

CLINICAL LEGAL AID MOVEMENT AND LEGAL AID

By

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Any discussion on legal aid should start with the understanding that it is the socio-cultural, economic and geographical barriers rather than the individual responsibility that makes 'justice' least approachable.

The present Indian judicial system is a colonial creation where clear distinction was made between the Rulers and the Ruled, where the Rulers were kept out of the purview of this system. This led to the failure in making justice approachable. In order to make justice accessible, 'legal aid' acts as an important tool.

While talking about access to justice, one gets reminded of the fact that only in late 1970's we recognized the fact that justice is beyond the reach of the most and that the right of access to justice is universal and most fundamental of all rights and that it is not a matter of charity, but, a matter of right.

This becomes evident by the fact that in spite of various international instruments including the Universal Declaration of Human Rights of 1948, The UN Charter and the Covenants of ICCPR, ICSEER that recognized the entitlement to legal aid as a human right, in India, Article 39A providing for free legal aid was introduced in the Constitution only in 1976.¹ The need for statute was cured, when through the creative interpretation based on the conjoint reading of the Fundamental

rights (specifically Articles 14, 19 and 21) and the Directive principles, the Indian Judiciary created the 'new fundamental right' to 'legal aid',².

Moreover, it was introduced as a Directive Principle of State Policy and not as a fundamental right. And, interestingly no provision was made that deals with the methods of securing it and this proved to be a lacunae in taking justice to the reach of common man. The Legal Services Authority Act was enacted only in 1987 (The Amendments were carried out in 2002)

The phenomenon of legal aid can be classified into three phases. In the first phase, legal aid was looked upon as charity; in the second phase, it was looked upon a legal entitlement and in the third phase, it is looked upon as a definite social responsibility of the Government. Based on the above we can only state that we are still in the second phase and are awaiting the third phase.

In this context, it will be interesting to refer to the history of legal aid in India.

Legal aid as a concept of providing legal assistance and making access to justice a reality for the indigent in India first saw the light of day in 1924 with the formation of the Bombay Legal Aid Society. However, this did not have any statutory sanction. The British Parliament gave the concept of legal aid statutory recognition by enacting the Legal Aid and Advice Act in 1949.

Around this time, the Government of Bengal set up the Trevor Harries Committee. This committee also recommended grants of

1. Article 39-A, reads as follows, "Equal justice and free legal aid- The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

2. *Hussainara Khatoon v. Union of India*, (1980) 1 SCC 81.

legal aid to the needy, but made a significant contribution by suggesting payment of fees to legal aid lawyers from funds to be given by the Government.

All these developments persuaded the Central Government to address a communication to the State Governments to provide for legal aid in criminal cases. It was this initiative that led to the formation of the Legal Aid and Advice Society in West Bengal

The Law Ministers Conference in New Delhi in 1957 gave the necessary fillip to the legal aid movement, particularly when the State of Kerala enacted rules for grant of legal aid on the earnest insistence of Justice *Krishna Iyer* who was the then State Labour Minister. The 14th Report of the Law Commission also discussed legal aid and strongly recommended provision being made for assisting the poor in payment of Court fees and lawyer's fees.

In June 1970, the State of Gujarat appointed a committee headed by Justice *P.N. Bhagwati* in the matter of grant of legal aid. This committee recommended that the State must take upon itself the responsibility of providing legal aid to poor persons and persons of limited means. A similar committee was appointed by the Central Government in 1972 headed by Justice *Krishna Iyer*.

After the introduction of Article 39, Schemes for grant of legal aid under executive instructions issued by the State came into operation. Some States formulated rules for working out these Schemes. Lok Adalats came to be held under executive instructions, but the other concepts of legal aid, namely, legal advice, legal literacy, holding of legal clinics and camps *etc.* were not taken care of rendering the right to be largely unused and underutilized.

The Legal Services Authority Act of 1987 gave great impetus to the legal aid movement. Although the said Act was enacted in the

year 1987, it was given effect by different States only during the period 1996-97 under the orders of the Supreme Court of India, which directed the States to frame rules in this behalf. Until then, Legal Aid and Advice Boards were functioning. The scope of the Act was expanded through innovative interpretation and pre-litigation disputes were also brought within its purview. Recently, major advancements have been made in the process of providing access to justice for the poor.

The Legislative recognition of alternative disputes resolution mechanisms as a part of legal aid movement can be observed through the Code of Civil Procedure (Amendment) Act, 1999 that came into force only in 2002. During the same year, the Legal Services Authority Act was also amended. Two significant provisions in the Act, namely, bringing into focus the possibility of settlement of pre-litigation disputes and the setting up of Permanent Lok Adalats in relation to the matters concerning public utility services.

The third phase indicated by Judge *Weeramantry* has also been reached in India. Schemes are now available in some Courts where advocates engaged by the legal services authority are actually present in Court (loosely called 'duty advocates') and watching brief. If an advocate does not accompany any accused or under-trial, the lawyer for the legal services authority is expected to render him assistance free of cost.

Legal Aid

The legal aid movement has to address two main issues:

1. Ignorance of legal rights-due to lack of access to education and above all the 'legal' education *etc.*
2. Inaccessibility to the judicial systems-due to poverty-unable to afford Court fees, costs of appeals *etc.*, geographical barriers- *eg.* in case of tribals *etc.*, complex procedural laws *etc.*

3. Any discussion on legal aid should start with the understanding that both the above are further dependent upon each other and legal aid acts as a tool to make 'effective' the access to justice.
- The judiciary - Consisting of both the Bench and the Bar,
 - Academicians, students and related Legal institutions
 - Social Organizations such as NGOs

Since, Legal aid is now considered as the fundamental right inherent in the conjoint reading of Articles 14 and 21, the right to clinical legal aid that facilitates the legal aid becomes a concomitant fundamental right.

Legal aid clinics

The Concise Oxford English Dictionary defines 'clinic' as 'a place where specialized medical treatment or advice is given'. In the modern legal world, Legal aid clinics are performing the similar tasks with regard to the legal advice and problems.

Clinical legal aid addresses two issues:

- Advice and aid regarding a legal dispute (the curative stage): This should not only contain the explanation of laws but also the methods to approach various forums³. These should also be present during the litigation period.
- Spreading awareness regarding the Rights and Duties and Laws (the preventive stage)

Clinical aid should be practiced with the understanding the Legal aid can be successful only with the collaboration from the following quarters:

3. A survey in Nepal conducted by an NGO, the Nepal Law Society, has concluded that 85% disputes are resolved without being brought into the public realm. (ADR in Nepal - Perspective on Mediation by Mukti Rijjal, March 2004 (Institute of Governance and development) Similarly, a UNDP report on Bangladesh says that village elders settle 60-70% of petty disputes between villagers, adding that villagers do not approach the formal legal system due to delay and expenses. (National Workshop on ADR: In question of a new dimension in Civil Justice Delivery System in Bangladesh -Keynote paper Introducing ADR in Bangladesh by Chief Justice Mustafa Kamal (former Chief Justice of Bangladesh) dated 31st October, 2002. Similar results were also found in India where a pre-litigation consultations were held between the parties.

At present, Legal aid is mostly carried out by Social welfare organizations or NGOs and in situations where it is conducted through State, it is done with the attitude to fulfill the obligations of the Statutes or is considered secondary in nature. Clinical legal aid can be a success only when it is placed on equal footing along with the other formal Judicial needs.

In order to achieve this, legal aid clinics should be established and attached to the Legal aid Committees established in the Courts. Among the above categories, Student community should be emphasised. As the prospective lawyers, practical legal aid work can largely sensitize them regarding the various needs of the general litigant and society at large. They can appreciate the need to apply law based on social sensitivity rather than the rigid technicalities.

The law students should be attached to the Courts or Legal Aid Committees or Lok Adalats or NGOs conducting legal aid clinics. Law Schools should be encouraged to adopt the local villages for the conduct of legal aid clinics⁴. Since, the availability of the expert lawyer is one of the main ingredients of 'Right to effective Legal aid', the Clinics

4. For eg: such efforts were made by NLSIU, Bangalore and this proved successful (also: the Conciliation efforts of the law faculty, Guru Nanak Dev University and Legal aid clinics by the Delhi University). But, These efforts can be successful only when they enjoy the support and strength of the Bar and activists to take up such cases during the litigation stage. If no such support is available, such efforts tend to fail because the law professors and students other than advising the needy, can not carry it through out the litigation. Besides the failure, it may also damage the spirit with which such activities are carried.

conducted or advices rendered by students should be supervised by the lawyers and law teachers.

Certificate courses shall be introduced by Judicial Academies to train the para legals⁵. They should be treated on par with the Courses on social work *etc.* The beneficiaries should consist of the recommended candidates of Various NGOs (both legal and non-legal), students, lawyers and other interested individuals. The Courses should be classified as General and Specialized courses. For *eg.* NGOs dealing with Labor welfare or women welfare *etc.* can be benefited through the specialized Courses especially designed for them. Even the local NGOs should be licensed with periodical checks to conduct Clinical legal aid training programmes. The para-legal courses shall also be open to the individuals qualified upto 12th standard, but interested in clinical legal aid or related social work. Students (not only law), unemployed, house-wives *etc.*, have proved successful in performing such tasks.

Clinical work should be viewed as a part of professional 'legal' work rather than as a volunteer work carried out by 'NGOs' or 'Social welfare Organizations'. To achieve, this the legal aid clinics should appoint advisors selected from among the experts in law, social work *etc.* Part time or full time employment of persons experienced in such work will be useful. Honorarium per case or per time period *eg.* monthly or bi-monthly can be paid to these workers/advisors.

In Delhi, the Delhi Legal Services Authority (as well as the Delhi High Court Legal Services

Committee) constituted under the LSA Act does not pay more than Rs.5,000/- for an entire case (including drafting and additional refresher fee) regardless of the number of hearings or appearances. Due to this inadequate payment, lawyers refuse to participate in legal aid and this results in a situation where the client either fails to appoint a legal aid Counsel or the one he can afford will be amateur⁶.

Where as the survey of legal aid lawyers showed that 63.3% are there for the payments offered, 16.7% were asked by judicial officers and only 20% are there due to missionary spirit (Research work conducted for "Legal aid- Human right to equality" by Dr. *Sujan Singh* (1998), (Deep and Deep Publications), Pg:274-5

And out of 30 legal aid counsels, 23 had an experience between 5-10 years, 7 were those whose standing was above 10 years. Pg: 273 (Experience showed that very few advocates with standing of more than 20 years take up legal aid cases) Since, clinical work is a part of legal aid, it is obvious that it will face similar situations.

Recently in England, a barrister refused to appear in a case where he found the total legal aid fee that is to be paid to him which was around 600 pounds per day was inadequate⁷. Converted into Indian Rupees, this would work out to roughly Rs.40,000/- per day. This may be contrasted with the fees paid to a legal aid Counsel in India.

Since, clinical work also needs proper legal advice, in order to keep up the spirit of Clinicians minimum payment shall be made to the advisors.

5. These are considered as the 'first-aiders', with minimum knowledge of laws, who can advice and direct the needy regarding the basic procedures *eg.* filing FIR *etc.* in criminal cases, teach them about issues such as producing warrants before arrest *etc.* and the forums that can be approached. They are the local level mobilizers. They should also be able to direct the people to the advocates dealing with such work.

6. In a survey, 75.4% beneficiaries expressed their dissatisfaction due to the inexperienced advocates, 24.6% mentioned disinterest of the advocates: (Total beneficiaries studied -114, State of Punjab and Haryana)

7. When Pound 600 is not enough for one of Britain's top QC's, Sunday Telegraph 30th May 2004

The Clinics should also emphasize upon the case management techniques where by cases are divided into complex and simple cases and the available legal expertise should be utilized accordingly. The Clinical advice should be based on the 'Early Neutral Evaluation',⁸, that is based on the strengths of the case in the pre-litigation stage. During this stage, the advisers should also consider and advice regarding the use of even informal Judicial systems such as arbitration, conciliation *etc.* The advisors should also use the 'doctrine of empowerment of the litigant' where by the person seeking the advice is made aware of the strengths and weaknesses of the cases. The Clinical legal aid can be classified as follows and work can be assigned accordingly:

- (i) *Remand Advocates.* Provision of remand advocates in all Magistrate Courts to represent those who qualify for legal aid.
- (ii) *Visiting Advocates.* Provision of visiting advocates in the jails. (Criminal justice system till date is largely related to dispute between unequal parties *i.e.* the accused and the State. Statistics show that most persons languishing in jails for petty crimes are poor and underprivileged,⁹, legal aid clinics conducted for these people gain importance)
- (iv) *Satellite Legal Centres.* Operating satellite legal service centres around major cities and in some towns. Wherever there is affordability and accessibility, Video conferencing facilities should also be utilized for expert legal advice.

- (v) *Legal Literacy Programs.* Organizing legal literacy programs, with special programs organized for observance of "Legal Services Day".
- (vi) *Legal Helpline.* Maintaining a legal services helpline.
- (vii) *Lok Adalats.* Organizing of lok adalats.

Besides this, The Legal aid Committees working in various States should work in consonance with the Local NGOs for conducting Clinical work. This can be done through pamphlets and newsletters explaining the rights, duties under the Constitution and various laws. Care should be taken that the pamphlets are written in simple local language. They should also make a mention of various Judgments. Such pamphlets should be distributed not only during the legal aid clinics, but also during the gatherings such as the meetings of DWACRA *etc.* The NGO need not be necessarily Legal aid NGO. Pamphlets should be developed based on the nature of the work the NGO is involved with. For *eg:* NGO involved with women and child welfare should be assisted by the Judiciary in developing the related Pamphlets. Besides, the literary pamphlets, Audio and video should be effectively utilized to explain various issues. Since most persons in need of justice are poor and illiterate, these clips will do the needful in disseminating legal aid and advice. Besides, general explanation of laws, it would be useful if specific case laws related to sexual harassment, bonded labor, maintenance *etc* are explained through them. They should also address the legal educational needs of the social workers and NGOs involved in such work.

8. Largely advised as an optimal Court and Case management technique.

9. 73.2% respondents in a prison survey tried for bail but could not fulfill surety or monetary requirements. Moreover, the monthly income of 83% of these prisoners was with in Rs.300 and only 16.1% had income above Rs.300 (Dr. *Mrinmoy Choudhary* (1995), "languishing for Justice: Being a critical survey of criminal justice system" Pg: 205

There is also a need to recognize the fact that different cases need different solutions. And in most cases, the attitude should be towards achieving 'win-win' solution rather than 'win-lose' solution. This is true of cases involving matrimonial disputes, labor disputes, minor land disputes *etc.* When the Judiciary in

order to cure delays and arrears, is struggling to imbibe this understanding in its functioning. It is a relief to see that this understanding is clearly understood and utilized by the legal aid clinicians where Formal litigation is viewed as the last resort.

Though legal aid clinics are largely emphasized in cases of rights in criminal law and of the prisoners,¹⁰, at the same time, the clinicians should also not lose sight of the ever expanding socio-economic rights. Right to education,¹¹, Right to food,¹², Right against sexual harassment,¹³, Right to clean environment and health,¹⁴, Right to compensation *etc*, Right to livelihood,¹⁵, Rights of mother as natural guardian,¹⁶, *etc*.

Since, most of these basic rights deal with issues affecting the underprivileged, Legal aid clinics should also address these issues.

Clinics should be widely conducted during the Panchayat meetings, Melas and Exhibitions. They should be emphasized during mass disasters where the victims are to be made aware of the laws regarding the insurance, loans, Government grants *etc* and also the forums of redressal. Care should be taken that the environment should be appealing and approachable to the common individual who is often finds himself to be a stranger and confused in the formal environment of law Courts.

Further suggestions include:

- *Statistics Collection.* The legal services authority should begin collecting

statistical information regarding the activities of its literacy programs and the extent to which its target audience is being reached.

- *Program Evaluation of Legal Literacy Programs.* An evaluation of the effectiveness of legal literacy programmes should be carried out, preferably with the NGOs or the evaluation could be done by a competent outside agency.
- *Annual Evaluation.* Using data collected at least monthly, a yearly evaluation of the effectiveness of its legal literacy camps/programs should be conducted.
- *Use Literacy Material of Reputed NGOs.* Use the literacy material prepared by qualified and reputed NGOs who have already prepared legal literacy material like booklets, pamphlets and videos on legal literacy.
 - a. *Develop Appropriate Teaching Tools/ Techniques.* Develop appropriate teaching tools for the legal literacy programmes; or
 - b. *Use Appropriate Teaching Tools/ Techniques Prepared by Specialised NGOs.* Use the appropriate teaching tools prepared by specialised NGOs who have already designed appropriate teaching tools for their legal literacy programs.
 - c. *Training of Paralegals.* Identify members of the staff and local persons who can be trained as paralegals.
- *Advertising.* Promote legal aid service via advertising and promotional campaigns such as:
 - d. In the print and electronic media in a systematic and professional manner.

10 ref: *DK Basu v. State of West Bengal*, 1997 (1) ALD (Cr.) 248 (SC) = AIR 1997 SC 3017 *etc*

11. *Unnikrishnan v. Union of India*, (1993) 1 SCC 645

12. *Kapila Hingorani* (2003) 6 SCC 1

13. *Vishaka v. State of Rajasthan*, 1997 (2) ALD (Cr.) 604 (SC) = (1997) 6 SCC 241

14. *Vellore Citizen's forum v. Union of India*, AIR 1996 SC 2715, *APPCB v. MV Naidu* AIR 1999 SC 812

15. *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180

16. *Geetha Hariharan v. RBI*, AIR 1999 SC 1149

- e. At bus stops, railway stations, markets and other public places.
- f. Produce easy to read and recognisable information booklets and posters on the services
- provided to be prepared and distributed to NGOs for display in their offices.
- g. Develop and use a distinctive and easy to recognize logo.

HEALTH INSURANCE: INDIAN SCENARIO

By

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“In order to work out a viable health insurance system, geographical mapping of health infrastructure would be undertaken by the Government.” — Dr. *A. Ramadoss*

Health is a human right, which has also been recognized and accepted in the Constitution of India. Its accessibility and affordability has to be insured. Much of the Indian population both in rural and urban areas have acceptability and affordability towards medical care, at the same time cannot be said about the people who belong to poor strata of the society. It is well known that more than 75% of the population utilizes private sectors or medical care unfortunately medical care becoming costlier day by day and it has become almost sky scrapper to the poor people. Today there is need for injection of substantial resources in the health sectors to ensure affordability of health care to all. Health insurance is an important option, which needs to be considered by the policy makers and planners. Health care has always been a problem area for India, a nation with a large population and a larger percentage of this population living in urban slums and in rural area, below the poverty line.¹

Nearly 80% of Indian populations are without life insurance cover and the health insurance. Health insurance designed to pay

the costs associated with health care. Health insurance plans pay the bills from physicians, hospitals, and other providers of medical services. By doing so, health insurance protects people from financial hardship caused by large or unanticipated medical bills.

The health care system in India is characterized by multiple systems of medicine, mixed ownership patterns and different kinds of delivery structures. Public sector ownership is divided between Central and State Governments, Municipal and Panchayat Local Governments. Public health facilities include teaching hospitals, secondary level hospitals, first-level referral hospitals (CHCs or rural hospitals), dispensaries; primary health centers (PHCs), sub-centres, and health posts. Also included are public facilities for selected occupational groups like organized work force (Employees State Insurance), defence, Government employees (CGHS), railways, post and telegraph and mines among others. The private sector (for profit and not for profit) is the dominant sector with 50 per cent of people seeking indoor care and around 60 to 70 per cent of those seeking ambulatory care (or out-patient care) from private health facilities. While India has made

1. <http://www.pitt.edu/~super1/lecture/lec 19571/005.htm>