages (Maintenance) Ordinance 2003; Married Women and Children (Enforcement of Maintenance) Act 1968; rights and liabilities in respect of proceedings for divorce and custody; rights and liabilities under the Adoption Act 1951; Adoption Ordinance 1960; Moneylenders Act 1951; Hire-Purchase Act 1967; *Padi* Cultivators; (Control of Rent and Security of Tenure) Act 1967; and proceedings relating to tenancy as well as consumer claims.

<sup>163</sup> Legal aid services provided by LAD pertaining to criminal cases are enshrined under the Second Schedule of the Legal Aid Act (1971). These include all criminal proceedings in which the accused not being represented by counsel and pleads guilty to the charge; criminal proceedings under the Child Protection Act (1991) (which has been repealed by the Child Act (2001) and; criminal proceedings under the Minor Offences Act (1955).

<sup>164</sup> Legal aid services pertaining to Syariah may be granted, as set out in Third Schedule of the Legal Aid Act (1971) – in relations to proceedings relating to betrothal (damages), maintenance, custody, divorce, marital debt, "*mutaah*", "*harta sepencarian*" as well as gifts *inter vivos* (*hibah*).

<sup>165</sup> Legal Affairs Division of the Prime Minister's Department of Malaysia. 2015. Annual Report (refer Section on Legal Aid Department). p. 127. Accessible at <http://www.bheuu.gov.my/index.php/en/perkhidmatan/annual-report>

<sup>166</sup> Bar Council of Malaysia. 2016/2017. Annual Report. p. 268.

<sup>167</sup> Legal Affairs Division of the Prime Minister's Department of Malaysia. Procedure to Access Legal Aid. Accessible at <http://www.jbg.gov.my/index.php/ms-my/bantuan-guaman/tatacara-mendapatkan-bantuan-guaman>

**Table 16: Academic Institutions & NGOs (Non-Exhaustive List), Their Services & Targeted Beneficiaries**

No.	Legal Aid Service Providers	Services Provided	Targeted Beneficiaries
<b>Academic Institutions /Faculties</b>			
1	HELP University College (Legal Clinic)	Legal advice and education	General public
2	International Islamic University Malaysia (IIUM)	Legal advice and education	Malaysian citizens, staff and students of IIUM
3	National University of Malaysia (UKM)	Legal advice, education and representation	General public
4	Science Islamic University Malaysia (USIM), Faculty of Syariah & Law	Legal advice and education	General public
5	Taylor’s Law School	Legal advice, education and representation	General public
6	Universiti Utara Malaysia (UUM), (COLGIS)	Legal advice and education	General public
7	University Malaya, (UM), Faculty of Law	Legal advice, education and referral to other legal aid providers	General public
<b>Non-Governmental Organisations (NGOs)</b>			
8	All Women’s Action Society (AWAM)	Legal advice, advocacy and reform	Women
9	Angkatan Belia Islam Malaysia (ABIM)	Legal education and advocacy / reform	General public
10	Asylum Access Malaysia (AAM)	Legal advice & education on Malaysian immigration law and UNHCR procedures	Asylum seekers and refugees
11	Federation of Malaysian Consumers Associations (FOMCA)	Legal advice and advocacy (on consumer issues)	Consumers in Malaysia
12	Health Equity Initiatives (HEI)	Legal and procedural advices on matters concerning UNHCR’s refugee application	Asylum seekers and refugees
13	Jaringan Rakyat Tertindas (JERIT)	Legal advice and education	General public and non-citizens
14	Malaysian Trade Union Council (MTUC)	Legal advice and advocacy	Malaysian & migrant workers



No.	Legal Aid Service Providers	Services Provided	Targeted Beneficiaries
15	Malaysian Centre for Constitutionalism and Human Rights (MCCHR)	Legal advice, strategic litigation and education	General public
16	North South Initiative (NSI)	Legal education and advocacy	Migrant workers
17	Partnership of Community Organisations Sabah (PACOS)	Legal advice, education & referral (for pro bono)	Indigenous Peoples / Orang Asal
18	Pertubuhan Pengguna Islam Malaysia (PPIM) – Islamic Consumer Organisation	Legal advice, representation and education (on consumer issues)	General public
19	Sister in Islam (SIS)	Legal advice, education and court watch (focuses on Syariah law)	Women (citizens & non-citizens)
20	Suara Rakyat Malaysia (SUARAM)	Legal advice, “urgent arrest” assistance and education.	Citizens, migrant workers & refugees
21	TENAGANITA	Legal advice, education & representation in court.	Citizens, migrant workers & refugees
22	The Indigenous Peoples Network of Malaysia (JOAS)	Legal advice, education & referral (for pro bono)	Indigenous Peoples / Orang Asli
23	Voice of the Children (VoC)	Legal advice, education, advocacy and reform.	Children (citizens of Malaysia and non-citizens)
24	Women’s Aid Organisation (WAO)	Legal education and assistance.	Women (citizens of Malaysia and non-citizens)

Source: Various, mainly through their respective official portals.

Note: This information is non-exhaustive

### III. Compilation of Good Practices in the Provision of Legal Aid

A legal aid service identified as a good practice must initially enshrine a range of basic principles, such as (a) equality before the law; (b) the right to a fair and public hearing; and (c) a foundation for the enjoyment of other rights, including the right to a fair trial. The UN Guiding Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems may be referred to as the benchmark for effective implementation of legal aid schemes.

In order to identify the range of good practices in Malaysia, this study refers to a set of non-rigid and broad criteria, namely (a) accessibility; (b) credibility; (c) sustainability – all of which are derived heavily from the UN Guiding Principles and Guidelines on Access to Legal Aid.

## Good Practice 1 - Diversifying Community Empowerment Programmes

Provider: Legal Aid Department (LAD), Prime Minister's Department, Malaysia

### Summary of Good Practice

Accessibility is an essential element of a functioning and effective legal aid service. It also relates to the right of individuals to be informed of their right to legal aid. The lack of awareness and understanding of their right to legal aid and the range of accessible services serves as a major impediment to the right to justice.

In many countries, including Malaysia, the state agency (such as the LAD) plays an important role to inform potential beneficiaries of the types of services provided, applicants' eligibility and the ways in which they can access such services (matters concerning procedures).

This is in line with the UN Guiding Principles and Guidelines on Access to Legal Aid, which states that persons must be informed of their right to legal aid, other procedural safeguards and potential consequences of voluntarily waiving those rights. The said guidelines and principles also stress that information on beneficiaries' rights during the criminal justice process and on legal services should be made freely available and accessible to the public.<sup>168</sup>

These principles have been implemented on the ground by the LAD. One way is through community empowerment programmes that seek to raise awareness among the public on the availability of legal aid services provided by the LAD.

Such community empowerment programmes are dedicated to reaching out to and empowering targeted segments of the population, mainly among socially and economically disadvantaged people, thereby equipping them with basic legal information and procedural matters in the hopes that this would enhance their access to justice.

### Diversifying the Community Empowerment Programmes

The LAD has been diversifying their community empowerment programmes into five categories as follows: (i) 1Malaysia Legal Aid Clinics; (ii) community programmes at prison/detention centres for children; (iii) community dialogues/talks; (iv) local community services; (v) media engagement and participation in public service announcements.

One particular empowerment programme – which has high impacts in terms of its (i) number of programmes organised; (ii) number of individuals/participants engaged; (iii) alliance-building strategy – is the 1Malaysia Legal Aid Clinic programme.

The programme seeks to engage and empower the underprivileged and low-income families on a wide range of contemporary issues, such as the right of women to legal counsel, marriage and divorce, and the role of youth, religious institutions, teachers and preachers. It is also aimed at addressing the social, cultural and economic determinants that impede their right to justice, and strengthen awareness and understanding of procedures to access legal aid as provided by the LAD.

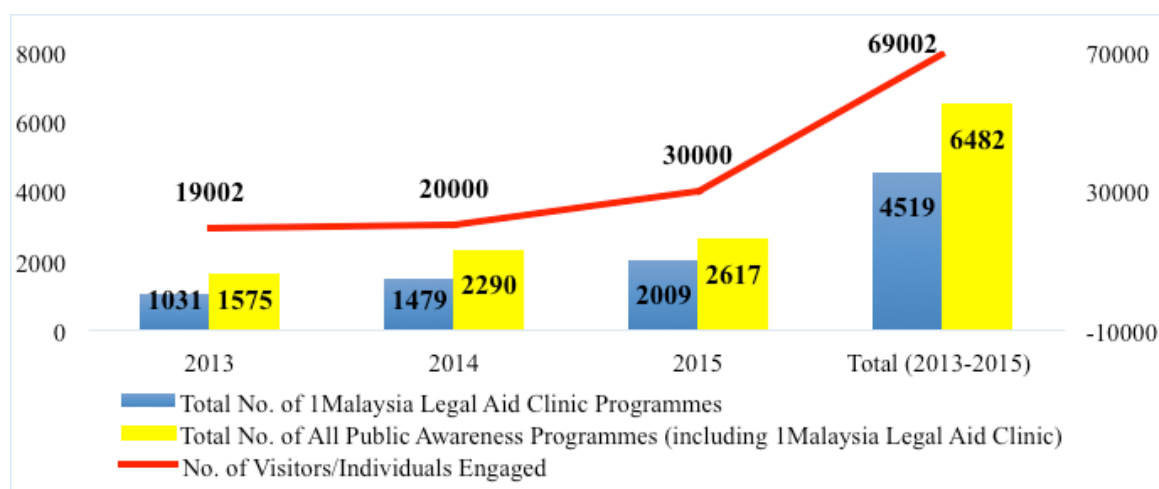
From the period of 2013 to 2015, a total of 4,519 1Malaysia Legal Aid Clinic programmes were organised throughout the country. These programmes attracted a total of 69,002 participants ranging from various walks of life such as students and youths, low-income government servants, rural community, women and children.

In relation to the alliance-building strategy, the 1Malaysia Legal Aid Clinics have brought together various other agencies including federal ministries, state government agencies and religious departments, public universities, government schools and parliamentarian offices.

Apart from the implementation of 1Malaysia Legal Aid Clinics, the LAD organised a total of 357 awareness-raising programmes at prisons and children's shelters across Malaysia in 2015. Meanwhile, a total of 125 community dialogues and 97 local community services were organised throughout 2015.

<sup>168</sup> United Nations. 2013. *Guiding Principles and Guidelines on Access to Legal Aid in Criminal Justice System*. Refer Principle 8 (paragraphs 29 and 30). Accessible at [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

**Number of 1 Malaysia Legal Aid Clinic Programmes,  
Legal Aid Department (LAD), 2013-2015**



Source: Legal Aid Department's (LAD) Annual Reports (2013-2015)

## Good Practice 2 - Dispute Settlement through Mediation

Provider: Legal Aid Department (LAD), Prime Minister's Department, Malaysia

### Summary of Good Practice

Dispute resolution mechanisms play an essential role in resolving any dispute between two parties or more. Dispute settlement through various channels of mediation is used to arrive at a mutually agreeable solution and to avoid bringing disputes to court. In many cases in Malaysia, the disputing parties have not gone through a proper mediation process due to a lack of awareness on the availability of mediation services. Consequently, their disputes are being brought into court for judgement, and this has contributed to a pool of cases which require further action.

Ideally, an effective mediation process would enable the disputing parties to exercise their right to express their voices in view of resolving their dispute without pursuing the matter in court. This would reduce legal cost and time required to resolve conflicts peacefully and in a mutually beneficial manner.

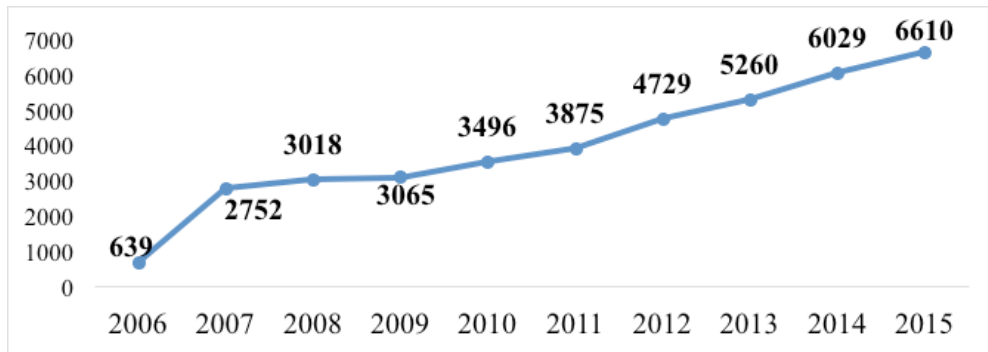
The LAD began providing mediation services in 2006 to all eligible individuals, specifically for family-related disputes under civil and Shariah mediation services. Among family-related cases that can be considered for mediation services are:

- All Shariah family-related cases, excluding divorce, fasakh and judgement notice;
- All civil family-related cases, excluding cases related to domestic violence;
- All disputes where the disputing parties can be contacted.

Since 2006 until the end of 2015<sup>169</sup>, the LAD registered a total of 43,337 mediation cases under three categories: Shariah (family), civil (family) and civil (others). The figure below shows the increased trend in the registration of mediation cases by the LAD from 2006 to 2015. This depicts an increased awareness among the public (in general) or the disputing parties in considering mediation services before pursuing their cases for court judgement.

<sup>169</sup> Data excludes total number of registered mediation cases in year 2014 due to the unavailability of data. Refer Legal Affairs Division of the Prime Minister's Department of Malaysia. 2015. Annual Report. Accessible at <http://www.bheuu.gov.my/index.php/en/perkhidmatan/annual-report>

**Figure 2: Number of Mediation Cases Registered by LAD from 2006 to 2015**



Source: Legal Aid Department (LAD), Annual Reports (2013-2015)

In 2015 alone, a total of 6,806 mediation cases were settled by the LAD. The breakdown of the settled mediation cases are as follows:

- 3,747 (55%): Shariah family-related cases
- 2,845 (44%): civil family-related cases
- 18 (1%): civil (other) cases

Initially, the LAD focused its mediation services on Shariah and civil family-related cases. However, data provided in 2015 showed that it began providing services covering civil cases (other than family-related issues) on a limited basis.

### **Good Practice 3 - Legal Companion for Sexual Offences against Children**

**Provider: Legal Aid Department (LAD), Prime Minister's Department, Malaysia**

#### **Summary of Good Practice**

Lack of awareness among the general public, and taboos and mistrust of authorities are collectively considered to be the root causes for the lack of reported cases around child sexual abuse in Malaysia. Additionally, the emerging patterns of child sexual abuse, mainly in virtual spaces driven by today's technological advancement, has further complicated efforts by the authorities to address sexual abuse cases in the country.

Child expert groups allege that weak policing and child protection laws make it difficult to investigate, prosecute and convict child abusers in Malaysia.<sup>170</sup> Data released by the Government of Malaysia for a period between January 2012 and July 2016 reported a total of 12,987 cases of child sexual abuse.<sup>171</sup> Of this number, only about 2,189 charges were filed, which is 17 percent of the total reported cases for the same period. Worryingly, only about 6.4 percent, or 140 convictions, were successful from the total number of charges filed at the same period.

#### **Amendment to the Legal Aid Act (1971)**

In August 2017, the Malaysian Parliament amended the Legal Aid Act (1971) to include provisions of a "legal companion" for a child victim in sexual abuse cases.<sup>172</sup> This is to assist child victims or their families to obtain necessary advice and information, as well as to understand legal proceedings. It is hoped that this would improve their access to the justice system from the beginning of their case.

<sup>170</sup> A. Ananthalakshmi. 2016. *How Malaysia Allows Child Abuse to go Unpunished*, 14 November 2016, Reuters. Accessible at <https://www.reuters.com/article/us-malaysia-sexcrimes-insight/how-malaysia-allows-child-abuse-to-go-unpunished-idUSKBN1390AT>

<sup>171</sup> Ibid.

<sup>172</sup> Carvalho, M. 2017. *Changes to Allow Underage Sexual Crime Victims to Get Legal Advice*, 27 July 2017, The Star. Accessible at <http://www.thestar.com.my/news/nation/2017/07/27/changes-to-allow-underage-sexual-crime-victims-to-get-legal-advice/>

The introduction of this provision is also meant to complement the newly passed Sexual Offences against Children Act 2017, as well as the proceedings of special courts for sexual offences against children in the country.

Legal companion services can be provided to all children in Malaysia for any type of sexual crimes committed by abusers. “Any type of sexual crimes” herewith refers to any crimes against children as defined by written laws in the country.

The Legal Aid Act (Amendment 2017) under Section 29I has explicitly specified the role of legal companion to:

- Provide legal advice to the guardian or protector of child victims;
- Obtain information relevant to the accusation(s) against the accused person(s) in any stage of the criminal proceedings;
- Accompany the child victim in any stage of court proceedings, and represent and speak on behalf of the child victim, if needed;
- Provide legal advice to the guardian or protector on matters concerning further civil action.

With the introduction of the legal companion service, child victims or their families are expected to come forward, seek advice and obtain necessary assistance from the LAD. Their willingness to come forward to get assistance from the LAD is also expected to increase number of cases reported to the authorities for further investigation.

The provision of a legal companion is hoped to improve the trust and confidence among the general public towards Malaysia’s justice system, in particular the role of relevant authorities in responding to child sexual abuse cases. The improved trust and access to appropriate legal advice are also expected to result in effective prosecution and conviction of child sexual offences, including those committed in virtual spaces.

## Good Practice 4 - Institutionalising Private Lawyers’ Involvement in the Provision of Legal Aid in Criminal Cases under NLA Scheme

Provider: National Legal Aid Foundation (NLA)

### Summary of Good Practice

A study conducted in 2008 found that more than 80 percent of the total 108,000 criminal cases that were brought to courts were not represented by lawyers.<sup>173</sup> Multiple reasons contributed to this trend, whereby the accused were not represented by lawyers to defend themselves from arrest up to mitigation and bail stages. These include financial constraints of the accused to get legal advice and representation, while others indicated their lack of awareness on the availability of legal aid services provided by the Bar Council.<sup>174</sup>

### Government’s Responsibility to Guarantee Access to Justice

Grounded on the principle that legal aid is a fundamental human right and hence is a governmental responsibility to guarantee access to justice for everyone<sup>175</sup>, the Bar Council submitted a proposal to the Government of Malaysia to establish a national legal aid foundation.

The proposal was submitted with multiple objectives – among others, to fund the conduct of legal aid in a way to encouraged more involvement of private practitioners in providing free legal aid services. It was also meant to address the worrying trend of absent legal representation for the accused in criminal cases in Malaysia.

<sup>173</sup> Anon. 2011. *Najib Lancar Yayasan Bantuan Guaman* (Najib Launched National Legal Aid Foundation), 25 February 2011, Malaysiakini. Accessible at <https://www.malaysiakini.com/news/156997>

<sup>174</sup> Ibid.

<sup>175</sup> The government’s responsibility to guarantee access to justice may be interpreted broadly deriving from the Malaysia’s Federal Constitution under Article 5 (Clause 3) stating that “*where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice*”. Further refer Government of Malaysia. 1957. Federal Constitution of Malaysia. Accessible at <http://www.agc.gov.my/agcportal/>

Realising the need to establish an independent, respectable and transparent institution to complement the existing legal aid schemes (e.g. under Legal Aid Department), as well as to address unmet needs, the Government of Malaysia launched the NLAF in February 2011. The NLAF was fully operationalised in April 2012.

#### **Implementation: Coordination between the Authority and NLAF Lawyers**

Generally, a person who has been arrested by authorities, in this context referring to the Royal Malaysian Police (known by its initials “PDRM”), will be informed of the grounds of his/her arrest at the police station. Any questioning or recording of statement of the arrested persons shall not proceed for a reasonable time, permitting the arrested person to meet with the NLAF lawyer.

For any reasons in which the arrested person is unable to get in touch with the NLAF lawyer up to the point where he/she is brought to court for remand order (pending further investigation), the arrested person still has the opportunity to meet the NLAF lawyer in court prior to the remand application.

It is obvious that throughout this process, effective communication and coordination between PDRM officials on duty and NLAF lawyers are critical. The duty solicitor scheme at police stations, mainly at district police headquarters, is needed to ensure the arrested person has immediate access to legal representation. Similarly, any form of duty solicitor at remand centres is also crucial in ensuring that the arrested or remanded person has access to justice at this point.

As of early 2013, it was found that NLAF operations covered a total of 66 out of 106 district police headquarters, and over 66 out of 90 remand courts.<sup>176</sup> However, there are gaps in this statistic that require serious attention from the Government of Malaysia in order to guarantee full access to the right to justice in the country.

#### **Implementation: The Role of the Court**

Apart from the authorities and NLAF lawyers, the courts in Malaysia have a role to play to ensure effective implementation of the NLAF scheme. In June 2013, the Office of the Chief Registrar (Justice) released a circular, disseminating standard guidelines for all courts at all levels to adhere to in order to support the implementation of the NLAF scheme.

The standard guidelines intend to ensure that the arrested persons during remand and the accused persons during judgement are represented by legal practitioners. The role of the courts is crucial in these two situations:

##### **A. During remand proceedings**

In the event whereby the arrested person is not represented by a lawyer, the Magistrate must inform the arrested person on his/her right to obtain legal aid from the NLAF.

If the arrested person has chosen to obtain legal aid from the NLAF, the Magistrate must immediately inform the Investigating Officer (PDRM official) to contact the NLAF, and to make a decision to postpone the remand proceeding for a reasonable time within the same day. In the absence of an NLAF lawyer within the timeframe permitted by the Magistrate, the Magistrate may proceed with the remand proceeding.

The standard guidelines issued by the Office of the Chief Registrar also state that the Magistrate must ensure that the arrested person is a Malaysian citizen. Additionally, he/she should not be under investigation for prevention (pencegahan) and abduction-related cases in order to get legal aid from the NLAF.

<sup>176</sup> Bar Council of Malaysia. 2013. *NLAF Concludes Ground-breaking First Year*, 15 May 2013. Accessible at [http://www.malaysianbar.org.my/index2.php?option=com\\_content&do\\_pdf=1&id=36549](http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=36549)

## **B. During judgement**

In the event where the accused is not represented by a lawyer of his/her choice, the Magistrate has the responsibility to inform the accused of his/her right to obtain legal aid from the NLA. The legal aid service from an NLA lawyer may be obtained until plea stage at the Court of Appeal, but does not apply in any case that carries a death sentence.

To conclude, the implementation of the NLA scheme requires communication and coordination between stakeholders, namely the courts, authorities (PDRM), NLA lawyers and legal associations. Each has their unique role to play in ensuring the efficacy of the NLA scheme.

The Bar Council's LAC across Peninsular Malaysia, Sabah Law Association and Advocates' Association of Sarawak have their shared responsibility to encourage more of their respective members to participate in the scheme. To ensure the sustainability of the NLA scheme, the Government of Malaysia must ensure sufficient annual financial allocation to support NLA operations, while paving the way to inspire private-government partnership in the long run.

## **Good Practice 5 - Alliance-Building and Partnership with Non-Governmental Organisations (NGOs)**

**Provider: Bar Council's Legal Aid Centre (LAC)**

### **Summary of Good Practice**

Alliance building and partnership between the Bar Council's LAC and NGOs in Malaysia are grounded upon its own objectives, namely:

- To provide legal representation and assistance to the marginalized, underprivileged and disadvantaged segments of society;
- To promote legal aid as a fundamental human right;
- To raise awareness on the availability of legal aid, as well as legal knowledge, information and education.

### **Protecting the Rights of Non-Citizens**

Migrant workers in Malaysia encounter various forms of exploitation by various quarters, including their employers and members of the local community. However, given their status as non-citizens, they have difficulty in raising their grievances or obtaining necessary legal aid services.

Derived from the need to advocate and protect the rights of migrant workers in Malaysia, the LAC partnered with TENAGANITA, a Malaysian human rights organisation dedicated in assisting, building and protecting migrant and refugee populations in the country.

Apart from providing training to community leaders among migrant workers and leading domestic worker campaigns, TENAGANITA does case management, covering cases such as fraud by agents and employers, exploitation and abuse, detention of migrant workers as well as denial of workers' basic labour protection.<sup>177</sup>

TENAGANITA identified the need to provide legal assistance in order to resolve the complex nature of migrant workers' cases in the country. This has inspired TENAGANITA to partner with the LAC to handle such cases, ensuring they are properly filed in court and necessary action is undertaken to protect the rights of migrant workers.

The LAC also partnered with the United Nations High Commissioner for Refugees (UNHCR) office in Malaysia to provide various forms of legal aid among asylum seekers and registered refugees in the country.

Asylum seekers and refugees are not recognized by the Government of Malaysia, and are hence disallowed from entering the formal labour market, regardless of sector. Given the lack of financial support and high cost of living, particularly in the urban and semi-urban settings in Peninsular Malaysia, they persistently enter the informal labour market with no labour protection accorded to them.

<sup>177</sup> Further information may be retrieved at TENAGANITA's official portal at <http://www.tenaganita.net/our-work/migrant-rights-protection/#>

The LAC's partnership with the UNHCR is meant to assist the vulnerable asylum seekers and refugees to resolve their employment related cases, including the non-payment of wages. The LAC also provides legal advice and representation for refugees in courts, as well as representing refugees for the resolution of criminal prosecutions and civil disputes with government authorities.

#### **Providing Legal Aid & Awareness for Vulnerable Women**

The LAC runs community legal aid clinics for vulnerable women, regardless of the status of the nationality, who are in need of legal advice and assistance. In doing that, the LAC partners with NGOs such as All Women's Action Society (AWAM), Women's Aid Organisation (WAO) and Sisters in Islam (SIS).<sup>178</sup>

In Penang (a state located at Northern Peninsular Malaysia), the LAC (Penang's Legal Aid Centre) partners with various local NGOs, such as Penang Women's Development Corporation and Women's Centre for Change (WCC) in co-organising numerous outreach programmes, including setting up legal aid booths for women and children.<sup>179</sup>

Penang's LAC is also involved in legal awareness programmes for women at the community level through setting up legal aid booths and organising talks and dialogue sessions concerning the rights of women. Often, such programmes were organised in conjunction with important commemorations such as Women's Day.

To conclude, alliance-building and partnership are two crucial strategies used by the Bar Council's LAC in order to extend the reach of legal aid, mainly to vulnerable and at-risk segments of society. This is also pivotal to fill the gaps in the government-led legal aid scheme, in which services provided are limited to Malaysian citizens.

### **Good Practice 6 - Provision of Urgent Arrest Assistance in Support of Public Rallies & Gatherings Provider: Bar Council's Legal Aid Centre (LAC)**

#### **Summary of Good Practice**

The right to peaceful assembly and any form of public rallies and gatherings are fundamental human rights that are provided for and guaranteed under Malaysia's Federal Constitution. The Bar Council's LAC plays an important role to observe, monitor and provide legal assistance in support of such peaceful assembly, ensuring that this fundamental human right is promoted and facilitated.

In many public rallies and gatherings in Malaysia, the LAC provides "urgent arrest" assistance by immediate legal representation for those detained during such gatherings. In doing this, the LAC deploys a team of lawyers to monitor, report and provide immediate legal assistance to those detained primarily by the enforcement agencies for participating in or organising for public rallies and gatherings. Between 2014 and 2016, the LAC deployed teams of lawyers in 15 major public rallies and gatherings throughout the country, as shown in the below.

<sup>178</sup> Bar Council of Malaysia. 2016/2017. Annual Report, p. 264.

<sup>179</sup> Ibid, p. 265. Also refer to Bar Council of Malaysia's Annual Report 2015/16, p. 326.



**Table 17: Major Public Rallies & Gatherings Participated by LAC’s Urgent Arrest Teams between 2014 & 2016, Malaysia**

No.	Public Rallies & Gatherings	Date / Year
1	Red Pencil Gathering	4 January 2014
2	Derita Rakyat Baling 2.0 (Kedah)	5 April 2014
3	May Day Rally	1 May 2014
4	Candlelight Vigil by Citizens against Rape	23 August 2014
5	Solidarity for Azmi Sharom Campaign	10 September 2014
6	Walk for Peace and Freedom	16 October 2014
7	#Kita Lawan Rally	7 March 2015
8	ASEAN Peoples’ Forum	22-25 April 2015
9	May Day Rally	1 May 2015
10	Walk Against Rape	7 June 2015
11	808 Rally – The Edge Rally	8 August 2015
12	BERSIH 4.0 Rally (Kuala Lumpur)	28-30 August 2015
13	BERSIH 4.0 Rally (Perak)	30 August 2015
14	Anti-TPPA Rally	21 November 2015
15	BERSIH 5.0 Rally (Nationwide)	1 October-19 November 2016

Source: Bar Council of Malaysia’s Annual Reports (2016/17) / (2016/15) / (2015/14)

Rallies and gatherings assisted and observed by the LAC were often political in nature. Hence, potential crackdown and arrest of participants is expected, based on the past experiences. To ensure every participant is defended and represented on time, the LAC provides immediate channels of communication such as setting up a hotline number and text messages. Persons who require immediate legal assistance are encouraged to immediately call the hotline number and provide their details, including the police station in which he/she is being detained.

Apart from providing urgent arrest assistance, the LAC also monitors participants and enforcement agencies during public rallies and gatherings. Such monitoring and field observations are crucial to better improve the reporting and documentation of these events for recommendations and future reference.

## Good Practice 7 “Dock Brief Programmes” - Provision of Immediate Legal Assistance for the Unrepresented Accused Persons in Courts

Provider: Bar Council’s Legal Aid Centre (LAC)

### Summary of Good Practice

The issue of unrepresented accused in courts is a matter concerning the rights of an individual to due process and a fair trial in the justice system. A person who is not legally represented in court is also a serious concern, because he/she may be deprived of, among other things, the right to be presumed innocent, the right of silence, the right to a speedy trial, and the right to disclosure of documents. These are predominantly derived rights in nature.

The Bar Council’s LAC introduced and implemented Dock Brief Programmes with the objective of providing legal advice and representation for unrepresented accused in courts. These programmes are provided by the LAC in various states such as Kelantan, Malacca, Kuala Lumpur, Penang, Perak and Selangor.

The Dock Brief Programmes are led by pupils in chambers who are present in courts to assist the unrepresented accused in any cases within the jurisdiction of the LAC. The pupils in chambers who are present in courts usually assist the accused to handle bail application and a plea in mitigation on behalf of the accused. To further strengthen such services in courts, the LAC organised capacity-building programmes for the pupils in chambers.

**Table 18: Capacity-Building Programmes (Trainings) Organised by LAC to Further Strengthen “Dock Brief Programmes” in 2016, Malaysia**

No.	State & Number of Training Sessions	No. of Pupils Trained	Year
1	4 training sessions in Kuala Lumpur	261	2016
2	2 training sessions in Malacca	81	2016
3	11 training sessions in Penang	N/A	2016
4	4 training sessions in Perak	N/A	2016
5	3 training sessions in Selangor	99	2016

Source: Bar Council’s Annual Report (2016/17)

In the year 2016 alone, the LAC organised a total of 24 training sessions in Kuala Lumpur, Malacca, Penang, Perak and Selangor. This involved a total of 441 pupils in chambers (excluding the number of pupils who were trained for the same programmes in Penang and Perak). Such training sessions are crucial to strengthen their capabilities in handling cases on the ground, and this subsequently strengthens the competency and effective delivery of their legal aid service.

The provision of immediate legal representation for the unrepresented accused is hoped to reduce the number of unrepresented persons in courts while ensuring their access to a fair trial and judgement as a whole.

## Good Practice 8 – Administration of Court Assigned-Counsel Scheme for Corporal Punishment Cases

Provider: Chief Registrar's Office (Justice), Malaysia

### Summary of Good Practice

Effective administration is an essential element of a functioning legal aid system. The International Covenant on Civil and Political Rights (ICCPR)<sup>180</sup> states that everyone should enjoy, among others, the right to legal assistance assigned to him, in any case, where the interest of justice is needed. Additionally, the UN Principles and Guidelines on Access to Legal Aid and Criminal Justice System states that anyone who is detained, arrested, suspected or charged with a criminal offence punishable by a term of imprisonment or death penalty, is entitled to legal aid at all stages.<sup>181</sup>

### Death Penalty for Drug Trafficking, etc.

In Malaysia, judges are required to impose the death penalty for anyone convicted of, among others, drug trafficking, murder, kidnap and discharge of firearms. For record, about 651 Malaysians have been sentenced to death since 1992 – most of them were drug-related offences, regulated under the colonial-era Dangerous Drugs Act (1952).<sup>182</sup>

### Assigned-Counsel Scheme for the Interest of Justice

The assigned-counsel scheme is the only legal aid service provided by the Chief of Registrar's Office (Justice), Malaysia. It is a legal aid scheme that has been provided since the pre-World War 2 era until present time. Provision of the court assigned-counsel, without the need for a means test, is a strong manifestation of the justice system in Malaysia to ensure the right to justice for the accused persons is guaranteed.

Implementation of this scheme requires a solid coordination between the Chief Registrar's Office (and its State's offices across Malaysia) and other stakeholders especially the Bar Council (and State's Committees), Sabah Law Association, Sarawak Advocates Association and other legal associations.

Ineffective coordination between these stakeholders would have negative impacts to the accused persons including the delay in obtaining legal advice and representation and would subsequently affect the accused person's emotion and motivation. In a worst-case scenario, the absence of legal counsel due to ineffective coordination to appoint counsel in a reasonable time, would potentially result in unfair trial and wrongful conviction.

It is the responsibility of the Chief Registrar's Office to appoint the best and competent counsel at the soonest time possible. At the same time, the Chief Registrar's Office must ensure that the fee to counsel is commensurate to their service, with the hope that this will boost the quality of service.

### Comprehensive Guidelines for the Provision of Assigned-Counsel

In May 2017, the Chief Registrar's Office released its comprehensive guidelines namely General Procedures & Responsibilities of the Assigned-Counsel for Death Penalty Offence.

It contains some procedural matters for the Bar Council and other legal associations to update their database and list of advocates and solicitors who are interested to participate in the assigned-counsel scheme.

<sup>180</sup> United Nations. 1966. International Covenant on Civil and Political Rights (*ICCPR*). Refer Article 14, Paragraph 3(d). Accessible at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>181</sup> United Nations. 2013. Guiding Principles and Guidelines on Access to Legal Aid in Criminal Justice System. Refer Principle 3, Paragraph 20. Accessible at [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

<sup>182</sup> Anon. 2017. *Malaysia Moves Closer to Scrapping Mandatory Death Penalty for Drug Traffickers*, 7 August 2017, *Malay Mail*. Accessible at <http://www.themalaymailonline.com/malaysia/article/malaysia-moves-closer-to-scrapping-mandatory-death-penalty-for-drug-traffic#TLMgTfaAWv2Fys7G.97>

The Chief Registrar's Office sets strict criteria for the appointment of assigned-counsel, as follows:

- He/she must be an active advocate and solicitor for a period of five (5) years and above;
- He/she must be actively handling criminal cases for a period of five (5) years;
- Within five (5) years of active involvement in criminal cases, he/she involved directly or indirectly in handling five (5) cases involving death penalty.

Lawyers who wish to participate in the assigned-counsel scheme must submit their application form through the Bar Council (and State's Committees), Sabah Law Association and Sarawak Advocates Association. However, the Courts have discretionary power to appoint any counsel to represent the accused person, based on the list submitted by the Bar Council (and State's Committees), Sabah Law Association and Sarawak Advocates Association.

The guidelines indicate key responsibilities of the assigned-counsel including his/her duty to represent his/her client during proceeding (trial) or appeal. The assigned-counsel is also advised not to handover the given case to him/her to other advocate or solicitor without the court's permission. On matters pertaining to service's fee, the guidelines indicate that payment of fee will be made once the case is completed, based on scale of payment/fee as stated in the guidelines.

In summary, the issuance of these guidelines is expected to better coordinate the appointment of the assigned-counsel in a reasonable time. In doing that, the Chief Registrar's Office and its state's offices across Malaysia - require list of advocates and solicitors both at central and state levels, to enable them to appoint the eligible counsel.

It is a collective responsibility between the Chief Registrar's Office and the private associations including the Bar Council to encourage more advocates and solicitors to participate in the scheme, allowing the Courts to have more candidates for the appointment of the assigned-counsel.

## IV. Analysis on Challenges in the Provision of Legal Aid

The evolution of legal aid schemes in Malaysia is accompanied by multiple challenges, and they are unique to each scheme. Such challenges may be structural in nature, but may also be influenced by the organisational settings and administration barriers. This includes the public's perceptions and awareness towards legal aid providers or the services provided by these institutions. This section analyses some key challenges facing legal aid institutions in Malaysia.

### Scope of Coverage

The Legal Aid Act (1971) is the foundation of the LAD in Malaysia. It informs the administration and application of legal aid in criminal and civil cases, as well as other services such as legal advice and mediation. The scope of coverage with regards to the implementation of legal aid by the LAD can be framed in two aspects – (i) the list of criminal and civil matters within the scope of the legal aid; (ii) targeted beneficiaries.

The list of criminal matters that falls within the scope of the legal aid is itemised under the Second Schedule<sup>183</sup> (for criminal matters) and Third Schedule<sup>184</sup> (for civil matters) of the Legal Aid Act (1971). The confined list of criminal and civil matters listed in the Second and Third Schedules has been the key limitation for the provision of legal aid on the ground on other matters. The Legal Aid Act (1971) specifically mentions the minimum criteria for an applicant (targeted beneficiaries) to be approved. These criteria include an applicant's financial capability, which does not exceed RM25,000 per annum. The act does not include status of nationality of the applicant as part of the approval's criteria. In practice, the LAD does not stop non-citizens to obtain legal aid services, but prioritises citizens of Malaysia.<sup>185</sup>

## Financial Allocation and Administration

Generally, insufficient finance due to lack of available funding or absolute reliance to one source of funding (i.e. annual federal allocation) to support the day-to-day operation of legal aid services has been among the key challenges facing legal aid institutions in Malaysia. It is also a major barrier for legal aid institutions to expand their services to cover more pressing civil and criminal matters, as well as to reach more clients (including non-citizens) so they too can access legal aid.

Essentially, financial constraint and administration are intimately related subjects. On the one hand, lack of funding may cause inefficient administration. It may also cause the management body to enforce a strict and rigid administration process that could lead to other administrative barriers, including the delayed payment of services.

In essence, a strict and rigid administration process is meant to ensure proper process and accountability from all parties involved. However, this can result in time-consuming administration processes, including delayed transaction of payment to lawyers who provided their service under a particular legal aid scheme.

Succinctly, if not managed well, financial insufficiency and poor administration would have a greater impact on the provision of legal aid services and subsequently hamper the vision to encourage more private lawyers to participate in Malaysia's legal aid schemes.

## Private Lawyers' Participation in Legal Aid Schemes

Members of the Malaysian Bar have increased steadily from a total of 13,011 in 2010 to 15,697 lawyers as of February 2014.<sup>186</sup> Similarly, the number of private legal entities reached to slightly more than 5,000 firms as of 2014. Participation of private lawyers in legal aid schemes may be analysed from three perspectives: (i) the size of these legal firms; (ii) level of seniority among the practicing lawyers; (iii) gender perspective.

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<sup>183</sup> Criminal matters that are included under Second Schedule include criminal proceedings under the Child Protection Act 1991 (which has been repealed by the Child Act (2001) and criminal proceedings under the Minor Offences Act 1955. Further refer Government of Malaysia. 1971. Legal Aid Act (LAA). Accessible at <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/MY/Akta%2026.pdf>

<sup>184</sup> Civil matters that are included under Third Schedule include proceedings pertaining to Married Women and Children (Act 1950); Maintenance Ordinance 1959 (Sabah No. 7 of 1959); Sarawak Customary Marriages (Maintenance) Ordinance 2003; Married Women and Children (Enforcement of Maintenance) Act 1968; rights and liabilities in respect of proceedings for divorce and custody, rights and liabilities under the Adoption Act 1951; Adoption Ordinance 1960; Moneylenders Act 1951; Hire-Purchase Act 1967; *Padi* Cultivators (Control of Rent and Security of Tenure) Act 1967; and proceedings relating to tenancy as well as consumer claims. Further refer Government of Malaysia. 1971. Legal Aid Act.

<sup>185</sup> Andrew Khoo. 2017. *Baseline Study on Legal Aid in Malaysia*. Unpublished paper, p. 13.

<sup>186</sup> Andrew Khoo. 2017. *Baseline Study on Legal Aid in Malaysia*. Unpublished paper, p. 8.

Firstly, as of 2014, a majority of 89.5 percent from the total 5,031 legal firms registered in the country were small-sized firms with a total workforce between one and five personnel.<sup>187</sup> However, as a matter of fact, a majority of these small-sized legal firms' workforce is unlikely to be legally qualified to provide legal aid. Hence, the huge number of small-size legal firms is unlikely to contribute significantly in private lawyers' participation within the existing legal aid schemes in the country.

Secondly, a majority of 52.5 percent of the total 15,697 practicing lawyers in 2014 were among senior solicitors and advocates with more than 12 years of legal work experience.<sup>188</sup> Senior solicitors and advocates who fall within the majority group of practicing lawyers are less likely to undertake pro bono legal aid work. Hence, their huge number does not form the basis that this would increase private lawyers' participation in legal aid schemes.

Thirdly, from the same source of statistics for 2014, it was found that 51 percent of the total 15,697 practicing lawyers were women.<sup>189</sup> Statistically, women are less likely to practice at criminal courts or with regards to criminal matters. Hence, the high number of practicing women lawyers is unlikely to fill the gap for the pressing needs of legal aid in criminal matters.

### **Private Lawyers' Participation in Pro Bono**

Involvement of private lawyers in pro bono is scattered across the country. There is no dedicated organisation currently responsible to monitor and keep track of the private lawyers' participation in pro bono. Some pro bono services were provided by private legal firms while others by politicians or political parties on select issues such as land grabbing and dispute, family matters and immigration-related matters. Some private lawyers providing pro bono services through the existing legal aid schemes such as the LAD, LAC and NLAF on issues pertaining to indigenous peoples' rights and various criminal offences.

The lack of mandated organisation to monitor and keep track of private lawyers' participation in pro bono leads to the absence of comprehensive data, recording the patterns of pro bono services provided by private lawyers, subsequently impeding quality control mechanism to be established. This would also limit the initiative for resource allocation in view of supporting and sustaining pro bono services by private lawyers.

### **Legal Aid for Non-Citizens**

Provision of legal aid by some legal aid schemes has its limitation where only Malaysian citizens are eligible to access their services. For example, legal aid services on criminal matters provided by the NLAF only applicable for Malaysian citizens, with the exception of criminal cases involving children.

Meanwhile, legal aid services provided by the LAD prioritises Malaysian citizens over non-citizens, due to limited resources available to accommodate the need for legal aid among eligible citizens. As a result, according to LAD official, the LAD's branches across the country provided legal aid services for a total of 30 non-citizen clients in 2015 and three non-citizen clients in 2016 on issues concerning family matters.<sup>190</sup>

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<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Interview session with Legal Aid Officials of the Legal Aid Department (LAD), Prime Minister's Department of Malaysia on 25 August 2017 at Putrajaya.

## Public Awareness & Perceptions towards Legal Aid Institutions / Schemes

Lack of awareness is among factors that contribute to the trend of unrepresented accused or defendants in courts. They do not benefit from the existing legal aid schemes. The lack of awareness is intimately related to the lack of outreach activities organised by the legal aid providers to the targeted beneficiaries, especially in the semi-urban and rural areas.

Lack of awareness may also be influenced by the fact that most of the LAD and LAC facilities are concentrated in urban areas. The lack of outreach initiatives by legal aid institutions, primarily in rural areas, has left many rural communities unaware of the availability of legal aid and their procedural requirements.

## V. Conclusion and Recommendations

### 1. Conclusion

Until recent years, the legal aid system in Malaysia has seen a steady progression from the day the government-led legal aid scheme was established under the LAD's purview in 1970. The presence of private-led legal aid schemes under the Bar Council's LAC reinforces the national legal aid scheme. This is done through reaching out to various segments of the society – mainly those who are unable to access government-led legal aid services for various reasons, including their status of nationality.

The establishment of the NLAFF scheme in 2011 was perceived as a breakthrough in the history and development of legal aid. It paved the way for a more robust public-private partnership in the provision of legal aid in the future. While the presence of the LAD and LAC remained relevant, the role and expectation towards the NLAFF is instrumental. This is in order to strengthen legal aid and access to justice on criminal matters.

The list of good practices as discussed in Section 3 of this study demonstrated some transformational and progressive initiatives undertaken by each of the legal aid institutions in the country. The implementation of these good practices is not without their respective challenges, and must be addressed and remedied wisely. It is also worth mentioning that these good practices may also be replicable in other AMS, depending on their respective national context and needs.

### 2. Recommendations

Derived from various secondary reports, as well as analysis of good practices as discussed in Section 3, this final section presents a set of recommendations.

As a national legal aid scheme in Malaysia, the LAD plays a very important role to ensure that members of society are empowered to access various forms of legal aid and are given legal aid assistance that suits their qualification. To achieve this aspiration, the following recommendations deserve thoughtful attention:

- To expand the list of criminal and civil matters to be covered under the LAD scheme. The LAD may also consider expanding its scope of services to cover pressing transnational issues such as human trafficking, providing legal representation for vulnerable victims in court (i.e. abused women and children), conducting watching briefs and acting as counsel.<sup>191</sup>
- To widen the eligible groups of recipients, including non-citizens regardless of their nationality, in all areas within the scope of LAD. The LAD may also partner with international organisations whose mandate is to protect the rights of vulnerable segments of non-citizens, in order to provide access to legal aid services.<sup>192</sup>
- To collaborate and partner with NGOs, corporate entities and academic institutions in the implementation of legal education, awareness and empowerment. Such collaboration and partnership would also allow the LAD to share knowledge, information and expertise on matters that are of mutual concern.
- To fully participate in the government-led open data initiative that paves the way for greater transparency and accountability.
- To explore ways to innovate and benefit from today's technological advancement in order to strengthen its service delivery. One potential innovation that is worth exploring is the provision of legal advice over the phone or through creation of a call-centre operation (or unit). This will enable the provision of immediate legal advice or referral services on select matters.
- To institutionalise the active participation of private lawyers in pro bono services. Institutionalisation of private lawyers' participation in pro bono would enable effective data gathering, creation of quality control mechanism, and facilitate resource allocation.
- To create and/or provide incentives (e.g., tax reduction) to encourage private lawyers to participate in the scheme. Such incentives should aim to nurture pro bono culture and enhance quality of services.

As a private-led legal aid institution that seeks to provide legal representation and assistance to the impecunious, the Bar Council's LAC plays a critical part in ensuring access to justice is equally enjoyed by the public from all walks of life. The following recommendations seek to further strengthen its role and functions:

- To review the set criteria for a "means test" so it reflects the present and rational income status of the targeted beneficiaries.
- To diversify sources of funding including attracting private and corporate entities to contribute to the LAC's operations. This may be done by entering on a time-bound partnership or through corporate social responsibility (CSR) initiatives with private and corporate entities.
- Subject to the availability of funds, the LAC should expand its programmes such as "dock brief programmes" to cover more courts throughout Peninsular Malaysia and to expand their prison visitation programmes.
- To seek consensus among the members of the Bar Council in raising the members' mandatory annual contribution of RM 100 to a reasonable figure. The present annual contribution has not changed for the past three or four decades.

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<sup>191</sup> This recommendation was retrieved from consultation proceedings entitled "*The Rights of Vulnerable Witnesses in Court*", published by the Women's Centre for Change (WCC) in 2015.

<sup>192</sup> This recommendation was retrieved from inputs provided by the Asylum Access Malaysia (AAM) which were submitted to Malaysia's National Researcher on 27 September 2017. Among other recommendations put forward by the AMM include the call for the LAD to cooperate with government authorities such as Immigration Department of Malaysia in order to provide legal aid services to the vulnerable segments of non-citizens under detention facilities.



- To explore possibility to enter into formal partnership and/or binding agreement with private law firms, ensuring sustainable legal talents to provide legal aid services for a certain period of time. In Singapore, the Criminal Legal Aid Scheme (CLAS) has entered into Memorandum of Understanding (MoU) with 21 private legal firms for the same objective.
- To partner with public and private universities to encourage and provide opportunity for the newly graduated law students to participate in legal aid scheme in select stages and cases, within the mandate of the LAC.
- To expand its outreach programmes at strategic locations such as in airports, city centres and migrant workers' accommodations to inform the availability of legal aid, contact details and complaint mechanisms available for workers to refer or use in the future.

As expectation is mounting for the NLAF to fill the gaps in the provision of legal aid by the LAD and LAC, recommendations for the NLAF are instrumental to meet such expectation.

- To expand its scope of services covering domestic violence, inmates on death row and those who require legal assistance in preparation for clemency applications.<sup>193</sup> The NLAF may also consider providing civil matters in the future.
- To explore the possibility of enabling the non-citizens regardless of their nationality, to access legal aid services provided by the NLAF.
- To strengthen administration of the NLAF scheme including regular updates of registered solicitors and advocates and disbursement of service fees to lawyers.
- To attract more volunteer practising solicitors and advocates to involve in NLAF scheme, and subsequently expand the NLAF's representation in remand courts and district police offices across the country.

To strengthen communication and coordination between NLAF's lawyers and law enforcement agencies such as the Royal Malaysian Police (RMP), ensuring that the arrested person would have immediate legal representation and advice from NLAF's lawyers.

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193 Andrew Khoo. 2017. "Baseline Study on Legal Aid in Malaysia". Unpublished paper, p. 18.

# MYANMAR

## I. Country Background

The legal culture of Myanmar was mainly derived from the common law legal system, also belonging to the same fundamentals or modality of the principles of Myanmar legal system. The Myanmar legal system greatly took its root from the common law legal system as a result of the British colonial rule during the British colonization period (1842-1948). That is why Myanmar legal practice was heavily influenced by the common law tradition.

## II. National Legal Framework in Myanmar

Concerning the legal framework of legal aid, the fundamental legal provisions are enshrined in the Constitution of the Republic of the Union of Myanmar 2008; the core principles are Section 19 (b), (c) and Section 21 of the 2008 Constitution which provide the legal concept of rule of law and access to justice in criminal matters.<sup>194</sup> This principle of the right to be heard, the right to be defended and the right to be cared for are seen in Sections 374 and 375 of the Constitution of the Republic of the Union of Myanmar which lay down that every person is guaranteed to enjoy equal rights before the law and legal protection. At present, the *Pyidaungsu Hluttaw* (the Union Parliament) introduced a renovated new legal aid regime under the Legal Aid<sup>195</sup> Law 2016 and the Law Amending the Legal Aid Law 2017 as well.<sup>196</sup>

## III. Types of Legal Aid Provision under the Legal Aid Law 2016

The Legal Aid Law 2016 is much wider conceptualization to grant legal aid. Legal aid means hiring the lawyer, giving legal knowledge, tendering legal advice, giving assistance and giving information to the persons who are stipulated under the Legal Aid Law 2016.<sup>197</sup> The persons, stipulated to request the legal aid under the Legal Aid Law 2016 are those who are accused, detained, arrested, prosecuted, sentenced and kept in jail by a crime, include persons in poverty, children, women, persons who need special care, elderly persons, persons with disabilities, persons affected with HIV and other epidemic diseases, stateless persons, asylum seekers, foreigners, migrant workers, refugees, criminal victims and witnesses who request legal assistance as a special matter.<sup>198</sup>

Relating to the witnesses' access to legal aid, section 29 provides that in case of requesting legal aid because of the special circumstances, they shall be granted legal aid in criminal prosecution.<sup>199</sup> Also, the victims of crime shall be granted legal aid in criminal prosecution. Therefore, generally, as mentioned above, there are five

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<sup>194</sup> The Constitution of the Republic of the Union of Myanmar 2008, Section 19 & 21.

<sup>195</sup> Id, Section 374 & 375.

<sup>196</sup> The Pyidaungsu Hluttaw Law No. 10/2016 was enacted on 18<sup>th</sup> January 2016.

<sup>197</sup> Id, Section 2 (a).

<sup>198</sup> Id, Section 2 (b).

<sup>199</sup> Id, Section 29

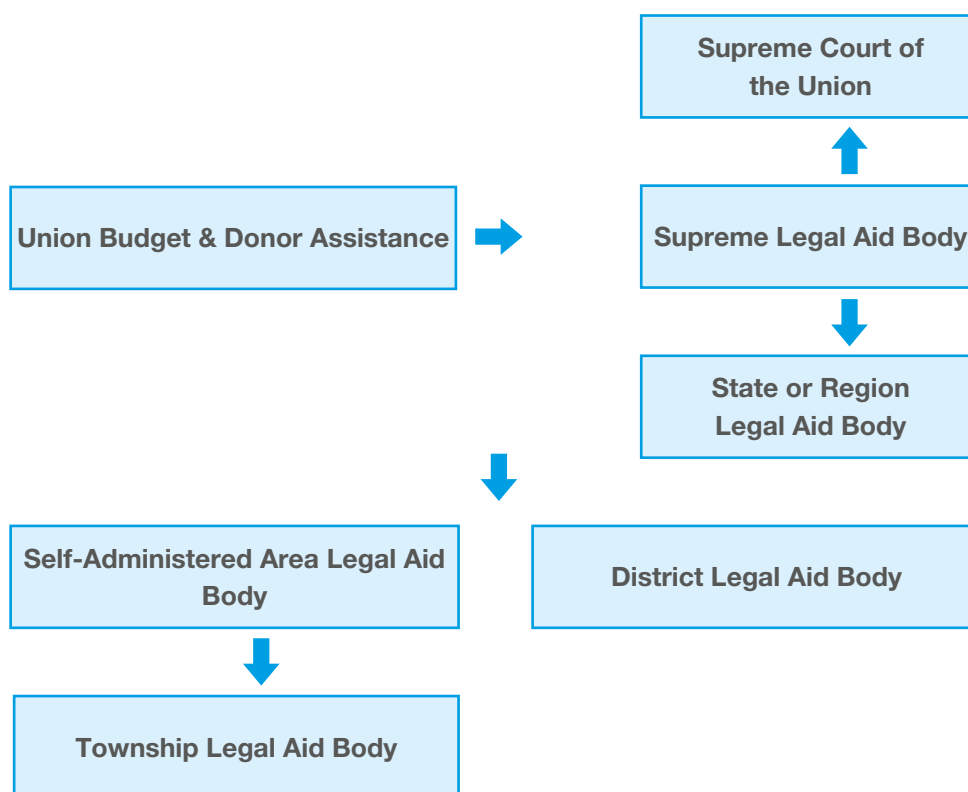
types of legal aid which are hiring the lawyer, giving legal knowledge, tendering legal advice, giving assistance and giving information to the “competent person” under this Law.<sup>200</sup> These legal aids have to be provided in three steps of criminal trial, such as legal aid at the pretrial stage,<sup>201</sup> legal aid during courtproceedings<sup>202</sup> and legal aid at the post-trial stage.<sup>203</sup>

## IV. Institutional Government Designs of the Legal Aid Supervision Bodies

Concerning the institutional governance designs of the legal aid supervision bodies of Myanmar, the Legal Aid Law 2016 allows the formation of a hierarchal structure of legal aid supervision bodies of Myanmar, which include the Union Legal Aid Body, or the State or Region Legal Aid Body, the Self-Administered Area Legal Aid Body, or the District Legal Aid Body, and the Township Legal Aid Body.

The following is the hierarchical structure of the Myanmar legal aid bodies:

**Figure 3: Institutional governance framework of Myanmar legal aid bodies**



<sup>200</sup> Id, Section 32

<sup>201</sup> Id, Section 25 (a), (b)&(c).

<sup>202</sup> Id, Section 25 (d).

<sup>203</sup> Id, section 26.

## V. Monitoring and Evaluation Framework

Regarding the monitoring of the respective legal aid bodies in the Legal Aid Law, two kinds of institutional supervision are mentioned, which are (i) the insider supervision and (ii) the outsider supervision. The insider supervision power is vested with the Legal Aid Body under section 6 of the Legal Aid Law 2016. This body has the power not only for supervision of the different levels of legal aid bodies, but also for laying down the implementation policy, stipulating the related regulations to be followed by the different levels of legal aid bodies, stipulating the sorts of crimes that can request legal aid, supervising the services of the different levels of legal aid bodies in conformity with the law, disseminating judicial and legal knowledge to the public, disseminating the knowledge concerning the methods of legal aid for the purpose of assisting the competent persons accessibility, stipulating the standards of assessing whether the person is indigent or not, giving the legal aid to the competent persons in criminal revision, appeal and miscellaneous, stipulating the regulations, functions and duties for the competent persons, supervising the functions of the recognized institutions, and giving the assistance to the different levels of legal aid bodies in order to undertake the legal aid services in accordance with the law.<sup>204</sup>

Regarding the outsider supervision, the Union Body has the power to supervise the legal aid providers and to ensure that they do not ask for some remunerations and fees from the competent persons, to supervise the competent persons for non-corruption, and inquiring the legal aid providers and taking action against the legal aid providers in case of corruption and for asking for some remunerations and fees.<sup>205</sup> Likewise, where the legal aid providers are doing so for their own benefits, infringing the functioning regulations and undertaking illegal means, the Union Body shall make inquiries and take necessary action against the legal aid providers.<sup>206</sup> As to the evaluation of the legal aid providers, the Union Board shall stipulate the conditions that are necessary on granting the accreditation letter to the legal aid providers. Concerning the appointment of the legal aid providers, the lawyers can apply to the legal aid bodies to be accredited the *pro bono* lawyer in accordance with the stipulations. Law students, the law degree holders, and those persons who have experience in judicial and legal related fields, although they are without a law degree, can also apply to the legal aid bodies as the legal aid providers without the purpose of practicing law.<sup>207</sup>

## VI. Collaboration with the Other Relevant Institutions

Relating to collaboration with other relevant institutions, the courts, the law offices, the Myanmar Police Force, the Prison Department and the other prosecuting bodies shall collaborate with the legal aid providers in support of the legal aid to the competent persons.<sup>208</sup> The relevant government department and institutions shall assist when the different levels of legal aid bodies request the necessary assistance under the Legal Aid Law 2016.<sup>209</sup>

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<sup>204</sup> Section 6.

<sup>205</sup> Section 37.

<sup>206</sup> Section 37 (a).

<sup>207</sup> Section 20

<sup>208</sup> Section 38.

<sup>209</sup> Section 42.

## VII. Suggestions, Proposed Strategies for Strengthening National Legal Aid Policy and Conclusion

This chapter focuses on suggestions and proposed strategies from the results of the comparative analysis with China, South Africa, Rwanda, Uganda and the ASEAN countries for strengthening national legal aid policy of Myanmar under the Legal Aid Law 2016.

### A. Suggestions to Strengthen National Legal Aid Policy

To strengthen the National Legal Aid Policy, Myanmar needs a good institutional governance structure, sufficient institutional finance and a quality control mechanism for legal aid providers.

First of all, when assessing the above governance models as well as the international practices, the ideal management model for a national legal aid scheme should be decentralization in order to organize an Access to Justice Unit, where one can get not only legal aid but also the capacity building training for legal aid providers, and to support the budget from the direct donations of the donors and the benefits of the academic training. If needed to amend this Law, Myanmar should amend this Law.

Secondly, on analyzing the above institutional finance systems as well as the international finance assistance, the ideal finance management system to support a national legal aid scheme is to establish an Own Reserve Fund at the subordinate levels of the legal aid bodies by direct donations and benefits from the academic training.

Finally, on examining the quality control mechanism for legal aid providers of the above jurisdictions as well as the international norms, Myanmar needs to establish a capacity building mechanism for all legal aid providers in the subordinate legal aid bodies to successfully establish a national legal aid scheme.

### B. Proposed Strategies to Strengthen National Legal Aid Policy

To strengthen the national legal aid policy, Myanmar needs to draft the national legal aid policy under not only the Legal Aid Law 2016, but also the economic development and the current political situation. This term paper proposes the following strategies for the National Legal Aid Policy.

Under the current Legal Aid Law 2016, the following forms of legal aid services are envisioned:

- i. **Legal information:** This basic form of legal aid provides general information to the competent persons about their legal position and their rights in relation to access to justice. This will help them to exercise their rights and possibly solve their problems without recourse to a legal expert.
- ii. **Legal education:** This form of legal aid educates people to know and actively pursue their rights. It can take the form of outreach programmes aimed at empowering local communities or activities raising awareness such as the legal aid week.
- iii. **Legal advice:** Legal advice is giving information to a client on how he/she can access a concrete legal protection.
- iv. **Collective legal action:** Organizing groups of individual clients to act collectively in and out of court against a powerful public or private opponent that violates their rights.

**v. Legal assistance:** Advising a client before a case is brought before the court.

**vi. Representation:** Defending the position of a client in a formal court procedure.

Concerning Legal Aid Delivery Methods, this particularly envisions the provision of free legal information and education, legal advice and assistance in criminal cases to not only all Myanmar citizens but also foreigners, including free legal representation. The methods of delivery of legal services shall include legal information and education on citizens' legal rights and duties to all persons or target groups of persons, except in such instances as may be provided for under relevant legislation and regulations; legal advice and assistance in criminal cases by approved or accredited legal aid service providers; legal representation on counselling clients, representing or defending clients in criminal cases during pre-trial, trial and post-trial proceedings and representing or defending clients in other legal cases according to the law.

### **Proposed Strategy 1: Expansion of Legal Aid Provision**

- i. Under the Legal Aid Law, the institutions, individual volunteers, lawyers, paralegals and the university legal clinics shall be recognized as legal aid providers subject to relevant accreditation and regulation year by year in that the relevant legal aid body needs to assess the ability of the legal aid providers. In Myanmar, the competency of the private legal services is lower than in other countries.
- ii. Myanmar needs to gradually expand legal aid provision in the short term and long term in line with the economic conditions of State.
- iii. Certain services provided by other state institutions such as the Office of the Union Attorney General, the Myanmar Human Rights Commission and the Department of Social Welfare and others shall be recognized as legal aid. Consequently, such institutions will also be categorized as legal aid providers. Legal aid providers shall enhance cooperation with civil based societies as a mechanism to enhance citizen dispute resolution.

### **Proposed Strategy 2: Establishment of a referral system**

Myanmar should establish a systematic referral/appeal system, other state institutions such as the Special Committees, the Myanmar Human Rights Commission and the Department of Social Welfare and others; however, Myanmar does not apply the ADR system. A coordination system will be established to provide suitable mechanisms for the collaboration, enhanced communication among all the legal aid providers, improve efficiency and effectiveness, and prevent duplication and overlaps in handling community complaints and cases. Therefore, Myanmar should establish a systematic ADR referral/appeal system which could use appropriate mechanisms including electronic systems.

### **Proposed Strategy 3: Establishment of a Coordination Structure**

This structure wants to be composed of a National Legal Aid Steering Committee. In this regard, NLASC shall be formed with nine members including one member of the Myanmar Human Rights Commission and formerly eight members of Union Legal Aid Body under the Legal Aid Law 2016, because, according to this Law, the same types of legal aid are based on human rights violations. It intends to refrain from the overlapping legal aid between the relevant legal aid body and the Myanmar Human Rights Commission.

#### **Proposed Strategy 4: Establishment of a Legal Aid Fund**

A Legal Aid Fund shall be established under the budget of the Union Supreme Court under the Legal Aid Law 2016. This fund will hold money allocated by the government or received from donors. It is already mentioned in this Law. Moreover, the government should allow money which is received from auctioning the valuable exhibits to be added to the Legal Aid Fund. The relevant legal aid body should receive the donation directly from the donor and should seek the budget from the academic training when the relevant legal aid body needs more budget on promoting capacity building for legal aid providers.

#### **Proposed Strategy 5: Determination of Eligibility for Legal Aid**

In Myanmar, in order to have a successful National Legal Aid Policy and to secure the legitimacy of public funding and subsidies, Myanmar needs to test the eligibility for legal aid. There are two methods of test. They are (1) automatic qualification (this is automatic extension of legal aid under the Legal Aid Law 2016), and (2) introduction of a means test (this means test will make an assessment of the financial standing of the person requesting legal representation).

## **VIII. Conclusion**

This term paper focuses only on the policy strengthening of the Legal Aid Law 2016, through a comparative study of practices in China, South Africa, Rwanda, Uganda and the ASEAN countries. As a result, this paper highlights three suggestions, such as the ideal governance model, ideal institutional finance system and the quality control mechanism, and five proposed strategies for strengthening legal aid policy, such as the expansion of legal aid provision, the establishment of a referral system, the establishment of a coordination structure, the establishment of legal aid fund and the determination of eligibility for legal aid.

Therefore, this paper suggests that Myanmar should lay down the National Legal Aid Policy under the Legal Aid Law 2016. Furthermore, Myanmar needs to amend this Law to decentralize the institutional governance to form an Access to Justice Unit, the institutional finance – finding the budget and receiving directly the donation from donor, to establish the quality control mechanism of the legal aid providers and to create the eligibility testing mechanism for legal aid.

# PHILIPPINES

## I. Country Background

The **Republic of the Philippines** is an archipelago of more than 7100 islands.<sup>210</sup> It is bounded on the north and east by the Pacific Ocean and by the West Philippine Sea and the Celebes Sea on west and south respectively.<sup>211</sup> It is divided into three main island groups namely, Luzon, Visayas and Mindanao. Its capital city, Manila, is located in the island of Luzon. As of 31 May 2017, it is composed of 18 regions,<sup>212</sup> 81 provinces,<sup>213</sup> 145 cities,<sup>214</sup> 1489 municipalities,<sup>215</sup> and 42,036 Barangays (which is the smallest political unit).<sup>216</sup> As of 1 August 2015, it has a population of 100,981,437 with 50.6 per cent of which is male and 49.4 per cent is female.<sup>217</sup> The poverty incidence as of 2015 is pegged at 21.6 per cent<sup>218</sup> - an important piece of information for appreciating the importance of legal aid in the Philippines.

The Philippines is a democratic and republican state where sovereignty resides in the people as well, as all government authority emanates from them.<sup>219</sup> It has three main branches of government pursuant to the 1987 Constitution, namely, the Executive, the Legislative and the Judiciary.<sup>220</sup> The Legislative Branch is the law-making body and is divided into the Senate and the House of Representatives.<sup>221</sup> The Executive is headed by the President and is the chief implementer of the law.<sup>222</sup> The Judicial Branch interprets the laws and adjudicates competing claims under the laws (civil, administrative criminal cases).<sup>223</sup>

All these branches of government play important roles in the provision of legal aid services in the country.

## II. Legal Aid in General

Legal aid in the Philippines is provided in criminal, civil and administrative cases. Various governmental and non-governmental bodies provide these services.

<sup>210</sup> See <http://www.encyclopedia.com/places/asia/philippines-political-geography/philippines#TOPOGRAPHY> last accessed 3 September 2017.

<sup>211</sup> Philippine Maps, Word Atlas at <http://www.worldatlas.com/webimage/countrys/asia/philippines/phmaps.htm#page> last accessed on 21 August 2017.

<sup>212</sup> Philippine Standard Geographic Code as of 31 March 2017, at <http://nap.psa.gov.ph/activestats/psgc/listreg.asp> last accessed on 21 August 2017.

<sup>213</sup> Id., at <http://nap.psa.gov.ph/activestats/psgc/listprov.asp> last accessed on 21 August 2017.

<sup>214</sup> Id., at <http://nap.psa.gov.ph/activestats/psgc/listcity.asp> last accessed on 21 August 2017.

<sup>215</sup> Id., at <http://nap.psa.gov.ph/activestats/psgc/listmun.asp>, last accessed on 21 August 2017.

<sup>216</sup> Provincial Summary as of 31 March 2017 at <http://nap.psa.gov.ph/activestats/psgc/SUMWEBPROV-MAR2017-CODED-HUC-FINAL.pdf> last accessed on 21 August 2017.

<sup>217</sup> Philippine Population Surpassed the 100 Million Mark (Results from the 2015 Census of Population), 30 June 2017 at <http://www.psa.gov.ph/population-and-housing> last accessed on 21 August 2017.

<sup>218</sup> Farmers, Fishermen and Children consistently posted the highest poverty incidence among basic sectors - PSA, 30 June 2017 at <http://www.psa.gov.ph/poverty-press-releases> last accessed on 21 August 2017.

<sup>219</sup> 1987 Constitution of the Republic of the Philippines, Art. I, Sec. 1.

<sup>220</sup> Id.

<sup>221</sup> Id., at Art. VI.

<sup>222</sup> Id. at Art. VII.

<sup>223</sup> Id. at Art. VIII.



No less than the 1987 Constitution of the Republic of the Philippines guarantees legal aid to the poor and marginalized. The Bill of Rights guarantees free access to judicial and quasi-judicial bodies for the poor thus, Article III, Section 11 states:

*Section 11. Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.*

Likewise Section 12(1) of the Bill of Rights guarantees the right to counsel of one's choice to any person being investigated of any offence with a corresponding guarantee that should he/she is unable to afford one, then, he/she will be provided with counsel free of charge.<sup>224</sup>

In order to ensure that these rights are enforced, no less than the Supreme Court itself has been granted the power to promulgate rules regarding legal assistance to the underprivileged pursuant to Article VIII, Section 5(5), thus:

*Sec. 5. The Supreme Court shall have the following powers:*

*1. x x x*

*2. x x x*

*3. x x x*

*4. x x x*

*5. Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and **legal assistance to the under-privileged**. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.*

Pursuant to such power, the Supreme Court promulgated rules relating to treatment of indigent litigants under Rules 3 and 141 of the Revised Rules of Court and the Student Practice Rule under Rule 138-A also of the Rules of Court. These will be discussed further in the next section.

It can be gleaned from the Constitutional provisions themselves that the guarantee to free legal services for the poor and the marginalized are assured not only in criminal cases but likewise, in civil and administrative cases.

### III. Legal Aid and Legal Aid Service Providers

Because the 1987 Constitution itself guarantees legal aid, there are a number of mechanisms/bodies involved to ensure that this constitutional right is enforced. The main body mandated to provide free legal aid to the poor and marginalised is the Public Attorneys Office (PAO). It is an independent and autonomous office attached to the Department of Justice. However, other government offices/bodies that have quasi-judicial or investigative functions do provide some form of free legal assistance such as the Department of Agrarian

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<sup>224</sup> Id., at Article III, Sec. 12(1) Any person under investigation for the commission of an offense 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 must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

Reform and the Commission on Human Rights. The Judiciary through the Supreme Court as mentioned earlier, has promulgated rules with respect to treatment of indigent clients including the system of appointing *de officio counsel*. Legal aid is likewise one of the main programs of the Integrated Bar of the Philippines.

However, there is such a great demand for legal aid especially considering that a good number of Filipinos live below the poverty threshold. Thus, the services being offered by the government agencies, especially by the PAO, are not enough to attend to the demands of the public. This gap is being filled-in by non-government organisations (NGOs) either through their lawyers or paralegals, and by the school-based legal aid centers. Lastly, there are also private law firms that provide free legal aid. This section will discuss the foregoing services and service providers.

## Government Provided Legal Aid

### 1. Public Attorneys Office (PAO)

#### a. Nature, extent and types of services

The Public Attorneys Office (PAO) is the main legal aid arm of the government. Republic Act (R.A.) No. 9406 entitled *AN ACT REORGANIZING AND STRENGTHENING THE PUBLIC ATTORNEY'S OFFICE (PAO), AMENDING FOR THE PURPOSE PERTINENT PROVISIONS OF EXECUTIVE ORDER NO.292, OTHERWISE KNOWN AS THE "ADMINISTRATIVE CODE OF 1987", AS AMENDED, GRANTING SPECIAL ALLOWANCE TO PAO OFFICIALS AND LAWYERS, AND PROVIDING FUNDS THEREFOR*, otherwise known as the PAO LAW, is the law that governs the existence of the PAO. It is an independent and autonomous office but attached to the Department of Justice (DOJ) for policy and program coordination.<sup>225</sup> The PAO Law unequivocally and categorically states the mandate of the Office and the types of cases covered by its free legal assistance. It provides thus:<sup>226</sup>

*"The PAO shall be the principal law office of the Government in extending free legal assistance to indigent persons in criminal, civil, labor, administrative and other quasi-judicial cases."*

Likewise, the law amended the Administrative Code of 1987 to insert a new provision regarding the Powers and Functions of the PAO, thus:<sup>227</sup>

*"SEC. 14-A. Powers and Functions. – The PAO shall independently discharge its mandate to render, free of charge, legal representation, assistance, and counselling to indigent persons in criminal, civil, labor, administrative and other quasi-judicial cases. In the exigency of the service, the PAO may be called upon by proper government authorities to render such service to other persons, subject to existing laws, rules and regulations."*

<sup>225</sup> Republic Act (R.A.) No. 9406 entitled *AN ACT REORGANIZING AND STRENGTHENING THE PUBLIC ATTORNEY'S OFFICE (PAO), AMENDING FOR THE PURPOSE PERTINENT PROVISIONS OF EXECUTIVE ORDER NO.292, OTHERWISE KNOWN AS THE "ADMINISTRATIVE CODE OF 1987", AS AMENDED, GRANTING SPECIAL ALLOWANCE TO PAO OFFICIALS AND LAWYERS, AND PROVIDING FUNDS THEREFOR* otherwise known as the PAO LAW, 8 February 2007, Sec. 2 amending specifically Section 14, Chapter 5, Title III, Book IV of the same Code.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*, at Sec. 3 inserting Section 14-A, is hereby inserted in Chapter 5, Title III, Book IV of Executive Order No.292, otherwise known as the "Administrative Code of 1987

From Section 14-A, it is clear that the PAO renders for free a full range of services to include legal representation, counselling and other forms of legal assistance to indigent persons. It likewise reaffirms the types of cases where free legal assistance may be provided, that is, criminal, civil, labor administrative and other quasi-judicial cases. The services are provided even on the appellate level up to the Supreme Court. Rule I, Section 2 of the Implementing Rules and Regulations (IRR) of R.A. 9406 further amplifies this by defining “legal services” as follows:<sup>228</sup>

*“Legal Services - Shall refer to legal representation, assistance and counseling to be rendered by the PAO, be it judicial or non-judicial in nature, given to qualified indigent persons in criminal, civil, labor, administrative and other quasi-judicial cases resulting in the creation of an attorney-client relationship.”*

The IRR clarifies that the legal services rendered by PAO includes both judicial and non-judicial in nature. It likewise emphasizes that the rendering of legal services shall create an attorney-client relationship.

Generally, these services are provided for free only to indigent or poor clients which is discussed below. However, Section 14-A does allow for an exception if the exigencies or circumstances warrant that its services be rendered even to non-indigent clients.

**b. Structure of PAO<sup>229</sup>**

The PAO is headed by a Chief Public Attorney at the National level. She is assisted by two Deputy Chief Public Attorneys. It has Regional Offices throughout the country corresponding to the administrative regions of the government. Each Regional Office is headed by a Regional Public Attorney who is assisted by an Assistant Regional Attorney. There are also Public Attorneys offices at the Provincial, City and Municipal levels. The PAO Law envisions that there will be one public attorney per court branch/sala.<sup>230</sup> However, there were instances where some Public Attorneys handle more than one court branch/sala.

It must be noted that the passage of this law resulted in strengthening and professionalizing even more the Public Attorneys Office. The rank of the Public Attorneys is now at par with that of corresponding lawyers belonging to the National Prosecution Service (NPS).<sup>231</sup> Thus, their salaries and benefits are now at par with the NPS.<sup>232</sup> The impact is that more and more lawyers are entering the PAO service. This somehow helps to unburden the Public Attorneys as they are just too saddled with cases. This also means better service, because with lesser case load, they will be able to give better attention to their cases.

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<sup>228</sup> IMPLEMENTING RULES AND REGULATIONS OF REPUBLIC ACT NO. 9406, OTHERWISE KNOWN AS AN ACT REORGANIZING AND STRENGTHENING THE PUBLIC ATTORNEY’S OFFICE (PAO), AMENDING FOR THE PURPOSE PERTINENT PROVISIONS OF EXECUTIVE ORDER NO. 292, OTHERWISE KNOWN AS THE “ADMINISTRATIVE CODE OF 1987”, AS AMENDED, GRANTING SPECIAL ALLOWANCE TO PAO OFFICIALS AND LAWYERS, AND PROVIDING FUNDS THEREFOR”, Rule I, Sec. 2.

<sup>229</sup> Id., at Sec.5, amending Section 16, Chapter 5, Title III, Book IV of Executive Order No. 292, otherwise known as the “Administrative Code of 1987.”

<sup>230</sup> Id., at Sec. 7 - “SEC. 7. Ratio of Public Attorney’s Position to an Organized Sala. - There shall be a corresponding number of public attorney’s positions at the ratio of one public attorney to an organized sala and the corresponding administrative support staff thereto.”

<sup>231</sup> Supra note 20

<sup>232</sup> Id.

**c. Who are qualified to receive PAO services?**

**i. Indigent persons whose case are meritorious**

Rule VI, Section 22 of the IRR defines who are primarily qualified to receive free legal services, to wit:

*“Section 22. Persons Qualified for Free Legal Services. - The PAO shall provide legal services, free of charge to indigent persons or the immediate members of their family, in all civil, criminal, labor, administrative and other quasi-judicial cases, where, after due evaluation, it is determined that the interest of justice will be served thereby. Accordingly, the PAO shall extend free legal services to an applicant who is indigent and whose case is meritorious.”*

Section 22 basically sets two criteria, namely, economic/financial status and merit. The first criterion requires that the person seeking free legal assistance should be an indigent person. Section 23 defines an indigent person as follows:

*“(a) Those residing in Metro Manila whose family income does not exceed (P14,000.00) Fourteen Thousand Pesos a month;*

*(b) Those residing in other cities whose family income does not exceed (P13,000.00) Thirteen Thousand Pesos a month; or*

*(c) Those residing in all other places whose family income does not exceed (P12,000.00) Twelve Thousand Pesos a month.*

*For this purpose, ownership of land does not per se constitute a ground for the disqualification of an applicant from availing of free legal services.”*

Section 24 of the IRR enumerates the required proof of indigent status, that is any of the following:

*“(a) Latest Income Tax Return;*

*(b) Certificate of Indigency from the Department of Social Welfare and Development having jurisdiction over the residence of the applicant; or*

*(c) Certificate of Indigency from the Barangay Chairman having jurisdiction over the residence of the applicant, together with an Affidavit of Indigency executed by the applicant.”*

The second criterion is the merit of the case. The merit test requires that after an evaluation of the law and evidence applicable to the case at hand, the provision of legal service by the PAO “will assist, or be in aid of, or in furtherance of justice, taking into consideration the interests of the party and those of society.”<sup>233</sup> Conversely, a case is considered not meritorious if “it has no chance of success, or is intended merely to harass or injure the opposite party, or to cause oppression or wrong.”<sup>234</sup>

<sup>233</sup> Supre note 19, at Rule VI, Section 25.

<sup>234</sup> Id.

## ii. Others persons qualified for legal aid

The IRR of the PAO LAW likewise, enumerates other persons who may receive free legal services from the office regardless of the indigent status, namely:<sup>235</sup> 1. the immediate members of the family or relatives within the fourth civil degree of affinity or consanguinity of a public attorney provided that there is previous approval from the Chief PAO. Likewise, the Public Attorney concerned should file the following: an affidavit of kinship, an official leave for each hearing date and status report of the case being handled; and 2. PAO personnel may take advantage of the legal services of PAO lawyers in criminal cases provided that the PAO is not the adverse party.

As an exception from the foregoing, the PAO LAW under Section 14-A, as mentioned previously, and further amplified under Section 27 of the IRR, the PAO may, if the exigencies of service and circumstances will require it and when called upon by the proper government office, to render free legal services.

## 2. The National Prosecution Service

The National Prosecution Service's Prosecution Staff "*act as counsel for the People of the Philippines in any case involving or arising from a criminal complaint investigated by any of its prosecutors and pending before any trial court.*"<sup>236</sup> The victims of the crimes have become complainant-witnesses in the cases that they have filed. This is based on the understanding that generally, criminal offences are really offences against society. The practical effect is that the victims and their families have the government prosecutors representing them as well during the trial of the case free of charge. Although this is not technically legal aid, the net effect is the same, that is the complainant gets free legal assistance for their cause.

Criminal cases are always under the control of the public prosecutor. However, the complaining witnesses may opt to hire their private lawyers to represent their interests in courts. With the authority from the public prosecutor, the private lawyers may direct the prosecution of the case but always under the direct control and supervision of the public prosecutor.

One big limitation to this system is that during the preliminary investigation stage, i.e., prior to the filing of the cases in court, the public prosecutor cannot act as counsel for the victims. Thus, the latter needs to find free legal assistance elsewhere. The Public Attorneys Office though is allowed to represent the victims during preliminary investigation stage. The drawback is that when the case reaches the court, the PAO will no longer be allowed to represent the accused because it has previously represented the complaining-witnesses.

## 3. Other Government Agencies or Bodies

Other government agencies, especially quasi-judicial bodies, have mechanisms for free legal assistance. For example, the Department of Agrarian Reform in Agrarian Cases and the Overseas Workers Welfare Administration likewise provides legal aid to members. Even the Commission on Human Rights, a constitutionally created independent body is tasked to provide "*legal aid services to the underprivileged whose human rights have been violated or need protection.*"<sup>237</sup>

<sup>235</sup> Id., at Section 26

<sup>236</sup> Republic Act No. 10071 entitled AN ACT STRENGTHENING AND RATIONALIZED THE NATIONAL PROSECUTION SERVICE otherwise known as the PROSECUTION ACT OF 2010, 08 April 2010.

<sup>237</sup> Supra note 10, at Art. XIII, Sec. 18(3).

## B. Supreme Court/Judiciary Mechanisms

As mentioned previously in this research, the Supreme Court has been granted the power to promulgate rules regarding legal assistance to the underprivileged pursuant to Article VIII, Sec. 5(5) of the Constitution. Thus, under Revised Rules of Criminal Procedure, Section 7, Rule 116 promulgated by the Supreme Court, the judges may appoint de officio counsel, thus:

*Sec. 7. Appointment of counsel de officio. The Court, considering the gravity of the offense and the difficulty of the questions that may arise, shall appoint as counsel de officio such members of the bar in good standing, who, by reason of their experience and ability, can competently defend the accused.*

A counsel de officio is a court-appointed lawyer. In the Philippines, judges appoint *de officio counsels* for various reasons but usually it is resorted to in instances where the accused has no lawyer either because he/she cannot afford one or refused to get one. Under the Code of Professional Responsibility of Lawyers, no lawyer should decline an appointment as *counsel de officio* except for serious and sufficient cause.<sup>238</sup> It must be noted that this provision is placed under Canon 14 that is entitled *A LAWYER SHALL NOT REFUSE HIS SERVICES TO THE NEEDY*.

*The guarantee to free access to courts under Article 3, Section 11 of the 1987 Constitution as discussed in Part II above "is extended to litigants who may be indigent by exempting them from the obligation to pay docket and filing fees."<sup>239</sup> The Supreme Court has promulgated the rules that govern exemption from payment of filing fees by pauper litigants in the Revised Rules on Civil Procedures.<sup>240</sup> Section 19, Rule 141 of said Rules provides thus:*

*Sec. 19. Indigent litigants exempt from payment of legal fees. - Indigent litigants (a) whose gross income and that of their immediate family do not exceed an amount double the monthly minimum wage of an employee and (b) who do not own real property with a fair market value as stated in the current tax declaration of more than three hundred thousand (P300,000.00) pesos shall be exempt from the payment of legal fees.*

Meanwhile Section 21, Rule 3 of the same Revised Rules on Civil Procedures, states thus:

*Section 21. Indigent party. — A party may be authorized to litigate his action, claim or defense as an indigent if the court, upon an ex parte application and hearing, is satisfied that the party is one who has no money or property sufficient and available for food, shelter and basic necessities for himself and his family.*

The Supreme Court also promulgated the rules on how members of the bar should look at and handle legal aid cases under Canon 14 of the Code of Professional Responsibility of lawyers which mandated lawyers not to refuse his services to the needy unless any of the following exists:<sup>241</sup>

<sup>238</sup> Section 14.02, CANON 14 - A LAWYER SHALL NOT REFUSE HIS SERVICES TO THE NEEDY.

<sup>239</sup> G.R. No. 194412, November 16, 2016 SAMSODEN PANGCATAN, Petitioner, v. ALEXANDRO "DODONG" MAGHUYOP AND BELINDO BANKIAO, Respondents and G.R. No. 194566, November 16, 2016 ALEXANDRO "DODONG" MAGHUYOP AND BELINDO BANKIAO, Petitioners, v. SAMSODEN PANGCATAN, Respondent.

<sup>240</sup> See G.R. No. 150135, October 30, 2006, Algura v. The Local Government Unit of the City of Naga where the Supreme Court of the Philippines discussed the interplay between Section 19, Rule 141 and Section 21, Rule 3 both of the Revised Rules on Civil Procedures.

<sup>241</sup> Code of Professional Responsibility, Rule 14.03, Canon 14.

- a) *he is not in a position to carry out the work effectively or competently;*
- (b) *he labors under a conflict of interest between him and the prospective client or between a present client and the prospective client.*

Rule 14.04 of the same Code requires a lawyer “who accepts the cause of a person unable to pay his professional fees shall observe the same standard of conduct governing his relations with paying clients.”

*The Supreme Court likewise promulgated the Student Practice Rule under Rule 128-A of the Revised Rules of Court in order to allow senior law students to represent indigent clients before lower courts. One of the purposes is to address the high demand for legal aid. This will be discussed below in relation to legal aid by academic institutions.*

Finally, in 2009, there was a proposal to require all lawyers to render free legal aid. This was contained in Bar Matter 2012 which was entitled PROPOSED RULE ON MANDATORY LEGAL AID SERVICE FOR PRACTICING LAWYERS. Section 2 of said proposal clearly states that the laudable purpose was to enhance the duty of lawyers as agents of social change and to improve access to justice of the less privileged, it states:

*SECTION 2. Purpose. - This Rule seeks to enhance the duty of lawyers to society as agents of social change and to the courts as officers thereof by helping improve access to justice by the less privileged members of society and expedite the resolution of cases involving them. Mandatory free legal service by members of the bar and their active support thereof will aid the efficient and effective administration of justice especially in cases involving indigent and pauper litigants.*

However, this proposal has been temporarily shelved due to opposition from some segments of the legal profession. In fact, the Supreme Court tasked the Integrated Bar of the Philippines (IBP) to come up with the Implementing Rules and Regulations (IRR) but after several “deadlines,” the IBP did not manage to come up with the IRR.

### **C. The Integrated Bar of the Philippines (IBP)**

The Integrated Bar of the Philippines (IBP) is the association of all lawyers in the Philippines. It is mandatory for all members of the bar to become members of the IBP. It was created by the Supreme Court in accordance with Rule 139-A of the Revised Rules of Court.<sup>242</sup> The Supreme Court’s power to integrate the Bar was affirmed by Republic Act No. 6397 in 1971. The IBP has chapters all over the country. It has established as one of its standing committees a National Committee on Legal Aid. Each Chapter has its Chapter on Legal Aid. The relationship between the National and Chapter legal aid is clearly spelt out in Section 55 of the By-Laws of the IBP (1974) which states:

*SEC. 55. Committee on Legal Aid. - This committee shall promote the establishment and efficient maintenance of Chapter legal aid organizations suited to provide free legal service; direct and supervise all Chapter legal aid organizations; maintain maximum levels of coordination and cooperation with other organizations having similar objectives; receive and solicit aid and assistance from any available and suitable source or sources, provided*

<sup>242</sup> Brief History, Integrated Bar of the Philippines at [http://www.ibp.ph/ibp\\_about.html](http://www.ibp.ph/ibp_about.html) last accessed on 2 September 2017.

*that the independent character of the legal aid is not impaired; and, in general, do or cause to be done all things necessary and proper for the promotion of legal aid activities, projects and objectives.*

The GUIDELINES GOVERNING THE ESTABLISHMENT AND OPERATION OF LEGAL AID OFFICES IN ALL CHAPTERS OF THE INTEGRATED BAR OF THE PHILIPPINES emphasises that legal aid is not a matter of charity but a way to correct social imbalance that may lead to *injustice and for which reason it is a public responsibility of the Bar.*<sup>243</sup>

#### **D. Legal Aid Provided by Private Entities and Non-Government Organizations**

The demand for legal aid is so huge and thus the services of the Public Attorneys Office alone are not enough to respond to such demand. This is true even with the existence of the IBP Legal Aid and the services of other government agencies. This gap is filled-in by school-based legal aid centers/human rights centers, non-government organisations (NGOs) and even by private law firms.

##### **a. Law school-based clinics**

There are a number of law schools that offer legal aid services such as the Ateneo de Manila University Law School, University of the Philippines College of Law and the San Beda College of Law, among others. The Supreme Court recognizes the need for legal aid services due to the high demand for it. In order to address this, it promulgated Rule 138-A of the Rules of Court entitled the “Law Student Practice Rule.” The rule allows students to appear without compensation in any civil, criminal or administrative case before the lower court, tribunal, board or officer, to represent indigent clients accepted by the legal clinic of their law school provided that they have successfully completed their third-year law studies of a regular four-year law curriculum and are enrolled in the law school’s clinical legal education program recognised by the Supreme Court.<sup>244</sup>

A law student who has successfully completed his third year of the regular four-year prescribed law curriculum and is enrolled in a recognized law school's clinical legal education program approved by the Supreme Court, may appear without compensation in any civil, criminal or administrative case before any trial court, tribunal, board or officer, to represent indigent clients accepted by the legal clinic of the law school. Their appearance should be under the direct control and supervision of the members of the Integrated Bar of the Philippines.<sup>245</sup> The students are bound to abide by the same professional conduct applicable to the members of the Bar.<sup>246</sup>

The Supreme Court of the Philippines clarified that the supervising attorneys should always be physically present during the students’ appearances.<sup>247</sup> It further made clear however, that this rule does not apply when the students appear in inferior courts, it states thus:

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<sup>243</sup> Section 1, Rule 1, Guidelines Governing the Establishment and Operation of Legal Aid Office in All Chapters of the Integrated Bar of the Philippines.

<sup>244</sup> Section 1 - Conditions for Student Practice.

<sup>245</sup> *Id.*, at Section 2.

<sup>246</sup> *Id.*, at Section 4.

<sup>247</sup> Sec. 2, Bar Matter 730, *IN RE: NEED THAT LAW STUDENT PRACTICING UNDER RULE 138-A BE ACTUALLY SUPERVISED DURING TRIAL*, June 10, 1987.



*The rule, however, is different if the law student appears before an inferior court, where the issues and procedure are relatively simple. In inferior courts, a law student may appear in his personal capacity without the supervision of a lawyer. Section 34 Rule 138 provides:*

*Sec. 34. By whom litigation is conducted. — In the court of a justice of the peace, a party may conduct his litigation in person, with the aid of an agent or friend appointed by him for that purpose, or with the aid of an attorney. In any other court, a party may conduct his litigation personally or by aid of an attorney, and his appearance must be either personal or by a duly authorized member of the bar.*

*Thus, a law student may appear before an inferior court as an agent or friend of a party without the supervision of a member of the bar.*

These law school clinics provide legal aid in criminal, civil and administrative cases. They provide their own criteria for accepting legal aid clients.

#### **b. Non-government organizations (NGOs)**

There are also a number of non-government organisations (NGOs) that provide legal aid. Usually their free legal services are tied to their organizations' sectoral advocacy. For instance, those whose advocacy is to promote the rights of children handle cases relating to children such as child abuse, trafficking, child labor, etc.; those promoting the rights of women handle cases involving women's rights such as violence against women, sexual abuse, etc.; and those focusing on the rights of indigenous peoples handle cases related to the indigenous peoples concerns such as ancestral domain rights. They handle civil, criminal and administrative cases.

Their legal aid practice is developmental in nature as opposed to traditional legal aid. In the latter, the focus is the immediate need of the client only, such as legal advice and legal representation in court. It is usually viewed as charity and too lawyer-centered. Developmental legal aid focuses on the larger picture, that is, it views the legal problem as a product of a greater systemic social problem that marginalizes the concerns of the basic sectors. Thus, litigation through legal aid is just one of the many ways to address the violation of the rights of the poor. Hence, along with litigation, other strategies are resorted to such as law reform, policy advocacy and grassroots human rights education. The focus is empowerment of the clients. Among the well-known NGOs practising this brand of lawyering, which is also called alternative lawyering, are the Free Legal Assistance Group (FLAG), SALIGAN, Ateneo Human Rights Center (university-based NGO), Women's Legal Bureau and Balaod Mindanao. The latter three are part of a national network of legal service NGOs called Alternative Law Groups (ALG).

These law groups have both lawyers and community-based paralegals to attend to the legal needs of the community that they serve. The resort to community-based paralegals is not only empowering to the community, but also practically helps to distribute the burden of providing legal aid.

#### **c. Private Law Firms**

Finally, there are also private law firms that provide legal aid services on top of their regular paid services. For some, it is part of their corporate social responsibility program. However, for others, their legal aid services focus more on legal aid needs of their employees and the relatives of their employees including the relatives of the lawyers.

## IV. Analysis and Recommendations

### A. General Analysis and Recommendations

The demand for legal aid services in the Philippines is so huge. This means that there are just too many people who need legal aid. The Public Attorneys Office, especially under the leadership of Chief PAO, Persida Acosta, has increasingly made its positive presence felt in responding to the legal aid needs of the country that involves civil, criminal and administrative cases. It handles not only cases pending before lower and intermediate courts, but also cases on appeal. The further professionalisation of its ranks particularly with the amendment of the law that governs it, resulted to more and more lawyers applying for a PAO post. With more lawyers getting into the service, the more effective and efficient the PAO becomes as the case-load get to be distributed more. This means the public attorneys will have more time to focus on their cases.

This, notwithstanding, the case-load is still just too huge that in the end, the PAO lawyers still get too many cases to handle. In 2016, for instance, on judicial cases alone, it had a case load of 850,298. This somehow impacts the attention that they provide to each of the cases that they handle. There might be a need to continue with its aggressive recruitment. PAO may also need to increase its openness to partnering with other law groups in addressing the legal aid demand.

Furthermore, the financial criteria that the PAO uses are not anymore attuned to the current times. For instance, Php 14,000.00 (less than 300 USD) a month as monthly income is too low a threshold. There are those who earn more than that amount, but considering the size of the family and the higher cost of living nowadays, there will definitely not be enough money left to pay for the services of a lawyer if and when the need arises. Thus, there is a need to adjust the financial threshold.

The appointment of *de officio counsel* by the Courts does not impact much as it is normally resorted to in criminal cases and the lawyers appointed usually limit their engagement to arraignment only or to specific stages of the case only. Judges also do not resort to this practice often. The Supreme Court need to encourage judges to use their power to appoint *de officio counsel* more and more. Likewise, the Supreme Court may need to look into the possibility of coming up with a more detailed rule on the matter.

The other agencies that do provide legal aid are, of course, limited to providing so to the cases related to the mandate of their offices. In most cases pending in different government agencies, it is still the Public Attorneys Office that provides the free legal assistance needed.

It is a good development, though, that there are more and more law schools that provide legal aid services to address the gap. The community-based paralegals trained and developed by NGOs, likewise, help alleviate the burden in providing legal aid to the poor and the marginalized.

### B. Good Practices

Despite the challenges particularly borne by the high demand for legal aid, there are a number of good practices that are worth mentioning and sharing that contribute to greater access to justice and the strengthening of the rule of law.

## **1. Professionalization of the Public Attorney's Office**

The amendment to the law institutionalising legal aid services provided by the government was passed in 2007. Previous to this, there were too many anecdotal complaints against the services of the Citizen's Legal Assistance Office (CLAO) the predecessor of the Public Attorneys Office. Among these were public attorneys asking for fees for their services, corruption and competency issues. When CLAO was renamed PAO, the ranks of the public attorneys were made at par with those of the National Prosecution Service (NPS), and thus their salaries and other benefits were likewise increased - the country saw the transformation of the service. There may probably still be pockets of the old problems, but the general experience after the passage of the law strengthening the PAO was very positive. This was especially under the leadership of the current Chief PAO, Dr. Persida Acosta. As previously mentioned, more and more lawyers are drawn to working for the PAO. With the increase in the number of lawyers, the case load gets to be shared. This positively affects the quality of legal aid services that the poor and the marginalized get.

## **2. Harnessing the Legal Clinics of Law Schools and the Promulgation of the Student Practice Rule**

The increasing number of law schools that establish legal aid clinics/centers help alleviate the already over-burdened PAO. These law schools are also near the communities and therefore, more accessible to the clients. They can take advantage of the expertise of their faculty members while they train their law students in the rigors of litigation. The existence of the rule on student practice promulgated by the Supreme Court helped to facilitate this process.

## **3. Developing Community Paralegals**

The training and development of community paralegals provide an additional response mechanism to the heavy demand for legal aid. The advantage of having community paralegals is that it is empowering to both the paralegals themselves and the community that they service. Another advantage is that the paralegals know the community and the people in the community that they service and hence there is a greater opportunity to resort to alternative modes of dispute resolution as allowed by law. Finally, this familiarity also allows empathy and thus, a greater inspiration to serve the cause of the poor and marginalized.

## **4. Development Approach to Legal Aid**

In the Philippines, the traditional legal aid practice is centered only on the immediate legal aid need of the clients rather than a holistic approach to the legal problem. It is viewed as charity and therefore, disempowering. Finally, it is also lawyer-centered.

Developmental legal aid or alternative lawyering, while trying to address the immediate legal needs of the clients, views the legal problem as part of a bigger picture of access to justice or rule of law or human rights such as oppressive laws, corrupt system, etc. It therefore, provides a systems approach in addressing the legal problem. Thus, legal aid is just one of the many roads to achieving justice. Hence, alternative or developmental legal aid lawyers while handling the cases likewise do community education, policy advocacy and law reforms, among others. The idea is that by addressing the legal issue from a systems perspective, more people will benefit from the intervention. Thus, the need for individual legal aid will eventually diminish.

# SINGAPORE

## I. Country Background

A mere land mass of around 720 km<sup>2</sup>, Singapore is a small, densely populated island city-state of 5.61 million people, comprising 3.47 million citizens, 0.52 million foreign citizens who are also Permanent Residents, and another 1.64 million foreign citizens living and working in the country. The citizen population is also ethnically diverse, comprising 76.1% Chinese, 15.0% Malays, 7.4% Indians and 1.5% from other races. Not surprisingly, Singapore is also multi-religious, with a resident population that is 33.3% Buddhist, 14.7% Muslim, 18.3% Christian, 10.9% Taoist, 5.1% Hindu, and 17% who do not subscribe to any faith. In 2014, the Pew Research Centre ranked Singapore as the most religiously diverse country in the world.<sup>248</sup>

Founded in January 1819 by Sir Stamford Raffles of the British East India Company, Singapore's legal system has its roots in the English common law and practice. Since attaining self-government from Britain in 1959 and independence from Malaysia in 1965, Singapore has developed an autochthonous political and legal system that is relevant and unique to its political, social and economic circumstances. Modelled on the Westminster system, the Government comprises the Legislature, Executive and Judiciary. The Legislature is made up of the Parliament and the elected President. The Executive is made up of the President and the Cabinet, which is responsible for the general direction of the Government and accountable to Parliament. The Judiciary is composed of the Supreme Court, the State Courts, and the Family Justice Courts. The Supreme Court is made up of the Court of Appeal and the High Court, and hears both civil and criminal matters. The State Courts comprise the District Courts, Magistrates' Courts, and specialised courts such as the Coroner's Court, the Small Claims Tribunals, the Community Disputes Resolution Tribunal, and the Employment Claims Tribunals. The Family Justice Courts comprise the Family Courts, the Youth Courts, and the Family Division of the High Court.

Singapore is a party to four major international human rights conventions: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), including the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, Convention on the Rights of Persons with Disabilities (CRPD), and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). On 19 November 2012, Singapore, together with other ASEAN Member States, affirmed her commitment to advancing, promoting, and protecting human rights in Singapore and in the region by adopting the ASEAN Human Rights Declaration.

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<sup>248</sup> I am grateful for the valuable assistance provided by the Ministry of Law, Singapore, and the Law Society of Singapore in furnishing information and data for this study. All errors of fact and analysis remain mine alone. This study is dedicated to the late Brother Emmanuel @ Pierre Paul Gaudette, Montfort Brothers of St Gabriel, who was called home to the Lord on 31 August 2017. Brother Emmanuel dedicated his life in the service of the last, the least, and the lost. Pew Research Centre, "Global Religious Diversity: Half of the Most Religiously Diverse Countries are in Asia-Pacific Region," April 2014, <<http://www.pewforum.org/files/2014/04/Religious-Diversity-full-report.pdf>> accessed 1 October 2017.

## II. Legal Aid in General

The Singapore Government recognises and is committed to legal aid as an integral part of access to justice. Sixty years ago in 1958, Singapore was the first country in Southeast Asia to enact a legal aid scheme, which provided for the establishment of the Legal Aid Bureau (LAB) to provide civil legal aid to persons of limited means. Over the course of independent Singapore's history, legal aid<sup>249</sup> as part of the overall access to justice has broadened significantly.<sup>250</sup> Members of Parliament make regular calls for more people to qualify and receive government-funded legal aid. The government regards access to justice as being extremely important, and the public debate often centres on how to improve access to justice. While access to justice is often understood in terms of access to the courts and affordability of legal services, access to justice in Singapore is conceived in a broader and more nuanced context. This includes accessing and achieving justice through various means, including consensual outcomes that are acceptable to the parties in a dispute and reached within or without the court system.

Today, government-funded legal aid schemes cover both civil and criminal cases and they are co-delivered by the government with strong support from the legal fraternity and the civil society. Broadly speaking, eligible citizens and permanent residents can avail themselves to civil and criminal legal aid directly provided or co-funded by the state. Foreigners residing in Singapore may approach various volunteer welfare organisations, such as the Humanitarian Organisation for Migration Economics and the Archdiocesan Commission for the Pastoral Care of Migrants and Itinerant People, for help. The Law Society Pro Bono Services Limited also provides assistance on a case by case basis.

For criminal cases, all persons facing capital charges are offered legal representation without any means testing or other eligibility criteria under the Supreme Court-administered Legal Assistance Scheme for Capital Offences (LASCO).<sup>251</sup> For non-capital charges, criminal legal aid has been administered since 1985 through the Criminal Legal Aid Scheme (CLAS) administered by the Law Society Pro Bono Services Limited (LSPBS).<sup>252</sup> In a historic philosophical shift in 2015, the government began to directly fund criminal legal aid.

Other than legal aid funded by the government and the legal fraternity, legal services are also provided to persons of limited means by a rich landscape of community partners. This includes various regular and ad hoc programmes organised by LSPBS, the Community Justice Centre (CJC), and various community, religious and volunteer welfare organisations. The different stakeholders make significant efforts in providing the community with greater access to pro bono legal advice and representation. This multi-stakeholder approach ensures that access to justice remains a salient feature of Singapore's administration of justice in the civil and criminal realms.

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<sup>249</sup> In this country study, legal aid is broadly understood as embracing legal advice, legal assistance (e.g., drafting of legal documents) and representation in court proceedings.

<sup>250</sup> In this country report, legal aid generally refers to legal assistance and advice provided to 'disadvantaged persons' who include:

- Persons from households with low income, whether determined by a means test or by other means;
- Persons who are disadvantaged because of financial hardship, intellectual or physical disability, mental or physical illness, lack of education or other circumstances;
- Persons who are unable to afford legal representation; and
- Persons who are unaware of their legal rights, liabilities and responsibilities, or their right to legal representation.

<sup>251</sup> *Singapore Parliament Reports*, vol. 94, col. 1349, 6 April 2016. Figures are for January to December of each year.

<sup>252</sup> Formerly known as the Law Society's Pro Bono Services Office (PBSO), it was established in 2007 before it became the Law Society's first wholly owned subsidiary in 2017.

As indicated earlier, even before Singapore attained self-government or independence, there was already a system of legal aid in place.<sup>253</sup> In June 1956, Singapore's Legislative Assembly passed the Legal Advice and Aid Ordinance. During the debate on the Bill, Chief Minister David Marshall said, "The institution of justice is one thing for which we can be unreservedly thankful to the colonial power, but it has one drawback, and that is that, in some measure, the poor people of the country have no opportunity either to understand their powers under it or to have full access to it ...".<sup>254</sup> In moving the Bill at its Second Reading, Minister for Labour and Welfare Mr Lim Yew Hock began his remarks as follows:

... [T]hat all citizens should enjoy equality before the law and that there should be no necessity for a golden key to unlock the door to the courtroom. The ideal of fairness to rich and poor alike means that no man should suffer in the prosecution or defence of his legal rights for want of professional assistance and advice. Where inadequate facilities exist for a citizen of limited means to seek redress through the Courts for a wrong which has been done to him, or to obtain legal aid for his defence when he is committed for trial, then justice becomes a rationed commodity not freely available to all. ... It is of little comfort to the poorer citizen that the laws of his country are fair and just and that the Courts are impartial if, in practice, he is debarred from access to the Courts through lack of funds.<sup>255</sup>

This early institution of state-funded legal aid, as an indicator of access of justice, has created the requisite path dependence that continues to sustain current and future pathways on access to justice. In particular, access to criminal legal aid has undergone significant change in the past decade. The Government's previous longstanding position, first publicly articulated in 1995, was that "providing criminal legal aid would put the State in the position of using public funds to both prosecute and defend the same accused persons, after significant resources had been allocated to the careful and meticulous investigation, assessment and conduct of prosecutions".<sup>256</sup> Then Law Minister S. Jayakumar explained that:

But as I said, the Government's policy is to provide legal aid to criminal cases only in capital offences. ... To elaborate, the State spends a lot of resources in maintaining as best as possible a first-class, top-rate law enforcement machinery - the Police, the Central Narcotics Bureau, the Commercial Affairs Department and so on. It also invests heavily in an excellent legal service with very good legal officers handling prosecutions, who sieve and vet all the police investigation papers. Their job is to investigate offences when there is evidence to prosecute, when accused persons are brought to book, only after thorough and careful process. Why are they prosecuted? They are prosecuted in the public interest and the State expends these monies in the public interest and in order to protect the law abiding majority. Therefore, ... it is paradoxical. It is incongruous and inconsistent that public funds should be used to defend an accused person which the State has decided ought to be charged in court and use public funds at the same time to get him off. The exception is where life is involved and for capital cases, counsel is assigned.<sup>257</sup>

The "paradoxical" and "incongruous" position then was that civil litigants could, in appropriate cases, avail themselves to legal aid provided by the State. However, in the case of criminal prosecutions, where

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<sup>253</sup> On the origins and early years of legal aid in Singapore, see Colin Cheong and Lim Hui Min, *Access to Justice: 50 Years of Legal Aid* (Singapore: Legal Aid Bureau, 2008).

<sup>254</sup> *Singapore Parliament Reports*, vol. 1, col. 1965, 6 June 1956.

<sup>255</sup> *Singapore Parliament Reports*, vol. 1, cols. 1957-1958, 6 June 1956.

<sup>256</sup> Speech by Mr K. Shanmugam, Minister for Foreign Affairs and Law, at the Association of Muslim Lawyers' Inaugural Lecture, 6 December 2013, available at <https://www.mlaw.gov.sg/news/speeches/speech-by-min-at-aml-lecture.html>

<sup>257</sup> *Singapore Parliament Reports*, vol. 64, col. 1349, 7 July 1995.

a person could lose his livelihood, his liberty, or be caned, legal aid was not provided by the State. Before the government provided funding for criminal legal aid, criminal legal aid was provided by the Criminal Legal Aid Scheme (CLAS) run by the Pro Bono Services Office of the Law Society of Singapore (now renamed as Law Society Pro Bono Services Limited, or LSPBS). This was financed almost entirely by the generosity of members of the legal profession and public donations.

However, in 2007, the Government began to provide *indirect* criminal legal aid through annual funding to the LSPBS.<sup>258</sup> This marked the start of a different philosophical approach to legal aid. From 2015, the government began providing direct funding support in criminal cases to accused persons through CLAS. The improved access to legal aid was evident immediately. In 2016, the scheme benefited 2,542 accused persons, of which 1,669 received full legal representation or legal services not involving court attendance. This was a significant increase from 2014, where only 431 accused persons received full legal representation.

These changes to the legal aid regime were in response to the evolution of society towards a “more inclusive, a more compassionate society”.<sup>259</sup> In making this significant shift, the Singapore government was and remains mindful that public funds are involved and that a clear framework has to be put in place to ensure that money is “well spent, properly spent, and not abused”.<sup>260</sup> Hence, the government has consciously sought “to develop a system that is fair, prudent and sustainable right from the start. It is therefore not right to say that the State will underwrite all cases, will write a blank cheque”.<sup>261</sup> The foundational basis for the steadfast commitment to legal aid is well captured in Singapore’s report for the 2016 Universal Periodic Review where the government affirmed its commitment to building a fair and inclusive society amid persistent social inequalities.<sup>262</sup>

### III. Legal Aid in Specific Areas

#### (a) Government-funded Legal Aid

##### *Civil Legal Aid & the Legal Aid Bureau*

The Legal Aid Bureau (LAB), a government department under the Ministry of Law, provides legal aid on civil matters such as divorce, estate matters, personal injury, adoptions, maintenance claims, custody of children, family violence, probate matters, monetary claims, wrongful dismissals, tenancy disputes, and motor and industrial accident claims.<sup>263</sup> The key legislation is the Legal Aid and Advice Act (Cap. 160, 2014 Revised Edition) and the Legal Aid and Advice Regulations (Cap. 160, Rg 1, 1995 Revised Edition). The LAB provides legal aid in the form of oral legal advice, assistance in drafting legal documents, and representation in proceedings on civil matters. LAB receives more than 9,000 applications for civil legal aid per year.<sup>264</sup> Representation in

<sup>258</sup> Historically, criminal legal aid was provided for in the original Legal Aid Act and Advice Ordinance in 1956. But those provisions were never brought into effect and were in fact repealed in 1995.

<sup>259</sup> Speech by Mr K. Shanmugam, Minister for Foreign Affairs and Law, at the Association of Muslim Lawyers’ Inaugural Lecture, 6 December 2013, at paras 33 and 34.

<sup>260</sup> *Ibid.*, at para 29.

<sup>261</sup> *Ibid.*, at para 32.

<sup>262</sup> See Singapore’s 2016 Universal Periodic Review report, para 14: “We seek to build a nation where our citizens lead meaningful and fulfilling lives in a fair and inclusive society. To build a successful economy and share the fruits of growth with all Singaporeans, we need effective social strategies that enable individuals to fully realise their potential, help the less advantaged so that they have a fair chance to succeed regardless of their starting point in life, and protect the most vulnerable groups in society.”

<sup>263</sup> The LAB does not handle criminal cases, or matters involving defamation, breach of promise of marriage, cases where the applicant admits liability and the only question is as to the time and mode of payment by him of a debt (including liquidated damages) and costs, relator actions, and applications under the Parliamentary Elections Act or the Presidential Elections Act.

<sup>264</sup> See Table 19 at Annex 1.

civil proceedings and oral legal advice each constitute about half of LAB's caseload. Assistance to draft legal documents only constitutes about two percent of LAB's cases. Most LAB applications concern matrimonial or adoption matters, followed by claims and probate or other matters.<sup>265</sup>

At this time of writing (October 2018), to qualify for civil legal aid at the LAB, an applicant must be a citizen or a permanent resident of Singapore, and satisfy both the means test and the merits test. This helps channel the limited public funds available to those with a more enduring connection with Singapore. This notwithstanding, the LAB may provide legal aid to foreigners<sup>266</sup> who are involved in applications under the Hague Convention on the Civil Aspects of International Child Abduction.

To pass the means test, an applicant's disposable income cannot exceed SGD10,000 per annum<sup>267</sup> and disposable capital cannot exceed SGD10,000.<sup>268</sup> These criteria allow about 25 per cent of the resident population to qualify for legal aid. The means test includes a range of deductibles to exclude income required for daily living and supporting dependents. To give greater protection to vulnerable individuals involved in family proceedings, the deductibles for disposable capital are higher for family proceedings involving children, or protection orders involving spouses, ex-spouses or children.

If the applicant passes the means test, a legal opinion is prepared and submitted to the Legal Aid Board to conduct the merits test. The Board comprises the Director of Legal Aid and at least two solicitors from private practice. The Board will determine if there are reasonable prospects of success in the Applicant's case. This is to avoid expending public monies on supporting vexatious claims.<sup>269</sup>

A person receiving legal aid also has certain responsibilities. He may be required to pay a contribution, to pay a deposit to be used for out-of-pocket expenses incurred on his behalf, or to reimburse the Director for any costs incurred on his behalf when money or property has been recovered. Requiring such a contribution is intended to encourage legally aided persons to take ownership of their cases and not take legal assistance for granted, but this is subject to the applicant's ability to pay. The LAB may also cancel aid if the applicant acts unreasonably, for example, by refusing to participate in alternative dispute resolution or refusing to listen to legal advice, or if the applicant becomes uncontactable, or is found to be above means. This is to avoid any moral hazard that may follow if a person does not contribute to some of the cost of legal aid cost regardless of the outcome of the case.

The Ministry of Law regularly reviews the means test criteria to ensure that legal aid continues to be accessible for Singaporeans with limited means. The law is currently being amended, *inter alia*, to simplify the means

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<sup>265</sup> Other matters include guardianship, enforcement or variation of court orders, wills, Mental Capacity Act, etc.

<sup>266</sup> Citizens or residents of contracting states.

<sup>267</sup> Disposable income means the applicant's income and his spouse's income for the past 12 months, after deducting: SGD6,000 for the applicant; SGD6,000 for his spouse; maintenance for dependent(s) (capped at SGD6000 per dependent); rent (capped at SGD20,000) and Central Provident Fund (CPF) contributions.

<sup>268</sup> Disposable capital is the capital assets which an applicant possesses or is entitled to, after deducting: subject-matter of the proceedings; wearing apparel; tools of trade; household furniture; the applicant's home if it is a Housing Development Board (HDB) flat or a dwelling-house assessed at an annual value of not more than SGD13,000; CPF moneys; the surrender value of life policies up to SGD46,000 and savings up to SGD30,000 (if the applicant is aged 60 years or older). An additional SGD5,000 will be excluded in determining the disposable capital in family proceedings involving children, or protection orders between spouses or ex-spouses or which involve children.

<sup>269</sup> An example of legal aid in a civil matter that satisfies the merits and means test: Assume an applicant who is a plaintiff in a divorce proceeding. If the applicant's disposable income is not more than SGD10,000 annually, and his disposable capital is not more than SGD10,000, he will pass the means test. Note that this applicant could be living in a 3-room public housing (HDB) apartment that he owns, with SGD50,000 savings in his CPF accounts and a delivery van that he owns. HDB flats, CPF accounts, and tools of the trade are excluded from consideration in the means test. If the applicant satisfies the pre-conditions for divorce in Singapore and there is sufficient evidence for this, the applicant has a reasonable prospect of success in his divorce proceedings against his spouse, and will therefore pass the merits test.



test, to provide greater flexibility to help applicants with extenuating circumstances, and to improve the administration of legal aid. The Legal Aid and Advice (Amendment) Bill (Bill No. 42/2018) was first tabled before Parliament on 1 October 2018.<sup>270</sup>

The proposed amendments seek to change the way by which an applicant for legal aid is assessed. This includes aligning the means test with those more commonly used in various social support schemes. The proposed law will empower the Ministry of Law with the flexibility to establish such means criteria which will be set out in the subsidiary legislation. The intention is to replace the current disposable income and disposable capital criteria with the “per capita household income” and the annual value of the applicant’s place of residence, savings, and investments. The qualifying limit for the proposed revised means test will not materially impact the number of households eligible for legal aid. The proposed criteria will also shorten the application process.

The proposed amendments will also provide the Legal Aid Bureau with greater flexibility to assist those who fail the means test if the Minister for Law (or delegated person or panel of persons) is of the opinion that it is just and proper to do so given the applicant’s extenuating circumstances. Currently, the Legal Aid Bureau has the discretion to grant legal aid to those who fail the means test under only four prescribed circumstances: applicant is living separately and apart from spouse, the applicant has a sudden physical or mental disability, the applicant suffers a sudden loss of income, or the proceedings involve children or protection orders between spouses or ex-spouses.

The LAB partners the legal fraternity to deliver civil legal aid. The Assigned Solicitors are private lawyers who take on LAB cases on a pro bono basis. About a third of the LAB’s cases are assigned to the Assigned Solicitors while the rest of the cases are handled by the LAB’s team of Legal Officers. Cases assigned to the Assigned Solicitors include cases where there is a conflict of interests (e.g. both parties are legally aided), involve specialised areas of law such as Syariah Court proceedings or medical malpractice, or urgent and complex cases.

## **(b) Legal Aid for Foreign Migrant Workers**

Of the 1.644 million non-residents (non-citizens and non-permanent residents) in Singapore in June 2018, 56% of them are either foreign domestic workers (15%) or work-permit holders (41%).<sup>271</sup> Given the large number of foreign migrant workers, the Singapore government is mindful of access to justice issues that may be faced by them when they have legal disputes such as those relating to their terms of employment in Singapore. The State complements the various initiatives undertaken by various civil society groups that provide a range of pro bono legal services to migrant workers.

In 2016, the Ministry of Manpower (MOM) received about 9,000 salary-related claims involving some 4,500 employers.<sup>272</sup> Through mediation by MOM and adjudication by the “Labour Court”<sup>273</sup>, more than 95% of salary

<sup>270</sup> The Bill is available online at the Parliament’s website: [https://www.parliament.gov.sg/docs/default-source/default-document-library/legal-aid-and-advice-\(amendment\)-bill-42-2018.pdf](https://www.parliament.gov.sg/docs/default-source/default-document-library/legal-aid-and-advice-(amendment)-bill-42-2018.pdf)

<sup>271</sup> *Population in Brief 2018*, p. 5.

<sup>272</sup> Information in this section obtained from the oral answer by Mr Lim Swee Say, Minister for Manpower, to parliamentary questions on workplace injury compensation and unpaid wages, 6 February 2017. See <http://www.mom.gov.sg/newsroom/parliament-questions-and-replies/2017/0206-oral-answer-by-mr-lim-swee-say-minister-for-manpower-to-parliamentary-question-on-workplace-injury-compensation-and-unpaid-wages>

<sup>273</sup> “Labour Court” is colloquially used by the public and the Ministry of Manpower (MOM) when referring to hearings before a MOM assistant commissioner. From April 2017, the Employment Court Tribunals (ECT) have replaced the Labour Court in adjudicating statutory and contractual salary-related claims. Established by the State Courts under the Employment Claims Act 2016 (Act 21 of 2016), the Tribunals provide employees and employers with a speedy, low cost means to resolve salary-related disputes capped at SGD20,000 (or SGD 30,000 if the unions have helped to mediate in the dispute).

claims have been resolved successfully.<sup>274</sup> Where an employer of foreign migrant workers has yet to comply with the Labour Court orders, it is debarred from hiring foreign workers until it complies with the Labour Court orders. This debarment also applies to culpable directors even if they were to start new companies.

Between 2014 and 2016, 158 employers have been prosecuted and convicted for salary-related offences. Such offences carry a fine of between SGD3,000 and SGD15,000 per charge, or to imprisonment for a term not exceeding six months, or both. In the area of workplace injuries, over 99.9% of the approximately 16,000 injured workers had their cases successfully resolved in 2016. However, five (out of about 16,000 cases) did not because their employers had failed to purchase work injury compensation insurance and were unable to pay due to financial difficulties. The Ministry of Manpower takes such offences seriously and prosecutes such employers under the Work Injury Compensation Act (Cap. 354, 2009 Revised Edition) and debars the companies and individual directors from hiring foreign workers, until they compensate their workers.<sup>275</sup>

In cases where the orders for unpaid salary or work-injury compensation could be enforced, the workers have to apply for the Writ of Seizure and Sale through the State Courts. This is the same process that applies to all unpaid Civil Court orders including those made by the State Courts. The Ministry of Manpower assists the workers by advising them on the process and preparing the necessary documents. Eligible low wage local workers may seek legal assistance from the Legal Aid Bureau, while foreign workers may approach the Migrant Workers' Centre (MWC). In addition, workers can also apply to the State Courts Registrar to waive or defer the costs of enforcing the order, or to recover these costs from the sale proceeds. Meanwhile, foreign workers with valid salary claims are also allowed to change employers. More than 2,200 of such requests were granted in the past three years.

The Singapore government remains concerned with workers who are unable to recover their claims because their employers no longer have the financial means to pay. It has pledged to continue to strengthen the system support for them. Currently, foreign workers can receive financial relief from the MWC.<sup>276</sup> As with local low-wage workers, those with unresolved salary claims have been able to receive short-term relief from the Tripartite Alliance for Dispute Management (TADM) since April 2017.<sup>277</sup> As for workers with more serious injury, if they fail to receive their work injury compensation and are in financial difficulties, they are assisted through the Manpower Ministry's Workers' Fund.

### **(c) Criminal Legal Aid for Non-Capital Cases – Criminal Legal Aid Scheme**

Law Society Pro Bono Services Limited (LSPBS), a registered charity and an Institution of Public Character (IPC), has been running CLAS since September 1985.<sup>278</sup> CLAS provides criminal legal aid for non-capital cases. To qualify for CLAS, an applicant must be charged in Singapore with one of the criminal offences

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<sup>274</sup> In most of the unresolved cases of unpaid salary or work injury compensation, the chance of workers recovering payments from their employers is slim because the employer companies are mostly in deep financial difficulties and have no means to pay.

<sup>275</sup> Such offences carry a maximum penalty of SGD10,000, or imprisonment of up to 12 months, or both. In the last five years, 14 employers have been prosecuted for non-insurance and non-compensation of work injury.

<sup>276</sup> A non-government organization, the MWC was established in 2009 by National Trades Union Congress (NTUC) and the Singapore National Employers' Federation (SNEF), umbrella bodies for the trade unions and employers in Singapore respectively. The MWC's mission is to champion fair employment practices and the well-being of migrant workers in Singapore. For more information, see <http://www.mwc.org.sg>.

<sup>277</sup> The TADM is a collaboration of the tripartite partners: the Ministry of Manpower, National Trades Union Congress, and Singapore National Employers' Federation (SNEF). It seeks to "help employees and employers manage employment disputes amicably through advisory and mediation services". See further <http://www.tadm.sg>.

<sup>278</sup> Prior to the establishment of CLAS, "pro bono never existed as such" but is now seen as a "golden crown": see "The lawyers who take cases for no fee: Pro bono movement now seen as a 'golden crown'," *ChannelNewsAsia*, 15 October 2017, <<http://www.channelnewsasia.com/news/singapore/pro-bono-movement-lawyers-9300718>>

covered<sup>279</sup>, satisfy the means test (disposal income not exceeding SGD10,000 per annum and disposable capital not exceeding SGD10,000), and satisfy the legal merits test.

As discussed earlier, previously, the Singapore government did not directly fund criminal legal aid, apart from capital cases. The number of applicants to CLAS had been steadily increasing over the years. However, due to limited resources, CLAS was not able to represent all who deserved representation. Prior to the government providing funding, CLAS saw about 1,000 applications per year, of which 200 to 300 applicants qualified for aid.<sup>280</sup> The government decided to play a bigger role to better assist the defendants who cannot afford their own lawyers and should not be left to face the criminal justice system themselves.

Hence, in a significant shift in government policy, the government announced in 2013 that it had decided to fund CLAS. The government worked closely with partners including the legal fraternity, the Singapore Academy of Law, and the Judiciary to develop a policy framework to enhance CLAS. The enhanced CLAS was launched in 2015, which continues to be run by LSPBS. The government provides the bulk of the funding to cover operational costs, honoraria, and disbursements while LSPBS raises funds to cover the rest of the costs.

Launched on 19 May 2015, the enhanced CLAS now serves more accused persons. It also provides more types of legal services in addition to full representation, including basic legal advice and unbundled services not involving court attendance, such as written mitigation pleas and drafting of the defence case. Coverage was also extended to include more offences for which accused persons may be granted assistance, and to provide aid in cases where the accused person intends to plead guilty - if legal aid can make a difference in the sentencing.<sup>281</sup> The means test was significantly enhanced to allow more accused persons to qualify for legal aid.

Even with government funding an honorarium to help lawyers defray expenses, these enhancements would not be possible without the support of the legal fraternity to take up CLAS cases. Four schemes were introduced to grow the pool of lawyers taking on CLAS cases and to provide additional support to pro bono criminal legal aid. They are:

- a. **Lead Lawyers:** These are volunteer senior criminal law practitioners who are on duty at the LSPBS office to provide basic legal advice to CLAS applicants, assess the merits of the case, and make a recommendation on the level of aid to be given.
- b. **Memorandums of Understanding (MOUs):** Signed with 22 law firms (as at August 2017), which pledged to take on over 300 CLAS cases per year between them.
- c. **CLAS Fellows:** These are lawyers seconded or sponsored by their law firms to work full-time on a one-year tenure exclusively on CLAS cases. The Fellowship strengthens the provision of criminal legal aid. It also aims to strengthen the criminal Bar, and to develop a pro bono spirit that the young lawyers will carry back into the fraternity.

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<sup>279</sup> CLAS covers offences under the following 16 statutes: the Arms & Explosives Act; Arms Offences Act; Corrosive & Explosive Substances & Offensive Weapons Act; Dangerous Fireworks Act; Enlistment Act; Explosive Substances Act; Films Act; Miscellaneous Offences (Public Order and Nuisance) Act; Misuse of Drugs Act; Moneylenders Act; Penal Code; Prevention of Corruption Act; Undesirable Publications Act; Vandalism Act; Misuse of Computer Act; and the Women's Charter.

<sup>280</sup> Note that between 2012 and 2014, there was a significant year-on-year increase in the number of accused persons granted legal aid by CLAS: 320 cases in 2012; 427 in 2013; and 431 in 2014 (figures from the Law Society).

<sup>281</sup> Before 2015, CLAS only assisted persons claiming trial, except for defendants who are 16-18 years old of age or with mental illness/disability.

- d. CLAS Advocates:** These are full-time criminal lawyers hired by LSPBS with government funding support. These Advocates are more experienced lawyers working full-time on CLAS on two- to three-year tenures. They work on more complex and challenging cases, mentor the CLAS Fellows, and ease the transition of cases between different batches of CLAS Fellows.

There is strong support from the legal fraternity for enhanced CLAS. Many firms have contributed greatly to CLAS through their support for the CLAS Fellowships and taking on a significant number of CLAS cases under the MOUs. Some firms have also exhibited strong pro bono spirit by waiving all honoraria their lawyers would have received for taking on CLAS cases.

With the provision of government funding and the strong support of the legal fraternity, the enhanced CLAS is now able to serve many more accused persons. The number of applications has increased by more than 30 per cent (from about 1,800 cases in 2014 to about 2,500 cases in 2017), and the number of applicants receiving full representation or unbundled services each year has almost quadrupled (from about 400 cases in 2014 to about 1,600 cases in 2017).<sup>282</sup> In addition, all CLAS applicants now receive basic legal advice, regardless of whether they are eventually granted legal aid. This service was not provided prior to 2015.

#### **(d) Criminal Legal Aid for Capital Cases – Legal Assistance Scheme for Capital Offences (LASCO)**

The Legal Assistance Scheme for Capital Offences (LASCO), which is overseen by the Supreme Court, provides pro bono legal aid for capital offences. LASCO is provided regardless of the accused person's nationality, without any means testing or other eligibility criteria. Once a person is charged with a capital offence, legal counsel will be offered to the person. Usually, two counsels will be assigned: one lead and one assisting. This applies to legal representation at both the initial trial and subsequent appeal.

As with all pro bono criminal legal aid, LASCO relies on the support of the legal fraternity. Practising lawyers apply through the Supreme Court to become LASCO counsel. Those who qualify as LASCO counsels are put on a list maintained by the Registrar of the Supreme Court. When there is a case, counsels on the list are notified. Any LASCO counsel may volunteer to take on the case. The LASCO Case Assignment Panel then assigns the counsel to the case after deliberation. Currently, about 200 lawyers are empaneled as LASCO counsel. All assigned counsels are paid an honoraria for the professional services rendered. The Registrar of the Supreme Court decides on the amount of honorarium to be paid in each case.

## **IV. Legal Aid Service Providers**

### **Pro Bono Legal Services Provided by the Legal Fraternity and the Community**

In terms of financial resources, the State is a significant legal aid service provider. In the current financial year (FY2018-19), the government has budgeted SGD7.21 million (SGD7.54 million in FY2017-2018) to fund the legal aid programme.<sup>283</sup> In addition, for the CLAS, the government commits up to SGD3.5 million annually to

<sup>282</sup> Statistics based on calendar year (1 January – 31 December).

<sup>283</sup> The budget is the sum of the operating and development expenditures. For FY2014-15 and FY2015-16, the actual expenditures for the Legal Aid Bureau were SGD5.93 million and SGD6.87 million respectively. The estimated expenditure for FY2016-17 is SGD6.85 million.

LSPBS to cover operational costs, honoraria and disbursements.<sup>284</sup> To reiterate, other than legal aid funded by the government, the legal fraternity and a rich network of community partners provide pro bono legal services. Some of these key stakeholders are highlighted below.

### (a) The Law Society of Singapore (Law Society)

The role of the Law Society in ensuring access to justice is crucial. The Legal Profession Act (Cap. 161, 2009 Revised Edition) states that one of the purposes of the Law Society is “to make provision for or assist in the promotion of a scheme whereby impecunious persons on non-capital charges are represented by advocates”.<sup>285</sup> Beyond fulfilling its statutory purpose, the Law Society “believes that lawyers have a professional and ethical obligation to provide pro bono assistance in our community, arising from (1) our calling or vocation as lawyers and (2) a social contract with the community arising from our monopoly over legal advice and representation”.<sup>286</sup> The Criminal Legal Aid Scheme (CLAS) has been a major undertaking of the Law Society since 1985. In 2007, the Law Society established the Pro Bono Services Office (LSPBSO) with the mission to help bring free legal assistance. Subsequently, the LSPBSO was corporatised on 1 April 2017 as the Law Society Pro Bono Services Limited (LSPBS), the Law Society’s first wholly owned subsidiary. This has enabled it increase its staff strength and to provide a wider range of initiatives and activities which had grown considerably over the years.

The LSPBS’ major legal aid programmes include various legal clinics, and legal literacy outreach.<sup>287</sup> Over 10,000 underprivileged individuals receiving legal advice and aid annually, with the support of 2,000 volunteer lawyers across different specialisations. The Community Legal Clinics, which provide free legal information, advice and referral on questions of Singapore law and procedure to persons of limited financial means, in a one-to-one 20-minute session. They are to assist needy Singaporeans and Permanent Residents who are not represented by a lawyer. Advice would be provided on personal matters and not business/corporate or professional matters.<sup>288</sup> Four Community Legal Clinics are held each week, one at each of four Community Development Councils (CDCs) spread across the island, for greater accessibility to members of the public.<sup>289</sup> About 180 lawyers volunteer with LSPBS’ Community Legal Clinics.

Other than the Community Legal Clinics, LSPBS also collaborates with specialised organisations in the following Specialist Legal Clinics: Civil, Criminal and Family Legal Clinics held at the State Courts, Criminal Legal Remand Clinics to provide advice for persons in remand and Law Works Clinics to assist union members. LSPBS also has an Ad Hoc Pro Bono Referral Scheme, which provides civil or criminal legal representation for exceptional cases not covered by LAB or CLAS. Cases are generally referred to LSPBS from social welfare organisations, lawyers, Members of Parliament, or government agencies. Other activities organised by the LSPBS targeted at members of the public to raise legal literacy can be found at Annex 2.

<sup>284</sup> Press release by the Ministry of Law on enhanced CLAS, 19 May 2015, available online at <<https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/Enhanced-CLAS-to-provide-greater-access-to-justice.html>> accessed 6 Sep 2017.

<sup>285</sup> See section 38(1)(f) and (g) of the Legal Profession Act, which provide that the purposes and powers of the Law Society include:  
(f) to protect and assist the public in Singapore in all matters touching or ancillary or incidental to the law;  
(g) to make provision for or assist in the promotion of a scheme whereby impecunious persons on non-capital charges are represented by advocates;

<sup>286</sup> Correspondence with the Law Society of Singapore.

<sup>287</sup> See Table 20 at Annex 1. See also the LSPBS website at <http://probono.lawsociety.org.sg/Pages/default.aspx>.

<sup>288</sup> More information on the Community Legal Clinics can be obtained from <http://probono.lawsociety.org.sg/Pages/Community-Legal-Clinic.aspx>.

<sup>289</sup> To qualify for assistance, the applicant must be a Singapore Citizen or Permanent Resident, be of limited financial means, reside in Singapore, and not already have engaged the services of a lawyer.

## (b) Community Justice Centre

The Community Justice Centre (CJC) was established in 2012 through an MOU between the Ministry of Community, Youth and Sports (now the Ministry of Social and Family Development<sup>290</sup>), the Ministry of Law, the Subordinate Courts (now renamed the State Courts), the Tan Chin Tuan Foundation, and the Law Society of Singapore. The CJC is also at the forefront of promoting a pro-alternative dispute resolution (ADR) culture so that litigants have an avenue to resolve issues more amicably, expeditiously, and cost-effectively. The CJC provides legal services via the following programmes<sup>291</sup>:

- a. The Primary Justice Project encourages the public to explore amicable settlement of disputes before taking legal action in court. Under this scheme, a party who has a dispute may seek the assistance of a lawyer who is listed on the Primary Justice panel. These mediation-trained lawyers provide, at a fixed low cost, basic legal services geared towards resolving the disputes at an early stage.
- b. The CJC provides information and support for LIPs through (i) the HELP (Helping to Empower Litigants in Person) Service Centres located in the State Courts and the Family Justice Courts, which provide procedural information; (ii) the University Court Friends programme in which law students provide immediate support and guidance to litigants-in-persons by explaining court processes and proceedings to them, and (iii) the Friends of Litigants-in-Person (FLIP) scheme in which volunteers provide guidance on non-legal issues and moral support such as attending court hearings with the LIP and assisting them to note down useful information. In November 2016, the CJC collaborated with the Supreme Court to establish a satellite office in the Supreme Court.<sup>292</sup> These centres serve as a one-stop legal service hub that provides greater integration of legal aid and social assistance to litigants-in-person (LIPs).
- c. The CJC also provides legal advice and assistance to LIPs through the On-Site Legal Advice Scheme (OSLAS) which provides immediate legal advice to LIPs at the HELP Centre located at the State Courts (Mondays to Fridays) and Supreme Court (every Thursday for bankruptcy matters only); and the Enhanced Guidance for Plea Scheme (eGPS) under which judges can call upon the pool of lawyers from the Association of Muslim Lawyers or the Association of Criminal Lawyers to give legal advice to unrepresented litigants facing criminal charges.
- d. Many litigants coming to the courts also face socio-economic challenges. The CJC's Legal Information and Knowledge Services (LINKS) located at the Family Justice Courts provides litigants with interim financial assistance and food rations support. If CJC assesses that the party requires further specific assistance, CJC may refer the party to other relevant social service agencies for more targeted social support to be provided to them.

## (c) Other Legal Service Providers

Other than these LSPBS and CJC programmes, there are more than 50 other legal clinics in Singapore organised by community centers, religious organisations, and volunteer welfare organisations that provide

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<sup>290</sup> In 2012, the Ministry of Community, Youth and Sports was restructured to become the Ministry of Social and Family Development. Some functions were also moved to two other ministries, i.e. the Ministry of Culture, Community and Youth, and the Ministry of Communications and Information.

<sup>291</sup> See Table 21 at Annex 1.

<sup>292</sup> The CJC satellite office at the Supreme Court was soft launched in November 2016. It caters to persons involved in bankruptcy proceedings and may expand its scope of work in future.

legal support to members of the public. Some legal clinics cater specifically to foreigners providing free legal advice for migrant workers. They include the Foreign Domestic Worker Association for Skills Training (FAST) Legal Clinic and the Migrant Workers' Centre (MWC) Legal Clinic.

Other than legal advice, some organisations e.g., Humanitarian Organisation for Migration Economics (HOME) and the Catholic Church's Archdiocesan Commission for the Pastoral Care of Migrants & Itinerant People (ACMI) (in collaboration with the Catholic Lawyer's Guild and other volunteer lawyers) also provide legal representation to migrant workers on an ad hoc basis.

In addition to legal services, non-legal services may be provided to support vulnerable parties in need of other forms of social assistance. This is usually done through social services referrals. The provision of such a service recognises that the legal issues faced by an indigent litigant are not self-contained legal problems but are often a manifestation of other issues. LSPBS and LAB make social service referrals if they assess that applicants for legal aid also have unmet social needs. For example, applicants may be referred to CJC's LINKS program for interim financial support, the Divorce Support Specialist Agencies (DSSAs) for divorce, family dispute counselling and case management, or Centre For Promoting Alternatives to Violence (PAVE) for cases involving family violence.

## V. Good Practices

The relative success of Singapore in broadening the provision of legal aid and ensuring robust access to justice is the result of an effective and efficient legal aid regime that is undergirded by the commitment to meaningful access to justice. There are four key pillars: strong political will in ensuring access to justice, a multi-stakeholder approach and collaboration on legal aid, a growing pro bono culture that is constantly nurtured, and the provision and promotion of alternative dispute resolution and the use of diversionary strategies and institutions.

### (1) Strong Political Will and Leadership in Ensuring Access to Justice

The political will to provide and ensure access to justice through legal aid has been a lodestar in the development and growth of legal aid in Singapore. Since independence, the Singapore government recognises that to have a system of governance defined by the rule of law, a key determinant is access to justice. The government has developed a legal framework that is supportive of legal aid. This commitment towards a rules-based system was initiated under the leadership of Singapore's founding Prime Minister, Mr Lee Kuan Yew, when the People's Action Party (PAP) was elected into government in 1959.<sup>293</sup> Although Singapore's approach to criminal legal aid was initially marked by an ambivalent, if not conflicted, sense of what the public interest required, the government has always been very supportive of efforts by the legal fraternity, led by the Law Society, in providing criminal legal aid.

In order for the legal system (and courts in particular) to fulfill their constitutional role, those who use the legal system must have as much unimpeded access to them as possible. They should not be excluded merely because of their lack of ability to pay. Furthermore, an independent judiciary is a necessary condition for the rule of law to prevail but it is not a sufficient condition. The touchstone is the availability of meaningful access

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<sup>293</sup> As a lawyer prior to becoming Prime Minister, Mr Lee Kuan Yew was a legal advisor to many trade unions and recognised the potential and central importance of the law in making a positive difference to society.

to the legal system, especially the courts. There is the abiding commitment of various stakeholders, led by the government, in ensuring that access to justice is not denominated and differentiated by the “haves” and the “have nots”. Without meaningful access to the legal system, laws are likely to become a dead letter - a rebuke to a system that seeks to be defined by the rule of law. In addition, without adequate access to justice, the work of the legislature in enacting laws that promote the common good would be rendered nugatory, and the vision of a society defined by the rule of law illusory.

The strong political will and leadership vis-à-vis access to justice were in tandem with the government’s determination to build an incorruptible and meritocratic government and an inclusive society. The Singapore government is an advocate, promoter and practitioner of ensuring access to justice which impacts upon a person’s inclusion in society. As a result of the government’s unwavering political commitment and leadership, which has seen renewed vigour in the past decade, a culture of pro bono service is being engendered and reinforced in the Singaporean psyche and way of life.

## (2) Firm and Deep Foundation of Pro Bono Culture

The political will and leadership in ensuring access to justice is complemented by a strong pro bono culture within the legal fraternity. In the delivery of legal aid, lawyers are the “legs to go places”. Access to justice is not just an ideal worth striving towards but any framework designed to this end must also be sustainable. The Singapore government is strongly supportive of the legal fraternity’s concerted efforts towards growing a pro bono culture as an integral part of building a more caring and compassionate society.<sup>294</sup> Similarly, the Judiciary is also an active supporter and promoter of pro bono work.<sup>295</sup> This belief and support in co-creation is important in ensuring that legal aid is adequate, access to justice is secure, and the overall framework is sustainable.

Since 2015, Singapore lawyers are required to disclose the number of hours spent in each preceding year on pro bono work.<sup>296</sup> On the contributory factors for the current success and which would underpin future success for their pro bono efforts, the Law Society pointed to the following:

- “The continued support and selfless contributions of our members and volunteers”;
- “Adoption of public-private partnerships (3P) as the model of choice to scale up our pro bono initiatives”;

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<sup>294</sup> Pro bono work includes:

- i. Legal advisory / representation work for legal organisations and societies; and
- ii. Other law-related work (e.g. committee work for the Law Society of Singapore, the Singapore Academy of Law, the Singapore Mediation Centre, the Singapore Institute of Legal Education, any Ministry in a law reform project and sitting as a member of a Disciplinary Committee).

Work will be considered as pro bono if no remuneration is received, or only an honorarium is received. (<https://www.mlaw.gov.sg/news/press-releases/mandatory-reporting-for-legal-pro-bono-work-done.html>)

<sup>295</sup> See Chief Justice Sundaresh Menon, ‘Law and Medicine: Professions of Honour, Service and Excellence,’ 23<sup>rd</sup> Gordon Arthur Ransome Oration, 21 July 2017, para 36. See also Chief Justice Sundaresh Menon, ‘The Singapore Academy of Law: An Essential Dedication to Honour and Service,’ 25<sup>th</sup> Singapore Academy of Law Annual Lecture, 11 October 2018. The themes of honour and service underscore both lectures. It is worth noting the Chief Justice’s constant exhortation, encouragement, and emphasis that the “spirit of public service” embodies the purpose and ideals of the legal profession. See also the theme of honour and the legal profession’s nobility made by Justice Andrew Phang in *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR 308 at [81].

<sup>296</sup> When a lawyer applies for a practicing certificate, he is required by statute (Legal Profession (Mandatory Reporting of Specified Pro Bono Services) Rules 2015) to declare the number of hours spent on pro bono work in the immediately preceding practice year. The Law Society of Singapore recommends a minimum of 25 pro bono hours per year, although this is not a statutory requirement (<http://www.lawsociety.org.sg/probono/pdf/probonoguide.pdf>). See Table 22 at Annex 1 for annual pro bono hours between 2009 and 2016.



- “Consistent support and guidance from the Law Society’s leadership, investment in building structures to provide support for lawyers doing pro bono work and instill a spirit and culture of volunteerism amongst the profession”;
- “Reaching out beyond the legal profession/practising lawyers and are engaging law students as well as non-practising lawyers (e.g. in-house teams, corporate counsel). For example, we work closely with NUS [National University of Singapore], SMU [Singapore Management University] and SUSS [Singapore University of Social Sciences], as well as associations such as the Singapore Corporate Counsel Association”.

While the legal fraternity is at the vanguard of pro bono efforts, the three Singapore law schools at NUS, SMU and SUSS also contribute to the growing culture by instilling the pro bono ethos in their law students.<sup>297</sup> Law students who commenced their relevant qualifying law programmes from 2013 are required to perform 20 hours of pro bono work as part of their graduation requirements for their entire course.<sup>298</sup> Earlier, the 2007 Report of the Committee to Develop the Singapore Legal Sector recommended that measures should be taken to foster idealism and community bonding among lawyers, in particular, through the promotion of pro bono work.<sup>299</sup>

Building on the Committee’s recommendation, the Singapore Institute of Legal Education (SILE) has initiated a pro bono programme for law students from the local law schools. Through the programme, law students would acquire a better understanding of what is access to justice, raising awareness of legal rights, liabilities and responsibilities, and of self-help remedies such as mediation, negotiation and alternative means of conflict resolution for disadvantaged persons. The programme aims to develop students’ conception of the practice of law as a public service vocation in which benefit to the community is the clarion call. By enabling students to experience how the law works in real life through interaction with the host organisations, this effort seeks to normalise and encourage pro bono work.

### **(3) Multi-stakeholder Approach**

Closely tied to the strong and growing pro bono culture is the strong belief and commitment to the multi-stakeholder approach and collaboration in providing legal aid and enhancing access to justice. In Singapore, there is the 3P approach involving the public, private, and people sectors in a joint partnership. This collaborative partnership of key stakeholders facilitates all stakeholders in bringing their strengths and values to the cause of access to justice. Undergirded by the keen recognition that the legal system, especially the courts, does not merely provide a public service, the issue of access to justice is, at its core, about the accessibility and trust in the legal system, including the courts. Hence, access to justice must be effective not just in a theoretical sense, but in practice too.<sup>300</sup>

<sup>297</sup> Law schools have traditionally and culturally confined themselves to the academic instruction of the law. The law schools at NUS and SMU have established pro bono centres to further encourage law students to help the needy and better understand the role of law and the lawyer in society.

<sup>298</sup> This may be done at any time after their first year of study. The criteria and guidelines for approved pro bono work under SILE’s Pro Bono Programme can be found at [http://www.sile.edu.sg/pdf/SILE\\_Approved\\_Pro\\_Bono\\_Work-Criteria\\_and\\_Guidelines\\_2014.pdf](http://www.sile.edu.sg/pdf/SILE_Approved_Pro_Bono_Work-Criteria_and_Guidelines_2014.pdf). The SILE has a Review Committee comprising representatives from the Institute, the Law Society and the Law Schools to review and confirm specific activities as Approved Pro Bono Work.

<sup>299</sup> See paras 3.56 and 3.57 of the Report, available at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclিকে1d7.pdf>.

<sup>300</sup> While this study would not be able to make any conclusion on this, Singapore’s legal system continues to very well-regarded.

This “many helping hands” approach is necessary to ensure that legal aid is delivered to those who require it and that access of justice is assured both in form and in substance. The government and the legal fraternity cannot go the course alone. For example, the Law Society’s collaboration with relevant stakeholders and agencies has allowed them to tap on their partners’ wide network and enabled the Law Society to provide customised assistance to targeted segments of the community. Similarly, the Law Society collaborated with the Ministry of Law to roll out the enhanced CLAS in 2015. Since its launch, it has served almost four times more accused persons with full representation or unbundled services, and provided the other applicants with basic legal advice as well. Simply put, “the [enhanced CLAS] is an excellent example of a game changer public-private partnership that works”.<sup>301</sup>

The Judiciary is another invaluable stakeholder in the drive to ensure access to justice, particularly in civil matters. Since the early 1990s, the Judiciary has been continually revamping and overhauling civil litigation. In late 2017, after three years of careful study, the Supreme Court’s Civil Justice Commission appointed by the Chief Justice submitted its report recommending bold reforms which aim at “enhancing efficiency and speed of adjudication and maintaining costs at reasonable levels”.<sup>302</sup> The intent is to update and simplify procedural rules of court, eliminate time- and costs-wasting procedural requirements, promote the greater use of technology in litigation, and allowing for greater curial control of the litigation process. These reforms to the civil litigation process are undergirded not just at making the courts more efficient and effective but are fundamentally about improving access to justice. There are now more litigants-in-person appearing before the courts. Not all of these litigants may be indigent but if the litigation process becomes expensive, tedious, and forbidding, then the central principle of meaningful access to justice becomes severely undermined. In this regard, the concern of access to justice is not confined to the poor and disenfranchised but extends to those prevented from fully utilising the legal system to assert and protect their rights and interests.

There are also efforts for the medical and legal professions to collaborate for the public good. For example, the Law Society and the Singapore Psychiatric Association collaborate to enable more accused persons to have access to psychiatrists leading to “a sharper focus on key psychiatric issues in the prosecution and defence of criminal cases”. Furthermore, there are plans to have senior doctors to act as assessors and assist judges in medical litigation cases.<sup>303</sup>

What can be discerned clearly is the collective, collaborative effort by a wide variety of stakeholders in working towards the common goal of improving access to justice. The growing participation by civil society organisations in Singapore’s associational life, not directly concerned with the law, in improving access to justice demonstrate the extent to which ensuring the protection of one’s legal rights contributes to the development of social capital.

Overall, the legal aid framework has an intimate public-private-people collaboration in which community organisations provide help to the needy and vulnerable, with the government providing either financial or moral support and ensuring the legal infrastructure continues to be accessible to the wide variety of users. In keeping with the multiracial and multireligious ethos of Singapore, many of the volunteer welfare organisations provide their legal aid services to the community regardless of the beneficiaries’ religion, race, or language.

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<sup>301</sup> Speech by Mr K. Shanmugam, Minister for Foreign Affairs and Law, at the Association of Muslim Lawyers’ Inaugural Lecture, 6 December 2013.

<sup>302</sup> See Justice Steven Chong’s speech titled, “Judicial Reform: Reshaping the Civil Justice System in Singapore,” at the Judicial Conference of the Supreme Courts of the G20, 10 October 2018 in Buenos Aires, Argentina, available at [https://www.supremecourt.gov.sg/docs/default-source/default-document-library/j20-paper---judicial-reform---justice-steven-chong-\(singapore\).pdf](https://www.supremecourt.gov.sg/docs/default-source/default-document-library/j20-paper---judicial-reform---justice-steven-chong-(singapore).pdf).

<sup>303</sup> See Chief Justice Sundaresh Menon, ‘Law and Medicine: Professions of Honour, Service and Excellence,’ 23<sup>rd</sup> Gordon Arthur Ransome Oration, 21 July 2017, para 36.

#### (4) Provision and Promotion of Alternative Dispute Resolution

Besides the provision of legal aid, Singapore's approach to access to justice also encompasses providing more affordable means for people to resolve their disputes. This includes the establishment of dispute resolutions forums in addition to the courts and the promotion of the use of alternative dispute resolution (ADR). At a basic level, Singapore's ideational approach to dispute resolution is to create a system where the courts can provide expeditious resolution parties who seek a solution from the formal legal system. Part of this approach entails the strong support for the principle that the courtroom should be the *ultimum remedium* (forum of last resort).

To limit the use of litigation to resolve disputes, the state has established facilities and incentives for ADR and made them accessible as the first port-of-call for the settlements of disputes. In fact, the state's direct and active involvement in conflict management is a distinctive feature of the ADR framework in Singapore and is supported by a cultural approach, by which ADR is portrayed and promoted as being in accord with the values and norms of Singaporean society. Such a pervasive institutional and cultural commitment to ADR profoundly influences the behaviour of disputants resulting in disputants using ADR especially for relatively small commercial claims and social disputes.<sup>304</sup>

The efficiency and cost-effectiveness of such a system requires the application of proportionate judicial and party resources in the dispute resolution process. This, in turn, demands that trivial cases are diverted out of the court system, such as some non-injury motor accidents.<sup>305</sup> By diverting minor commercial claims and social disputes to alternative forums, the courts are free to focus on complex cases and commercial claims of higher monetary value. More importantly, through an adroit use of and concerted promotion of ADR, a clear benefit is improved access to justice. While ADR is also a manifestation of a technocratic ethos emphasising the values and norms of efficiency, functionality and economic pragmatism, litigation-avoidance methods also reflects a larger movement towards moulding Singaporeans' views of ADR vis-à-vis litigation, with all its attendant socio-economic and political objectives and consequences. Disputing parties can still avail themselves to the legal system without concerns over access to justice since the alternative methods are more affordable.

Besides the courts, other dispute resolutions forums have been established. The establishment of the Small Claims Tribunals within the Subordinate Courts (now known as the State Courts) in 1985 was to provide a quick and inexpensive forum for the resolution of small claims, arising from disputes between consumers and suppliers, not exceeding SGD10,000.<sup>306</sup> Other specialised dispute resolution forums include the Tribunal for the Maintenance of Parents (under the Maintenance of Parents Act (Cap. 167B, 1996 Revised Edition), and the complaints process for the Commissioner for Labour to resolve salary disputes. These fora have been established to serve the needs of different groups, particularly those in need. Their simplified procedures allow cases to be heard expeditiously, at much lower cost, and without the need for representation by lawyers.

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<sup>304</sup> See my 'Harmony as Ideology, Culture, and Control: Alternative Dispute Resolution in Singapore,' *Australian Journal of Asian Law*, vol. 9, no. 1 (2007), pp. 120-151.

<sup>305</sup> For example, the "FIDReC-NIMA Scheme," administered by the Financial Industry Disputes Resolution Centre Ltd ("FIDReC"), targets a limited segment of non-injury motor accident cases (i.e. cases involving insurance companies, and where claim amount is less than SGD3,000). It further only requires that mediation and adjudication by FIDReC be first undertaken before the commencement of court proceedings; it does not bar court proceedings per se: see <http://www.fidrec.com.sg/website/aboutfidrec.html>. A large proportion of motor accident claims (injury and non-injury cases) are in fact commenced in the courts, and are referred to court-annexed ADR processes at first instance.

<sup>306</sup> This limit can be raised to SGD20,000 if both parties agree to it and file a Memorandum of Consent. A claim cannot be split or divided to bring it within the Tribunals' jurisdiction.

In multi-racial, multi-lingual and multi-religious Singapore, mediation is clearly the preferred mode of dispute resolution. Unlike other jurisdictions where mediation was introduced as a diversionary measure to deal with backlogs and delays, Singapore's motivation was different. Mediation was singled out as being in accord with Singapore's Asian traditions and cultures, and promoting it ensures their continuance. Community mediation is also strongly advocated and promoted as an effective means of settling relational disputes at the grassroots level. Following the recommendation of the Inter-Agency Committee on ADR, the Community Mediation Centres Act (Cap 49A, 1998 Revised Edition) was enacted in 1997 to spearhead this endeavour. The Community Mediation Centre (CMC) promotes mediation as an effective means of addressing disputes regardless of whether users have been referred voluntarily. Although members of the public can bring their social disputes to CMC, community mediation remains largely dependent on referrals by the authorities. Cases are often referred to the CMC by the Magistrates' Court (without the need for consent of all the parties), the police, or other strategic partners like the Housing and Development Board (HDB).<sup>307</sup> The norms of mediation apply to community mediation. Parties are not required to produce evidence when undergoing mediation at the CMC. Access to the CMC is very affordable. Volunteer mediators are assigned to each case and legal representation is not allowed. When the disputants come to an agreement, a legally binding settlement is signed.

Efforts are also placed on developing 'soft' infrastructure as part of efforts to popularise community mediation in the residential heartlands. That mediation skills can be taught and imparted is a core belief underpinning the putative national mediation movement.<sup>308</sup> Community leaders are encouraged to undergo training as mediators or as facilitators/persuaders of mediation. Their role is to visit and persuade the disputing parties to use mediation as a means of resolving their conflict. Community leaders are ideal candidates as they usually have affinity with other members of their own community and can therefore be trusted to facilitate, mediate and resolve disputes with knowledge and empathy of the local situation. The usual benefits canvassed are that relationships can be preserved, while also saving time and expense, and engendering public trust and confidence in the justice system.

## VI. Recommendations

The landmark change to criminal legal aid in 2015 manifested a fundamental shift in the government's thinking and philosophy towards legal aid and, more broadly, access to justice. It is important to continue to strengthen the overall framework for access to justice by recognising that the administration of justice is not just another public service. Access to justice is a public good, with legal aid serving members of the public when they are at their most vulnerable. It reflects the basic ethos of a society and represents the commitment to ensuring that justice is not denied and not delayed but is given effect to promptly and affordably with those legitimately requiring legal aid obtaining them. Unmet legal needs undermine the rule of law. Singapore's approach to legal aid and, more broadly, access to justice seeks to consider and manage the "demand" and "supply" of legal aid. The following are some recommendations that can refine an increasingly robust legal aid regime in Singapore that involves the public, private, and people sectors in co-creating a sustainable system for the access to justice.

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<sup>307</sup> Eighty percent of Singaporeans live in public housing estates developed by the HDB.

<sup>308</sup> Frontline officers in government agencies are being taught basic mediation techniques as well. See "Frontline govt officers learn mediation skills," *The Straits Times*, 6 October 2018.

First, the government should continue with its regular reviews of the means test, with a periodic root-and-branch review of the legal aid regime. Regular reviews can ensure that the means test stays relevant and continues to facilitate access to justice by targeting those most in need. As such, the means test must keep pace with living costs so that vulnerable people are not unwittingly excluded. It is timely to consider whether legal aid should only be restricted to the very poor. Article 47 of the European Charter of Fundamental Rights and Freedoms puts it well: “Legal aid shall be available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

While the current means test appears to be working well, the proposed legislative amendments (which were tabled in Parliament in October 2018) to update and simplify the means criteria, and to align them with means criteria more commonly used in current social support schemes, will simplify and shorten the application process for legal aid. The amendments will also provide greater flexibility for LAB to help those who fail the means test but have extenuating circumstances, and improve the administration of legal aid. Together, these amendments will strengthen access to justice for those who with limited means.<sup>309</sup>

Second, at a systemic level, it bears reminding that the stakeholders in the legal system have to keep an eye on the costs of using the legal system. These include court fees, lawyers’ professional fees, and the like. Access to justice is also compromised if people decide not use the legal system because the costs are prohibitive or perceived to be prohibitive. Similarly, the legal fraternity must not rest on its laurels in making pro bono services a professional priority and an integral part of the commitment to social justice. It is crucial that justice remains affordable and that people are not priced out of justice. Continual reviews and reforms to the costs of legal representation and the use of court system are necessary to ensure that access to justice is robust. The legal fraternity should also assess and appraise the social impact of their pro bono work, including the clients’ satisfaction and cost effectiveness.

Third, notwithstanding the official emphasis on mediation and the state’s self-ascribed definition of Singaporean society as consensus-seeking, the use of ADR (especially mediation) as a means of promoting access to justice has to managed carefully to ensure the rights of individuals are not compromised. To be clear, a non-adversarial mode of dispute resolution would be preferred, as it provides significant savings in time and costs, as well as preserving relationships between members of that society. However, even as ADR is preferred, resolving disputes involving the indigent and disadvantaged must not prevent stakeholders from critically inquiring into the proper access to judicial adjudication and relief, and the proper balance between social consensus and harmony and an individual’s rights and interests in the matter at hand. The apparent fixation with settlement and settlement rates, and the preservation of traditional norms, raises the question of whether equity, fairness and procedural protections are, in fact, optimally internalised in Singapore’s ADR framework, especially in legal aid cases. In short, the need to manage the costs of legal aid to the public purse should not marginalise the use of litigation in legal aid cases. Adjudication also enables the application and dissemination of law, educating the citizenry on the law’s obligations and remedies as well as limitations. For a small nation-state, adjudication offers democratic governance the opportunities to observe the state’s authority and power being exercised, and for the citizens to participate in the creation of norms even in ordinary cases.

Even as the legal fraternity, the government and the Judiciary continue to nurture and promote the pro bono culture and framework in Singapore, it is also timely to consider the link between pro bono practice and legal professionalism. Lawyers enjoy a monopoly over the provision and delivery of legal services, and this tends to result in an artificially high market value for such services. In turn, this can affect people, especially

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<sup>309</sup> “‘Sandwiched class’ too may need pro bono legal help,” *The Straits Times*, 15 October 2017.

the indigent, in accessing legal services.<sup>310</sup> Pro bono clients may also present ethical issues for lawyers that are often different from those of fee-paying clients.<sup>311</sup> As the legal fraternity pursues pro bono legal work in a more significant way, the potential ethical challenges and dilemmas arising out of the professional monopoly should be identified and addressed. Currently, the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) applies to all practising lawyers, including those providing pro bono legal services. It is worth considering whether there should be specific regulations and/or guidance for lawyers providing pro bono work. Given the intimate ties between pro bono work and legal aid, both the lawyers and the clients would benefit if clients are not “short-changed” merely because they are receiving pro bono legal services.

## VII. Conclusion

*Justice that cannot be accessed because it is beyond the reach of those who need it ceases to serve its fundamental role of assuring legitimacy in our social framework.*<sup>312</sup>

Singapore promotes access to justice through the provision of legal aid and other legal services and infrastructure that serve both the underprivileged and the community at large. To improve access to justice, the Government has been providing more funds as well as institutional support for civil and criminal legal aid to Singaporeans and permanent residents in need as well as foreign migrant workers working in Singapore. The provision of legal aid and other legal services is delivered through a strong partnership between the government, the legal fraternity and other community partners.<sup>313</sup> It is a rich landscape of stakeholders motivated by a unity of purpose in ensuring access to justice as an integral part of the rule of law.

In developing and enhancing the overall framework for access to justice, all the stakeholders fully recognise that the administration of justice is not just another public service. It is, arguably, *sui generis*. In this regard, the courts are not mere providers of service to the “users” who appear before them. The value of such a service is not only specific to the users themselves (and to those who are remunerated for their participation in the court proceedings) but extend to others who may well derive a benefit from the establishing, clarification, or amplification of legal issues and the law. Thus, the mere existence of the courts is a necessary but insufficient condition for the rule of law to prevail. The imperative to attend purposefully to unmet legal needs continues to sustain Singapore’s approach to legal aid and, more broadly, access to justice.

Like the approach towards human rights and the rule of law, access to justice in Singapore is not just conceived as an end in itself but also as a process, a means to the end of good governance denominated by a stable political order, social equity and justice, and grounded in social consensus of the common good. Government spending on legal aid can be likened to an important form of social investment. Pro bono work and lawyering can provide needed intimate connection between law and lawyering and the public good.

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<sup>310</sup> Lorne Sossin, a Canadian legal scholar, puts it aptly, “In other words, pro bono is the *quid pro quo* for lawyers’ wealth and privilege”: Lorne Sossin, “The Helping Profession: Can Pro Bono Lawyers Make Sick Children Well?” in Adam Dodek and Alice Wooley (eds.), *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: University of British Columbia Press, 2016), pp. 150-163 at 152.

<sup>311</sup> This includes conflicts with fee-paying clients, clients with diminished capacity, clients with multifaceted legal problems over and above what a pro bono lawyer have agreed to work on.

<sup>312</sup> Chief Justice of Singapore Sundaresh Menon, Keynote address at the Subordinate Courts Workplan, 1 March 2013.

<sup>313</sup> It is, however, arguable whether legal aid in Singapore is an implicit constitutional right. If there is a constitutional right to legal aid, then the right is a ‘hybrid’ one: It imposes a positive obligation of funding on the state, while it is also an integral part of the right to a fair trial.

As society evolves and matures, the substantive content of access to justice will adjust to the societal changes and norms. The provision and delivery of legal aid in Singapore will have to evolve and adjust accordingly. The longstanding position that the state ought not to fund criminal legal aid has decisively given way to a broader conception of what access to justice is and requires, as well as enhancing the administration of criminal justice. Increasingly, prosperity will not be measured only by material wealth and pragmatic indicators (like GDP) but also by post-material considerations of the “wellbeing” of an individual and of society, especially the disadvantaged and the indigent. Wellbeing is determined by both tangible (e.g., health and security) and intangible factors such as happiness and the substantive content and quality of fundamental freedoms that Singaporeans and non-Singaporeans living in Singapore enjoy.

As a component of the rule of law, access to justice, broadly conceived and not narrowly confined to the provision of legal aid, is therefore critical to Singapore’s nation-building process.

## Annex 1

**Table 19: No. of Legal Aid Applications to Legal Aid Bureau (2013-17)**<sup>314</sup>

Financial Year	2013	2014	2015	2016	2017
No. of applications for legal aid	10,070	9,490	9,190	9,053	9,012

**Table 20: Statistics for LSPBS’ Programmes**<sup>315</sup>

Programme	No. of cases (FY2017)
Criminal Legal Aid Scheme (CLAS)	2,741 applications (all received basic legal advice), of which 1,790 granted aid
Community Legal Clinics	1,522 attendees
Civil Legal Clinics	62 attendees
Family Legal Clinics	128 attendees
Law Works Clinics Legal Clinics	113 attendees
Ad Hoc Pro Bono Referral Scheme	31 applications, 26 assignments

<sup>314</sup> Source: Legal Aid Bureau website.

<sup>315</sup> Source: Law Society 2018 Annual Report.

**Table 21: Statistics for CJC’s Programmes**<sup>316</sup>

Programme	No. of cases/interactions (CY2015)
HELP Services	8,650
OSLAS	2,837
UCF	2,759
GPS	91
PJP	61
FLIP	51

**Table 22: Annual Pro Bono Hours (2009-2014)**<sup>317</sup>

**Annual Pro Bono Hour Survey of Practising Lawyers**

To obtain fuller information on the pro bono commitment of members, the Law Society had included since 2010 a non-mandatory section in the “Application Form for Approval to E-file Practising Certificate” to request practitioners to provide information on their pro bono involvement in the preceding year (the “survey”). New practice rules were, however, introduced from 1 March 2015 providing for the mandatory reporting of pro bono hours for lawyers applying for a practising certificate (Legal Profession (Mandatory Reporting of Specified Pro Bono Services) Rules 2015).

Please see the following tables for a summary of the survey results:

Number of Lawyers Declaring Pro Bono Hours	2009	2010	2011	2012	2013	2014
No. who declared zero pro bono hours	2,530	2,569	2,534	2,471	1,266	2,886
No. who declared some pro bono hours	1,034	1,168	1,177	1,343	1,494	2,479
No. who did not declare pro bono hours	0	24	22	193	1,744	587
<b>Total</b>	<b>3,564</b>	<b>3,761</b>	<b>3,733</b>	<b>4,007</b>	<b>4,454</b>	<b>5,952</b>
No. contributing at least 25 pro bono hours per annum	331	414	431	469	519	646
Number of Pro Bono Hours	2009	2010	2011	2012	2013	2014
Total number of pro bono hours declared	35,634	45,094	45,247	53,766	66,743	68,256
Ave. number of pro bono hours / lawyer	10	12	12	13	15	13

- New practice rules were introduced from 1 March 2015 providing for the mandatory reporting of pro bono hours for lawyers applying for a practising certificate (Legal Profession Mandatory Reporting of Specified Pro Bono Services Rules 2015). The data is captured by the Supreme Court in the application by lawyers for a practising certificate.

<sup>316</sup> Source: Community Justice Centre’s 2016 Annual Report.

<sup>317</sup> Source: Law Society 2015 Annual Report



- Since the Supreme Court took over the renewal of practicing certificates, the Law Society no longer collects this information.
- With mandatory reporting, the data collected will also enable a more holistic appraisal of the pro bono

## Annex 2

### Activities by the LSPBS targeted at members of the public to raise legal literacy

- (1) Working with the Community Development Councils and the People's Association, the Law Society has organized the Community Legal Clinics Network and annual Law Awareness Weeks @ CDC public legal literacy event.<sup>318</sup> Since 1998, the Law Society has also produced and circulated a "Know the Law" publication to provide basic legal information, including reference point on legal issues and where to seek legal help, to members of the public.
- (2) The Law Awareness Weeks (LAWs) @ CDC is a public legal literacy event, held annually since 2015. It is tailored for non-legally trained audiences, with the intention of breaking down the legal jargon into easy-to-understand elements. These presentations aim "promote awareness, instill a basic understanding of the law, and empower Singaporeans to navigate basic legal issues. LAW aims to bring together all members of our community to ensure equal access to legal knowledge for all".<sup>319</sup>
- (3) The National Trades Union Congress (NTUC) and the Law Society of Singapore launched 'Law Works' on 19 January 2013. This initiative is aimed at educating working people on their legal rights in Singapore. Under the partnership, a series of legal primer talks for targeted groups of working people will be held, and monthly legal clinics will be organised to provide general legal advice and guidance. Legal resources in the form of a compendium of pocket series booklets (quick reference guides in online and hardcopy formats) are being co-developed and made available. These will cover various aspects of the labour law. The first pamphlet, 'I want to be a Freelance Professional', was launched concurrently with the broader campaign.<sup>320</sup> NTUC is a national confederation of trade unions (or the umbrella trade union body or labour movement) as well as a network of professional associations and partners across all sectors in Singapore.
- (4) With the National Council of Social Services (NCSS), the Law Society piloted the Appropriate Adult (AA) Service. This AA Service aims to provide assistance to persons with intellectual or mental disability (PWIDs) who are required to give a statement to the Police during investigation. The role of the Appropriate Adult is to help the PWID communicate more effectively during the police interview so that the PWID does not misunderstand the questions asked or that he is not misunderstood by the Investigation Officer. This will help ensure that statements recorded are reliable. From 1 January 2016, MINDS (Movement for the Intellectually Disabled of Singapore) took over the administration of AA Service from the Law Society.

<sup>318</sup> The Community Development Councils (CDCs) were established by the People's Association Act (CDC Rules & Regulations 1997) to build a tightly-knit, compassionate and self-reliant community in Singapore. Its mission statement is "To build a caring and cohesive community, where we assist the needy, bond the people and bonnect the community". See <https://www.cdc.org.sg>. The People's Association is a statutory board with the mission "to build and to bridge communities in achieving one people, one Singapore by connecting Government and people, and by bringing people closer to one another".

<sup>319</sup> See further at <http://probono.lawsociety.org.sg/Pages/LawAwareness.aspx>

<sup>320</sup> Information obtained from <http://probono.lawsociety.org.sg/Pages/Law-Works.aspx>

# THAILAND

## I. General Background

Thailand is located on the mainland of Southeast Asia. Covering an area of approximately 200,000 square miles, Thailand is the third largest country by size in the Association of Southeast Asian Nations (ASEAN). As of 31 December 2016, the population - citizens and foreigners legally working – in Thailand was 65,931,550<sup>321</sup>, the 25th largest country by population.<sup>322</sup>

GDP per capita based on the Purchasing Power Parity (PPP) of Thailand, as of 2016, was 1,164,928 international dollars which ranked 19th in the world and 2nd in ASEAN.<sup>323</sup> The country has seen a continuous and dramatic drop in the percentage of its population living below the national poverty line. It was 42.3 in 2000 but was 10.5 in 2014.<sup>324</sup>

Being composed of more than 60 ethnic groups, Thai is the only official language in the country. However, local dialects and languages are used in various regions of the country on a daily basis. 94.6 percent of all Thai citizens are Buddhist, and most of them are of the Theravada school. Islam and Christianity follow at 4.6% and 0.7 % of Thai people respectively.<sup>325</sup>

## II. Political Structure

Thailand is a constitutional monarchy and democratic country. His Majesty King Maha Vajiralongkorn Bodindradebayavarangkun, the tenth King of the Chakri dynasty, is the current Head of State. The government is composed of the Legislative branch, the Executive branch and the Judicial branch.

Legislative power is exercised through the National Assembly. According to the 2017 Constitution, the National Assembly comprises the House Representatives and the Senate, although, currently, the unicameral National Legislative Assembly established under the 2014 Constitution is still active until the first convocation of the National Assembly under the 2017 Constitution.<sup>326</sup>

The House of Representatives consists of 500-elected members. 350 of which are elected on a constituency basis and the other 150 members are elected through the party-list proportional system.<sup>327</sup> The Senate is not a directly-elected body of the National Assembly. Section 107 paragraph 1 of the Constitution reads as follows: “*The Senate consists of two hundred members selected by and among themselves of persons having knowledge, expertise, experience, occupation, attribute, or common interests, or working or having worked in various fields of society. The categorisation of groups shall be done in a way that people enabling to stand for the selection can be categorised in a group.*”

<sup>321</sup> <[http://stat.dopa.go.th/stat/statnew/upstat\\_age\\_disp.php](http://stat.dopa.go.th/stat/statnew/upstat_age_disp.php)> accessed 20 August 2017.

<sup>322</sup> <<http://data.worldbank.org/data-catalog/Population-ranking-table>> accessed 20 August 2017.

<sup>323</sup> <<http://data.worldbank.org/data-catalog/GDP-PPP-based-table>> accessed 20 August 2017. Thailand, however, had the actual GDP of US\$ 406 which was the 25<sup>th</sup> in the ranking < <http://data.worldbank.org/data-catalog/GDP-ranking-table>> accessed 20 August 2017.

<sup>324</sup> <<http://data.worldbank.org/indicator/SI.POV.NAHC?locations=TH>> accessed 20 August 2017.

<sup>325</sup> <<http://service.nso.go.th/nsonspublish/themes/files/soc-culPocket.pdf>> accessed 20 August 2017.

<sup>326</sup> The 2017 Constitution, section 263

<sup>327</sup> The 2017 Constitution, section 80

The Cabinet is the executive organ of the government. It is headed by the Prime Minister and composed of no more than thirty-five other Ministers. Principally, the Prime Minister is appointed by a simple majority vote of the House of Representatives.<sup>328</sup> However, in the first five years, since there is the National Assembly under the 2017 Constitution, the appointment will be made by a simple majority vote of the National Assembly.<sup>329</sup> Apart from the central administration, there are more than seven thousand local administrative organisations across the country adopting the principle of self-government according to the will of the people in the locality.<sup>330</sup>

The organisation of Thai courts will be outlined below.

### III. Legal System

The Thai legal system is a system of civil law in which the principal source of law is written law passed by Parliament, such as codes and statutes. The modern legal system of Thailand was established by King Chulalongkorn more than a hundred years ago with the aim of reforming the out-dated legal system. The first modern Code of Law in Thai history was the Penal Code, promulgated in 1908 before being substituted by the current Penal Code in 1957.

Despite being not legally binding, in practice, Supreme Court decisions are heavily persuasive and play significant roles in defining laws and shaping legal arguments. The constitution is the supreme law of the land. The current constitution, which is the 20th Thai constitution, entered into force on 6th April 2017.

In terms of international law, Thailand practices dualism, i.e. an act of Parliament is required for an article of international law to be incorporated in the domestic legal order. Municipal courts cannot recognise any international laws, written or unwritten, as a reason for deciding a case. Therefore, even if the Thai government agrees, with the consent of Parliament, to be a party of a convention, the rights and obligations enshrined in that convention are not legal rights and obligations applicable in a Thai court, unless Parliament introduces a law incorporating such rights and obligations to be part of the internal law.

There are four types of courts recognised by the 2017 Constitution; namely, (1) the Court of Justice, (2) the Administrative Court, (3) the Martial Court, and (4) the Constitutional Court.

The Court of Justice holds power to adjudicate cases of all types except for those being under the jurisdiction of other courts.<sup>331</sup> It is composed of the courts of first instance as trial courts, the appellate courts consisting of ten Courts of Appeal, and the Supreme Court.<sup>332</sup> Apart from general courts of first instance, there are six specialised courts which are (1) Juvenile and Family Courts (2) Labour Courts (3) Intellectual Property and International Trade Courts (4) Bankruptcy Courts (5) Tax Courts and (6) the recently established Criminal Courts for Corruption and Misconduct Cases. In these courts, the relevant procedural laws are different from those applicable in general cases. These courts are all located in Bangkok. However, some of them have operated in some provinces as well.

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<sup>328</sup> The 2017 Constitution, section 159.

<sup>329</sup> The 2017 Constitution, section 272.

<sup>330</sup> The 2017 Constitution, section 249.

<sup>331</sup> The 2017 Constitution, section 194.

<sup>332</sup> <<http://web.krisdika.go.th/data/law/law2%be16%be16-20-9999-update.pdf>> accessed 20 August 2017.

As their names suggest, the Administrative Court carries the power to try all administrative cases,<sup>333</sup> while, the Martial Court can try any cases where the offender is under the jurisdiction of the military and other kinds of cases as the law provides.<sup>334</sup> The Constitutional Court has the power to consider (1) the constitutionality of a law or a bill, (2) the duties and powers of the National Assembly, the Cabinet, and any independent organs, and (3) any cases according to the Constitution.

## IV. Human Rights Conventions ratified by Thailand

As of October 2017, Thailand has ratified these core UN international human rights instruments (in alphabetical order):

a) Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	2 October 2007
b) Convention on the Elimination of All Forms of Discrimination against Women	9 August 1985
c) Convention on the Rights of Persons with Disabilities	29 July 2008
d) Convention on the Rights of the Child	27 March 1992
e) International Covenant on Civil and Political Rights	29 October 1996
f) International Covenant on Economic, Social and Cultural Rights	5 September 1999
g) International Convention on the Elimination of All Forms of Racial Discrimination	28 January 2003
h) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	27 February 2006
i) Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	11 January 2006

Apart from these conventions, Thailand has also expressed willingness to enter into the Convention for the Protection of All Persons from Enforced Disappearance (CED) by signing on 9<sup>th</sup> January 2012.

Even though Thailand is a dualist country, rights and obligations guaranteed by these conventions are mostly recognised and incorporated into Thai law.

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<sup>333</sup> The 2017 Constitution, section 197.

<sup>334</sup> The 2017 Constitution, section 199.

## V. Legal Aid system in Thailand

### A Overview: The Constitutional Change

The 2007 Constitution clearly recognised the right to be provided legal aid. Section 81 (1) provided that “The State shall act in compliance with the law and justice policies as follows: (1) *ensuring the compliance with, and the enforcement of, the law to be correct, quick, fair and thorough, enhancing the provision of legal assistance and education...and providing legal aid service to the public...*”<sup>335</sup> Furthermore, subsection (5) of the same section stipulated that the State shall provide “*support for the operation of private organisations rendering legal assistance to the public, especially the people who suffer from domestic violence.*” These provisions provided the state with a strong and clear duty to provide legal aid to “the public”. It even enlarged state obligations regarding legal aid, as the 1997 Constitution guaranteed such right only to an alleged offender or an accused in a criminal case. Even though there was a coup d’état in 2014 and the 2007 Constitution was abolished, the interim 2014 Constitution section 4 impliedly reaffirmed the right to receive legal aid.

However, since the 2017 Constitution was promulgated on the 6th April 2017, the right to legal aid is, at least in theory, substantially and constitutionally affected. Even though the current constitution still recognises the right to legal aid, Section 68 of the said constitution provides the guarantee of such right only to indigent or underprivileged people and only to the necessary and appropriate extent. Also, no definitions of ‘indigent’ or ‘underprivileged’ people are presently provided; therefore, it is unclear how broad the state duty to provide legal aid is as of now.

Nonetheless, apart from the constitutional change, the right to legal aid in practice is unchanged. The Criminal Procedure Code and other statutes continue to provide free legal aid to all defendants in most criminal cases. Legal aid in civil and administrative cases is also still available, to a modest extent, and is unaffected by the Constitution.

Therefore, presently, even though the Constitution change could be viewed as reducing the minimum standard of the right to legal aid, there is no real change in practice yet.

### B International Law and Domestic Legal Aid Services

As far as legal aid service is concerned, Article 14 (3) (d) 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 tried in his presence, and to defend himself in person or through legal assistance of his own choosing; 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;*”

These rights are well incorporated into and recognised in Thai law by the Criminal Procedure Code.

- The right to be tried in his presence:
  - Section 172 paragraph 1 “*Unless otherwise provided, the trial shall be conducted in open court and in the presence of the defendant.*”

<sup>335</sup> <<http://www.asianlii.org/th/legis/const/2007/1.html>> accessed 20 August 2017.

- The right to have a legal counsel of his choice:
  - Section 7/1 (2) *“the accused/defendant shall have...the right to have a legal counsel or someone whom he trusts in presence in inquiries.”*
  - Section 8 (2) *“the defendant shall have...the right to be assigned a legal counsel to represent him in the stages of preliminary examinations, courts of first instance, appellate courts, and Supreme Court.”*
- The right to have a free legal counsel:
  - Police bail (section 87 paragraph 8): If the inquiry officer wishes to extend the detention period, he must seek approval from a court, at this stage the accused may assign a legal counsel to oppose such request. If he has no legal counsel, and he wishes one, the court shall assign him a free legal counsel. However, this right is not entitled to offenders of a petty offence as these offenders can be detained briefly only to ask for his plea, who and where he is. Therefore, it is not possible to extend the period of detention.
  - Inquiry (section 134/1): In this stage, an accused is entitled to have a free legal counsellor in these scenarios;
    - He commits a capital crime, if he has no legal counsellor, the court shall appoint him one, this right cannot be waived in this case;
    - He commits an imprisonable offence, and he requires a free legal counsel;
    - The accused is not above 18 when he is charged.
  - At trial (section 173): In every stage of trials, a defendant is entitled to have a free legal counsel under these conditions:
    - He commits a capital crime, if he has no legal counsellor, the court shall appoint him one, this right cannot be waived in this case;
    - He commits an imprisonable offence, and he requires a free legal counsel;
    - The accused is not above 18 when he is prosecuted.
  - Moreover, the right to have free legal counsel is not limited to only the accused/defendant; the victim is under some circumstances entitled to such right as well. Section 44/2 provides that in a case where the victim files a motion for the court to consider the matter of damages for the loss of life, body, mind, liberty, reputation, or property according to section 44/1 and the victim is a poor person to the extent that he cannot hire a legal counsel to represent him in the case, the court may assign a lawyer to be the victim’s legal counsel. The payment will be made by the court according to the concerned regulations.
- The right to be informed of such rights:
  - Arrest (section 83): When being arrested, the accused has the right to be informed that he is entitled to have a legal counsellor.
  - At the police station (section 84): At the first chance when the arrested arrives at the station, the police officer on duty shall inform the arrested that he has the right to have a legal counsel.
  - Before taking testimony for the first time, the inquiry officer shall, per section 134/1, inform the accused who has the right to have free legal counsel during the inquiry that he has such right.
  - Before starting the trial, the Court shall inform the defendant who has the right to have a free legal counsel during the trial that he has such right.

To summarize the rights according to ICCPR Article 14 (3) (d) which are enshrined in Thai law, the table below is provided.

**Table 23: Rights according to ICCPR which are enshrined in Thai law**

Stages Rights	Right to have a legal counsel	Right to be informed	Right to have a free legal counsel	Right to be informed
Inquiry	x	x	x	x
Police Bail	x	x	x	x
Preliminary Examination	x	x	-	-
Courts of First Instance	x	x	x	x
Appellate Courts	x	x	x	x
Supreme Court	x	x	x	x

## C Types of Cases

Legal aid services in Thailand are available to all kinds of cases, to a varying extent. In a criminal case, there are two schemes of legal aid, namely, the ordinary scheme provided by the Criminal Procedure Code and the new scheme governed by the Justice Fund Act 2015. Both the Criminal Procedure Code and the 2015 Act also provide legal aid services in civil cases. For administrative cases, legal aid services are available through the Justice Fund Act 2015.

## D Beneficiary

As Thailand practices the doctrine of non-discrimination, both Thais and foreigners are entitled to legal aid services provided by the government. This is true in all kind of cases, not only those of criminal law. However, in practice, due to the limitation of funds, the Justice Fund is normally not spent as bail money for foreigners. For NGOs, legal aid services provided by them are generally available to all people regardless of nationality.

## E Legal Aid in Criminal Cases: the Ordinary Scheme

In a criminal case, the Criminal Procedure Code proclaims the right to legal aid to all people regardless of their nationality or financial status, i.e. there is no means test for a person to receive legal aid from the State. The only criterion is the severity of the punishment. If it is a capital crime, the accused/defendant is automatically entitled to the right to have a free legal counsellor. Also, if it is an offence punishable by imprisonment and the accused/defendant requires it, he shall have a free legal counsellor. This criterion of potential penalty is irrelevant if the accused/defendant is below eighteen on the day he is informed of the charge, at the investigation stage, or if he is prosecuted at trial.<sup>336</sup>

<sup>336</sup> Sections 134/1 and 173, the Criminal Procedure Code.

A person is entitled to the right to have a free legal counsellor both at the stage of investigation and at trial.<sup>337</sup> However, if the case is privately prosecuted, a preliminary examination will be compulsorily held,<sup>338</sup> and during that process, there is no obligation for the State to provide a free legal counsellor for the accused.<sup>339</sup> This might be because, in the course of the preliminary examination, there is no requirement for an accused to be present in the court. The court is barred from asking the accused if he chooses to appear before the court.<sup>340</sup> Nevertheless, if it is a human trafficking case or corruption case, the statutes governing the issues oblige the State to provide the right to free legal counsellor.<sup>341</sup>

A lawyers list or a roster is made by each court of first instance separately and is “borrowed” by police stations in the same district. In principle, a lawyer will be called upon to represent an accused/defendant in an orderly manner rather than because of his expertise.

If the lawyer is assigned to represent an accused at the stage of the investigation, he can receive his remuneration after the public prosecutor issues either a final order of non-prosecution or an order of prosecution.<sup>342</sup> The available remunerations are dependent on the types of case. The fixed rates of THB 2,000, THB 1,500, 1,000, and THB 500 are available for a lawyer in the cases of a capital crime, an offence punishable by more-than-ten-year imprisonment, cases where the punishment is lower or a possession of drug case or a case under the jurisdiction of a district court and the accused confesses, respectively.<sup>343</sup>

If the lawyer is assigned to counsel the defendant at trial, the remuneration rates are higher compared to fees available in the inquiry stage.

- For a crime punishable by death, the lawyer will get paid ranging from THB 8,000 – 50,000.
- For an offence punishable by more-than-ten-year imprisonment, the fees will be between THB 6,000 – 40,000.
- For other cases, a lawyer could be paid from THB 4,000 – 30,000.
- In any case, if the defendant confesses, or the case is over without a conviction, a lawyer cannot receive the remuneration exceeding the amount of THB 10,000.<sup>344</sup>

The relevant courts of the first instance will decide how much the lawyer will be paid depending on, inter alia, the difficulty of the case, the time and the expense the lawyer has spent on the case.<sup>345</sup>

There is no regulation concerning the quality of a lawyer, such as an experience requirement, to provide a legal aid service.

## **F Legal Aid in Criminal Cases: the Justice Fund Act 2015**

Apart from the ordinary scheme of legal aid provided by the Criminal Procedure Code, the Justice Fund Act 2015 also renders a new and arguably more effective program on legal aid.

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<sup>337</sup> Ibid.

<sup>338</sup> Section 162, the Criminal Procedure Code.

<sup>339</sup> There is an attempt to change the law to provide the accused with the right; however, the bill has not yet passed Parliament.

<sup>340</sup> Section 166, the Criminal Procedure Code.

<sup>341</sup> The Human Trafficking Procedure Act 2016, section 24; and section 17 of the Procedure for Corruption and Malfeasance Cases Act 2016.

<sup>342</sup> <<http://web.krisdika.go.th/data/law/law4/%bb05/%bb05-2g-2550-a0002.pdf>> accessed 20 August 2017.

<sup>343</sup> Ibid.

<sup>344</sup> <<http://web.krisdika.go.th/data/law/law4/%bb05/%bb05-2g-9991-update.pdf>> accessed 20 August 2017.

<sup>345</sup> Ibid.



The main, relevant provisions are read as follows;

- Section 26 paragraph 1: “A person may apply for assistance from the Fund in the matter of the litigation, the temporary release, the violation of human rights or the effect of human rights violation including the support of the project providing legal knowledge to the people.”<sup>346</sup>
- Section 27 paragraph 1: “The assistance of the people in the litigation is composed of the attorney’s fees, the court fees and other expenses relating to the litigation.”

From the previous sections, this program is not limited only to an accused or a defendant but also to victims or potential victims. Furthermore, the assistance given is broader than just providing a free legal counsellor, but also includes the money needed to get bail, and promoting legal knowledge. Also, this scheme extends beyond the boundaries of criminal cases to other kinds of cases as well. Legal aid services in a civil or administrative matter will be later explained.

In short, the Justice Fund supervised by the Ministry of Justice is available in three scenarios; (1) if a plaintiff in a civil case cannot afford the court fee; (2) if a defendant, in any type of cases, cannot afford to hire a lawyer; and (3) if an accused/defendant cannot afford bail.

Both Thai citizens and foreigners are eligible to apply for legal aid through this Justice Fund scheme.

As per the Regulation of the Justice Fund Committee on the Rules, Methods, and Conditions to Provide Legal Assistance to the People 2016,<sup>347</sup> the expenses covered by the Justice Fund include lawyer fees, court fees, and other relevant costs.<sup>348</sup> The Justice Fund covers more expenses than the ordinary scheme.

Also, even though normally the lawyer provided by the Justice Fund to the accused/defendant will be on the list in an orderly fashion similar to the free-lawyer-scheme provided by the Court, if necessary the Justice Fund can provide a specialised lawyer having expertise in the case.<sup>349</sup>

However, unlike the normal scheme, a person is not automatically entitled to receive the Justice Fund legal aid. He will get the assistance only if the Justice Fund Board, presided by the Minister of Justice approves. There are no strong criteria as to which case could get the approval; however, guidelines are provided by the said regulation sections 10-13 to assist the Board in making a decision. The guidelines are in regard to (1) the fact and circumstances, (2) the financial status of the applicant, and (3) the opportunity the applicant can receive legal aid from other statutes.

Only lawyers with these qualifications can participate in the Justice Fund legal aid scheme: (1) age above 25 years, (2) holding a lawyer license for at least 3 years, (3) having advocated at least 20 cases, and (4) having never been disciplined. As of January 2015, there were 601 lawyers participating in the scheme.<sup>350</sup>

Fees which a lawyer in the Justice Fund scheme will receive per case are slightly higher than those of a normal scheme. The rates, in criminal cases, are as follows;<sup>351</sup>

<sup>346</sup> <<http://www.krisdika.go.th/wps/wcm/connect/05c082804e2c2dfb9c9dbfe798fdc4669/Justice-Fund+Act%2C+B.E.+2558+%282015%29.pdf?MOD=AJPERES&CACHEID=05c082804e2c2dfb9c9dbfe798fdc4669>> accessed 20 August 2017.

<sup>347</sup> <[http://www.jfo.moj.go.th/docs/regulation\\_procedding.PDF](http://www.jfo.moj.go.th/docs/regulation_procedding.PDF)> accessed 20 August 2017.

<sup>348</sup> Ibid section 9.

<sup>349</sup> Ibid section 23.

<sup>350</sup> <[http://www.rlpd.go.th/rlpdnew/images/rlpd\\_32558\\_01.04-16-09-58.pdf](http://www.rlpd.go.th/rlpdnew/images/rlpd_32558_01.04-16-09-58.pdf)> accessed 20 August 2017.

<sup>351</sup> <<http://www.jfo.moj.go.th/Docs/F-002.pdf>> accessed 20 August 2017.

- In a court of first instance: the lawyer will receive fees according to his performance and the difficulty of the case ranging from THB 5,000 – 50,000;
- In an appellate court, and the Supreme Court: fees will be THB 5,000 – 20,000;
- However, if the case appears to be complex and/or has an impact on the people, the Secretary of the Justice Fund can offer, upon an approval of the Justice Fund Board, higher fees deemed necessary and suitable.

Moreover, to receive legal aid in the form of bail money, the accused/defendant shall not be at risk of fleeing, of tampering with a witness or evidence, or of committing a further crime.<sup>352</sup>

As of June 2015, the Justice Fund had spent the sum of THB 402,816,464.77.<sup>353</sup>

- THB 353,325,303.02 (87.70%) were spent as bail money;
- THB 25,932,949 (6.44%) was spent on lawyer fees;
- THB 01,293,906 (3.55%) was spent on court fees;
- THB 434,400 (0.11%) was spent for witness protection;
- The rest, 2.2%, was spent on other matters.

## G Legal Aid in Civil and Administrative Cases

The Justice Fund is the main and almost sole source of legal aid in civil and administrative cases.

The qualifications for lawyers providing legal aid in civil and administrative cases are similar to those of lawyers providing legal aid in criminal cases.

In a court of first instance, a lawyer can receive fees ranging from THB 5,000 – 30,000 for practising in a civil case, and ranging from THB 5,000 – 20,000 in administrative, juvenile and family, or other cases. In an appellate court or the Supreme Court, fees are similar to every type of cases (THB 5,000 – 20,000). However, if the case appears to be complex and/or has an impact on the people, the Secretary of the Justice Fund can offer, upon an approval of the Justice Fund Board, higher fees deemed necessary and suitable.<sup>354</sup>

Furthermore, if it is a civil case concerning a criminal case and a public prosecutor prosecutes the criminal part of the case, the Criminal Procedure Code provides that victim may submit an application asking the court to consider the civil part of the case in the same procedure. And if the victim is unable to provide a lawyer due to his poor financial status, the court can appoint a lawyer for him free of charge. The lawyer is able to claim lawyer fees up to THB 10,000 from the Court.<sup>355</sup>

Additionally, legal aid in civil and administrative cases is provided by other organisations such as some universities and NGOs.

<sup>352</sup> The Justice Fund Act 2015 sections 28 and 29.

<sup>353</sup> <[http://www.rlpd.go.th/rlpdnew/images/rlpd\\_32558\\_01.04.16.09.58.pdf](http://www.rlpd.go.th/rlpdnew/images/rlpd_32558_01.04.16.09.58.pdf)> accessed 20 August 2017.

<sup>354</sup> <<http://www.jfo.moj.go.th/Docs/F-002.pdf>> accessed 20 August 2017.

<sup>355</sup> <<http://web.krisdika.go.th/data/law/law4%bb05%bb05-2g-2550-a0001.pdf>> accessed 20 August 2017.

## H Different Service Providers

Four different types of organisation provide legal aid service. Government agencies, professional organisations, universities or law faculties, and private organisations.

Apart from providing lawyers to an accused/defendant by the court and the police, other state agencies also provide legal aid services in other forms as well. Even though a practising lawyer is not allowed to be a public servant<sup>356</sup>, government bodies hire lawyers to act as their legal officers, partly to provide legal aid services to the people. Many agencies, including but not limited to the Office of Attorney General and the Rights and Liberties Protection Department (of Ministry of Justice) (hereafter called RLPD), provide free, preliminary legal consultations. Every province in Thailand presently has at least one Justice Clinic, established by RLPD. These clinics' purposes are to provide legal explanations, legal education, mediations between private parties, and legal facilitations between an applicant and other government agencies. These services are eligible to all people regardless of economic status or merit of the case. Moreover, to increase the outreach of these free services, RLPD has commissioned a 1111#77 hotline for people who are unable to see officers in person to able to contact them by phone.

Two professional bodies, the Lawyer Council under the Royal Patronage (hereafter, the Lawyer Council) and the Thai Bar provide free legal consultations to the people. They, however, adopt different criteria and means to provide legal aid.

The Lawyer Council, established by the Lawyer Act 1985, is legally obliged to provide free legal aid services<sup>357</sup> but the law also limits its services only to those who are poor and receive injustice.<sup>358</sup> Their services include legal consultation and representation of the client both during the inquiry, in court, and the appellation. The Lawyer Council does not limit its services only to criminal cases; it provides services in all types of cases. The person who receives legal aid services from the Lawyer Council does not have to pay lawyer fees; however, he has to bear any other expenses incurred including court fees. A person could apply to receive the services at any of the branches of the Lawyer Council which are located in every province.

The Thai Bar provides legal consultation free of charge regardless of the applicant's economic status. A person could either have a consultation in person with a lawyer at the Thai Bar headquarters in Bangkok or do that via telephone. Also, the Thai Bar provides legal representation in court without charge. However, the latter service is available only to those (1) acting in good faith and suffering injustice, (2) being poor, (3) behaving according to good morals, and (4) whose case is viable.

As professional bodies, these two institutions do not stipulate any condition or requirement for lawyers to provide legal aid services or engage in pro bono services.

To practice law in Thailand, one must obtain a lawyer license. Therefore, a student is not qualified to practice law. However, 22 law schools in Thailand provide free legal consultation by hiring qualified lawyers to carry out the task. Nonetheless, save for Thammasat University, no university in Thailand provides legal representation in court.

There are many non-government organisations which provide legal aid services in Thailand. Almost all of these organisations provide services to specific, vulnerable population of the people rather than everyone.

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<sup>356</sup> The Lawyer Act 1985, section 35.

<sup>357</sup> The Lawyer Act 1985, section 9.

<sup>358</sup> The Lawyer Act 1985, section 78.

Muslim Attorney Center Foundation (MAC) provides legal counselling and representation to those who are poor, mainly including but not limited to Muslim people in three southernmost provinces, especially in a case regarding security offences.<sup>359</sup> There are currently 34 full-time lawyers.

Cross-Cultural Foundation (CrCF) was founded in 2002. It focuses on the justice process and its accessibility for disadvantaged people. It provides services for victims of human rights violations (especially torture, enforced disappearance and community rights) by giving legal counselling and representation in court in some strategic cases.

## VI. Analysis: The Pros

One of the most positive aspects of the Thai legal aid system is that in most criminal cases, an accused/defendant is entitled to have a free legal counsellor regardless of his nationality, financial status or the merit of the case.

The free legal counsellor service is available both at pre-trial and trial stages. Therefore, except for the preliminary examination in case of a private prosecution, an accused/defendant is theoretically accompanied by a qualified lawyer at every stage, except if he willingly waives such right.

Moreover, the Justice Fund, despite having some criteria, provides legal aid in all types of cases and aid is available to both Thais and foreigners.

Legal aid services efficiently cover all areas of Thailand. It is clear that in a criminal case, an accused/defendant can have a free legal counsellor regardless of where he is since the services are provided through every court and police station across the country. Furthermore, from statistics, the Justice Fund legal aid program reaches people in rural areas to a significant extent as well. In 2015, there were 4,542 applications for legal aid through the Justice Fund, of which only 28.95% were from Bangkok, but more than 70% were applications submitted from other provinces.

## VII. Analysis: The Cons

Even though providing legal aid in a thorough manner is recognised as a positive aspect of Thailand in theory, the lack of incentives for expert lawyers, the insufficient funds, and the troubled management should be regarded as challenges which should be overcome if legal aid services would be improved in Thailand further.

### Lack of incentives

Fees available for lawyers per case through both the ordinary legal aid scheme and the Justice Fund program are relatively, and explicitly, low compared to fees a lawyer will receive if he practices privately, especially if the lawyer is an expert. It is not hard to see that there are not many expert lawyers willing to offer their services through legal aid programs, and even if they do, a question of the level of enthusiasm should be fairly asked. Not only does monetary motive cause the lack of incentives problem, but also the lawyer regulations do not

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<sup>359</sup> <[http://th.macmuslim.com/?page\\_id=2](http://th.macmuslim.com/?page_id=2)> accessed 20 August 2017.

provide any compelling reason for a lawyer to engage in pro bono work. It is not compulsory at all for a lawyer to obtain or maintain a lawyer license that he has to do some pro bono work. A lawyer in Thailand can have either a 2-year or a lifetime license. Therefore, when obtaining a life license, a lawyer is no longer required to achieve or fulfil any further requirement, save for not practising law in violation of the Lawyer Council regulations.

### **Insufficient funds**

The insufficient funding might partly be the reason why lawyer fees are still kept low, even though the rates were recently reviewed and adjusted in 2016 to reflect the current circumstance. However, the problem of the inadequate funding does not affect only the low lawyer fees. It might also reduce the capacity of the Justice Fund to provide comprehensive legal aid to the people.<sup>360</sup>

### **Troubled management**

The management problem is also another key challenge. As Thailand has no unified law or centralised administrative body to administrate legal aid services, there is no agency to evaluate the quality of legal aid services as a whole. Without a precise and clear assessment of how and who should spend the limited budget, it is difficult for Thailand to provide thorough and effective legal aid services. Some works, such as educating people on legal knowledge and providing legal consultations, are clearly overlapped between government organisations.

## **VIII. Analysis: Recommendations**

Thailand should see a significant rise in lawyer remunerations to increase the incentive for lawyers to provide legal aid.

The Lawyer Council should consider the practice of engagement in pro bono work as a compulsory condition for a lawyer to obtain and maintain his license.

Other incentives should be provided and welcomed such as tax deductions for lawyers providing pro bono legal services as a form of charitable contribution.

Even though the discrimination based on race or nationality is unwelcome, it is difficult to see the reason why Thailand, facing the circumstance of lack of funds, should provide legal aid services equally to those who are financially viable. The limited budget should be prioritised and distributed to those who need it most. Therefore, a means test should be established to screen out those who can financially pay legal services for their selves.

A centralised body whose members includes all stakeholders in providing legal aid services should be commissioned to oversee, evaluate, and plan how legal aid services should be implemented and provided in Thailand. To attain this objective, a unified law on legal aid should be introduced.

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<sup>360</sup> <<https://thaipublica.org/2012/06/legal-aid/>> <[http://www.rlpd.go.th/rlpdnew/images/rlpd\\_32558\\_01.03-16-09-58.pdf](http://www.rlpd.go.th/rlpdnew/images/rlpd_32558_01.03-16-09-58.pdf)> accessed 20 August 2017.

# VIET NAM

## I. Country Background

### 1. Building a Socialist Rule-of-Law State in Viet Nam

As a country in Southeast Asia, Viet Nam has initiated the construction of a socialist rule-of-law state since 1980s with an aim of socio-economic development and international integration. This contributes to wealthy people, strong country, and a just and civilized society. One of the main characteristics of a rule-of-law state is the prevalence of law, which means the society is managed and administered by law. All agencies, organizations and individuals follow the law and every citizen is equal before the law as well as in access to justice. Viet Nam's law system follows the statutory legal system (The Constitution, Law, Ordinance, Decree, Circular, Decision). The constitution is the original law, while other laws are developed and amended in order to detail the policy of the Party and the Constitution of the State. In order to implement regulations on human rights, citizen rights as stipulated in the 2013 Constitution, in recent years, laws related to human rights, citizen rights and access to justice of the People have received special attention from the National Assembly. A number of laws have been approved by the National Assembly such as Criminal Procedure Code (amended in 2015), Civil Procedure Code (amended in 2015), Law on Administrative Procedure (amended in 2015), Law on Temporary Custody and Detention, and Law on Legal Aid (amended in 2017). The above-mentioned laws have created a general legal framework to ensure human rights, rights to access to justice and equality before the law of the People, including for "vulnerable" groups in the society.

Legal aid (LA) is one of the legal areas which contributes to the building of a socialist rule-of-law state and ensures the rights to access to justice for "vulnerable" people in the society. Legal aid is free legal provision for LA beneficiaries (including poor people and policy beneficiaries). It contributes to ensure the legitimate rights and interests of the People and creates opportunities for them to access to justice and stay equal before the Law.

## II. History of Development of Legal Aid in Viet Nam

### 1. The Period of 1945 – 1996

Even though there was no legal document officially recognizing the LA institution, LA in Viet Nam was established and developed from the early days of independence. In particular, along with promulgation of a number of Decrees<sup>361</sup>, activities with the LA nature were carried out under the form of "legal guardianship" and upon requirements to ensure the right to defense of "the accused, defendants". These activities were mainly performed by lawyers, State officials, civil servants and citizens who were not lawyers under the State's supports and budget. During this stage, Viet Nam's Constitutions (1946, 1959 and 1980) have continuously recognized the principle of "guarantee of the right to defense of the accused, defendants". However, "legal guardianship" activities only focused on ensuring the right to defense of the accused, defendants and did not expand to ensuring the legal supports in general. It is due to the fact that, at that time, the right to access to

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<sup>361</sup> Decree No. 46/SL dated 10/10/1945 on organization of lawyer organizations; Decree No. 13/SL dated 24/01/1946 on organization of military court and other relevant Decrees

law for typical subjects like in other countries worldwide was not put into consideration as the country was in the state of war.

In 1982, Viet Nam joined international conventions on human rights<sup>362</sup>. The memberships have required Viet Nam to innovate its thinking about the right to access to legal supports of lawyers or people with legal knowledge, ensuring all citizens are equal before the law. These events have created the precondition for improvement of the legal system on proceedings, especially studies and improvement of institutions on “legal guardianship” with new contents and methods, not only ensuring “the right to defense” but also “the right to access and use the law” of citizens, especially those in difficulties, ensuring the social justice.

Since 1986, in Viet Nam’s context of implementing the comprehensive innovation policy in all economic, political, social aspects, ...a number of documents on lawyer mechanism<sup>363</sup>, stipulated a number cases where lawyers would support subjects without any fees, such as defense for the accused or defendants when being appointed by the proceeding agency. Moreover, citizens with economic difficulties or other special cases, if there was a request, the Chairman Board of the Bar Association would consider an exemption or discount of fees for them. Legal support activities, including free legal supports of legal consultants from the legal service office<sup>364</sup>.

## 2. The Period of 1996 – 2006

This stage has marked many important milestones in the development history of LA in Viet Nam. Firstly, the Ministry of Justice and the Government Personnel Committee piloted the establishment of the State Legal Aid Centers in Can Tho (13/7/1996) and the old Ha Tay (28/1/1997). Based on the pilot’s results, in addition to results of a research on experience of organization and performance of LA in some developed countries and development tendency of LA in the world, the Ministry of Justice and Government Personnel Committee developed a project on the establishment of LA organizations to be submitted to the Government.

To institutionalize the Party’s policy on “*enabling the poor to enjoy free legal consultancy services*”, based on results of the LA pilot in some provinces, on 6/9/1997, the Prime Minister adopted Decision No. 734/TTg on establishment of LA organizations for the poor and policy beneficiaries. This was the legal ground for establishment of the system of LA organizations in Viet Nam. According to this document, the system of the State LA organizations included the National Legal Aid Agency of the Ministry of Justice (whose functions to support the Minister of Justice in the State management of LA and to directly perform LA in cases of necessity<sup>365</sup>); and the Legal Aid Center of Departments of Justice at provinces, centrally-run cities with the functions to provide free LA services for the poor and policy beneficiaries<sup>366</sup>.

Therefore, during this stage, a series of legal regulations on LA had been promulgated in Decisions and Directives of the Prime Minister, Joint Circulars, Circular and Decisions of the Minister of Justice, etc. This established a legal ground for establishment of a system of the State management agencies and specialized organizations operating in the LA field, which initially established a mechanism for participation of organizations, individuals in LA activities, aiming to effectively and practically support LA beneficiaries, contributing to “poverty reduction” in the legal field.

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<sup>362</sup> The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights

<sup>363</sup> The 1987 Ordinance on Organization of lawyers and Decree No. 15/HDBT of the Council of Ministers on promulgation of bar association statutes

<sup>364</sup> Circular No. 1119/QLTPPL dated 24/12/1987 and Document No. 870/CV/QVLL dated 26/10/1989 of the Ministry of Justice

<sup>365</sup> Article 1 Decision No. 734/TTg dated 6/9/2017 of the Prime Minister on establishment of legal aid organizations for the poor and policy beneficiaries.

<sup>366</sup> Article 4 Decision No. 734/TTg dated 6/9/2017.

### 3. The Period of 2006 – Present

With the objective to improve the effectiveness of the LA policy in social life and establish a firm legal ground for development of LAs in Viet Nam, on 29/6/2006, the 9th Session of the XIth National Assembly adopted the Law on Legal Aid. The promulgation of the 2006 Law on Legal Aid has marked a new development step in the legislative history of LAs. This has reflected the National Assembly's interests in achievements of LA works during the last 09 years implementing Decision No. 734/TTg and the necessity to have a Law realizing the Party's and State's policy on hunger eradication, poverty reduction, paying gratitude and increase supports for LA beneficiaries in having equal access to the law. Subsequently, a series of sub-law documents such as decrees, circulars, guideline documents on LAs have been promulgated<sup>367</sup>.

Based on implementation of the Law on Legal Aid and its guideline documents, LA works have gained significant achievements, contributing to protection of legitimate rights and interests of the poor, policy beneficiaries and other disadvantaged, as well as ensuring fairness in access to the law. Especially, on 10/5/2011, the Prime Minister adopted the *Strategy on development of legal aid in Viet Nam to the year 2020, vision to the year 2030*<sup>368</sup>. This is the first Strategy of the Justice Sector determining the important overall and specific objectives of LA development in Viet Nam to the year 2030.

With an aim of tremendous reform of legal aid work, on 1/6/2015, the Prime Minister adopted the Project on renovation of legal aid works in Viet Nam for the period of 2015-2016<sup>369</sup> with the objectives to renovate LA works under the direction of vigorous reforms of administrative procedures applied in access to LA services of the State; to streamline the apparatus organization and human resources of the State LA organizations; to promote socialization with a roadmap fit with the features of each region, area to aim at the target that by 2025, LA service providers shall be practicing lawyers; to ensure the LA beneficiaries shall be timely provided LA services with the quality equivalent to services provided by lawyers on the market, etc. At the same time, the Project also requires to conduct further studies on revision of the Law on Legal Aid.

Based on practice summary and orientations of the Reform Project on LA, in 2016, Ministry of Justice was delegated to lead Amendment project of the Law on Legal aid. On June 20th 2017, 100% participants present in the National Assembly conference approved of the Law on Legal Aid No. 11 2017/Qh14 (which comes into force since January 1st 2018). A number of new important changes in the Law relate to the expansion of legal aid beneficiaries (from 6 groups to 14 groups). This helps “vulnerable” people to obtain more opportunities to access to justice; serving as a stronger commitment of the State responsibility in term of ensuring funds and human resources for LA. Currently, National Legal Aid Agency, Ministry of Justice continues to review legal normative documents (LND) and draft guiding documents on Law on Legal Aid No. 11 2017/QH14 in order to take effects on January 1st 2018.

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<sup>367</sup> According to Report No. 158/BC-BTP dated 30/6/2016 of the Ministry of Justice on summary of 8-year implementation of the Law on Legal Aids, from 2007 – 2014, there have been 45 LNDs on guiding implementation of the 2006 Law on Legal Aids.

<sup>368</sup> The Strategy on development of legal aid in Viet Nam to the year 2020, vision to the year 2030 was adopted in attachment with Decision No. 678/QD-TTg dated 10/5/2011 of the Prime Minister.

<sup>369</sup> Decision No. 749/QD-TTg of the Prime Minister.



### III. Overview of Current Legal Profession in Viet Nam

#### 1. Legal Profession

Currently, legal provision of lawyers are stipulated by many LNDs, among which 2006 Law on Lawyers and Law on amendments of 2012 Law on Lawyers are of most significance.

According to the Law, lawyers are Vietnamese citizens who are loyal to the Fatherland, observe the Constitution and law, have good moral qualities, possess a law bachelor diploma, have been trained in legal profession, have gone through the probation of legal profession and have good health for law practice may become lawyers. Based on a statistics report, until December 2015, over all the nation, there are 63 bar associations established in 63 provinces, centrally-reun cities with over 9,897 official lawyers and approximately 3,500 lawyers on probation, with over 3,500 legal practicing lawyers<sup>370</sup>.

A foreign lawyer shall be granted a permit for law practice in Viet Nam if fully meeting the following conditions: having a law practice certificate which is granted by a competent foreign agency or organization and remains valid; respecting the Constitution and law of the Socialist Republic of Viet Nam; being nominated by a foreign law-practicing organization to practice law in Viet Nam or recruited by its Viet Nam-based branch by a foreign law firm or Vietnamese law-practicing organization. However, foreign lawyers practicing law in Viet Nam may only advise on foreign laws and international law, provide other legal services related to foreign laws, advise on Vietnamese law if having Vietnamese bachelor's diploma in law and meeting all requirements set for a Vietnamese lawyer but may not participate in legal proceedings as defense counsels or defenders of interests of the involved parties, as representatives or defenders of legitimate rights and interests of the involved parties before Vietnamese legal proceeding-conducting agencies.

Regarding results, from July 2011 to December 2015, lawyers provide services as such<sup>371</sup>:

- (i) Legal representation: lawyers participated in 87,614 cases, including 43,342 criminal cases (with 16,786 cases invited by the customers and 25,556 cases requested by proceeding organizations), 30,179 civil and marriage cases, 9,281 economic and trade cases, 2,811 administrative cases and 2,991 labor cases.
- (ii) Legal advice: lawyers provided 206,400 cases.
- (iii) Representation beyond legal proceedings and other legal services: 4,766 cases in beyond legal proceeding cases, 62,903 free LA and 47,938 other legal cases.

In addition to achieved results, there are still a few shortcomings with regard to lawyers and their activities in Viet Nam. First, the number of lawyers has witnessed a tremendous increase, however, in many localities with economic difficulty, the quantity of lawyers versus the population is relatively low. The quality of lawyers has not received positive interests from the society. Lawyers still remain inexperienced. The quality of representation of lawyers have not met requirements of trial litigation with legal reform spirits. Some lawyers have no due attention and responsibility in compliance with the regulations of Law on lawyers and related laws... Most of legal practicing organizations in Viet Nam are at small scale. Almost all organizations are operated in form of lawyer offices, with 1 or 2 lawyers and limited facilities. Their headquarters are often located in the house

<sup>370</sup> Report No. 205/BC-BTP dated 03/8/2016 of Ministry of Justice on results of 5 year on Lawyer Development Strategies till 2020.

<sup>371</sup> Report No. 205/BC-BTP dated 03/8/2016 of Ministry of Justice on results of 5 year on Lawyer Development Strategies till 2020.

of lawyers. Administrative and management work remains unprofessional. Activities of lawyers and lawyer practicing centers are in lack of profession. 20% of lawyers are also responsible for other tasks at the same time. The number of legal practicing lawyers who specialize in legal areas are limited<sup>372</sup>.

## 2. Legal Consultancy Services in Social Organization

Legal consultancy services of social organizations are stipulated in the Decree No. 77/2008/ND-CP dated 16/7/2008 of the Government on legal advice (hereafter shall be referred as Decree No. 77/2008/ND-Cp) and Circular No. 01/2010/TT-BTP dated 09/02/2010 of Ministry of Justice on detailing and guiding on implementation of Decree No.77/2008/ND-CP.

Legal consultancy centers are established in many levels, from the Central to the provinces and local districts, mostly in provincial and district levels. Often, centers employ from 02 to 80 legal consultants and other collaborators. Currently, nationwide, there are 177 legal consultancy centers which are established and registered in 61/63 provinces<sup>373</sup>. Among them, there are 59 centers under Bar Association, 16 centers under Labor Union, 12 centers under Women Association, 09 centers under legal research and institutions and 05 centers under Farmer Association, the remaining under other social organizations. All over the country, there are 3,126 legal consultants, including 581 consultants owning a legal consultant card, 2,439 legal collaborators and 106 lawyers signing individual contracts with centers<sup>374</sup>.

Regarding the scope of the activities: under the law, legal consultancy centers have many responsibilities. First, they provide legal advice. Next, they assign lawyers to contract with the centers to participate in representation in order to defend, represent, protect legitimate rights and interests of individuals and organizations whom request legal advice from the center. Furthermore, they provide LA in accordance with laws on LA and provide free legal advice for members of organizations in charge, poor people and other policy beneficiaries as regulated in the law. In addition to free legal advice provided for those beneficiaries, legal consultancy centers are allowed to collect fees from other individuals and organizations requesting legal advice to compensate for normal fees of the center. Based on reports from localities, legal consultancy centers frequently provide legal advice in form of guiding, providing legal answers, consulting on drafting documents and providing legal documents, and information for members of those organizations and providing free LA for the poor, policy beneficiaries and ethnic minority people. On results of legal advice: According to reports from provinces, from 05/7/2011 to 30/9/2014, legal consultancy centers have conducted 180,033 cases (including 2,269 criminal representation cases, 10,817 civil representation cases)<sup>375</sup>.

Overall, legal consultancy centers under associations are established and operated for non-profit. In general, expertise, skills and profession of legal consultants are limited, therefore, they still face difficulties and hesitance when being requested to provide legal advice for complicated cases related to various legal areas. This leaves important impacts on the quality and effectiveness of legal consultancy centers<sup>376</sup>.

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<sup>372</sup> Report No. 205/BC-BTP dated 03/8/2016 of Ministry of Justice on results of 5 year on Lawyer Development Strategies till 2020.

<sup>373</sup> Quang Tri, Dak Nogn has no legal consultancy centers.

<sup>374</sup> Report of 7 year implementation of Decree No. 77/2008/ND-CP of Ministry of Justice.

<sup>375</sup> Report of 7 year implementation of Decree No. 77/2008/ND-CP of Ministry of Justice.

<sup>376</sup> Report of 7 year implementation of Decree No. 77/2008/ND-CP of Ministry of Justice.

## IV. The Legal Services Provider System in Viet Nam

The legal services provider system in Viet Nam includes legal practice organizations (*to chuc hanh nghe luat su*) of lawyers, foreign law firms practicing in Viet Nam, provincial legal aid centers and legal advisory centers. These organizations are different in name, but vary only slightly in activities. Legal practice organizations of lawyers and foreign law firms practicing in Viet Nam are set up in the forms of practice stipulated by the Lawyers' Law; Provincial Legal Aid Centers are organized in accordance with the Law on Legal aid; legal advisory centers are established and operate under Decree No.77/2008/ND-CP of Government dated 16 July 2008 on legal consultancy and Circular No.01/2010/TT-BTP of Ministry of Justice dated 9 February 2010 on detailing and guiding the implementation of a number of articles of Decree No.77/2008/ND-CP. Thus, legal services are provided by various bodies, not only by professional lawyers (*luat su*).

### 1. The Legal Practice Organization (*to chuc hanh nghe luat su*)

Legal practices organizations of *luat su* operate under the Lawyers' Law and are licensed by the Local Department of Justice under the control of the Ministry of Justice. In Viet Nam *luat su* can practise in a legal practice organization, or can practise in their own capacity.<sup>377</sup> The practice of law in a legal practice organization shall be performed by establishing, or participating in the establishment of law entities in the form of a law office, law partnership company, law limited liability company<sup>378</sup> as stated in the Lawyers' Law;<sup>379</sup> or working under contract for a legal practice organization.

Ordinance 2001 allowed *luat su* to set up three forms of practice: as solo practitioners, as a partnership law office and as a partnership law company. However, the form of a law partnership firm did not seem to be popular with *luat su*. In the period from 2001 to February 2007 only 9 law partnership firms were established.<sup>380</sup> In fact, the nature of a law partnership company and a law partnership office set up by more than one lawyer was almost the same. The only reason why law partnership firms were not popular among lawyers is that *luat su* practising in a law partnership firm were not allowed to represent clients before courts.<sup>381</sup> The Lawyers' Law has abolished this prohibition, has merged these two forms into one, and now stipulates two forms of legal practice: a law office (*van phong luat su*) and a law company (*cong ty luat*).<sup>382</sup> A law office can be established by one lawyer and shall be organized and operated as a sole proprietorship company.<sup>383</sup> The lawyer bears unlimited liabilities for the law office. The law office is the most popular form of practice and forms the majority of legal practice organizations in Viet Nam so far.

According to Report No.01/BC-BTP of Ministry of Justice statistics dated 3rd January 2017, there were 11.527 lawyers working for 3.711 legal practice organizations.<sup>384</sup> Law companies include law partnership companies and limited liability law companies.<sup>385</sup> The minimum number of *luat su* to start up a law partnership

<sup>377</sup> Law No.65/2006/QH11, dated 29 June 2006 amended by Law No.20/2012/QH13 dated 20 November 2012, *Lawyers' Law*, Article 23.

<sup>378</sup> Law No.65/2006/QH11, dated 29 June 2006 amended by Law No.20/2012/QH13 dated 20 November 2012, *Lawyers' Law*, Articles 32, 33, 34.

<sup>379</sup> Law No.65/2006/QH11, dated 29 June 2006 amended by Law No.20/2012/QH13 dated 20 November 2012, *Lawyers' Law*, Articles 32, 33, 34.

<sup>380</sup> Source: the Ministry of Justice, April 2007.

<sup>381</sup> Ordinance, dated 23 July 2001, *Ordinance on Lawyers*, Articles 13.

<sup>382</sup> Law No.65/2006/QH11, dated 29 June 2006 amended by Law No.20/2012/QH13 dated 20 November 2012, *Lawyers' Law*, Article 32.

<sup>383</sup> Law No.65/2006/QH11, dated 29 June 2006 amended by Law No.20/2012/QH13 dated 20 November 2012, *Lawyers' Law*, Article 33.  
<sup>384</sup> Page 17.

<sup>385</sup> Law No.65/2006/QH11, dated 29 June 2006 amended by Law No.20/2012/QH13 dated 20 November 2012, *Lawyers' Law*, Point 1, Article 34.

company is two.<sup>386</sup> Every *luat su* in a law partnership company shall enjoy full rights to participate in the management of the company and bear unlimited liability for the operation of the company. Limited liability law companies include those of two or more members or of one member.<sup>387</sup> These new types of law companies have been the result of an amendment in the Lawyers' Law in order to diversify the forms of practice. The responsibilities of members of a limited liability law company are proportional to their capital contribution to the company's assets.

## 2. Legal Aid Centres

Until 1 January 2007 Legal Aid Centers were operating under Decision No.734-TTg of the Prime Minister dated 6 September 1997 (Decision No. 734), On the Establishment of State Organizations Providing Free Legal Assistance to the Poor and to Social Policy Beneficiaries. Legal Aid Centers, which were set up by the Ministry of Justice, were staffed by legal advisers. Legal Aid Centers primarily gave advice to clients, but were not allowed to represent them before courts. Their activities were limited to giving advice on criminal, family, and land related issues. In cases where practising lawyers were needed to represent clients before courts, the cases were referred to lawyers, who were then paid 70,000 VND/day.<sup>388</sup> (This amount has now been increased to 500.000 VND per half of a working day<sup>389</sup>). However, since 1 January 2007, legal aid activities have operated under the Law on Legal Aid,<sup>390</sup> which allows state officials (legal aid officials) who work for Provincial Legal Aid Centers to do the same job as *luat su* usually do, including representation before courts.<sup>391</sup> Thus, although state officials of legal aid centers are not *luat su*, what they do is exactly what *luat su* are entitled to do. The differences are that legal aid officials cannot call themselves *luat su* and shall be free from the period of lawyer-practising probation. Under the new Law on Legal Aid approved by Viet Nam National Assembly on 20 June 2017, the criteria and conditions to be a legal aid official and to be a practising lawyer as much as the same qualification,<sup>392</sup> but the only difference is that legal aid officials cannot call themselves *luat su*. Currently, there are 63 Provincial Legal Aid Centers under 63 Local Departments of Justice of 63 provinces and cities under the Central Government, with 184 branches located in judiciary bureaus of districts, employing around 1.326 working staffs, including 605 legal aid officials.<sup>393</sup> This development of the legal aid system has made the distinction between lawyers and non-lawyers further unclear, and it means that *luat su* are in greater competition with legal aid officials than previously.

In other words, legal practice organizations of *luat su* have to compete with these legal aid centers, but not on a footing of equality. This is because legal aid officials enjoy certain kinds of privileges as public servants, as, for example, having access to certain information that *luat su* cannot easily access. Staff in Provincial Legal Aid Centers, as state officials, are also in a better position than *luat su* to deal with judges, prosecutors, and police.

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<sup>386</sup> Law No.65/2006/QH11, dated 29 June 2006 amended by Law No.20/2012/QH13 dated 20 November 2012, *Lawyers' Law*, Article 23, Point 2, Article 34.

<sup>387</sup> Law No.65/2006/QH11, dated 29 June 2006 amended by Law No.20/2012/QH13 dated 20 November 2012, *Lawyers' Law*, Point 3, Article 34.

<sup>388</sup> Decree No.94/2001/ND-CP, dated 12 December 2001, On the Implementation of the Ordinance on Lawyers, Article 26.

<sup>389</sup> Decree No. 80/2015/ND-CP of the Government dated 17 September 2015, Article 1.

<sup>390</sup> Law on Legal Aid was passed by the National Assembly on 29 June 2006.

<sup>391</sup> Law No. 69/2006/QH11, dated 29 June 2006, Law on Legal Aid, Point 3, Article 21.

<sup>392</sup> Law No.11/2017/QH14, dated 20 June 2017, Law on Legal Aid, Article 19.

<sup>393</sup> Source: The Ministry of Justice Viet Nam, December 2016.

### 3. Legal Advisory Centres

There are various legal advisory centers<sup>394</sup> providing legal services not operating under the Lawyers' Law. The legal advisory centers of political-social organizations and socio-professional organizations<sup>395</sup> were established under Government Decree No. 65/2003/ND-CP, dated 11 June 2003 (Decree No. 65), On the Organization and Activities of Legal Advice. Then, Decree No.65 was replaced by Decree No. 77/2008/ND-CP, dated 16 July 2008 (Decree No.77), on legal consultancy.

According to Decree No.77, socio-political organizations, socio-political professional organization, or socio-professional organizations have been established at the central level, provincial level and district level depending on the scope of activities of the organism in charge. The legal advisory centre has at least two legal consultants (*tu van vien phap luat*), or one legal consultant and one *luat su* working as the solo practitioner under labor contracts, or two *luat su* working as solo practitioners under labor contracts<sup>396</sup>. Hence, legal advisory centers are allowed to provide legal advice as well as assign their lawyers to represent before the courts for clients whom they provided legal advice and provide legal aid services under the Law on legal aid.<sup>397</sup> According to Report of Ministry of Justice on the results after 7 years of implementing Decree No.77, there are a total 177 legal advisory centres at 61/63 provinces and their 34 branches with 3.126 legal advice providers, including 581 legal consultants, 2.439 legal advice collaborators and 106 working as solo practitioners under labor contracts.

Legal advisory centers provide free of charge legal advice to their organizations' members, to the poor and to people who enjoy preferential treatment from the State.<sup>398</sup> Besides that, the legal advisory centers are allowed to charge others to finance their activities. Legal advisory centers are allowed to provide the same legal advice as practising lawyers do.<sup>399</sup>

The mixture of functions makes legal advisory centers of socio-political organizations or socio-professional organizations become more like "law firms." In practice, legal advisory centers provide largely the same services as *luat su* do; and they are under little supervision by any organization. Therefore, many legal advisory centers operate for profit-making purposes, exactly as law firms do, mainly by interpreting laws, and advising on legal issues relating to civil, economic, criminal, marriage, family or labor law. This phenomenon adds more confusion in the society about lawyers' services and it can also undermine the perception of the value of the services of *luat su*.

Legal advice experts (*chuyen vien tu van phap luat*) working in legal advisory centers are not likely to be able to provide the same level of advice and professional conduct as trained lawyers.<sup>400</sup> One case in point is the issue of confidentiality. It is reported that *chuyen vien tu van phap luat* have been known to naively disclose confidential information of clients to other people.<sup>401</sup> The concern is that, because the public finds it hard to differentiate between lawyers and non-lawyers if they get poor services, they blame lawyers.

<sup>394</sup> After Decree No.65 came into effect, legal advisory centres were renamed from 'legal advisory offices'.

<sup>395</sup> These organizations are non-governmental organizations such as Lawyers' Association, Viet Nam Labour Confederation, Viet Nam Women's Union.

<sup>396</sup> Decree No.77, Article 5.

<sup>397</sup> Decree No.77, Article 7.

<sup>398</sup> Decree No.77, Article 10.

<sup>399</sup> Decree No.77, Article 11.

<sup>400</sup> Student Group EUREKA, above n 307, 40

<sup>401</sup> Ibid.

## V. Legal Aids in Viet Nam

### 1. Legal Ground for Legal Aid in Viet Nam

Relationships of LA in Viet Nam are regulated by a relatively comprehensive system of legal normative documents, including the Law on Legal Aid and its guideline documents. The Constitution of the Socialist Republic of Viet Nam does not stipulate rights to enjoy LA as the fundamental rights of the citizens. However, up to 30/6/2017, there are 32 valid legal normative documents in the LA field, including:

- Decision No. 734/TTg of the Prime Minister dated 06/9/1997 on establishment of State LA organizations for the poor and policy beneficiaries.
- Law on Legal Aid No. 69/2006/QH11 dated 29/6/2006.
- Decree No. 07/2007/ND-CP of the Government dated 12/01/2007 detailing and guiding implementation of a number of articles of the Law on Legal Aid, which is revised, supplemented by Decree No. 05/2012/ND-CP of the Government dated 02/02/2012; Decree No. 14/2013/ND-CP dated 05/02/2013 and Decree No. 80/2015/ND-CP dated 17/9/2015.
- Directive No. 35/2006/CT-TTg of the Prime Minister dated 13/10/2006 on implementation of the Law on Legal Aid.
- Decision No. 84/2008/QD-TTg of the Prime Minister dated 30/6/2008 on establishment of the Viet Nam Legal Aid Fund.
- Decision No. 32/2016/QD-TTg of the Prime Minister dated 08/8/2016 adopting LA policy for the poor, ethnic minority people residing in poor districts, communes and hamlets, mountain villages with exceptionally difficult conditions for the period of 2016-2020
- Joint Circular No. 08/2008/TTLT0BTP-BNV of the Ministry of Justice, Ministry of Internal Affairs dated 7/11/2008 guiding organization and personnel of the State legal aid centers.
- Joint Circular No. 02/2008/TTLT-BTP-TWHCCBVN dated 09/6/2008 guiding coordination in development of legal normative documents, law dissemination, education, LA for veterans.
- Joint Circular No. 10/2011/TTLT-BTP-TTCP dated 06/6/2011 guiding provision of LA in appealing against administrative decisions and administrative acts.
- Joint Circular No. 01/2012/TTLT- BTP-UBDT dated 17/01/2012 guiding provision of LA for the ethnic minority people.
- Joint Circular No. 209/2012/TTLT- BTC-BTP dated 30/11/2012 guiding preparation, management, use and reimbursement of budgets to ensure operation of the state LA providing agencies, organizations.
- Joint Circular No. 11/2013/TTLT-BTP-BCA-BQP-BTC-VKSNDTC-TANDTC dated 04/7/2013 guiding implementation of a number of articles of laws on legal aid in legal proceedings.
- Circular No. 05/2008/TT-BTP of the Ministry of Justice dated 23/9/2008 guiding LA professional and state management of LA, which is revised, supplemented by Circular No. 19/2011/TT-BTP dated 31/10/2011.
- Circular No. 07/2012/TT-BTP dated 30/7/2012 guiding LA collaborators of the State legal aid centers.
- Circular No. 02/2013/TT-BTP dated 05/01/2013 adopting standards to assess quality of LA cases.

- Circular No. 18/2013/TT-BTP dated 20/11/2013 guiding calculation of performance time and reimbursement procedures of providing LA services, which is revised, supplemented by Circular No. 05/2017/TT-BTP dated 20/4/2017.

In particular, on 20/6/2017, the 14th National Assembly adopted Law on Legal Aid No. 11/2017/QH14, which shall come into force since 01/01/2018 and replaces the Law on Legal Aid 2006. With many regulations have been revised and newly supplemented, the 2017 Law on Legal Aid marks an important milestone in improvement of institutions on LA in particular and implementation of human rights, rights and obligations of citizens prescribed in the Constitution of the Socialist Republic of Viet Nam in general. In the coming time, the Ministry of Justice will conduct a review of documents guiding implementation of the 2006 Law on Legal Aid for revision and supplement to ensure the conformity with the 2017 Law on Legal Aid.

## 2. Legal Aid Providing Organization in Viet Nam

LA providing organizations in Viet Nam include state LA centers (public LA providers) and LA participating organizations (private LA providers).

### 2.1. State legal aid centers

State LA centers are non-business units under local Departments of Justice, established by the provincial People's Committees, under the dual supervision of provincial People's Committees (Departments of Justice) and the Ministry of Justice (National Legal aid Agency).

State legal aid centers are responsible for providing LA for LA beneficiaries in its locality. There are currently 63 state legal aid centers in 63 provinces and cities nationwide. Based on the demand and current conditions of the province, the Chairman of the Provincial People's Committees establishes branches of the state legal aid center at district levels. There are currently about 200 district and joint-district branches of state legal aid centers. [On December 31, 2016, there were 1,326 persons at 63 state legal aid centers nationwide, including 605 legal aid professionals (accounting for 45.62%).<sup>402</sup>]

### 2.2. Legal aid participating organizations

The State encourages lawyer-practicing and legal consultancy organizations under socio-political, socio-political-professional and socio-professional organizations to provide LA. In fact, LA participating organizations are law firms, legal consultancy centers under socio-political, socio-political-professional or socio-professional organizations in accordance with the Government's regulations on the organization and performance of legal consultancy.

According to 2006 Law on Legal Aid, to provide LA, law firms, legal consultancy centers have to register at local Departments of Justice, which provide the Certificate of Registration and provide LA in accordance with the Certificate of Registration for LA provision. Those organizations provide LA for LA beneficiaries by their own sources and receive no financial support from the Government. In December 31, 2016, there were 357 legal practicing organizations and legal consultancy centers registering to provide LA nationwide.<sup>403</sup>

<sup>402</sup> Statistics Reports of provinces in 2016

<sup>403</sup> Statistic report from provinces 2016

However, the Law on Legal Aid 2017 has been amended and supplemented regulations on LA participation of the two types of organizations:(1) LA registering organizations providing free LA services for LA beneficiaries by their own sources and do not receive financial support from the State.

LA Contracting organizations : A local Department of Justice shall select suitable law firms or legal consultancy centers under requirements as stipulated in 2017 Law on Legal Aid and sign contracts . Based on the contract, local Department of Justice shall pay remuneration and expenses to those organizations, law firms or legal consultancy centers that shall have minimum requirements as such:

- (a) Registering in the field in compliance with LA fields (b) Having at least 01 legal consultant with 02 year experiences or more in legal consulting field or 01 standing lawyer in the organization;
- (c) Having facility compatible with LA activities;
- (d) Not in the execution period of administrative sanctions in lawyer practicing, legal consulting work.

## VI. Legal Aid Providers

According to Article 20 of the 2006 Law on legal aid, LA providers are LA officials, LA collaborators, lawyers and legal consultants. On December 31, 2016, there were 605 LA officials, 1,021 lawyers providing LA<sup>404</sup> out of a total number of 11,527 lawyers nationwide<sup>405</sup>, 241 legal consultants registering to provide LA and about 5,658 collaborators<sup>406</sup>.

### 1. Legal Aid Officials

Compared to other countries where there are only lawyers who provide legal aid, in Viet Nam, State LA officials are state employees paid by the State's budget, working at the state legal aid centers and granted LA *official's* cards by the Chairman of the provincial People's Committees. Like lawyers, LA officials shall provide LA in the following forms: providing legal advice, participating in legal proceedings, and acting as representatives beyond legal proceedings for LA beneficiaries to perform jobs related to law and other forms (mediation, administrative procedures, and complaints).

*On the criteria and conditions of LA officials:* in accordance with law on LA, LA officials are Vietnamese citizens who permanently reside in Viet Nam whose qualification is equivalent to lawyers but do not experience apprenticeship. Specifically, according to 2006 Law on Legal Aid, LA officials are required to fully satisfy the following conditions:

- (i) Having full civil act capacity; having good moral quality;
- (ii) Having a law university degree;
- (iii) Having a certificate of LA training;
- (iv) Having been involved in legal work for two years or more;

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<sup>404</sup> Statistic reports from provinces in 2016

<sup>405</sup> Report No. 01/BC-CTP dated 03/01/2017 of Ministry of Justice on 2016 LA summary and orientations, tasks, solutions for 2017 work, page 17.

<sup>406</sup> Statistic reports from provinces in 2016



- (v) Being physically fit for ensuring the fulfillment of assigned tasks.

The 2017 Law on Legal Aid stipulates that LA officials are required to have the same standards equivalent to practising lawyers stated in the Lawyers Law.

Despite their different name, LA officials are salaried lawyers paid by the State to provide LA. This job title is equivalent to public lawyers or public attorneys in many countries such as Argentina and the Philippines.

## 2. Lawyers

According to current regulations, lawyers can provide LA in 3 forms: (1) providing LA for free as their obligations stipulated in the Law on lawyers and in the Charter of the Vietnamese Bar Federation; (2) as collaborators of the state legal aid centers in accordance with provisions of the Law on legal aid; and (3) providing LA at lawyer practicing organizations registered to provide legal aid. Like LA officials, lawyers are allowed to perform all types of LA such as legal consultancy, participating in legal proceedings, acting as representatives beyond legal proceedings and other forms of LA.

When lawyers provide LA as collaborators, they are entitled to remuneration and administrative expenses in accordance with laws.

According to 2017 Law on Legal Aid, lawyers providing LA in accordance with the contract with State Legal Aid centers and shall receive remuneration and fees as regulated in the Law.

## 3. Legal Consultants

Legal consultants can provide LA in 3 types: (1) free legal consultancy for the poor and beneficiaries of preferential policies according to Decree no.77/2008/ND-CP of the Government dated July 16th, 2008 on legal consultancy; (2) providing LA as collaborators of state legal aid centers in accordance with provisions of the Law on legal aid; (3) providing LA at legal consultancy centers registering to provide legal aid in accordance with provisions of Law on Legal Aid. Legal consultants provide LA in the form of legal consultants and within the scope registered with relevant state authorities.

When participating in legal services, collaborators are entitled to remuneration and administrative expenses in accordance with laws.

According to 2017 Law on Legal Aid, legal consultants may provide LA when he/she has 2 year experiences in legal consultancy work and is employed by a LA participating organization. Legal consultants shall provide LA only in the form of legal advice.

## 4. Other Legal Aid Collaborators

According to the 2006 Law on Legal Aid, Vietnamese citizens who permanently reside in Viet Nam, have full civil act capacity, have good moral quality, are physically fit for ensuring the fulfillment of assigned tasks, and voluntarily participate in legal aid services will be considered, recognized and granted collaborator's cards by directors of a local Departments of Justice if:

- (a) They have a law university degree; they have a university degree in another major and work in branches or professions related to fundamental rights and obligations of citizens;

- (b) They permanently reside in areas with exceptional socio-economic difficulties, ethnic minority or mountainous regions, have an intermediate degree in law or have been involved in legal work for three years or more, or have legal knowledge and high prestige in their communities;
- (c) They are lawyers or legal consultants.

Collaborators shall participate in LA services under the assignment of directors of state legal aid centers. Collaborators who are not lawyers shall participate in LA services only in the form of legal consultancy. When participating in legal aid services, collaborators are entitled to remuneration and administrative expenses in accordance with law.<sup>407</sup>

However, regulations on LA collaborators have been amended by the new Law on Legal Aid. Specifically, LA collaborators shall only be employed in areas with especially difficult economic conditions. They could be retired people, have full civil act capacity, have good moral quality, in good physical quality, have an interest in providing LA and used to be LA officials; judges, investigators in court, prosecutors, and inspectors in the prosecution area; and investigators and executors in civil execution in public agencies.

LA collaborators provide LA in form of legal consultancy. LA collaborators sign LA contracts with the State legal aid center and are entitled to remuneration and case expenses as regulated by law.

## 5. LA Beneficiaries

The 2006 Law on Legal Aid stipulates 4 groups of LA beneficiaries, including: (1) the poor; (2) people with meritorious services to the revolution; (3) lonely elderly people, persons with disabilities and helpless children; and (4) ethnic minority people permanently residing in areas with exceptionally difficult socio-economic conditions.<sup>408</sup> According to 2017 Law on Legal Aid, regulations on LA beneficiaries have been amended to include:

- (1) People with meritorious services to the revolution;
- (2) People from poor household;
- (3) Children;
- (4) Ethnic minorities permanently residing in areas with exceptionally difficult socio-economic conditions;
- (5) The accused from 16 years old to under 18 years old;
- (6) The accused from near poor households;
- (7) Those belonging to one of following cases when facing financial difficulty;
  - (a) Nature father, mother, wife, husband, offspring and people with meritorious service for revolutionary martyrs;
  - (b) Victims of orange agents;
  - (c) Elderly people;
  - (d) Disabled people;
  - (e) Harmed people in criminal cases from 16 years old to under 18 years old;
  - (f) Victims of domestic violence;

<sup>407</sup> Article 22 of the 2006 Law on Legal Aid

<sup>408</sup> Article 10 of the 2006 Law on Legal Aid.

- (g) Victims of human trafficking in accordance with the 2011 Law on Anti-human trafficking;
- (h) People with HIV/AIDS.

The Government shall detail regulations on financial difficulties of LA beneficiaries as regulated in this article in accordance with socio-economic conditions.

## 6. Scopes of Legal Aid

The LA cases shall be related to the rights and legitimate interests of the legal aid beneficiaries, and shall not be related to business and commercial fields. According to the current regulations, scopes of legal aid include:

- (1) Criminal, criminal proceedings and criminal judgment execution law;
- (2) Civil, civil proceedings and civil judgment execution law;
- (3) Law on marriage and family and law on children;
- (4) Administrative law and law on administrative complaints, denunciations and proceedings;
- (5) Law on land, housing, environment and consumer protection;
- (6) Law on labour, jobs and insurances;
- (7) Law on preferential treatments to people with meritorious services to the revolution and other preferential social policies;
- (8) Other fields of law related to the national goals on hunger eradication, poverty reduction or directly related to rights and legitimate interests of the people.

According to Article 27 (1) of 2017 Law on Legal Aid, LA is provided in all legal areas except for trade and business.

## 7. Types of Legal Aid

The 2006 Law on legal aid and its implementation documents stipulate the types of LA as follows:

- Legal counseling is provided by LA officials by giving instructions, explanations and opinions, supplying legal information or drafting documents related to legal aid cases;
- LA officials and lawyers shall participate in criminal, civil and administrative proceedings to defend LA beneficiaries and protect their rights and legitimate interests in proceedings. According to the Law on legal aid, only LA officials and lawyers can provide LA in the form of participating in proceedings.
- LA officials and lawyers shall provide LA in other forms to LA beneficiaries by helping them make reconciliation or performing other tasks related to administrative procedures, complaints and other activities in accordance with law.

From LA practice in recent time, LA activities are mostly provided in other forms by mobile LA together with legal education and dissemination. However, they have not concentrated on focal tasks which are handling cases requested by many LA beneficiaries. Therefore, 2017 Law on Legal Aid have provisions on LA forms to include (1) participation in proceedings; (2) providing legal advice; and (3) representations before legal proceedings. Specifically:

- LA officials and lawyers shall participate in proceedings to defend LA beneficiaries and protect their rights and legitimate interests as regulated in the Law on Legal Aid and laws on proceedings.
- LA providers provide legal counseling for LA beneficiaries by guiding, giving opinions, drafting documents related to legal disputes, complaints, questions, guiding all parties of mediation, compensation for a common solutions.

## 8. Legal Aid Providing Stages in Criminal Proceeding

According to Article 74 of the 2015 Criminal Code, advocates shall participate in the proceedings from the stage of prosecuting the accused. In case of arrest and/or detention of a person, advocates shall participate in the proceedings from the time the arrestees are present at the office of the investigation agency, competent agency in charge of conducting a number of investigating activities, or from the time of adoption of a decision to hold them in custody.

As a defense counsel, a lawyer and/or LA officials who provide LA services shall participate in all stages of the proceedings from instituting, investigating, prosecuting and/or adjudicating in order to defense and protect rights and interest of LA beneficiaries in criminal cases. In cases where the accused and victims are LA beneficiaries in accordance with the Law on Legal Aid, a competent agency, or persons in charge of carrying out legal proceedings, shall explain to them about their right to enjoy LA; if they request providing LA services, such competent agency of persons shall inform the State legal aid center. And the State legal aid center shall assign LA officials or lawyer to participate in the proceedings in order to defend and protect their legitimate rights and interests.

Article 76 of the 2015 Criminal Proceeding Code stipulates that, in cases where the accused or defendants are charged with the harshest sentence of 20 years in prison, life imprisonment or death as prescribed in the Penal Code; or the accused are not capable of defending themselves due to their physical defects; those with mental disabilities or those under 18 years old; and the accused, their representatives or their relatives do not hire defense counsels, then the competent procedural authorities shall appoint defense counsels or ask the following organizations to assign defense counsels:

A bar association assigns a law firm to appoint defense counsel(s);

A State legal aid center assigns a legal aid professional as an advocate for legal aid beneficiaries;  
The Commission of the Viet Nam Fatherland Front and its member organizations assign the people's defense counsels for the accused who are their members.

## 9. Financial Sources for Legal Aid Works

The financial source for LA in Viet Nam after 2010 when Viet Nam was not considered as a poor country is mainly covered by the State budget. At present, LA in Viet Nam enjoy financial supports from international cooperation projects as well as contributions from other organizations, and a few from individuals. During eight years of implementing the Law on Legal Aid (from 2007-2014), the total budget for LA works are 784,827,190,000 Vietnamese dong; the average budget for LA per year are 98.103.398.000 Vietnamese dong.

The 2017 Law on Legal Aid supplements 01 article on financial sources for LA works. Accordingly, the financial sources for LA works shall include the State budget; contributions, donors of domestic and foreign organizations, individuals and other legal sources. The annual State budget shall allocate a part of its budget for the agency in charge of the State management of LA in accordance with the legal regulations on the State budget. For provinces which cannot be self-funded, they shall prioritize budget allocation from the annual budget supplement from the Central to support performance of complicated, typical legal aid cases. Moreover, the budget for LA works of voluntary organizations shall be ensured by themselves.

## 10. Payments and Expenses for Providing Legal Aid Services

Decree No. 80/2015/ND-CP dated 17/9/2015 of the Government stipulates that LA providers shall enjoy their salary, payments and fees for providing LA services per case, specifically as follows:

- Legal aid lawyers shall enjoy payments for each LA case they carry out according to the number of hours of legal consultancy and other LA activities. Other payments shall be made per working session (i.e. half working day), which is applicable for participating in the proceedings or acting as representatives beyond legal proceedings per LA case.

Payments for LA services provided by collaborators, lawyers upon requests of the State are developed on the basis of the quality of LA, time for providing LA, complexity of LA cases, LA forms and its results.

In case where LA is provided upon requests of the State via participating in the proceedings, the payment for lawyers in such cases shall be 500,000 dong/working session (equivalent to \$25 USD) or a lump-sum package of the basic salaries of at least three months to the maximum of ten months (equivalent from \$200 to \$650USD) depending on the nature of the cases. The Ministry of Justice issues regulations on the cases' nature, content, calculation of working sessions, and calculation of time for basis to calculate the lump-sum package or payments per working session for lawyers for their working sessions/time.

The time to carry out LA works shall include time to study the case's dossiers, prepare materials for LA works, conduct meetings, work with the LA beneficiaries or their relatives, verify LA cases, and work with relevant agencies, organizations, individuals. The following is the basis for calculating the working time for collaborators and lawyers providing LA services upon requests of the State, which is the working time with confirmation by relevant agencies, organizations, individuals.

### - For legal aid officials:

LA officials are salaried state employees. Apart from a monthly salary, they shall enjoy allowances for their professional responsibility by 25% of their current salary and allowances by 40% of lawyers' remuneration. Whilst acting as representatives beyond the legal proceedings, LA officials shall enjoy allowances by 20% of lawyers' remuneration. Apart from that, LA officials and lawyers also enjoy administrative expenses and other expenses related to LA activities as stipulated in Joint Circular No. 209/2012/TTLT- BTC-BTP dated 30/11/2012, on the guiding preparation, management, use and reimbursement of budgets for operations of the State legal aid agencies and organizations.

## VII. Analysis and Recommendations for Legal Aid in Viet Nam

### 1. Distinguishments between Appointment of Defense Counsels and Legal Aid

Currently, in Viet Nam, there are two parallel institutions: appointment of defense counsels and legal aid. In terms of appointment of defense counsels, Article 76 of the 2015 Criminal Proceeding Code stipulates that if the accused, their representatives or relatives do not seek for defense counsels, the competent agencies in charge of conducting the proceedings shall appoint a defense counsel for them in the following cases: the accused, defendants are charged of the harshest sentences of 20-year imprisonment, life imprisonment or death penalty as prescribed in the Penal Code, and those with mental disabilities or those under 18 years old. Both types of activities are paid by the State budget for the legal services provided to those who cannot pay, those who are disadvantaged, or upon requests of justice. But they operate differently to each other, as follows:

*In terms of management agency:* The Ministry of Justice supports the Government to unifiedly manage LA activities; there is a system of organizations which directly perform LA works, including the State legal aid centers and LA providing organizations. On the other hand, agencies in charge of conducting the proceedings shall monitor and carry out appointments of defense counsels.

*In terms of payments:* Payments for LA providers and lawyers participating in the proceedings in cases provided by competent procedural agencies are stipulated in many legal documents. In detail, payments for LA providers comply with regulations of a Decree (i.e. 500,000 dong/working session (equivalent to \$25 USD)). Payments for appointed lawyers participating in the proceedings upon requests of competent procedural agencies shall enjoy about \$10 USD/ half working day, which is nearly half the remuneration compared to remuneration enjoyed by a legal aid lawyer.

*In terms of the quality of legal services:* The State adopts policies and measures to manage and control the quality of LA. There are a periodical preliminary report, an overall report and assessments, and developing specific plans and strategies for strengthening the capacity and skills of legal aid providers. For cases of appointing defense counsels, there are no such quality assessments or control of the competent procedural agencies. In practice, bar associations usually appoint inexperienced lawyers to participate in the proceedings of such cases or participate for form's sake; thus, the defense quality is not high, failing to protect rights and interests of the accused or defendants in accordance with the law.

### 2. Legal Aid Has Not yet Been Recognized in the Constitution

According to the United Nations' principle on access to LA in a criminal justice system, "...States should guarantee the right to LA in their national legal systems at the highest possible level, including, where applicable, in the Constitution" (Principle 1).

Despite the fact that there have been LA activities in Viet Nam since 1997, the highest level of legal document governing these activities from 2006 to the present is the Law on Legal Aid. Moreover, there is a relatively comprehensive system of documents guiding law implementation and stipulating in detail the organization and performance of LA, as well as the responsibilities of relevant agencies, organizations, and individuals.

However, there are certain shortcomings during the implementation of LA activities due to the failure to recognize the role and significance of this activity of a number of agencies. Therefore, a number of LA organizations did not receive adequate attentions from competent agencies in allocating budget and arranging human resources and infrastructure to ensure the effectiveness of LA activities. A number of LA organizations lack the budget for payment of LA providers participating in the proceedings and representatives beyond the proceedings. Working offices of a number of LA organizations are very small or located in an inconvenient place for people to access. In addition, there are certain difficulties in coordination among LA activities in the proceedings, such as the number of procedural agencies; officials in charge of the proceedings do not explain the right to LA to the accused; the failure to transfer their request of LA to the State legal aid center, etc. Such shortcomings have directly affected the right to LA of the people.

In some countries worldwide, the right to LA or responsibilities of the State towards LA activities are recognized in the Constitution. For instance, Article 23 of the Belgium Constitution recognizes the right to LA of the people.

In Dominica, the State's responsibility towards this activity is stipulated in its document of the highest legal validity. In particular, Article 177 of the 2002 Constitution of the Republic of Dominica states that: "*The State shall bare responsibility to organize free legal supporting programs and services for people in economic difficulties to ensure having legal representatives to protect their rights and interests, especially in protection of victims, except for cases affecting the power of the Ministry of Public Services in the criminal field*".

### **3. Quality of Legal Aid and Pro Bono Services**

LA and pro bono are two types of activities conducted by different subjects, covered by different budget sources and free of charge. However, for a relatively long time, there is lack of united understanding of the concepts of LA and pro bono in Viet Nam, thus resulting in mistakes between these two activities.

The 2017 Law on Legal Aid has fixed this shortcoming. LA activities shall comply with regulations of this Law in terms of LA beneficiaries, organization of LA provision, LA providers, forms, fields, etc. Organizations, individuals providing LA should meet qualifications and conditions to ensure the quality of LA services. Participation in LA works among lawyer practicing organizations and legal consultancy organizations shall be conducted via a contractual mechanism to provide LA and registration to provide LA. Provision of voluntary legal services of the society shall not be governed by this Law.

However, even they share a common feature of free-of-charge legal services for the beneficiaries, there is a lack of attention to the quality of pro bono services. Such services herein are mainly consultancy, answering simple legal concerns, law dissemination, instead of paying attention to specific cases where the legitimate rights and interests of the people are infringed or threatened to be infringed. Voluntary activities in Viet Nam are not strongly developed to support the State to reduce budget allocated for LA activities.

### **4. Legal Aid Model**

At the moment, the organizational model of LA in Viet Nam is a vertical model. The LA management agency at the central level does not directly manage or allocate human resources and budget for performance of LA works. During the recent years, this model has revealed some shortcomings such as failing to ensure the independence of professional activities, budget, human resources, etc. In particular:

- Dependence on the local authorities in terms of human resources and budget causes difficulties in ensuring independence in conducting professional activities, which may impact the impartiality whilst conducting LA works, especially in cases of administrative complaints, denunciations and proceedings.
- As the centers' human resources are on the payroll of the People's Committee at the administratively territorial level, there is a lack of coordination and support in the localities where there is a high demand or complicated or typical cases, etc. Many good and experienced legal aid officials were transferred to other jobs, which inevitably caused a waste of resources in trainings and education for these officials for a long period of time.
- The budget allocated for LA activities by the provincial People's Committee remains unequally and unstable. The amount of budget allocated for each Center depends on the economic conditions as well as the concerns of each province for this activity. At the moment, there are cases where there is a lack of budget for providing LA services in the proceedings. However, as the budget depends on the provincial People's Committee and is allocated at the beginning of a year, the request for budget supplement is very difficult. This results in the fact that in some places where LA beneficiaries have needs but cannot enjoy the State's LA services. Allocation of budget for LA activities in many provinces remains irrational; many provinces do not give priority in allocating budget for LA works.
- It is impossible to allocate resources among provinces, which results in a situation where there are great needs of LA of the people in many provinces, but the local budget fails to ensure the provision of LA.
- The personnel of the centers remains unstable. In many cases, LA officials with professional qualifications and experience of participating in the proceedings have been transferred to other work. This is a great disadvantage for the LA system in general and for the LA beneficiaries in particular, affecting the quality of LA services.

During the study and development of the Law on Legal Aid (revised), the question of renovating the organizational model of LA and establishing LA-providing organizations under the central LA management agency was raised. However, in the context of streamlining personnel and restructuring officials and civil servants, such transfers has caused certain disturbances, requiring the State to invest in initial infrastructures and equipment. Moreover, LA centers are located in provinces, but lack attention and facilitation from the local authorities. Therefore, this issue should be further studied, and is not yet reflected in the 2017 Law on Legal Aid.

## 5. The Nature of Free of Charge

In terms of the concept, the 2006 and 2017 Laws on Legal Aid both confirmed that LA activity is fully free of charge for its beneficiaries. To better present this principle, one of the prohibited acts prescribed in the 2017 Law on Legal Aid is to prohibit anyone from demanding or receiving any money, economic benefits or other benefits from LA beneficiaries. This clearly reflects the advantaged policy of Viet Nam in supporting people who are incapable to pay legal services, gratitude and ethnic minority's policies. However, the current free-of-charge nature for the beneficiaries in Viet Nam has certain disadvantages, especially in the context where there is limited support from international organizations. The budget for basic LA activities is mainly dependent on the State budget.

At the moment, Viet Nam is ranked as a middle-income country, but its financial and human resources for legal aid activities remain limited. Meanwhile, in comparison with other countries, the LA beneficiaries in Viet



Nam are much wider, including 14 groups of beneficiaries. From 1/1/2018, when the 2017 Law on Legal Aid comes into force and with good implementation of LA dissemination, it is expected that the number of LA cases will sharply increase. This will inevitably result in increasing financial difficulties for the State to support this work.

Currently, many countries apply a policy to charge a portion of the fees for LA activities (including Hungary, Belgium, Poland, Finland, Manitoba State of Canada, Korea, Ireland, Australia). According to these countries' regulations, in addition to the beneficiaries who enjoy free services, based on each party's incomes, financial conditions and specific conditions, legal consultancy organizations shall cover a part of the case's expenses. Such regulations ensure not only financial support for people with difficult economic conditions, but also for the performance of this activity. Only some countries provide free-of-charge legal aid for criminal cases and charge fees for civil cases (such as Japan).

## **VIII. Recommendations**

### **1. Conduct Studies on Defense Counsels and Legal Aid**

In substance, the appointment of defense counsels and LA is covered by the State budget for legal services in order to protect the legitimate rights and interests of the poor and disadvantaged, thus ensuring justice. In many countries worldwide, there is no distinguishment between these two activities (for instance, in China, Lithuania, Japan, etc.). Moreover, at the moment, the subjects who will have their appointed counsels and enjoy LA services are similar to one other (i.e. people under 18 years old, the disabled or people with difficult economic conditions). Therefore, the parallel existence of these two institutions under different management agencies, with different operation mechanisms, shall be considered as a weakness, which should be studied on how to unify them. Based on the united awareness that LA is the State's responsibility and the State shall pay such fees of legal services for those who are incapable to pay or to guarantee justice adjudication, the appointment of defense counsels should no longer exist. Research should be conducted on recommended regulations on LA in the Constitution

### **2. Study to Include the Right to Legal Aid into the Constitution**

Viet Nam has affirmed its policy to develop a socialist rule-of-law State of the people, by the people and for the people - this is the long term and thorough goal of the development cause. Article 14 of Viet Nam's Constitution in 2013 states that human rights and citizen rights shall only be restricted by regulations of the law in case of necessity for the national defense, security, social order, safety, ethics and public health. Therefore, in order to further emphasize the significance of the LA policy in protecting the legitimate rights and interests of the people, thereby ensuring justice for the disadvantaged, this shortcoming should be further studied, and it is proposed to recognize the right to LA of the citizens in the Constitution at a convenient time.

### **3. Study to Renovate the Legal Aid Model**

In order to overcome the shortcomings of the LA model as analyzed above, in the coming years, Viet Nam shall conduct further studies on the vertical management model of LA as applied in the majority of countries worldwide and to prepare the essential conditions for such transition whenever it is suitable. Through studies of the vertical management model of LA, if it is applicable in Viet Nam, we shall enjoy the following advantages:

- Professional management and direction shall be united and thorough from the central to local levels. The central level shall have a better picture of which provinces are in short of budget or resources for implementing LA activities, so that it could timely allocate resources for better protection of legitimate rights and interests of the legal aid beneficiaries upon their requests.
- Implementation of the vertical management model shall ensure the independence of the LA system to the local authorities. Accordingly, the implementation of LA activities in localities shall be stabilized, focusing on their officials without any impacts from transfers and/or rotation of staff, establishing impartiality and independence in their professional performance of legal aid providers whilst defending LA beneficiaries in the proceedings, especially in administrative proceeding cases where the local State representative is a party.

# ADDITIONAL RECOMMENDATIONS FOR ASEAN ON LEGAL AID

Noting the need for common efforts among the 10 AMS towards promoting and protecting the right to access and justice and equality before the law, the following recommendations are made:

- 1) It is recommended that AMS recognize and fully implement the right to legal representation for persons facing the death penalty. In addition, the provision of legal should be extended to those facing long terms of imprisonment. No criminal proceedings should be brought against a child. AMS should also provide legal aid for children and vulnerable adults for legal counsel in non-criminal matters in order to ensure the best interest of the child is protected in line with Article 3(1) of the Convention on the Rights of the Child.
- 2) There is also a need for AMS to adopt a victim-centered approach to justice by expanding provisions for victims. A mechanism is required to periodically review the means test in order to determine eligibility to legal aid. Such a mechanism must ensure not only sufficient flexibility when determining eligibility for legal aid, but also that the full provision of legal aid is provided at all costs.
- 3) An additional recommendation is put forth for undertaking studies to understand the costs and benefits arising from the extension of legal aid to various marginalized groups. Furthermore, there is a need to extent to the provision of legal aid to other groups which are not covered due to the nature of the case (for example, in civil versus criminal cases); these groups include labour, migrant workers, victims of human trafficking, stateless persons, refugees and asylum seekers, and non-citizens.
- 4) The interpretation of state obligation is key when analyzing the situation in each country among the AMS. The role of civil society organizations is important in assessing whether legal is being provided. Although many AMS provide a legal aid fund, allocation varies among the countries. In some countries, legal aid is regulated by the constitution and/or a law on legal aid. Many countries in ASEAN provide legal aid to indigent persons, but not to marginalized groups such as children, women, and persons with disabilities. Many ASEAN countries have also recognized the role of non-state legal aid providers, such as bar associations, CSOs, and community paralegals, in providing access justice to the most marginalized persons. A recommendation is therefore made to encourage the creation of an annual aid budget in all AMS and to increase the quality of legal aid services by providing monitoring and evaluation systems. Legal aid should also be extended to other beneficiaries.
- 5) An additional recommendation calls for AMS to develop bilateral efforts on legal aid for non-citizens to access such that they may enjoy the rights to access justice and legal aid services.
- 6) The quality of legal aid is identified as an area for improvement. For instance, in some countries, the provision of legal aid to the poor and indigent remains limited to certain criminal cases only. Better policies are needed for legal aid and pro-bono lawyers to improve the quality of these services.
- 7) In regards to the provision of legal aid for those imprisoned, a recommendation was put forth that legal aid be made applicable to those post-imprisonment, and not just at the pre- and post-stages of court proceedings.
- 8) A further recommendation was made to focus on strengthening legal aid education and ensuring better access to legal aid professionals. Governments could strengthen curriculums on legal aid and to develop ways to attract legal professions to work more on restorative justice.

- 9) Noting the importance of providing legal aid to specific groups, particularly indigenous peoples, migrant workers and trafficked persons, there is a need to provide a specific law mandating resources for legal aid services in order to ensure adequate funding.
- 10) Efforts are needed to improve the education and increase knowledge among people on various service provisions of legal aid. As such, it is recommended that AMS should ensure that people living in the countryside have access to and understanding of legal aid providers. ASEAN should develop a system to simplify information that people throughout the region can understand more about legal aid and access to justice. Governments should promote and implement legal aid policies, and cooperate more closely in ASEAN to improve access and understanding of legal aid among its citizens.
- 11) It was also recommended that legal aid be linked to SDGs, and that the following five elements should guide ASEAN in its next steps:
  - i. Legal aid should be available to everyone within ASEAN;
  - ii. Early access to legal aid to ensure legal aid is available especially in serious cases;
  - iii. Legal aid should be statutory with a fixed budget, and available to a wide range of providers including paralegals and NGOs;
  - iv. Data is important. Only when we have data we can understand whether legal aid is effective, and where it is still insufficient;
  - v. Set up a regional body within ASEAN to carry this work forward.
- 12) Data-sharing is also a fundamental component for AMS going forward. As one example, the new legal aid law in Myanmar embeds vulnerable groups in its provisions. Currently, the government of Myanmar has a legal aid body in all government levels in the country and also provides funding and resources. One of the key challenges is the lack of experience in providing legal aid, including to those vulnerable groups such as children and non-citizens.
- 13) It is also recommended to improve the accessibility to legal aid services for person with disabilities. Persons with disabilities find it challenging to physically access courts, and there are barriers regarding accessing court proceedings and documents, for example, for those who do not understand the language or cannot represent themselves in court. It was recommended to increase the investment of resources for legal aid for persons with disabilities and for legal advisors to be trained in disability law in order to better serve people with disabilities.
- 14) A recommendation was also put forth for AMS to consider how legal pluralism may create difficulties for vulnerable groups such as indigenous persons and religious minorities to access legal aid. Furthermore, legal aid must not only be available in urban areas, but also be present in the most remote parts of the country.
- 15) Lastly, a recommendation was made to improve the delivery of legal aid services during court proceedings to ensure justice for defendants and to uphold the principle of the assumption of innocence



