

Access to Justice: The Right of People to have Access to Legal Aid

The Office of Law Reform Commission of Thailand (OLRCT)

“Legal Aid” is an essential component of a fair and efficient justice system in any country governed by the rule of law. The early stages of the justice process are crucial to those who have been arrested or detained in respect to a criminal offence. Decisions made and actions taken, or not taken, will determine their ability to effectively defend themselves and whether or not they receive a fair trial. During this period, suspects and accused persons are at the greatest risk of torture or other forms of ill-treatment, ranging from neglect and demands for bribes, to coerced confessions and unlawful detention. Many of those arrested or detained are poor, ill-educated or disadvantaged for some other reason. They often lack the knowledge or experience needed to understand and navigate the justice system and also have limited financial resources.

Prompt access to legal aid is the key to guaranteeing a fair trial and the rule of law. Early intervention by legal aid providers helps to ensure that rights are respected. It improves the efficiency and fairness of the justice system and represents an important safeguard against torture and other forms of ill-treatment. State-funded legal aid, which can be complemented by other legal aid service providers, is essential in ensuring the availability of legal advice and assistance and securing legal empowerment for the poor. Without access to legal aid, they are vulnerable to unfair treatment, unlawful actions and demands for bribes.

The term “legal aid” is defined in the United Nations Principles and Guidelines as follows:

“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. Furthermore, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.

In global civil society, judges and lawyers have observed that the aim of legal aid should be contributed towards eliminating the obstacles that restrict access to justice by providing legal assistance to people. This concept has been reaffirmed by the Agenda 2016 Sustainable Development Goals (SDGs) under Goal 16 which has the target to promote the rule of law at the national and international levels and ensure equal access to justice for all.

In the face of ASEAN, migrant workers, women, children, youths and the elderly/older persons, persons with disabilities and vulnerable and marginalized groups are now facing challenges in accessing justice and legal aid. The ASEAN Political-Security Community Blueprint 2025 outlines the establishment of programs for mutual support and assistance among ASEAN Member States in the development of strategies for strengthening the rule of law, judicial systems and legal infrastructure which aims to enhance access to legal assistance in ASEAN Member States to promote social justice through greater public education and outreach activities including promoting the development of university curricula on legal systems of individual ASEAN Member States and legal instruments pertaining to the ASEAN Community.

In our society, in which the rule of law is sometimes complex, the legal aid system is a fundamental human right which ensures people’s rights to a free, fair and efficient justice system. This means not only the right to free legal assistance in criminal proceedings as guaranteed in the International Covenant on Civil Political Rights (ICCPR) but should also include the provision of effective legal assistance in any judicial or extra judicial procedure.

The right to legal assistance did not appear in the constitution until 1997 and in criminal procedure laws in 2004. A legal aid system organized at the national level is a recent phenomenon. In September 2015, the National Legislative Assembly enacted the Justice Fund Act to promote access to justice for all. In the meantime, the Law Reform Commission of Thailand (LRCT) drafted a law on access to legal aid which has complemented the implementation of the law in the Justice Fund. The drafted Act is the result of LRCT efforts since 2014, in partnership with the United Nations Development Programme (UNDP) and numerous other public and private institutions which have also launched a number of research projects on legal aid and a pilot project to help determine best practices suited to Thailand.

Access to Justice: The Right of People to have Access to Legal Aid by LRCT

The Law Reform Commission of Thailand (LRCT) through the Committee for the Improvement and Development of Justice Process Laws in collaboration with the United Nations Development Programme (UNDP) has implemented a project on “Access to Justice: The Right of People to Access Legal Aid” to strengthen access to legal aid with the following activities.

The Office of the Law Reform Commission of Thailand (OLRCT) has been assigned to conduct research as following:

1. “A Preliminary Study on Public Legal Aid” by Assistance Professor Dr. Pokpong Srisanit and Dr. Ua-aree Ungchanil

2. “Comparative Legal Aid Study: Experiences of Indonesia, Australia, South Africa, and the Philippines” by Mr. Heater E.Rae from UNDP

3. Explore and compile essential issues concerning international laws and standards on legal aid and legal empowerment as well as access to justice by Ms. Sathawan Chanprasert. A briefing has been made covering the existing legal aid mechanisms, statistics and data, the current status and problems in providing legal aid in Thailand and comparative analysis with similar legal aid mechanisms in other countries.

4. OLRCT with universities and civil society organizations (CSOs) in three provinces including (1) Ubonratchathani University, Ubonratchathani, (2) Pitsanuloke University with the Yongyuth Suebthayat Law Firm in Pitsanuloke, and (3) Thaksin University with the Andaman Foundation in Trang. They have conducted research in the three project sites under “Action Research on Strengthening of the Rights of People to Access Legal Aid”.

RESEARCH FINDINGS

1. The findings from “A Preliminary Study on Public Legal Aid” by Assistance Professor Dr. Pokpong Srisanit and Dr. Ua-aree Ungchanil which is relevant to the development of a legal aid system includes:

1.1 The legal aid system must be managed by a central agency. A fund should be set up along with a network of legal aid providers. The agency can be small, efficient and independent.

1.2 Duties and powers of the agency should include:

1.2.1 The central agency should help to set out policies on legal aid and oversee the operation of the legal aid providers.

- 1.2.2 The central agency should develop a system to facilitate the role of the service providers by acting as a unit to ensure quality control of legal aid work.
 - 1.2.3 Financial support should be made available for certified legal aid providers.
 - 1.2.4 The code of conduct or code of ethics of the legal aid providers should be developed.
 - 1.2.5 A complaint mechanism should be established to keep in check the operation of the legal aid providers and disciplinary action should be put in place against those breaching the code of conduct.
 - 1.2.6 Capacity building and awareness raising on legal aid should be provided to the public.
- 1.4 Deciding whether the central agency should rely solely on a state budget, or from either the state budget or support from the Public Legal Aid Fund.
- 1.3 The establishment of the Public Legal Aid Fund
- 1.4 Creating partnership with the legal aid providers
- 1.6 Possible methods of legal aid may include;
- 1.6.1 Creating a roster of lawyers from which an accused can choose,
 - 1.6.2 Providing incentives to lawyers and paralegals to encourage them to provide legal aid and
 - 1.6.3 Development of the means test criteria.
- 1.7 Ensuring confidentiality of the applicants.
- 1.8 Providing paralegals to assist the lawyers.
- 1.9 Providing legal education to the people and communities ensuring that they do not become an offender or a victim of a crime.
- 1.10 Prioritizing the need to ensure the delivery of legal aid to vulnerable groups including people with disabilities, children, women and minority groups.
- 1.11 Providing legal aid to prison inmates. In Thailand, there is not specific law to uphold the right to legal aid among prison inmates. It should then be deliberated if a prison inmate deserves to have legal aid, and to what extent and on which issues.
- 1.12 It should be deliberated whether a victim who complains or files a case as the plaintiff in either a criminal or civil suit directly deserves to have access to legal aid or not and on which issues.

2. The “Comparative Legal Aid Study: Experiences of Indonesia, Australia, South Africa, and the Philippines” by Heather E. Rae, UNDP Thailand, has found that existing laws in all countries including Indonesia, Australia, South Africa, and the Philippines, provide for the state to deliver legal aid to people. The laws aim to uphold the right of the people to have access to justice as follows:

- 2.1 The coverage and extent of the legal aid:
Representation, counseling, non-judicial assistance and other forms of legal aid to prevent any unfair treatment or to serve the public interest (prevention)
- 2.2 Legal aid provider
Though the law provides that the state is obliged to provide legal aid, it does not specify that only the state can solely provide legal aid. Legal aid can be provided by a state

agency, directly or indirectly. For example, the state can act to monitor public legal aid and provide some funding support to professional associations, educational institutions, non-governmental organizations and community organizations which implement legal aid projects for various groups.

2.3 The state can help to provide for a comprehensive legal aid scheme, not just by providing legal representation or legal counseling. The services provided can encompass the compilation of information useful for policy development, empowerment and enhancement of the legal aid to ensure its sustainability, and the prioritization of vulnerable groups.

2.4 The state should set out the policy to provide public legal aid based clearly on empirical and proven data. The services should also be delivered by the agency as a unit.

3. The study to explore the existing legal aid mechanisms, statistics and data, the current status and problems in providing legal aid in Thailand by Sathawan Chanprasert has found that the existing pretrial legal aid system does not comply with international standards since the alleged offenders have not been informed of their legal right. As a result, upon their arrest and during the investigation, they are deprived of their access to lawyers. It is recommended that the state should provide effective measures to enhance access to lawyers among the alleged offenders during the investigation by ensuring that the alleged offenders are informed of such rights and their right to bail. The system should be consolidated and be implemented strictly. Also, an interpreter should be provided for an alleged offender who does not understand Thai.

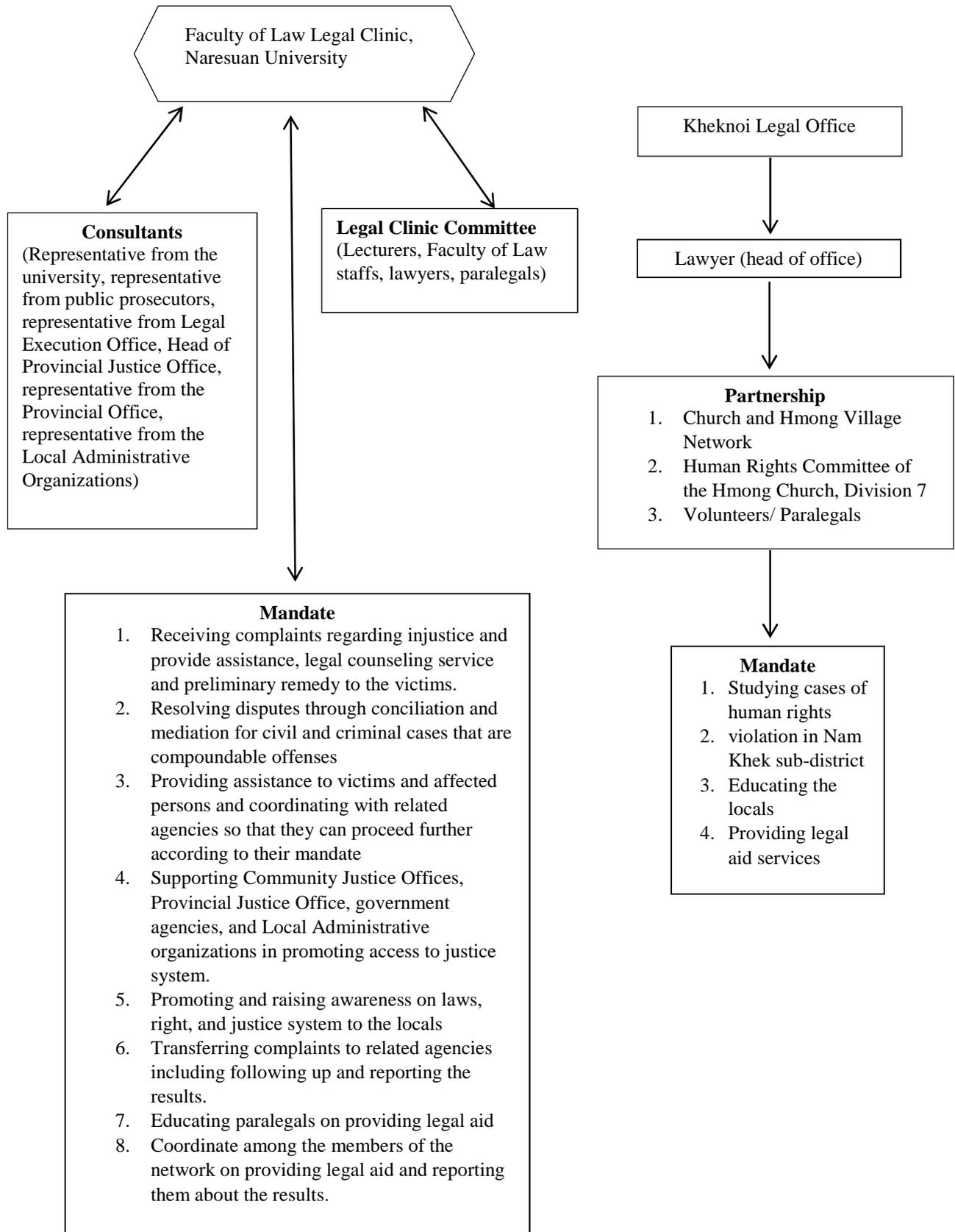
The main challenges of legal aid provided during the trial include the efficiency and quality of the public defenders. As a result, it has deprived the defendants of their right to a fair trial. It is recommended that the state should ensure efficiency of the public defenders by setting aside financial support for legal aid providers.

As to post-trial legal aid, the state should ensure that the defendant in a criminal case is always represented by a lawyer to help give advice and assist the person during the post-trial period. Clear measures must be put in place to monitor the performance of duties by the lawyers.

4. The Findings of Action Research on Strengthening of the Right of People to have Access to Legal Aid in 3 provinces were following:

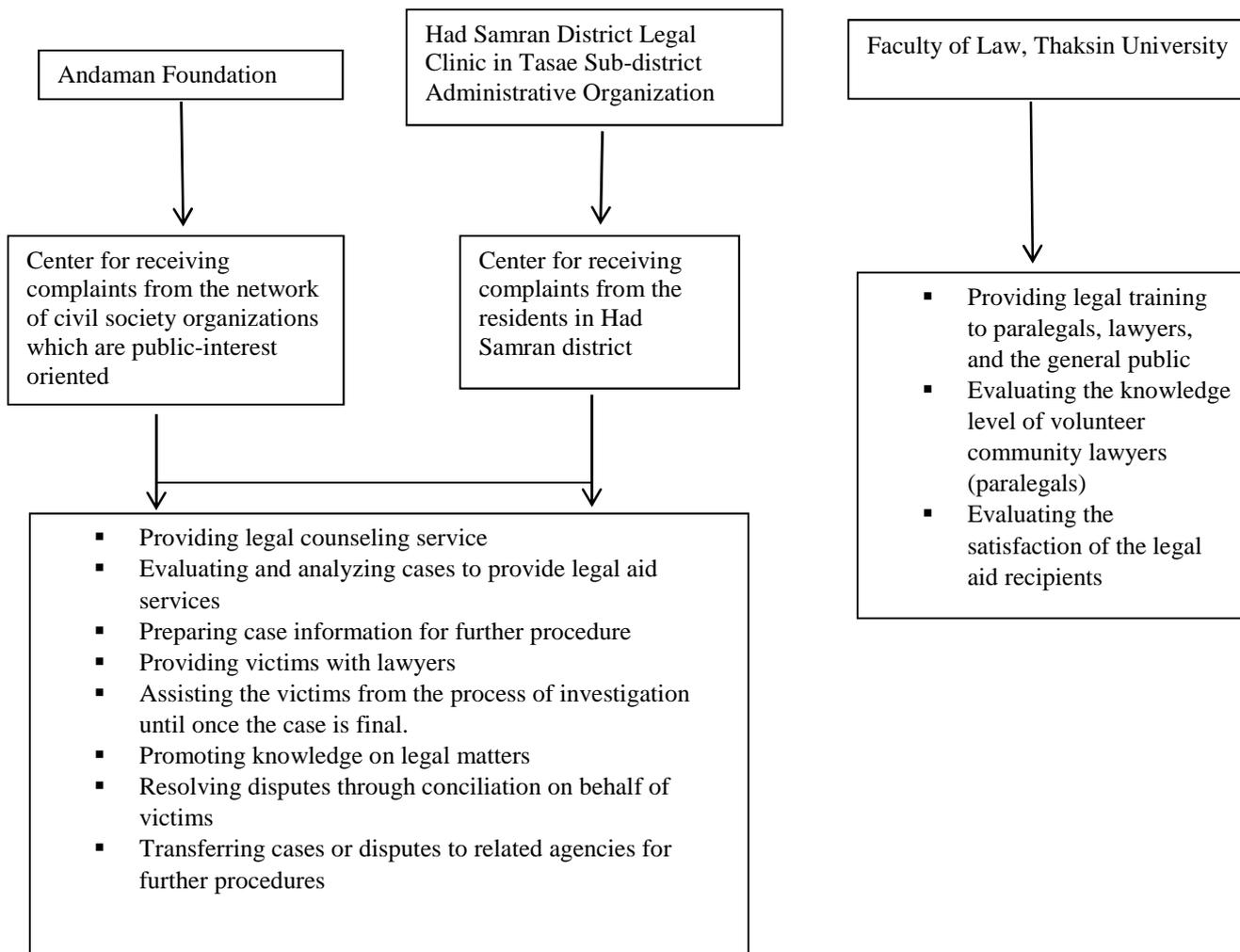
4.1 Legal Aid Unit Structure in Phitsanulok Province

(Consists of 1. Faculty of Law Legal Clinic, Naresuan University 2. Kheknoi Legal Office)

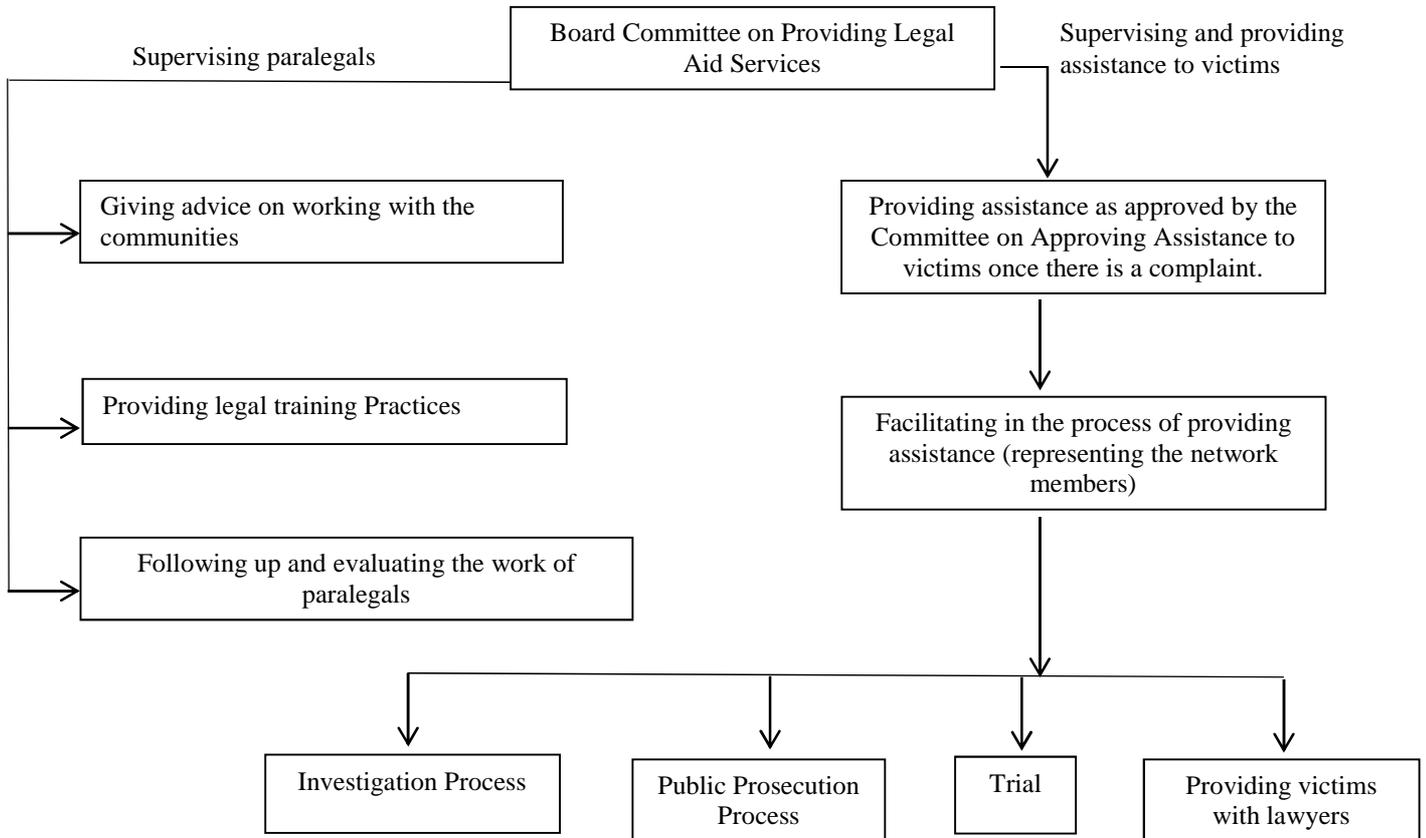


4.2 Legal Aid Unit Structure in Trang Province

(In collaboration with Faculty of Law, Thaksin University, Andaman Foundation, and Had Samran District Legal Clinic, Tasae Subdistrict Administrative Organization)



4.3 Legal Aid Unit Structure in Hnong Kin Phen Sub-District Legal Clinic Ubonratchathani Province



The Findings of the 3 Action Research Projects carried out in 3 provinces used the UN Principles and Guidelines as a framework in analyzing the data along the line with the Draft Law on Access to Legal Aid Bill B.E. by LRCT. The recommendations were followings:

1. In Ubonratchathani province, the action research project was carried out by the Faculty of Law, Ubonratchathani University in collaboration with the Hnong Kin Phen Subdistrict Administrative Organization in Warinchamrap district, Ubonratchathani.

The research showed that:

- 1.1 the disbursement of the legal aid budget had to be commensurate with the experience of the lawyers and the difficulty of the case.
- 1.2 the paralegals and community leaders were suitable for the position but they had to be equipped with knowledge on legal subjects and certified.
- 1.3 the assistance had not yet covered the correctional process.

2. In Phitsanulok, the action research project was carried out by Faculty of Law, Naresuan University in collaboration with Kheknoi Legal Office. The research showed that collaboration was highly significant. The collaboration among the Faculty of Law Legal Clinic, Naresuan University, a team of lawyers led by Mr. Sarot Chantarasiri, and the office of Community Justice in Phitsanulok in providing assistance regarding damages

and litigation, helped speed up the process and also made it more effective. The fact that the faculty of law in universities at the provincial level had a close relationship with the locals made them suitable for providing preliminary assistance.

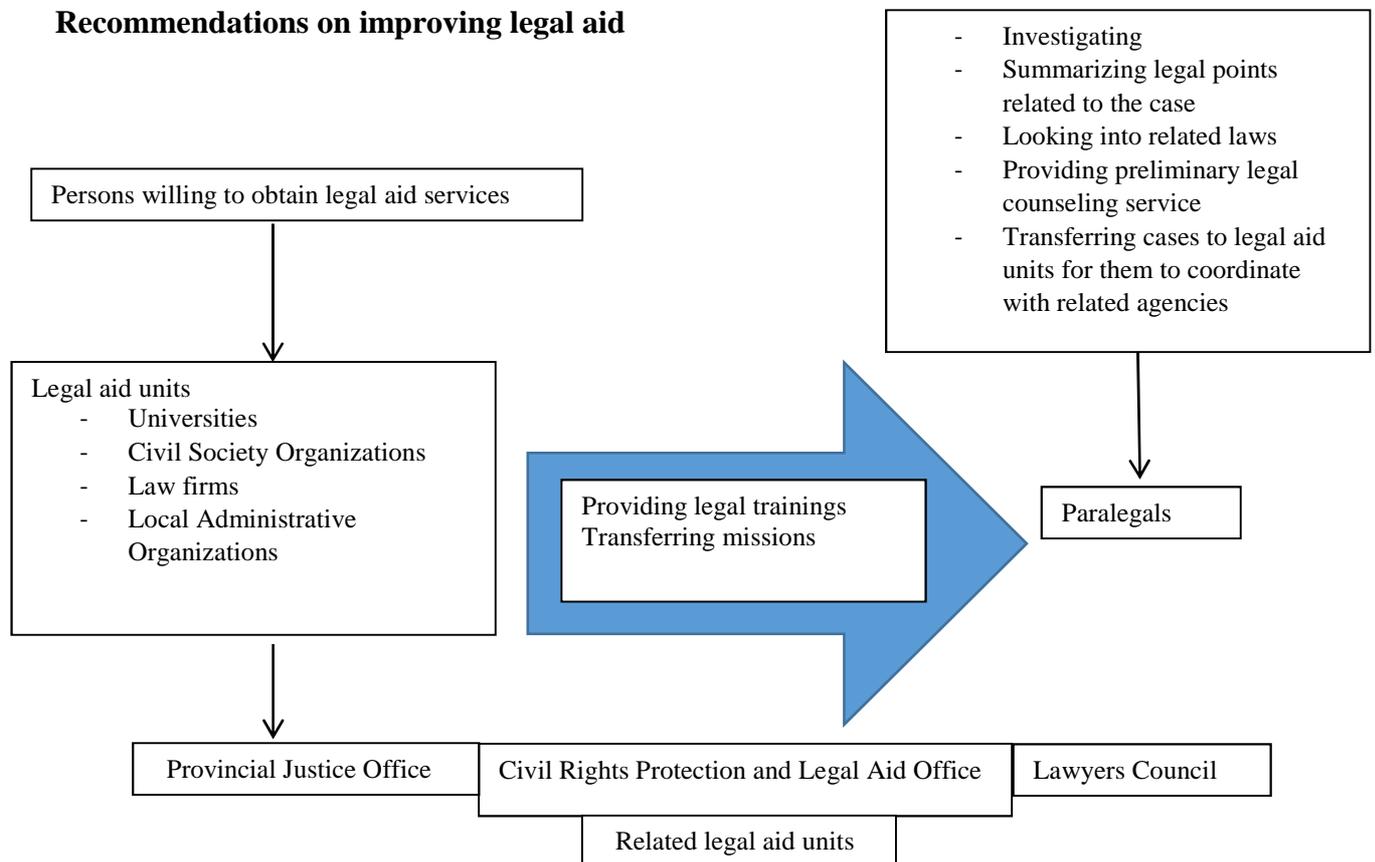
3. In Trang province, the action research project was carried out by the Andaman Foundation in collaboration with Thaksin University and the Tasae Subdistrict Administrative Organization in Samran district, Trang.

The research showed that:

1. the Sub-District Administrative Organizations (SAO) were capable of providing legal aid services and they should have consultants who are representatives from other local legal aid units and an effective case transferring system.
2. the legal aid units have to improve the capability of their paralegals, provide their victims with lawyers and assist them throughout the process of litigation. The assistance given should be extended to cover administrative cases, civil cases and cases regarding human rights and community rights.
3. in terms of budget allocation, the legal counseling service should be provided for free. However, during the trial, the victims should also share the cost which should be commensurate with their income.
4. there should be various independent legal aid units which can be evaluated under a quality control system.

Conclusion of the action research project on Legal Aid Reform in 3 provinces

Recommendations on improving legal aid



Recommendations from the Action Research Project on “Legal Aid Reform”

The Findings of the 3 Action Research Projects carried out in 3 provinces used the UN Principles and Guidelines as a framework in analyzing the data along the line with the Draft Law on Access to Legal Aid Bill B.E. by LRCT. The recommendations are as followings:

1. **Structure of the legal aid units:** Having legal aid units at the sub-district level has made legal aid services accessible for the residents of that sub-district/district. The legal aid units at this level are, for example, Local Administrative Organizations, Civil Society Organizations, legal clinics of faculties of law in local universities, and law firms.
2. **Network of legal aid units and agencies:** Local legal aid units should coordinate with one another.
3. **Role of paralegals:** the paralegals are highly significant in educating the general public on legal matters so that they can protect their own rights.
4. **Endorsement of legal aid units:** An independent central office must create a system to come up with a clear list of legal aid units and government agencies related to providing legal aid services.
5. **Financial support for legal aid units:** The legal aid units must develop annual project proposals for funding from the central office. The project should cover legal counseling services for civil, criminal and administrative cases including other disputes, coordination after the counseling, transferring of cases, paralegal work, trainings for paralegals, and litigation as deemed appropriate.
6. **Monitoring and Quality Control of legal aid units**
 - 6.1 Another committee should be set up under the central office. Its work is to evaluate the performance of legal aid units.
 - 6.2 There should be a complaint mechanism and a report on the work of the legal aid units should be available online.
7. **Criteria in providing financial support to legal aid units:** The findings from the analysis of the cost in providing legal aid services are as follows:
 - Training on providing legal aid services to persons giving the services
 - Lawyers/ coordination with lawyers to provide legal aid services
 - Paralegals
 - Travel expenses in providing legal counseling services and processing costs
 - Court fees, expenses related to witnesses, bail, translators/interpreters
 - Other related expenses, such as operating costs and expenses of legal aid units.
8. **Creating incentive plans to motivate legal aid units**
 - 8.1 Donations should be given to funds and legal aid units so that they can benefit from tax deductions.
 - 8.2 Income tax of law firms should be lowered.
9. **Creating a code of ethics**

Creating a code of ethics that legal aid units and paralegals must abide by will ensure that the confidentiality between lawyers and their clients will be protected. It will also help maintain the confidentiality in the operation regarding human rights protection of legal aid units and paralegals. In the case that a person breaks the code of ethics, they could be dismissed from any ongoing legal assistance and from their positions as paralegals in the legal aid units.

The Draft Act on the Right of People to have Access to Legal Aid B.E....

LRCT by the Committee for the Improvement and Development of Justice Process Laws has developed the Draft Act on the Right of People to have Access to Legal Aid B.E....with a note and recommendations and in compliance with the Constitution of the Kingdom of Thailand, the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

The Committee for the Improvement and Development of Justice Process Laws has developed a memo and a set of recommendations regarding the plan to enact the law to promote the right of the people to have access to legal aid along with the Draft Act on the Right of People to have Access to Legal Aid B.E....for the consideration of the government and National Legislative Assembly.

The draft Act aims to guarantee and support the right to access legal aid at all stages of the justice process so as to establish the right to a fair trial, the right to access justice and the principle of equality of arms and reduce miscarriages of justice according to the principles guaranteed in the constitution and international laws.

The draft Act defines “Legal aid” as distributing, training and promoting the people’s access to information and knowledge regarding the law, the justice process and human rights; advising on the law and the justice process; providing translation on the justice process; legal representation for people to seek justice all along the justice process, including pretrial, trial and post-trial, allegation, complaint, litigation and other stages in need of legal services in order to access justice; and supporting related expenditure in criminal justice, civil justice, administrative justice, constitutional justice and others, including alternative dispute resolution and restorative justice.

The principles of the right to have access to legal aid under this draft Act are as follows:

(1) Non-discrimination in access to legal aid.

(2) Equity in access to legal aid by children, women and groups with needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, consumers, stateless persons, migrants and migrant workers, refugees and internally displaced persons and victims from human trafficking. States should also ensure that legal aid is provided to persons living in rural and remote areas and to persons who are members of economically and socially disadvantaged groups.

(3) The right to be Informed - in the criminal justice process, civil and commercial process, administrative process, alternative disputes resolution mechanism and restorative justice.

Key features of the legal aid system under the draft Act should be accessible, independent, creditable, effective, sustainable and suitable with the needs of persons seeking access to justice. Legal aid should include enhancing the knowledge of the people about their rights and obligations under the law through appropriate public means. The state has the obligation to inform people about their rights and available legal aid services. The state also has the obligation to encourage private sectors (including lawyer offices, law universities, non-government organizations, community based organizations and local administrative bodies) to participate in the provision of legal aid services and to establish mechanisms that will enable them to carry out such work independently and without fear of intimidation, hindrance, harassment or improper interference by state and non-state actors.

The Right to have Access to Legal Aid of each type of case shall be the right of people and the duty of the state to provide Legal Aid in the Criminal Justice process with no cost and equality.

Legal Aid in the Civil and Commercial process, Administrative and other processes shall be the right of persons with low-income or those on the poverty line, vulnerable persons, marginal people, the victims of human rights violations, persons who have received injustice or in the case of public interest.

Legal Aid on Criminal Cases means and includes the legal aid or legal assistance in the Criminal Justice Process in pre-proceeding, during and after the proceedings in Court and in alternative dispute resolution methods and restorative justice under the United Nations Principles and Guidelines on the Access to Legal Aid in Criminal Justice System including legal aid or assistance for victims and witnesses in criminal case.

Under the draft Act, Legal Aid Providers shall be called “Legal Aid Providers” which contains the organization of an agency having a Legal Aid Project such as a private organization, CSOs, community organization, educational provider, the office of a lawyer or local administrative sector.

According to the draft Act, there is the provision to enhance and support Legal Aid Providers including academic research supporting and cooperating with any other process to create “The Network of Legal Aid Agency”. The Network of Legal Aid Agency also helps to increase the potential, quality and standard of legal aid effectively, continually and sustainably.

The draft Act has the provision of “The Committee of Legal Aid” to perform all of their professional functions to proceed with the policy and administrative management in order to guarantee the Right to have Access to Legal Aid. The Committee of Legal Aid is a professional group of people who carry out their work independently from improper interference by political groups, administrative officials or judges. The Committee of Legal Aid shall come from various groups of people as follows:

- (1) A Committee who come from justice agencies.
- (2) An eight-person Committee from academic fields, who have professional experience in Rights Protection work and have passed the selection of the Selection Committee, shall work for the Committee of Legal Aid for four years in each Committee agenda.

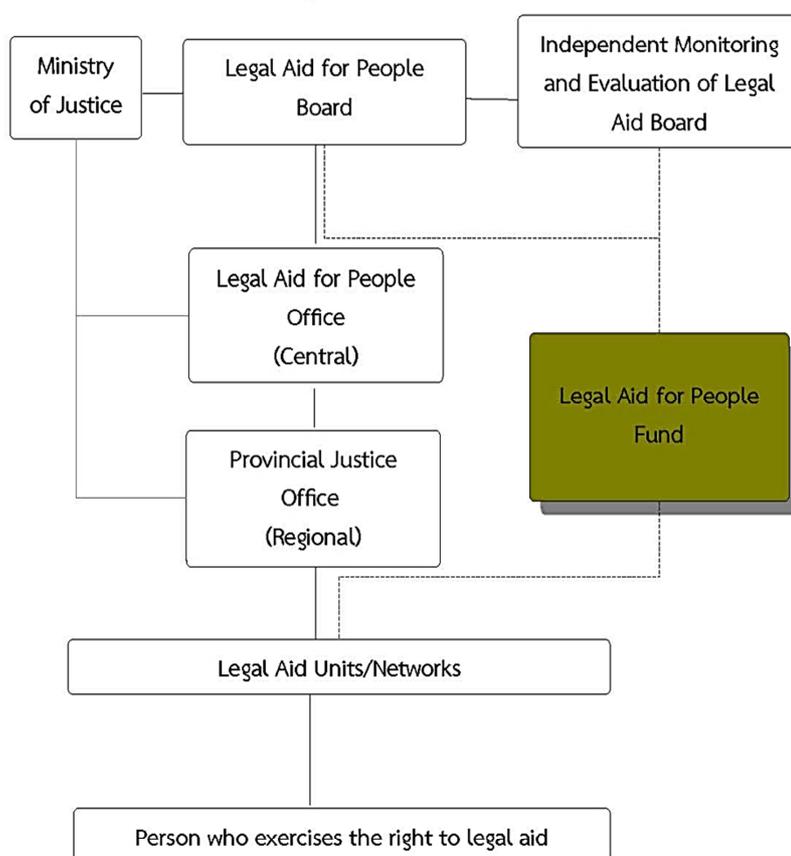
Moreover, under the draft Act, the Office of Legal Aid, a state agency shall be established and regulated by the Minister of Justice.

A Legal Aid Fund shall be established aiming to support the work of the Legal Aid Provider which shall cover the cost of access to justice for people.

An Independent Committee Mechanism for Monitoring and evaluating the legal aid system should be set up composed of five experts and persons who have experience in the field of Legal Aid, human rights protection, to track and evaluate the Legal Aid System. Two of the persons on this Committee must be persons who are professional at monitoring and evaluating a Legal Aid System. Such committee members shall pass the selection of the Selection Committee which has the authority to track, monitor and evaluate the quality and standard of a Legal Aid Provider and The Network of Legal Aid.

The Draft Act on the Right of People to Access to Legal Aid B.E. ...

Legal Aid = distributing, training and promoting the people’s access to information and knowledge regarding law, justice process and human rights; advising on the law and the justice process; providing translation on the justice process; legal representation for the people to seek for justice all along the justice process, including pretrial, during trial and post-trial, allegation, complaint, litigation and other stages in needs for legal services in order to access to justice; and supporting related expenditures in criminal justice, civil justice, administrative justice, constitutional justice and the others, including alternative dispute resolution and restorative justice.



Principles

- Non-discrimination
- Equity in access to legal aid
- Right to be informed

Key Features

- (1) Legal aid system to be accessible, independent, creditable, effective, sustainable and suitable with the needs of persons seeking to access justice;
- (2) legal aid to include enhancing the knowledge of the people about their rights and obligations under the law through appropriate public means;
- (3) to encourage the private sector (including lawyer offices, law universities, non-government organizations, community based organizations and local administrative bodies) to participate in the provision of legal aid services;
- (4) to establish mechanisms that will enable the legal aid providers to carry out such work independently and without fear of intimidation, hindrance, harassment or improper interference.

Nature of Legal Aid Services

- Criminal justice system: every person has the right to access free legal aid during all stages of the trial; pre-trial, trial and post-trial.
- Civil, commercial, administrative and other justice processes: the free legal aid shall apply to those who do not have sufficient income, to vulnerable and marginalized persons, to victims of human rights violations and miscarriage of justice and in cases of petitions concerning public interest.

The Pathway Forward for Strengthening Legal Aid in South East Asia

Between the 4th and 5th of April 2016 the Office of Law Reform Commission of Thailand (OLRCT) together with the South-East Asia Legal Aid Network (SEALAW) organized “the Regional Consultation on Access to Justice and Legal Aid in ASEAN: Situation, Challenges and Way Forward”. Ninety-nine (99) persons representing state agencies, civil society organizations, bar associations and academic institutions from a wide array of countries including Cambodia, Indonesia, Lao, Malaysia, Myanmar, the Philippines and Thailand came together to share and learn from best practices in the different countries, reflect on challenges faced by legal aid providers and brainstorm steps that can be taken to strengthen legal aid systems in the region.

Both OLRCT and SEALAW adhere to the principle that in accordance with international human rights law, States have the primary responsibility to adopt all appropriate measures to fully realize the right to legal aid. This obligation has been reaffirmed by States in the Sustainable Development Goals (SDG) number 16 dedicated to the promotion of just, peaceful and inclusive societies and one of the goal targets is to promote the rule of law at the national and international levels and ensure equal access to justice for all.
