

The Legal Aid Sector in Sri Lanka: Searching for Sustainable Solutions

A MAPPING OF LEGAL AID SERVICES IN SRI LANKA

POLICY BRIEF



The Asia Foundation



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

THE LEGAL AID SECTOR IN SRI LANKA: SEARCHING FOR SUSTAINABLE SOLUTIONS

A Mapping of Legal Aid Services in Sri Lanka

POLICY BRIEF



UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

© Copyright 2009

The Asia Foundation
UNDP Equal Access to Justice Project
UNHCR
Ministry of Constitutional Affairs and National Integration
Ministry of Justice and Law Reform

First Printing

For reproductions of this publication please contact:



The Asia Foundation

3/1A, Rajakeeya Mawatha
Colombo 7, Sri Lanka
Phone: +94 11 2698356
Fax: +94 11 2698358
www.asiafoundation.org



202-204, Bauddaloka Mawatha
Colombo 7, Sri Lanka
Phone: +94 11 2580691
Fax: +94 11 2581116
www.undp.org

All rights reserved

Printed in Sri Lanka

Contents

1. Key Findings and Recommendations	1
2. The Framework for Legal Aid Provision	4
3. The Legal Aid Commission.....	6
4. Non-Governmental Legal Service Providers	7
5. Perspectives of Legal Aid Beneficiaries and Other Stakeholders	8
6. Comparative Perspectives: Lessons from Different Legal Aid Systems	10
7. Next Steps	11

1. Key Findings and Recommendations

1.1 OBJECTIVES

This document summarizes the report entitled “The Legal Aid Sector in Sri Lanka: Searching for Sustainable Solutions - A Mapping of Legal Aid Services in Sri Lanka,”¹ which was initiated by the United Nations Development Programme (UNDP) Equal Access to Justice Project and the Office of the United Nations High Commissioner for Refugees (UNHCR) and carried out by a team of sector specialists led by The Asia Foundation. The study was prepared under the direction of a Steering Committee led by the Ministry of Constitutional Affairs and the Ministry of Justice. The Steering Committee was comprised of the two ministries UNDP, UNHCR, and The Asia Foundation. The goal of the report is to contribute to the development of a national solution for the systematic provision of legal aid in Sri Lanka by:

- comprehensively mapping the legal aid sector to identify current strengths and weaknesses;
- increasing understanding of different options for more sustainable provision of legal aid, drawing in part on the experience of other countries, and
- making recommendations for a long-term, rationalized system of legal aid service provision.

1.2 METHODOLOGY

The research team interviewed 13 legal aid service providers; analyzed 266 beneficiary questionnaires; conducted 10 focus group discussions with local stakeholders; and conducted six interviews with policy makers and senior members of the judiciary.

1.3 KEY FINDINGS

- There is a solid legislative and institutional basis for legal aid in Sri Lanka. Both the governmental and non-governmental sectors display a commitment to common goals for legal aid service delivery, and service providers operate independently.
- Beneficiaries indicate a high level of overall satisfaction with the legal aid services provided to them.
- However, the policy aspects of legal aid have been neglected. The rapid expansion of legal aid services over the past few years has not been matched with the development of an overarching vision for legal aid in Sri Lanka.
- In practice, the term “legal aid” refers to a broader access to justice agenda that includes legal awareness, legal empowerment, access to a wide range of remedies, and even psycho-social support for clients.
- Economic and socio-cultural factors have a major impact on access to legal aid. These factors include poverty, the conflict, and lack of mobility for such disadvantaged groups as internally displaced persons (IDPs).
- The geographic reach of legal aid is limited. There is no concerted strategy to reach the most remote and vulnerable areas.
- Some legal aid lawyers lack commitment and competence, and there is a perception that legal aid work is a training ground for new and inexperienced lawyers.
- The current focus of legal aid – quite often,

¹ It should be noted that this study covers formal legal aid service provision in Sri Lanka – primarily for civil, criminal, and fundamental rights-related matters – by non-governmental sector service providers and the Legal Aid Commission. The study provides limited information on service provision by the state-supported system of Assigned Counsel in the High Court.

assistance with family matters – does not always reflect the most pressing legal aid needs in society (e.g., such fundamental rights violations as abductions and disappearances, and abuse of power by public officials).

- Service providers' current awareness-raising and sensitization efforts are not sufficient. Many people who attend such programmes are already relatively empowered, with existing links to community organisations and other forms of support. Information is not flowing from key sources – including the police and local-level public officials – to marginalized and vulnerable people.
- There is a strong link in practical terms between alternative dispute resolution (ADR) and legal aid. People look to a variety of forums and legal services to settle disputes. However, community mediation programmes are not explicitly promoted by legal aid service providers as an alternative form of redress.
- There is no consistent, rationally-allocated funding scheme for legal aid. There has been no attempt by the main donors to coordinate the process of grantee selection and funding allocations so that resources achieve optimal impact.
- Quality control mechanisms and monitoring and evaluation of legal aid services are currently inadequate.
- Many countries, including Sri Lanka, have a mixed model of legal aid service delivery, combining the judicare system (hiring of private practitioners) with a system of government-salaried staff. The nature and proportions of the mix vary from country to country. The empirical research and comparative perspectives from other jurisdictions suggest that Sri Lanka should critically examine its current mix, to both enhance the state's regulatory role over judicare and strengthen the state's own capacity to offer legal aid services through existing or new machinery.

1.4 RECOMMENDATIONS

Recommendations for the Government of Sri Lanka (primarily the Ministry of Justice and the Legal Aid Commission), with donor support:

- Formulate a National Legal Aid Policy and Strategy with
 - a clear vision, goals and objectives;
 - participation of all stakeholders; and
 - support from a donor coordination group.
- Create a more supportive legislative environment for legal aid by conducting a comprehensive review of the legislative framework for legal aid in Sri Lanka, resulting in recommendations for law reform and specific recognition in the Constitution of the right to legal aid.
- Increase coordination and collaboration among service providers by
 - establishing an effective networking mechanism for legal aid service providers;
 - introducing Memoranda of Understanding between the Legal Aid Commission and non-governmental organisations (NGOs) to ensure full geographic coverage and access; and
 - devising a donor coordination mechanism, with full stakeholder participation.
- Increase lawyers' professional commitment to legal aid by
 - incorporating legal aid content into law curricula;
 - including legal aid work in Codes of Ethics;
 - ensuring that law students and new lawyers have access to professional development opportunities in the legal aid field, including internships; and
 - developing, in collaboration with the Bar Association of Sri Lanka, ways to promote a culture of volunteerism among lawyers.

- Establish closer formal links between legal aid and ADR by developing procedures to encourage use of ADR, where appropriate, within the context of legal aid service provision.
- Improve quality control and monitoring and evaluation by
 - developing minimum quality standards for legal aid service delivery;
 - establishing rational payment guidelines for legal aid lawyers;
 - conducting a capacity assessment of the Legal Aid Commission; and
 - locating the responsibility for overall monitoring and evaluation of legal aid service provision within an appropriate body.

technical assessment of the full cost of legal aid services and the current amount of funding provided, and a mapping of the donor funding base for legal aid.

Recommendations for legal aid service providers (the Legal Aid Commission and NGOs):

- Increase access to legal aid by
 - reviewing client eligibility criteria;
 - appointing legal aid representatives at the sub-district level; and
 - developing a legal aid services referral system.
- Raise awareness of the importance and availability of legal aid services, in particular among police, the courts, and community-level public officials.

Recommendations for the Government (Ministry of Justice) and donors:

- Provide adequate, consistent, and targeted funding for legal aid. This should be supported by a

2. The Framework for Legal Aid Provision

2.1 INTERNATIONAL FRAMEWORK

International Covenant on Civil and Political Rights (Article 14):

The minimum guarantees to a person in the determination of a criminal charge include the right

- to defend oneself through legal assistance of one's own choosing, and
- to have legal assistance assigned to one in any case where the interests of justice so require and without payment in such case if the person does not have sufficient means to pay for it .

United Nations (UN) Basic Principles on the Role of Lawyers (Principle 3.3):

“Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.

Professional associations of lawyers shall cooperate in the organisation and provision of services, facilities and other resources.”

2.2 NATIONAL FRAMEWORK

Sri Lankan Constitution:

Article 13(3) provides that “Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial in a competent court.”

While this gives a right to representation in criminal cases, it does not specifically articulate a right to legal assistance which must be provided and/or arranged by the state if the person is unable to do so.

International Covenant on Civil and Political Rights (ICCPR) Act:

A right to legal aid in criminal cases at all levels of the court system was recently expressly legislated for in Sri Lanka through the ICCPR Act No. 56 of 2007. Under Section 4 of the Act, a person charged with a criminal offence is entitled “to have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance.” It remains to be seen how this right will be operationalized.

Code of Criminal Procedure:

Section 260 gives

- every person accused before any criminal court the right to be defended by a lawyer, and
- every aggrieved person the right to be represented in court by a lawyer.

This provides a general right to legal representation in the case of criminal charges, but does not specifically articulate a right to free legal assistance. However, Section 195 imposes a duty on a High Court judge to assign a lawyer to an accused person when indicted. Under this practice of “assigned counsel,” the High Court nominates (or assigns) lawyers paid for by the state to represent accused persons who do not have the means to pay for legal assistance.

Section 353 provides that the Court of Appeal may assign a lawyer to any appellant in a criminal case if it appears desirable, in the interests of justice, that the appellant have legal aid and the appellant does not have

sufficient means to obtain aid. This has resulted in a similar practice in the Court of Appeal as in the High Court. However, there is no equivalent provision in the Code of Criminal Procedure, nor practice, in criminal proceedings before the Magistrate's Court.

Legal Aid Act of 1978:

The Act establishes

- the nine-member Legal Aid Commission (LAC), which provides legal aid services;
- the 30-member Legal Aid Advisory Council (including LAC members), which advises the Minister and the LAC on provision of legal aid services; and
- the Legal Aid Fund, which supports LAC's operations around Sri Lanka.

The objectives of the LAC are

- to operate an effective legal aid scheme by providing legal advice and funds to conduct legal and other proceedings for and on behalf of deserving persons;

- to obtain the services of attorneys at law to represent deserving persons; and
- to provide any other assistance that is necessary to provide legal aid to deserving persons.

The LAC is empowered

- to establish regional or district committees or clinics;
- to determine guidelines for the administration of the national Legal Aid Scheme;
- to consult with government and local authorities; educational institutions; community, neighborhood, professional, and social organisations; and other groups having an interest in the provision of legal aid;
- to develop "experimental programmes," law clinics, and special projects; and
- to carry out legal education programmes for members of the legal profession and members of the public with "special needs."

3. The Legal Aid Commission

The Legal Aid Commission provides assistance for

- civil litigation;
- fundamental rights cases; and
- bail applications for those in remand for over a year.

It operates 47 centres across the country, with the services of

- 72 full-time, salaried Staff Attorneys;
- Panel Lawyers: attorneys in private practice who are paid a nominal per-case honorarium by LAC; and
- Senior lawyers, including the President's Counsel, who assist with cases and provide representation on an occasional basis.

LAC clients are selected on the basis of a means test. In 2007 the LAC dealt with 15,547 legal cases and provided advice to 27,311 people. Cases handled included maintenance, divorce, money, land, labor, accident, bail, and appeals. Forty-six percent of the cases related to family issues.

The LAC operates the following Special Desks:

- Human Rights Bureau;
- Anti-Corruption;

- Child Rights;
- Consumer Rights;
- Disabled Persons' Rights;
- Elders' Rights;
- Internally Displaced Persons (IDPs);
- Migrant Workers' Rights;
- Schools Programme;
- Women's Rights; and
- Newspaper Legal Aid Pages.

LAC also runs a prisons project, awareness programmes, legal clinics, and training programmes for the judiciary, the Bar Council, and legal apprentices.

LAC's funding has rapidly increased over the past few years. In 2007/08 it had an overall budget of Rs 67.5 million (US\$ 624,133), comprising

- Rs 50 million (US\$ 462,320) from the Government of Sri Lanka;
- Rs 16 million (US\$ 147,942) from the Asian Development Bank (ADB); and
- Rs 1.5 million (US\$ 13,869) from the International Development Law Organisation (IDLO).

4. Non-Governmental Legal Service Providers

The 12 non-governmental legal service providers surveyed offer assistance for a variety of legal issues:

Issue	Number of service providers addressing the issue
Family issues	11
Fundamental rights	8
Civil cases	8
Land issues	6
Violence against women	6
Child rights violations	5
Criminal cases	4
Legal documents	4
Emergency regulations	3
Bail applications	3
Labour issues	2
Money issues	1

In terms of geographic coverage,

- Colombo receives the most coverage;
- Other well-served districts include Ampara, Batticaloa, Puttalam, Anuradhapura, Badulla, Hambantota, Matara, Trincomalee, and Kurunegala;
- Gampaha and Matale receive lower levels of coverage; and
- There are no service providers operating in Kilinochchi and Mullaitivu.

Several of the organisations surveyed have no fixed selection criteria for recipients of legal services. Some

organisations use a means test, while others use different criteria, such as the type of legal issue (i.e. whether the issue is of national importance), or only target certain priority client groups (e.g., IDPs). The 12 organisations surveyed served 250,505 clients in 2007, and filed 38,373 cases in court.

Most organisations provide all of the following services:

- Counseling;
- Referral to non-legal mechanisms of redress;
- Referral to other legal aid service providers;
- Legal advice; and
- Legal representation in court.

In addition to their commitment to direct legal aid service provision, the organisations surveyed also articulated the following organisational objectives:

- Creating awareness of legal rights and remedies through the provision of structured and unstructured rights education and legal literacy programmes for different target groups;
- Extending legal services through community paralegals;
- Promoting effective dispute resolution through community organizing, grassroots mediation, formal mediation, and other mechanisms outside the formal legal system;
- Achieving broader legal reform through legal research and advocacy; and
- Promoting community development and economic empowerment.

5. Perspectives of Legal Aid Beneficiaries and Other Stakeholders

5.1 BENEFICIARIES

Completed questionnaires were received from 266 people who had used the legal aid system. The survey sample was purposeful in terms of beneficiary category, consisting of estate workers, IDPs, urban poor, and women heads of household and women affected by violence, as well as 30% from other social categories. Random selection resulted in the following composition of beneficiaries:

- 208 females, 58 males;
- Representation from nine Provinces and from 17 Districts;
- 44% Tamil, 43% Sinhalese, and 12% Muslim; and
- 39% Buddhist, 33% Hindu, 16% Christian/Catholic, and 12% Muslim.

The greatest proportion of legal issues faced by these beneficiaries involved family matters. A breakdown of issues by target group follows:

Seventy-two percent of beneficiaries surveyed were satisfied with the legal aid services provided. Among Sinhala-speaking beneficiaries, better educated beneficiaries were more satisfied with services than the less-educated ones, whereas among Tamil-speakers, the less-educated beneficiaries were more satisfied than the better-educated ones. Overall, 86% were satisfied with the language of service provision.

The distance from beneficiaries' homes to the offices of legal aid service providers was a problem, with the majority of beneficiaries having to travel more than five kilometers to reach service providers.

5.2 OTHER STAKEHOLDERS

Focus group discussions were conducted with other stakeholders, including staff of civil society organisations; district, divisional, and community-level public officials; local authority officials; police officers; religious leaders; and school principals and teachers.

Table 2: Legal issues by beneficiary category

Beneficiary category	Legal Issue					
	Civil	Criminal	Family	Fundamental Rights	Land	Total
Estate workers	7	3	30	3	2	45
IDPs	15	1	22	10	3	51
Urban poor	6	2	10	7	7	32
Women head of households	3		26			29
Women victims of violence	2		21			23
No category mentioned	20	3	24	20	10	77
No answer	-	-	-	-	-	9
Grand Total	53	9	133	40	22	266

The following issues were identified by focus group participants as priority issues for legal aid services in their communities (issues listed in declining order of frequency):

- domestic violence;
- child abuse;
- land issues;
- maintenance for women;
- child labor;
- divorce;
- rape;
- family disputes;
- human rights violations (in general);
- incest, sexual harassment;
- access to legal documentation; and
- issues related to women migrant workers.

Regard for legal aid service providers – both the Legal Aid Commission and NGOs – appears to be high, but perceptions of these organisations' effectiveness varied from district to district. Full-time, in-house lawyers

employed by legal aid organisations are viewed as providing better, more comprehensive, more committed services.

Part of the stakeholders' critique of legal aid services was focused on legal aid lawyers. They expressed concerns about

- Lack of seniority, experience, and competence;
- Lack of commitment and motivation; and
- Exploitation of clients (e.g., asking for fees).

Other concerns were focused at the organisational level. These concerns included:

- Lack of proper procedures and structure for handling legal aid cases;
- Lack of follow up with clients;
- Ineffective management of available resources (financial and human);
- Lack of a customer-service orientation; and
- Failure to deploy enough legal aid lawyers (mentioned in Jaffna).

6. Comparative Perspectives: Lessons from Different Legal Aid Systems

Some important insights for Sri Lanka emerged from an examination of legal aid systems in other countries, notably South Africa, India, England and Wales, and Serbia. These other countries' experiences were found to be instructive notwithstanding differences amongst jurisdictions:

- Successful legal aid systems receive considerable investment of public funds. However, success is best measured against the goal for which the legal aid system is developed and against start-up conditions. Therefore the goal of each country's legal aid system, as well as the problems that system needs to address, must be clarified at the outset.
- Efforts to design or improve a legal aid system should incorporate a conscious assertion of the state's obligation to provide effective access to justice, including legal aid where it is required.
- Publicly-funded legal aid delivery systems have traditionally been divided into 1) systems in which legal aid is provided by the legal profession against payment by the state (e.g., the judicare system); 2) systems in which the state directly provides legal aid services through salaried professionals (e.g., staff attorneys, public defenders offices); or 3) a mix of the two systems.
- There is no "ideal" legal aid system which works across varying economic, social, and cultural contexts.
- Many developing and developed countries have shifted (or are shifting toward) "mixed models" of legal aid service delivery. Acknowledging the limited nature of public resources, these models see government take on a regulatory role to ensure high quality legal aid services, with services provided by non-governmental organisations, foundations, and paralegals and supported by international donors where necessary.
- It is not immediately evident that any one model is more cost-effective than another. Cost is determined more by the level of extension of the entitlement to legal aid rather than the system in place. However research indicates that investing the majority of funding in legal aid centres (run with state involvement), while reserving a minority of funds for judicare, may result in savings while serving a greater number of people.
- Client eligibility criteria for legal aid services should be closely linked to the goals of the legal aid system, the needs it is meant to address, and the amount of funding available. Such criteria could involve a means test for civil matters, and/or other screening methods such as vulnerability tests, prioritizing specific groups (based on bottom-up research), or assessing the likelihood of success.
- The provision of publicly-funded legal aid services should not be limited to criminal cases, but must also cover civil matters.
- Pursuit of a broader human rights agenda requires a legal aid system with a focus that goes beyond improving access to the courts. Public interest litigation may require specialized support, with service providers being obligated to identify patterns of abuse of individuals and communities. Advocacy for victims' rights may need to be included as part of a publicly-funded legal aid programme, particularly in cases where the legal profession is otherwise neutral or not interested in public interest litigation or advocacy. Advocacy may include broadening defendants' rights in criminal proceedings by challenging police practices, suggesting improvements to criminal procedure legislation, and invoking international human rights law.

7. Next Steps

A Steering Committee is expected to be formed to oversee and monitor the implementation of the recommendations in the report. The Committee will consist of senior officials from the Ministries of Justice and of Constitutional Affairs; other key government departments; representatives from the Legal Aid Commission, the Bar Association of Sri Lanka, and non-governmental legal service providers; and donors.

More generally, this brief is also intended to provide a platform for further policy discussions at the national and sub-national levels about how to provide higher quality legal aid services to more people across Sri Lanka, while prioritizing those who are most vulnerable.

"The Legal Aid Sector in Sri Lanka: Searching for Sustainable Solutions" was prepared by the United Nations Development Programme (UNDP), the United Nations High Commission for Refugees (UNHCR), and The Asia Foundation for the Ministry of Constitutional Affairs and National Integration and the Ministry of Justice as part of an overall analysis of the legal aid sector in the country. The study examines the formal legal aid services sector in Sri Lanka and recommends changes for a more effective and sustainable legal aid system that is accessible to all.

