THE KEY PARAMETERS OF LEGAL AID SYSTEMS

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I. Introduction

Access to justice is a fundamental human right, which is crucial for protecting many other human rights. It is also a key element of the rule of law. While there is no standard definition of access to justice, there is consensus concerning the main requirements. All people, regardless of their personal characteristics, social status, or financial means, should be equally able to protect human and legal rights through legitimate institutions and mechanisms. This necessarily includes counselling and services from lawyers, and recourse to the court system when required. For these purposes, legal aid is necessary. It protects individuals who lack resources, and/or who belong to marginalised/vulnerable social groups.

Many international and regional legal instruments establish access to justice and legal aid as basic human rights. The main treaties under the auspices of the United Nations are the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms creates a formal legal regime for protecting access to justice and securing legal representation, which is fully binding upon 47 countries. It is enforced by individuals through national courts, and if necessary the European Court of Human Rights located in Strasbourg. The Organisation of American States enforces the American Convention on Human Rights, which has 24 signatory countries, through the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

International instruments and rulings/jurisprudence from tribunals and commissions which review cases set standards and best practices for access to justice. With respect to legal aid, they cover the legal framework, institutional responsibilities, implementation and delivery mechanisms, eligibility, and quality control. Still, there is considerable diversity between national systems. Each country has specific characteristics, with respect to governmental structures, legal traditions, the legal profession, socio-economic conditions, and financial resources. Not surprisingly, most countries have mixed systems combining elements from different models. Further, legal aid systems are extremely dynamic, and subject to constant modification and improvement, even in developed countries. As a result, there is a significant degree of latitude concerning the design of legal aid systems. This makes it extremely important to understand the key issues, parameters, standards, and best practices.

II. Which Parties Play a Key Role in Legal Aid Systems?

The following key parties should be fully and constructively engaged in the design and implementation of legal aid systems, in order to make them sound, viable, practical, integrated, and comprehensive:

- Line Ministries (such as Justice, Finance, Interior, Planning, and Social Affairs)
- Juridical Institutions that administer the court system (like a High Judicial Council)
- Court Presidents, judges handling cases, and the Association of Judges
- The Prosecution Service and individual prosecutors
- The Bar Association and individual lawyers engaged in the provision of legal services
- Civil Society Organisations (CSOs, also known as NGOs) which provide legal services
- Law Faculties, law professors, and legal aid clinics
- The international and donor community (especially in developing countries and countries in transition). This includes public and private international organisations, multi-lateral and bi-lateral donors, diplomatic missions, and universities with international programmes.

III. What are the Key Parameters of a Sound Legal Aid System? The following chart presents 43 questions which need to be answered in order to establish a comprehensive and integrated legal aid system. To facilitate a systematic approach, they are divided into six categories:

KEY ISSUES TO BE ADDRESSED BY THE LEGAL AID SYSTEM	
CATEGORY	**QUESTION**
I. Legal Framework	1. Should there be a single and comprehensive Legal Aid Law?
	2. Which legal aid issues should be addressed in regulations, by-laws, statutes, or protocols?
II. Institutional Framework and Management	3. Will the legal aid system be administered by a governmental body (such as a line ministry), by the courts, or by a semi-independent or autonomous Legal Aid Authority?
	4. Will there be a policy making body or advisory body? To whom is it responsible?
	5. Will responsibility for organising the delivery of legal aid be centralised or delegated?
	6. What are the roles and responsibilities of institutions participating in the legal aid system, such as a) the Ministry of Justice, b) court management institutions, courts, and judges, c) prosecutors, d) the Bar Association and lawyers, e) CSOs, f) law faculties and clinics, and g) donors?
III. Implementation and the Delivery of Legal Services	7. What types of cases will be covered by legal aid? Penal? Civil? Administrative?
	8. Will representation be provided in **all** penal cases involving potential incarceration?
	9. In penal cases, should there be pre-trial representation (during detention, interrogation)?
	10. In penal cases, will representation be provided at the appellate level?
	11. Will there be legal aid in civil cases? What kinds? Should certain cases be prioritised?
	12. How will civil legal aid be delivered? Advice Bureaux? Via contracts for specific cases?
	13. Should the merit of civil cases be a factor? Should public interest litigation be supported?
	14. Which kinds of legal aid services will be provided? 15. Will legal aid be restricted to legal representation in litigation? 16. Will legal aid cover legal information, legal advice, or alternative dispute resolution?
	17. Will representation be provided by a) private *ex officio* lawyers paid on a case by case basis, b) lawyers working under contract, or c) salaried/employed lawyers (public defenders)?
	18. Who selects/appoints the lawyer? Will clients have a choice? If so, under what conditions?
	19. What means and mechanisms will be used to inform the public about rights and remedies?
IV. Coverage And Eligibility	20. Who is eligible for legal aid? Will there be different rules for penal and civil cases? 21 Will there be different degrees of eligibility (partial funding and/or co-payments)? 22. Will there be a means test? For income? If so, what level? For assets? If so, what level? 23. Should certain categories of individuals (e.g. minors, disabled) be automatically eligible? 24. Will there be mandatory defence in certain categories of serious penal cases?
	25. Who determines/certifies eligibility? Can denials be appealed? Is self-certification allowed?
	26. How will eligibility be documented? How will records be verified, processed, maintained?
V. Funding And Sustainability	27. How much total funding is available for legal aid? How should spending be prioritised?
	28. What are the sources of funding for legal aid, and how will they be accessed?
	29. Which institution(s) will manage the funding for legal aid, and make payments?
	30. Which institution(s) will audit legal aid funding, and ensure financial accountability?
	31. How much will private lawyers be paid? For which services? Who decides this? How?
	32. Will court costs and litigation expenses (tests, reports, expert opinions) be subsidised?
	33. Should clients reimburse costs (if finances improve, they get an award, or commit fraud)?
VI. Quality Control	34. Which institutions will be responsible for monitoring, oversight, and quality control? 35. What powers and mechanisms will they have for inspection, enforcement, and sanctions?
	36. How will overall statistics and records covering each case be generated, utilised, stored?
	37. How will lawyers be supervised and monitored? What about paralegals and legal interns?
	38. Is there a Code of Ethics for lawyers? Under whose authority? Are there provisions in laws?
	39. What ethical obligations do legal aid lawyers have? Are they obliged to take legal aid cases?
	40. What sanctions will there be for inferior quality representation or malfeasance?
	41. How are ethical obligations enforced? By whom? Are the results publicised?
	42. What kinds of training and continuing legal education will legal aid lawyers receive? 43. Will it be mandatory? How much and how often? Who will provide it? Who will finance it?

The answers to these questions determine the optimal structures and implementation mechanisms for the legal aid system, so that it can provide the required types of legal services to designated clients.

Therefore, it is appropriate to look at best practices and comparative approaches to each of the six categories of issues, and the main issues that need to be addressed.

A. Legal Framework

A viable legal aid system depends first and foremost upon a sound legal framework, which establishes the roles and responsibilities of the main institutions and creates practical and implementable working procedures for the delivery of legal services. Defects in the legal framework invariably lead to problems with implementation, and undermine the objectives of the legal aid system.

The key requirement for a legal framework is that it be sound and functional within the national context.

The main practical question is whether there should be a comprehensive legal aid law. See Category I (Questions 1–2) in the chart on Page 3. The following chart summarises the major advantages and disadvantages of such an approach:

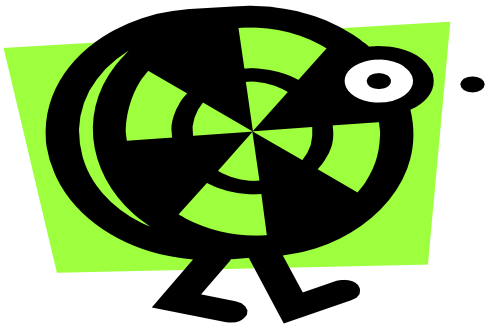
COMPREHENSIVE LEGISLATION COVERING LEGAL AID	
ADVANTAGES	**DISADVANTAGES**
• Addresses the most important issues in a complete and integrated manner • Serves as a single and authoritative source of answers to important questions • Requires key parties to communicate and achieve consensus regarding the system • Avoids an ad hoc approach which can lead to inconsistency, contradictions, and institutional conflicts • Promotes transparency and accountability	• Laws are cumbersome instruments which are difficult to amend • The more comprehensive and detailed the law, the more likely it will need to be amended • It is difficult to obtain consensus concerning laws which address many complicated issues • It is difficult to achieve the correct balance between centralised and delegated authority • Legal aid laws should be based on experience and empirical data developed over time

The current trend and preferred practice is to address many important issues in comprehensive legislation. Most developed countries and members of the European Union have laws specifically devoted to legal aid. The vast majority have been drafted in the last fifteen years.

However, particularly in developing countries, there are major obstacles to drafting sound and implementable legislation on legal aid. Legal aid must be incorporated into existing legal structures and practices. When these structures and practices themselves are not fully established or settled, it is extremely difficult to effectively design legal aid reforms.

In addition, the legislative drafting process becomes much more complicated when it is directed towards producing a single comprehensive law. When laws address multiple issues, more parties become interested and involved. This makes the laws more controversial, and impedes consensus. It also leads to multiple efforts to influence the drafting process, and make amendments. This prolongs the entire process, and can lead to variable results. These issues are particularly pertinent in the case of legal aid systems. Legal aid systems a) involve numerous juridical institutions, b) significantly affect the work of legal professionals (primarily judges, prosecutors, and lawyers), c) influence a wide range of social and economic interests, and d) obligate public funds.

Finally, without a track record and empirical data, it is difficult to design a comprehensive framework which is legally correct, financially sound, and practical. Regulatory Impact Analysis, a pre-requisite for drafting viable and affordable legislation, is problematic because of difficulties in estimating future costs and predicting the behaviour of potential legal aid clients. *As a result of all these factors, drafting a comprehensive legal aid law in a developing country can be like trying to hit a moving target*.



Therefore, particularly in developing countries, secondary legislation or protocols between key parties which put in place concrete working procedures can be a reasonable and practical first step.

Even in countries which have a comprehensive legal aid law, other/additional legal instruments address access to justice and legal aid. They include:

- The Constitution
- Codes of Criminal Procedure, Civil Procedure, and Administrative Procedure
- Laws on the courts, court costs, advocacy and the work of lawyers, lawyer's fees, etc.
- Presidential Decrees
- Regulations issued by the Supreme Court, line ministries, or other governmental agencies
- Statutes of the Bar Association
- Disciplinary Rules, Rules of Professional Responsibility, or Codes of Ethics for legal professionals (judges, prosecutors, and lawyers)

In the absence of a comprehensive legal aid law, these other/additional legal instruments need to cover the most important subjects, which include:

- Basic human rights, including access to the courts and court proceedings
- The institutional framework for providing legal aid, including procedures for delivery
- Types of legal services provided, and under which circumstances
- Types of cases which qualify for legal aid, and guarantees in penal cases
- Requirements for eligibility, based on income, assets, and personal status
- Funding mechanisms, sources of income, and payment procedures
- Quality control, including monitoring and evaluation
- Legal ethics, obligations to provide legal aid, and raising professional qualifications

The main priority is for the legal framework to appropriately address the key issues. The choice of legal instruments and their inter-relationship should not follow a pre-defined model, but be functional, and based upon what works in the jurisdiction. This depends upon specific circumstances, such as legal traditions, the roles and functions of juridical institutions, the interests of the legal professions, and socio-cultural factors.

B. Institutional Framework and Management

The institutional framework and management procedures for the legal aid system should be settled in the legal framework and the organic documents of the main parties. The fundamental issues to be resolved at this level concern the respective roles and obligations of the main institutions involved in the legal aid system. See Category II (Questions 3–6) in the Chart on Page 3.

The main managerial issue, and first question to be answered, is whether the legal aid system will be administered by 1) pre-existing juridical institutions or 2) a special body created for this purpose. Many countries establish a Legal Aid Authority (the term utilised herein). There are different models, with various names. It is often called a Legal Aid Board, but the United Kingdom has a Legal Services Commission, Latvia has a Legal Aid Administrative Authority, Quebec has a Commission des Services Juridiques, and in Australia there are Legal Aid Commissions. As defined herein, a Legal Aid Authority does not deliver services directly. Rather, it manages the system, selects and contracts parties which provide legal services, and exercises oversight.

The Legal Aid Authority model has many positive features, and it can be considered the preferred approach. It focuses authority and responsibility in a single institution, which can professionally and impartially organise and oversee the delivery of legal aid. On the other hand, the Legal Aid Authority is a complicated body, which depends upon successful institution building and long-term commitment. It requires a stable foundation, professional management, and skilled staff. A sound Legal Aid Authority simply cannot be built from scratch. The following chart summarises the advantages and disadvantages of a Legal Aid Authority:

LEGAL AID AUTHORITY	
ADVANTAGES	**DISADVANTAGES**
• Separation and insulation of legal aid from the State and prosecutorial functions • Neutral and de-politicised administration • Standardisation and rationalisation of legal aid system (policies and procedures) • Unitary and consistent approach to financing and delivering legal aid • Authority, expertise, specialised skills, and experienced leadership • Centralised information management • Comprehensive record keeping • Focal point for oversight and enforcement • Promotes accountability and transparency (through reporting, testimony, and PR) • Very able to contract legal services (with legal bureaux, law firms, CSOs)	• Complicated bureaucratic structure (board, executive director, committees, statutes, policies, procedures, strategic plans, etc.) • Board must balance input from different constituents (on individual or *ex officio* basis) • Nomination procedures for Board Members • Administrative requirements (property control, human resources management, accounting) • Expenses and overhead (premises, equipment, salaries, operating costs) • Time consuming to establish • Costly initial start-up • Cooperation from representatives of all main institutions is required • Successful operation depends upon a “culture of respect” for independent institutions

No two countries adopt the same approach, and no two Legal Aid Authorities are identical. Countries with shared legal traditions sometimes take very different approaches.

Three different categories of Legal Aid Authority can be identified. They are distinguished by the degree of power which is delegated to them, particularly for developing policy, setting procedures, defining services, and establishing eligibility. Specifically, a Legal Aid Authority can be:

1. Powerful
2. Functional
3. Advisory

1. Powerful Legal Aid Authority (Supervising the Legal Aid System)

Under the former system in England, the Legal Services Commission supervised and funded two institutions, the Community Legal Service and the Criminal Defence Service. The Community Legal Service was responsible for delivering legal services in civil cases, and the Criminal Defence Service provided representation in penal cases. The Commission managed a Community Legal Service Fund (to finance legal aid), set requirements for eligibility, and established conditions for delivering services. It also accredited other providers and used contracts and grants to supply services. Members of the Commission were appointed by the Secretary of State (Minister of Justice), who set policy and the Commission's structure and operations. This system is being revised to increase the authority of the Ministry of Justice.

2. Functional Legal Aid Authority (Fulfilling Specified Responsibilities)

In Latvia, the Legal Aid Administrative Authority is a self-governing institution, answerable to the Ministry of Justice. While it fulfils specific and defined operational duties with respect to delivering and financing legal aid, it does not have the power to set policies or criteria for legal aid, or enter into sub-contracts with legal persons (except for clinics at law faculties). The main responsibilities of the Authority are to accept applications from lawyers willing to provide legal aid and sign contracts with them, assess individual eligibility for legal aid, pay for legal aid (according to procedures established by law), ensure the effective use of public funds, and recover funds from clients when warranted. The Authority also maintains a register of providers and recipients of legal aid (in penal, civil, and administrative cases). The Cabinet of Ministers and Ministry of Justice retain authority to set parameters for eligibility and delivery of legal aid.

3. Advisory Legal Aid Authority (Supporting the Supervisory Institution)

In Lithuania, the State-Guaranteed Legal Aid Coordination Council has a purely advisory role for the Ministry of Justice, which has overall responsibility for managing legal aid (in cooperation with municipal Legal Aid Services). The Council is a collegial and advisory institution, operating on a voluntary basis, with a mandate to help the Ministry of Justice meet its obligations. Members of the Council include representatives of the Parliamentary Committees on Legal Affairs and Human rights, the Ministry of Justice, the Ministry of Finance, the Association of Local Authorities, the Bar Association, and the Lawyers' Society. Membership and operating procedures are approved by the Ministry of Justice. The specific tasks of the Council include: submitting proposals on improving the legal aid system, analysing reports on delivery of primary legal aid, reviewing the performance of legal services providers, assisting with budget forecasts and efficient utilisation of funding, reviewing remuneration schedules for lawyers providing secondary legal aid, and submitting recommendations concerning reform of the legal framework.

It can be argued that an advisory body does not truly qualify as a Legal Aid Authority. But advisory bodies can play a valuable role in the legal aid system, and help achieve some of the advantages listed in the chart on Page 6 above. Specifically, they can promote accountability and transparency, serve as a repository of expertise, and offer moral guidance. And their existence can encourage contributions to a legal aid fund. Countries which do not have a Legal Aid Authority, and/or which rely upon governmental institutions to manage the legal aid system, can still consider establishing an advisory body along the lines of the Lithuanian model.

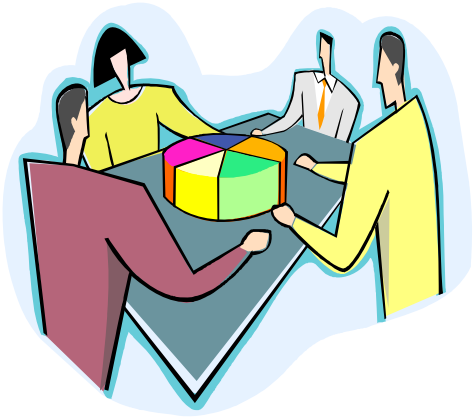
Whether or not there is a Legal Aid Authority, the roles and responsibilities of other key institutions must be settled. Crucial parameters are discussed in the chart below.

POSSIBLE FUNCTIONS AND RESPONSIBILITIES OF KEY INSTITUTIONS	
BODY	**FUNCTIONS AND RESPONSIBILITIES**
Line Ministries (Justice, Finance, Planning, Social Affairs)	• The Ministry of Justice can operate, manage, fund, and/or monitor the legal aid system, through departments or dependent institutions • The Ministry of Justice can delegate defined responsibilities to a Legal Aid Authority • The Ministries of Justice, Finance, and Planning can provide public funding for legal aid, ensure that it is spent efficiently and fully accounted for, and promote quality control • The Ministry of Interior can ensure that law enforcement institutions respect human rights • The Ministry of Social Affairs can help determine eligibility for legal aid
Legal Aid Authority	• Manage the system for delivering and financing legal aid services • Directly delivery legal services through legal aid centres or staff/employed lawyers • Indirectly deliver legal services through other providers, such as the Bar Association, Ex Officio lawyers appointed to handle specific cases, CSOs, etc. • Pay for legal services, generally through public sources • Monitor legal services and enforce performance standards
Management Body of the Judiciary And/or Courts	• Administer a legal aid fund, and/or make payments for legal aid services • Cooperate with judges and court personnel to facilitate the provision of legal aid • Ensure cooperation between courts, prosecution, and Bar to systematically appoint lawyers • Keep records concerning the handling of legal aid cases in court • Cover court fees and litigation expenses in legal aid cases
Court Presidents And Trial Judges	• Ensure that defendants and litigants have required legal services at all stages of trial • Work with the Bar Association and lawyers to secure appointment of counsel • Develop standards and practices for providing legal aid, and enforcing ethics • Facilitate coverage of court fees and litigation expenses in legal aid cases
Prosecution Service And Prosecutors	• Ensure that human rights standards and the right to legal aid are respected in practice • Cooperate with the courts and defence counsel according to law • Establish and enforce ethical obligations for prosecutors in legal aid cases • Provide training and information about fair trial standards to prosecutors
Bar Association And Lawyers	• Manage the legal aid delivery system • Maintain lists of lawyers willing, able, and available to take legal aid cases • Work with juridical bodies, judges, prosecutors to ensure appointment of legal aid lawyers • Fund legal aid and arrange for the provision of *pro bono publico* services • Establish and enforce ethical obligations for lawyers regarding legal aid • Provide training and information for lawyers on substantive and ethical issues • Engage in public outreach, awareness raising, and education
Civil Society Organisations	• Deliver legal services in particular areas of expertise • Provide information concerning their work and results • Raise public awareness concerning human rights and legal aid • Cooperate with and support juridical institutions and courts
Law Faculties, Professors	• Organise clinical programmes to deliver legal aid services and train young lawyers • Develop the professional skills of law students, and inform them about legal aid • Support legal reform and strengthen the legal aid system
International Institutions And Donors	• Provide financing for legal aid services, through official legal aid funding mechanisms • Provide financing and technical assistance for legal aid services, through CSOs • Support the institutional development of juridical institutions and legal aid providers • Provide information and expertise concerning international standards and best practices

From this description of roles and responsibilities, it is clear that the nucleus of a viable legal aid system can be formed by the Ministry of Justice (with or without a Legal Aid Authority), the institution managing/funding the judiciary, Court Presidents and judges, and the Bar Association. With suitable legal authority, these parties can combine to deliver and pay for legal aid services.

To make the legal aid system viable and sustainable, and ensure the effective utilisation of resources, the work of key institutions must be integrated. In developing countries, there may be parallel arrangements for delivering legal aid. The "public" mechanism involves the courts and Bar Association, while the "private" mechanism involves international donors and civil society. This may be necessary or advantageous at certain times, as donors implement important projects and support CSOs. But this approach is *ad hoc*, not integrated. Results on the ground depend upon a) the objectives/priorities and project management practices of donors, and b) the response of CSOs trying to win financing and provide legal services (invariably according to the project cycle).

To integrate the legal aid system, international organisations and donors can support a legal aid fund under the auspices of a Legal Aid Authority or governmental institution. In addition to paying private lawyers, the fund can contract CSOs for specific quantities of services in cases related to their area(s) of expertise. Coordinating support through a legal aid fund promotes systematic and rational use of resources. It encourages a strategic and holistic approach to legal aid, based on national priorities and needs. It also standardises procedures for tenders and procurement, based on open competition. *Legal aid systems work better when the key parties coordinate what they bring to the table.*



C. Implementation and Delivery

Category III (Questions 7–19) in the Chart on Page 3 concerns what types of cases qualify for legal aid, what kinds of legal services are provided, and how they are delivered. These issues have a major impact on the legal aid system, especially roles and responsibilities of institutions, and costs.

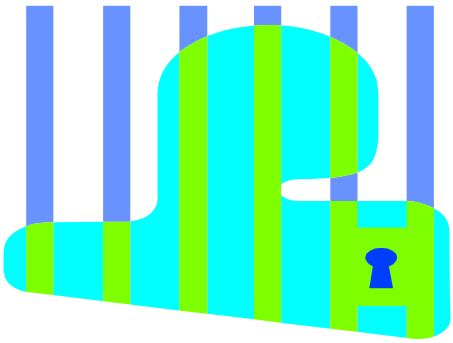
The first issue to decide is whether legal aid applies to penal, civil, and/or administrative cases.

Legal aid in penal cases is required by many international instruments. Article 14.3(d) of the International Covenant on Civil and Political Rights provides that: "In the determination of any criminal charge against him, everyone shall be entitled… 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". Under Article 6.3(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, everyone charged with a criminal offence has the right to "Defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". See also the Universal Declaration on Human Rights and Convention on International Access to Justice.

At the current time, almost all developed legal systems provide legal aid in serious penal cases. This can be on the basis of mandatory defence in certain kinds of serious cases, or due to financial need.

In some countries, legal aid in penal cases is a constitutional mandate. Examples include the Netherlands (Article 18), Switzerland (Article 29), Italy (Article 24), the United States (Sixth Amendment), South Africa (Article 35), Egypt (Article 67), and Palestine (Article 14 of the Basic Law). In other countries, the Code of Criminal Procedure requires counsel. Sometimes the courts require protection. In 1963, the U. S. Supreme Court held that the Sixth Amendment requires defense counsel in all penal cases (Gideon v Wainwright).

In penal cases, the best practice is to require/provide representation any time there is a **possibility** of incarceration. This standard is established by the European Court of Human Rights, and implemented by 47 countries in the Council of Europe. Any time defendants face possible incarceration, for **any** period of time, the stakes are very high, and warrant protections which only a lawyer can provide. Unfortunately, many countries impose limitations on the right to counsel in penal cases, relating to the length of the potential sentence, the category of crime alleged, and the status of the defendant.



It is also best practice to extend legal aid in penal cases to the pre-trial stage. During initial interrogation and pre-trial detention, defendants are most vulnerable, and most in need of urgent legal counsel. Indeed, it may be too late for effective representation at trial, if a defendant has been prejudiced during interrogation and investigation. For this reason, many countries establish practical mechanisms for promptly securing counsel. They include hotlines for defendants to use, notices/posters in police stations which advise defendants of their rights and how to secure them, and on-call lawyers available for emergencies (as in the Netherlands). The personnel involved (such as police, prosecutors, investigators, and lawyers) should receive training and informational materials. See Article 31(6) of the Constitution of Lithuania.

Most European countries extend legal aid to the appellate stage of penal proceedings, provided that the financial circumstances of the party have not changed (as in Austria). This is especially important in jurisdictions where the decisions of higher courts have precedential value, and affect the rights of the entire populace. Sometimes eligibility is considered *de novo* by the appellate court, on the basis of circumstances at the time of appeal. In certain countries, the appellate courts are expected to rely on the record from the trial court (where the defendant already had legal representation).

Legal Aid in civil and administrative cases is not absolutely required under international standards. Nonetheless, there is a trend towards recognising obligations under certain circumstances (for example, see the ECHR decision in Airey v Ireland). Likewise, there is no obligation to support Alternative Dispute Resolution (arbitration and mediation), which is usually handled privately. However, many countries provide legal aid in civil and administrative cases, because this ensures access to justice, and promotes social justice. Deprived of legal services in civil and administrative cases, many people are likely to end up without any remedy for violations of important legal rights.

While constitutional requirements exist, mandates are most commonly found in the Code of Civil Procedure or Code of Administrative Procedure. France passed the first law on this subject in 1851, and Germany followed in 1877. In 1937, the Supreme Court of Switzerland found that the constitutional requirement of equality before the law mandates counsel for indigent defendants in some civil cases, when knowledge of law is necessary. Legal aid in civil and administrative cases is sometimes covered by the statutes of professional bodies like Bar Associations, or their rules of professional conduct. These services are often provided *pro bono publico* (without remuneration).

Some countries are considered more generous with funding for legal aid, calculated per capita. They include: the United Kingdom, Norway, the Netherlands, Sweden, Ireland, and Finland. Central and East European countries rank lower. Interestingly, the countries which spend the most on legal aid often spend the largest percentage on civil cases compared to penal cases.

It is important to consider that legal aid in civil and administrative cases (especially information and advice) helps solve practical problems in a cost-efficient manner, and serves important societal goals.

There are sound reasons for focusing limited legal aid funding on penal cases, where incarceration is at issue. But there are relatively inexpensive mechanisms for providing extremely valuable services in civil and administrative cases. For example, hotlines and help desks in local courts can be staffed by lawyers who donate a few hours of their time per month.

It is also possible to prioritise (or restrict) eligibility in civil cases. This can be done in four ways:

- Prioritise Subjects. Preferential treatment can be given to civil cases which deal with certain high priority subjects. Depending on the local context, this could include property cases, asylum cases, family matters, etc.
- Exclude Certain Subjects. Certain types of cases can be excluded (made ineligible) for civil legal aid. For example, the Access to Justice Act in the United Kingdom does not cover cases involving wills, boundary disputes, defamation, partnerships, etc.
- Establish Special Status. Certain categories of people (such as pensioners, disabled persons, or veterans) could have preferential access to legal services (see Category IV, Question 23).
- Support Public Interest Litigation. Highly skilled lawyers can strategically select novel or potentially ground-breaking cases to set legal precedents and change jurisprudence. The goal is not simply to win a particular case, but to change the law, and thereby promote social welfare and expand human rights.

Finally, a merit test can be used to place limits on civil litigation. In fact, most countries require civil cases to be meritorious in order to qualify. But standards vary. Some countries require that the case be "warranted", while others require that it "not be unwarranted". Switzerland even addresses this issue in Article 29 of its Constitution, which requires that the case "not seem to lack any merit". Naturally, cases brought for improper purposes (like harassment) should be excluded. On the other hand, it is preferable not to look too deeply into the merits of cases at a preliminary stage. If non-court institutions make decisions regarding the merits of cases, this intrudes upon the judicial function. And in countries where the court makes this decision, it can create an appearance of lack of impartiality.

Once decisions are made concerning the types of cases which will be covered under the legal aid system, it is appropriate to consider the categories of legal services which will be provided.

Legal aid services can be divided into two categories:

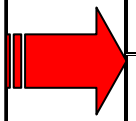
- Primary services. This includes Legal Information and Legal Advice. It is limited to communications between the lawyer and the individual.
- Secondary services. This includes Legal Assistance and Legal Representation. It involves representation of the client's interests before third parties.

Although some countries limit secondary services to litigation, it is acceptable to base the distinction on whether the lawyer works exclusively with the client, or whether outside parties are involved. In practical terms, the lawyer must open a formal file when providing any secondary services.

Primary services which go beyond Legal Information to include counselling based on specific circumstances become Legal Advice. When Legal Advice is provided, an Attorney Client relationship is established. Legal Advice becomes Legal Assistance when non-court institutions are involved. Legal Assistance becomes Legal Representation when there is litigation and representation in court.

The terminology for different categories of legal services is not always clear and consistent. The typology presented below identifies and describes different major categories:

TYPOLOGY OF LEGAL SERVICES

		Category	Type of Service		Obligations Of Lawyer	Institutions Involved	Description of Legal Services
LEGAL SERVICES		**Primary**	**Legal Information**		No Attorney-Client Relationship	None	Provision of standard and generic legal information which is **not** related to the specific circumstances or legal issues faced by the individual. This includes a) informational materials (statutes, regulations, articles, publications), b) forms or documents for administrative use, and c) referrals to other sources of information (hotlines, Websites, government offices, CSOs).
			Legal Advice		Attorney-Client Relationship	None	Provision of counselling, advice, or recommendations relating to the client's specific circumstances and legal issues. This involves applying legal knowledge to the resolution of actual legal problems. Legal advice can be provided in person, by phone, or via electronic means.
		Secondary	**Legal Assistance**		Attorney-Client Relationship and Repre-Sentation	Non-Court Institutions (Non-Litigation)	Representation that protects and advances client interests without or before formal litigation. This includes drafting documents that do not involve the courts (such as contracts or wills), handling commercial transactions, contacting administrative or governmental institutions, negotiating, alternative dispute resolution mechanisms, or other non-court action (such as phone calls, emails, letters, or meetings) involving advocacy for the client.
			Legal Repre-Sentation (Litiga-tion)	Penal	Attorney-Client Relationship Repre-Sentation Court Registration	Courts	Litigation and legal work reserved by law to licensed attorneys (or under limited circumstances to supervised paralegals). In penal cases, this includes all aspects of representation (pre-trial interrogation, drafting and filing of legal documents, trial, and appellate matters). In civil cases, this includes trial and appellate work. In administrative cases, this also includes work with governmental agencies and tribunals.
				Civil		Courts	
				Admin		Courts and/ or Admin Institutions	

Legal Information can be provided by trained non-lawyers. All other categories of legal services should ideally be provided exclusively by fully qualified lawyers, especially in criminal cases. Some European countries allow participation (not legal representation) of highly qualified non-lawyers. This is mostly in lower courts and certain types of civil cases where the State does not have a significant interest. In the United States, most of Europe, and many common law countries, only licensed lawyers can "practice law". The best practice is to restrict Legal Advice, Legal Assistance, and especially Legal Representation to fully qualified lawyers. Particularly in developing countries.

It is very important to pay attention to whether an attorney-client relationship is formed. This is not the case when general legal information is provided. However, when a lawyer gives advice which takes account of the specific circumstances of a natural or legal person, an attorney-client relationship is formed. This obliges the lawyer to comply with the rules of professional conduct (see Category VI, Questions 38–41 in the chart on Page 3). It also establishes obligations and duties relating to competence, confidentiality, conflicts of interest, etc. Any violation of the rules exposes the lawyer to discipline. Lawyers need to be very careful, because even casual advice related to specific legal problems can create a formal relationship governed by law and ethical obligations.

There are three basic models for delivering legal services to clients who lack sufficient means to cover the costs:

1. Private Lawyers acting in an individual and *ex officio* capacity
2. Contracted Lawyers working through designated institutions providing legal services
3. Employed Lawyers working directly or indirectly for the State or Legal Aid authority

Each of the three models is discussed in turn.

1. Private Lawyers

Under this model, legal services are provided *ex officio* by individual lawyers working in their private capacity. It is sometimes called "Judicare". In the overwhelming majority of countries, the lawyer is selected and appointed for the client. This service is performed by either 1) the court, 2) the Bar Association, 3) a separate institution (such as a Legal Aid Authority), or 4) a combination of institutions (such as the court and Bar Association). Sometimes selection is made by whichever institution the client approaches first. In a few countries, such as the Netherlands and Belgium, clients can participate in the selection of counsel. But this is an exception.

The Bar Association is usually charged with preparing a list of qualified lawyers, indicating their areas of expertise and availability. Courts and law enforcement officers may be given copies of this list and authority to use it. Otherwise, they contact the Bar Association, which makes the nomination. The best practice is to rotate through the list in order, to ensure transparency and prevent undue influence. Computer programmes can be used to perform this function. The designating authority sometimes helps make the selection, based on personal knowledge regarding the skills, experience, and interests of the lawyer. This is more likely to occur at the municipal level, or at district courts. In such cases, care must be taken to avoid any appearance of impropriety.

Private Lawyers are paid on a per-case basis, according to set parameters. Payment depends upon the type of case, number of court appearances required, and overall amount of effort which is likely.

This does not correspond exactly to the amount of time actually spent by the lawyer. Payment is usually made by the State, through the courts or Legal Aid Authority. Payment may also be made by the Bar Association (Belgium). In Lebanon, *ex officio* payments are authorised by the Legal Aid Committee of the Bar Association. In order to control costs, some countries allocate a fixed amount, and establish mechanisms for dividing it amongst qualifying lawyers on a percentage basis, reflecting the amount of work each has performed.

The *ex officio* model is utilised throughout Europe and in many Common Law countries. However, there are usually additional/supplemental mechanisms for providing legal aid services.

The following chart summarises the advantages and disadvantages of using Private Lawyers:

LEGAL SERVICES FROM PRIVATE LAWYERS	
ADVANTAGES	**DISADVANTAGES**
• Certainty regarding costs of each legal aid case (no overhead) • Limited administrative machinery • Straightforward appointment procedures • Large pool of available lawyers • Rapid appointment when required • Private Lawyers can more easily be deployed in rural areas • Private Lawyers participate in legal aid • Clients can have some choice of lawyer • Payment can be made directly to lawyers	• Often more expensive than other delivery systems • Potential for abuse of appointment procedures • Private Lawyers may not take fixed fee cases seriously, preferring to focus on regular work • Private Lawyers may reject certain kinds of cases • Possible misplaced allegiance to funding source • Most attractive for inexperienced/young lawyers • It is difficult to supervise Private Lawyers, and to exercise quality control • Centralised record keeping must be set up • There is no standardised training system

2. <u>Contracted Lawyers</u>

Under this model, the body responsible for organising and funding legal aid contracts directly with separate institutions, which in turn provide legal services to clients. The service provider can be a law firm, a Civil Society Organisation, or even the Bar Association. The contract usually provides for the delivery of a set quantity of legal services, or the handling of a certain number of cases, during a specified time-period, in return for a set fee. The contract can cover:

a) Certain types of cases
b) Certain categories of client
c) Cases in a specified geographical area

<u>The contract approach is optimal for securing special expertise</u>. It is possible to sign agreements with organisations which have extensive experience handling particular types of cases and legal issues. In addition, contractors can provide geographical coverage in areas which are difficult to reach. In a certain sense, international organisations and donors are using Contracted Lawyers (with special areas of expertise) when they award funding to CSOs.

Contracts cover a set period of time, usually no longer than two or three years. After the contract expires, a new tender and bidding process has to be launched. This necessitates procedures for securing the continuity of legal services in instances where a contract is not renewed, and a new organisation is selected. It is best practice to include quality control provisions in the contract. In certain jurisdictions, such as England and Scotland, prospective legal aid providers can register in advance and pre-qualify to participate in limited tenders. To do so, they must prove their qualifications, including management and quality control procedures.

Contracted Lawyers are utilised in many individual American States, and on a provisional basis in the United Kingdom. The current trend is to allow Legal Aid Authorities to contract for services. However, in some countries which follow the continental legal system, lawyers are ethically obliged to maintain an independent status, and thus cannot enter into an employment relationship with a contractor. This can complicate utilisation of the Contracted Lawyer model, and also the Employed Lawyer model described below.

The following chart summarises the advantages and disadvantages of utilising Contracted Lawyers:

LEGAL SERVICES FROM CONTRACTED LAWYERS	
ADVANTAGES	**DISADVANTAGES**
• Costs are certain and planned in advance • Less expensive than Private Lawyers • Overhead is covered in contract costs • Contractor is responsible for administration • Lawyers have special skills/experience for handling specific kinds of cases • Lawyers develop solid experience representing legal aid clients • Lawyers are perceived to be independent • Conflicts of interest are less likely • Extremely useful for placing duty counsel at specific courts or locations	• Limited control over service delivery, quality • Need to conduct tenders/procurement for both new contracts and renewals • Contracting procedures can be cumbersome • Dislocation can result from changes in providers • Accountability is diluted amongst providers • Potential for inconsistency in different locations • May be best suited for specific kinds of cases (specialised institutions handling specific cases) • Chance of excessive allegiance to funder • No centralised record keeping • No standardised training system

3. <u>Employed Lawyers (Staff Attorneys)</u>

Under this model, legal services are provided by full-time lawyers ("In-House Counsel") working for a governmental, semi-independent, or non-profit institution established for this specific purpose. Funding is provided directly by the State or a Legal Aid Authority. In South Africa this is the Legal Aid Board, while in Lithuania the Public Attorney Office answers to the Ministry of Justice. The standard format is a Public Defender in penal cases, and a Legal Aid Office in civil cases (such as in the United Kingdom and Poland). In the United States, Public Defenders serve indigent defendants. One of the oldest and largest organisations is the New York Legal Aid Society, founded in 1876. It has 850 lawyers and 600 staff members (social workers, paralegals, and investigators). With federal funding for penal cases and private funding for civil cases, it serves 300,000 clients annually.

Because they spend all of their time providing legal aid, Employed Lawyers can handle a larger volume of cases, and at a lower average cost. In addition, they develop expertise handling specific

types of cases, including those most commonly faced by legal aid clients. Finally, Employed Lawyers tend to take a more holistic approach to serving legal aid clients, who often have a combination of legal and socio-economic problems. In other words, Employed Lawyers develop skills and information which enable them to go beyond the provision of legal services (when this is feasible and warranted). This combination of skills and experience makes them good advocates, able to handle public interest litigation. However, care must be taken to prevent Employed Lawyers from being given excessive case loads, which disperse their time and energy.

There are many variations of the Employed Lawyers model. For example, the Office of the Public Defender in Israel contracts with private practitioners. In New South Wales, Australia the Public Defender handles public interest litigation. In San Francisco, the Public Defender is elected.

The following chart summarises the advantages and disadvantages of Employed Lawyers.

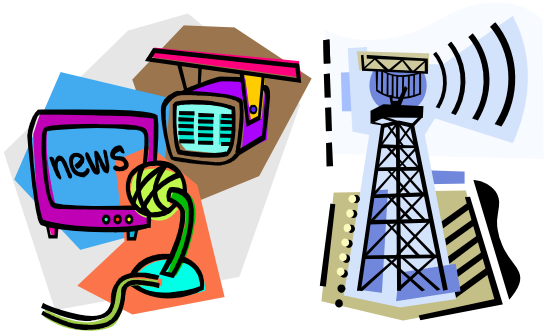
LEGAL SERVICES FROM EMPLOYED LAWYERS	
ADVANTAGES	**DISADVANTAGES**
• Less expensive per case than other models • Facilitates budgeting and financial planning • Lawyers have special skills and experience with common cases and legal aid clients • Lawyers can help with non-legal problems • Lawyers are more able to engage in public interest litigation, and awareness raising • Lawyers can cooperate, share expertise • Legal information can be rapidly disseminated to and shared between lawyers • Legal training is easily organised/delivered • Direct accountability for quality of services • Centralised oversight, quality control, information management, and record keeping • Well suited to countries with plea-bargaining	• Public Defender institutions can become bureaucratic • Requires significant overhead for premises, equipment, operating costs, salaries • Very high start-up costs, initial investment • Lawyers may end up with excessive caseloads, diminishing the quality of services • Clients may view lawyers as government functionaries, lacking independence • Lawyers may lack incentives to advance • Work in public defence may lack esteem • Rural outreach expensive and complicated • Outside expertise has to be incorporated • Most attractive to young and inexperienced lawyers

It is appropriate and common practice to combine different models, and develop variations upon them. Indeed, few countries rely upon a single delivery mechanism. In South Africa, for example, the Legal Aid Board is reported to have used Private Lawyers, Employed Lawyers, Contracted Lawyers working in specialised and rural law firms, state-funded law clinics, privately funded law clinics, and state-funded justice centres (one-stop legal aid providers). Most States in the United States use different combinations of each of the three models.

The choice of model (or rather combination of models) should be based upon what is authorised by the legal framework, what works best for the institutions involved, what is acceptable for the legal profession, and what is feasible on the ground. For this reason, no two countries have the same delivery system. In addition, legal aid systems are subject to frequent modification. This can generally be considered a positive feature, since it allows for flexible responses to changing circumstances, and innovations which can achieve better results. However, repeated changes of a fundamental nature can undermine any legal aid system.

The final subject included in Category III, that is to say Question 19, involves **public awareness**.

Every institution involved in the legal aid system has an obligation to provide information in a transparent manner, and educate the public concerning rights and remedies. Access to justice is not secured by the existence of a legal aid system, but rather by its utilisation. *Management of the system and delivery mechanisms should take full account of this fact, and systematically engage in focused outreach which is carefully designed for specific target groups.*



It is important to understand that the parties who most require legal aid and qualify to receive it are often marginalised, underprivileged, and detached from mainstream sources of information. This makes it necessary to adopt a multi-faceted, systematic, and diligent approach to information dissemination, in order to bring as many potential legal aid beneficiaries as possible into the system.

D. Coverage and Eligibility

Category IV (Questions 20-26) of the chart on Page 3 concerns coverage and eligibility for legal aid. The main issues are: a) who is eligible for legal aid, b) which parties make decisions regarding eligibility, and c) how decisions are verified and documented.

Eligibility is a matter of great concern to potential legal aid clients. Indeed, the two questions which most interest them are:

a) Do I qualify?
b) What kinds of services am I entitled to?

Perhaps the most authoritative international standard with respect to penal cases is contained in Article 6 of the European Convention for the Protection of Human Rights, which has been interpreted in numerous cases before the European Court of Human Rights in Strasbourg. Under this standard, mandatory for 47 Member States of the Council of Europe and generally followed in several others, there is a two-pronged test:

1. Financial Need. The defendant must lack sufficient means to afford counsel. Generally speaking, it is up to the defendant to prove that this is the case, in accordance with applicable standards and criteria.
2. Interest of Justice. The defendant must be entitled to counsel in order to promote the interests of justice. The factors to be considered include: what is at stake (potential imprisonment), the legal and factual complexity of the case, the public importance of the issues being litigated, and the ability/capacity of the defendant to understand the case and protect his or her own interests.

Financial need in both penal and civil cases is usually based on a means test. The most salient factors are income and assets. Criteria are assessed on a personal basis – only in special cases are family circumstances considered relevant. The majority approach is to compare income to a fixed standard, related to average salary (Hungary, Israel). But thresholds differ greatly. Greece sets the limit at 33%, whereas in Malta income can even exceed the average. In the United States, the federal poverty level serves as a benchmark. The minority approach is to define requirements in

general terms, and authorise the Legal Aid Authority to devise and apply specific criteria. Means tests should not be applied in penal cases having mandatory defence.

Means tests do not have to be structured on an "all or nothing" basis. It is acceptable to create sliding scales with different co-payments. This recognises the fact that clients might be partially able to pay for legal aid. Sliding scales for partial/percentage payments are found in Finland and the Netherlands. Co-payments are frequently reduced when clients request additional services.

Financial need is proven by appropriate documents. Tax declarations serve this purpose in the United States and United Kingdom. In Finland, Greece, and the Netherlands documents can be obtained from municipal authorities. Applications for legal aid often include questions which establish financial eligibility, for review by the authority funding the system. Approvals should be granted in writing. In some countries, such as Ireland, they take the form of a certificate, which is presented by the client to legal counsel in return for services.

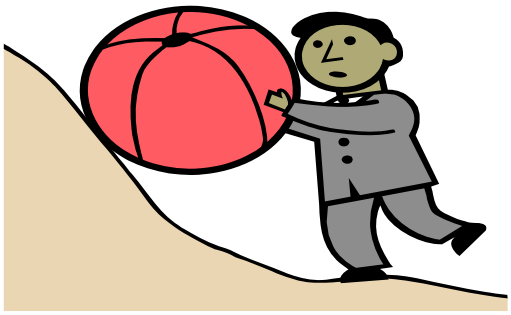
In addition to financial means, it is appropriate to look at the type of case and the category of client. In Norway and Germany, priority is given to penal cases with mandatory representation. In South Africa and Finland, priority is given to civil cases involving divorce, alimony, employment disputes, and pensions. In Ireland, priority is given to civil cases involving the welfare of minors. In several countries priority is given to certain categories of client, such as minors, disabled persons, pensioners, war veterans, and asylum seekers. In Norway, there is special support for victims of domestic violence, and in Russia for people with handicaps.

In some countries, such as Germany, Sweden, and the United States, it is possible to obtain insurance for legal services. This is generally through corporations or private organisations, which provide a benefit for their employees or members. In Germany, the failure to purchase such insurance when available may result in subsequent disqualification for legal aid.

Denials of eligibility are a constraint on access to justice. In fact, they can be the functional equivalent of a final decision on the merits of a case. For this reason, it is best practice to allow for appeals. The first stage of review is normally within the institution which makes decisions regarding eligibility. Final decisions by this institution can often be appealed to the courts.

In the final analysis, each country must determine its own qualification procedures and eligibility criteria. Decisions should be taken by experts from institutions which finance the system and deliver services. They should be based upon actual conditions, and experience in administering the legal aid system. Since circumstances are always changing, it is best to have the means to review and adjust qualification procedures and eligibility criteria. Matters settled by law are not easily adjusted. For this reason, eligibility criteria are often based on flexible/adjustable standards, like the average wage, minimum wage, or poverty level, rather than a fixed amount.

Eligibility procedures and criteria for legal aid determine whether or not people can exercise their right of access to justice. While economic conditions and financial resources must be considered, more is at stake. If the procedures are too complicated, and eligibility criteria are too stringent, legal aid cannot serve its objective of protecting human rights. *Qualification should not be an uphill struggle which in and of itself compromises human rights.*



E. Funding and Sustainability

Category V (Questions 27-33) of the chart on Page 3 covers financing the legal aid system. The main issues are: a) the amount and sources of funding, b) how payments are effectuated and accounted for, c) how much lawyers are paid, d) whether court costs and litigation costs are covered, and e) whether and under which conditions clients should reimburse the system.

In many countries with developed legal aid systems, the State provides funding (Germany, United Kingdom). Annual allocations are set and authorised through regular budgetary process. This involves the Ministry of Finance or Ministry of Justice. Disbursements can be made through a ministry, the court system, or a Legal Aid Authority. Turkey funds legal aid through the budget of the Ministry of Justice. In Croatia, Montenegro, and Cyprus, the courts budget and disburse funds. In Belgium, the Bar Association pays lawyers from public funds.

Bar Associations are the second major source of funding for legal aid. In Lebanon, for example, if the courts request that the Bar appoint defence counsel, reimbursements are made by its Legal Aid Committee. Bar Associations usually fund legal aid services through annual dues.

Bar Associations also organise *pro bono publico* legal services. This often involves finding a member who is willing to volunteer to handle a particular case (Morocco and Jordan). Under Article 44 of the Practicing Lawyers Act No. 3 of 1999, the Chairman of the Bar Association in Palestine can require lawyers to provide free professional services to the Bar once per year. In addition to lecturing and publishing, this includes "defending a person who was proven to the Chairman of the Bar to be poor and unable to pay remuneration to lawyers".

However, it is important to understand that an integrated legal aid system must include remuneration for lawyers. *Pro bono publico* legal services, while important and valuable, cannot really be considered a legal aid "system".

Civil society is the third major source of funding. This is often with support from international organisations and donors in developing countries, and private sponsors in developed countries. CSOs provide specialised legal services, and often focus expertise for specific categories of clients (such as refugees and minors) or cases (such as domestic violence). In countries where the State does not finance legal aid, civil society often steps in. In some countries, such as Jordan, semi-public institutions such as the Ombudsmen and National Centre for Human Rights also play an important role.

There are many creative mechanisms for funding legal aid. Potential funding sources include:

- Attorney registration fees and Bar membership fees
- Court filing fees
- Attorney fee awards in judgments
- Support from international organisations and donors
- Private donations, grants, and planned giving (from corporations, foundations, associations, individuals)
- Endowments, capital campaigns, and in-kind donations
- Fundraising drives, charitable events and auctions
- Interest earned on client funds held in trust by lawyers

In the United States, individual States are trying innovative mechanisms to fund legal aid. In Alabama and Arkansas, a small fee is charged in civil cases. In Kentucky, supplemental fines are imposed for drunk driving. In Tennessee, there is a surcharge on speeding tickets. In Louisiana and Ohio, there are extra assessments on criminal convictions. In Montana, part of the motor vehicle registration fee goes to legal aid. At least half of the States use such funding mechanisms, and they raise tens of millions of Dollars annually.

Another possibility is a nominal stamp duty for filing lawsuits. It can be collected by the courts or the Bar Association, and spent directly or added to a legal aid fund. This can generate enough income to partially fund a legal aid system. To enable the courts to collect this duty, it may be necessary to amend laws covering court fees.

Legal aid funds can serve as a practical and convenient mechanism for financing the delivery of legal aid and making payments to providers. They centralise record-keeping functions, facilitate auditing, and promote accountability. And they can be authorised to accept contributions from different sources, and thereby become a convenient mechanism for processing financial support. Legal Aid Funds can be set up under the authority of different governmental institutions, or be semi-independently managed. Some countries place what amounts to a legal aid fund under the auspices of a Legal Aid Authority, thereby combining the functions.

The remuneration of Private Lawyers is one of the most difficult and contentious aspects of every legal aid system. Generally speaking, the level of remuneration should be:

a) Sufficient to provide a reasonable incentive for lawyers to take legal aid cases, and
b) Not so excessive as to distort the market for legal services or place unreasonable financial burdens on the system

There is consensus that the level of fees in legal aid cases should be below that which is obtained from regular paying clients. However, the exact nature of this differential varies.

Jurisdictions which set minimum and/or maximum fees for lawyers sometimes use them as a basis for determining remuneration in legal aid cases. In Poland, for example, the maximum payment is set at 150% of the minimum fee for handling that category of case. In jurisdictions where lawyers set their own fees, the disparity between regular cases and legal aid cases is usually greater. In some countries, such as Ireland, the losing party customarily pays costs, which creates an incentive for legal aid lawyers if they manage to win the case.

Fees can be established by law, by the courts, or by a Legal Aid Authority. In Germany, where legal aid is generally administered by the Länder, fees in legal aid cases are usually regulated and set by law, and overseen by the courts. In this case, the criteria need to be clear and consistent. The authority which appoints counsel often has an important say. In Croatia, for example, rates can depend upon whether the courts or Bar Association makes the appointment.

In order to transparently fix remuneration and allocate a set amount of funding equitably amongst lawyers providing legal aid, some countries use a point system. In France and Belgium, for example, different activities in legal aid cases are assigned a point value, and the total number of points per lawyer is recorded on an annual basis. The value of each point is determined by dividing the total budget for legal aid by the total number of points. Then, each lawyer is paid according to the exact amount of points earned (work performed). This system is equitable, transparent, and

reasonably predictable, while respecting a fixed budget. However, the amount and rate of remuneration (value of each point) automatically decrease if lawyers do more work.

Waiver or reduction of **court costs** is a common and effective mechanism for supporting legal aid clients. While this reduces court revenues, it is not an expenditure from the court budget. Sometimes courts have discretion in this regard, depending on the circumstances of the legal aid client (Italy). As with qualification criteria for legal services, special support may be provided for certain kinds of cases, or certain categories of client. On the other hand, some countries treat court costs as a separate issue, unaffected by prior qualification for subsidised legal services.

Litigation expenses pose a major challenge to the legal aid system. Significant amounts can be spent on expert reports, laboratory tests, the analysis of evidence, etc. Many cases are won or lost on the basis of such proofs. Criminal defense, in particular, often depends upon challenging the evidence being presented by the prosecution. Legal aid recipients can be seriously prejudiced by inability to fully develop their cases. Some countries do cover these costs, at least when they are within the control of the court (such as court-appointed experts). However, there is no obligation to do so. The only exception to this rule concerns translation costs (for parties who do not speak the national/court language) and services for disabled people, minors, or the infirm.

International standards for the right to effective legal representation do not preclude the reimbursement of costs by legal aid clients. Once legal services have been provided and the case is closed, reimbursement is considered to be a financial matter, which does not limit human rights. However, in reality, the threat of reimbursement can have a deterrent effect on clients.

Reimbursement of legal aid costs may be contingent upon or affected by whether the defendant is found guilty, or the results in a civil case. If the financial conditions of the client improve, further/additional funding may be discontinued, and reimbursement may be required. Some countries require reimbursement if the client obtains an award. Reimbursement is always required if it is determined that the client engaged in fraud, for example by misrepresenting information about financial status in order to establish eligibility.

To handle difficult financial issues, it is best to use *consultative mechanisms* to reach provisional decisions based on funding levels, the nature of legal aid services being provided, the working practices of lawyers, and the requirements of legal aid clients. Flexibility should be built into the system, particularly in the early stages, to allow for improvements as experience and empirical data are generated.

F. Quality Control

Category VI (Questions 34-43) of the chart on Page 3 covers quality control. The main issues are: a) which institutions are responsible for monitoring and quality control, b) what policies and procedures are best, c) what records should be kept, d) what ethical requirements and sanctions apply to lawyers, and e) how should lawyers maintain/raise their professional qualifications.

Monitoring and quality control are important for ensuring that the legal aid system provides good services to clients. There is no point in securing services for legal aid clients if they are sub-standard, or significantly inferior to what paying clients receive. This would undermine the entire legal system, and perpetuate the violations of human rights which legal aid is supposed to address.

However, there is a widespread *perception* that legal aid services are by their nature inferior. Legal aid clients often assume that lawyers devote more time and energy to regular clients (who pay more money). In some countries, people actually prefer to pay their own money for legal services, even if it causes financial hardship, rather than entrust important matters to a legal aid lawyer. Simply stated, *legal aid has an "image problem" which needs to be overcome*.

This makes sound monitoring, evaluation, and quality control procedures absolutely crucial. And they need to be built into the legal aid system. The following principles apply:

- Quality control must be systematic, comprehensive, efficient, fair, and transparent
- Authorities which finance the legal aid system and/or designate lawyers should have primary responsibility for overseeing their work, and ensuring accountability
- There cannot be any "closed shops"; all institutions have to operate openly
- Comprehensive documentation should be collected, processed, stored, and shared
- The results of oversight should be public (with confidential information excised)
- Ethical rules for judges, prosecutors, and lawyers should be clear, known, and followed
- Judges, prosecutors, and lawyers should constantly raise their professional qualifications
- There should be serious and public sanctions for violating rules of professional conduct

There are major advantages when oversight is focused in a Legal Aid Authority (see Section "B" above). It is easier to establish systematic procedures when Contracted Lawyers and Employed Lawyers provide legal services (see Section "C" above). The Bar Association should always maintain its own oversight mechanisms, looking at performance and ethical behaviour. This is particularly important when Private Lawyers provide legal services. Oversight is much more problematic when service delivery is decentralised, for example through CSOs.

Legal aid lawyers need to provide documentation concerning their work to the supervising institution. In Belgium, for example, procedural documents and a report on the case are submitted electronically to the Legal Aid Bureau under the auspices of the Bar Association. They are maintained in an electronic file on each lawyer. Few countries solicit feedback directly from legal aid clients, but this is a useful way to supplement official information.

Of course, reporting and record keeping must be tailored to the requirements of institutions managing the system, and the nature of legal services provided. They also should be practical, and designed to deter misconduct. *Reporting and record keeping procedures should not be so burdensome or onerous that they create unnecessary problems for legal aid lawyers, and discourage them from participating in the system*.

Bar Associations almost always take charge of establishing and enforcing ethical obligations and rules of professional conduct for lawyers. While deontological provisions may be found in various laws, full treatment of the subject can only be achieved through a Code of Ethics. To develop and administer a Code of Ethics, Bar Associations require a Council or Committee for this purpose.

Ethical rules for handling legal aid cases are the same as those for any other kind of case. Ethical obligations do not depend on the lawyer's source of remuneration (whether it be the State, a Legal Aid Authority, the Bar Association, or the client). Professional duties like zealous representation, confidentiality, and avoiding conflicts of interest, are *inherent* to the lawyer-client relationship. Responsible lawyers handle all cases properly, regardless of who the client is or who pays the bills.

It is best practice to include an obligation to handle legal aid cases in the Code of Ethics. There can always be alternative means for meeting this requirement. For example, instead of taking a legal aid case, lawyers could contribute to a legal aid fund, or volunteer to spend a few hours per month providing primary legal services at a legal aid bureau.

The legal aid system can be an important part of the initial professional formation of young lawyers. It is often considered problematic that legal aid is provided by younger or less experienced lawyers. However, with appropriate supervision, young legal aid lawyers can develop important skills while enhancing access to justice for their clients.

The Bar Association can also promote access to justice through continuing legal education. In many jurisdictions, there is an annual educational requirement for maintaining a license to practice law. Many States in the United States require up to two full days of coursework annually. Legal aid issues, focused on effective client representation and fair trial standards, should be included.

Judges and prosecutors have a crucial role to play in the legal aid system. They can ensure the rights of defendants and litigants, and correct problems which arise. By rejecting penal cases where the prosecution has not met fair trial standards, judges can establish a serious disincentive for future violations. The training institutions for judges and prosecutors should cover these issues in courses on ethics, professional responsibility, and case handling.

Finally, it is important to ensure that the results of monitoring and quality control are visible and available. Lawyers who provide sub-standard services should not be protected by a Legal Aid Authority or the Disciplinary/ Grievance Committee of the Bar Association. Conversely, there should be mechanisms for acknowledging good performance. *Transparency and recognition of excellence are important for ensuring public confidence, without which a legal aid system cannot function optimally*.

IV. Conclusion

It is necessary to take a rational and systematic approach to the design and parameters of legal aid systems. All six of the key categories of issues must be addressed, including a) the legal framework, b) the institutional framework and management, c) implementation and the delivery of legal services, d) coverage and eligibility, e) funding and sustainability, and f) quality control. These issues need to be addressed in a focused, consultative, and pragmatic manner, taking into consideration the key objectives and the obstacles that must be overcome. This is the only way to arrive at consistent and sound arrangements which ensure access to justice, meet the legal needs of the populace, and protect human rights.

Unfortunately, legal aid systems often develop in an *ad hoc* manner over time. Their characteristics can depend excessively on historical antecedents, parochial interests, political considerations, and short-term conditions. This limits their functionality, and undermines the entire legal system. However, by utilising the framework and methodology set forth above, and following the best practices which have been identified, it is possible to overcome these challenges.

END