

CHRI 2014

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**ACCESS TO LEGAL AID
IN THE
CRIMINAL JUSTICE SYSTEM**



COMMONWEALTH HUMAN RIGHTS INITIATIVE

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and

Commonwealth Broadcasting Association

These sponsoring organisations felt that while Commonwealth countries had both a common set of values and legal principles with which to work, they required a forum to promote human rights. It is from this idea that CHRI was born and continues to work.

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Foreword

The Legal Services Authorities Act, 1987 was enacted inter alia to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Judges have been given a crucial role in ensuring this. Unfortunately the services, if at all provided, are generally neither competent nor do they secure justice to the disadvantaged particularly to those who are in custody under the criminal justice system. The instances of such failures are many and the reasons manifold. It is hoped that this compilation will assist all judges in ensuring that effective legal aid services are made available to those sought to be benefitted by the 1987 Act by analyzing the causes for such failures and bringing in new ideas to improve the functioning of the legal aid system within the State of West Bengal.

A handwritten signature in black ink, appearing to read 'Ruma Pal', is written above a single horizontal line.

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Section I: OVERVIEW

Importance of ensuring effective legal aid services for securing pre-trial justice & the role of legal aid lawyers

Jaishree Suryanarayanan

"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice" - Article 22 (1)

"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." - Article 39 A

Poverty and Access to Justice

The right to legal assistance at the state's cost is very crucial in our socio-economic context for the right to access to justice to be meaningful. Equality before the law demands that those who cannot afford to engage a lawyer, for reasons of impoverishment, should be provided legal representation by the state, at its cost.

Equal access to justice can be realised only if all those who come into conflict with the law, either by their actions or by abuse of the powers to arrest by the police, are placed in a position wherein their liberty is not compromised unnecessarily and illegally due to lack of resources or ignorance of the law.

Why is early legal representation necessary

The Supreme Court has held that:

- **the right to legal aid is available not only during trial but also at the stage of remand during first production and**
- **it is the duty of the magistrate to inform the accused person of this right and provide the accused with a legal aid lawyer.**

As noted in *Khatris (II)*¹ as far back as in 1981, a person arrested needs a lawyer at the stage of his first production before the magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the chargesheet is submitted and the magistrate applies his mind to the chargesheet with a view to determine the future course of proceedings. He would need a lawyer at the stage of framing of charges against him and he would, of course, need a lawyer to defend him in trial.

¹ *Khatris (II) v. State of Bihar* 1981 CrLJ 470

Reaffirming this, the Kasab² court which was recently called upon to go into the question of legal representation, held

“The resounding words of the Court in Khatri (II) are equally, if not more, relevant today than when they were first pronounced. In Khatri (II) the Court also alluded to the reasons for the urgent need of the accused to access a lawyer, these being the indigence and illiteracy of the vast majority of Indians accused of crimes.”

Dwelling on the introduction of Article 39A and the passage of the Legal Services Authority Act, 1987, the court concluded that there is no scope for any debate on the availability and scope of the right to legal aid any more. Placing the onus of enforcing the right on the magistrate, the court held that

“We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.”

On the question of what would be the legal consequence of failure to provide legal aid at the pre-trial stage to an indigent who is not in a position, on account of indigence or any other similar reasons, to engage a lawyer of his own choice, the court held

“But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case.

Need to institutionalize early access to legal aid at the time of arrest

On the right of an accused to legal representation at the time of arrest, Nandini Satpathy³ and D.K.Basu⁴, both have held that an arrested person has the right to have his lawyer present during interrogation, albeit, not throughout. The latter went to the extent of saying that the presence of a lawyer in the police station during interrogation of the accused will help in curbing third degree practices.

²Decision dated August 29, 2012 in Criminal Appeal Nos 1899 – 1900 of 2011

³ Nandini Satpathy v. P.L.Dani

⁴ D.K.Basu v. State of West Bengal AIR 1997 SC 610

Recognising the need for legal representation at the state's expense of an indigent accused at the time of arrest, the Supreme Court has laid down a mechanism by imposing a duty on the police to intimate the concerned legal aid committee.⁵

Institutionalizing this mechanism will ensure that lawyers appointed by the concerned Legal Services Authority (LSA) have access to an indigent accused at the police station itself. Appointment of Duty Counsels by the concerned LSA to provide legal services at the time of arrest itself will help in curbing unnecessary and illegal arrests, thereby preventing unnecessary detention.

Judiciary on the right to legal aid and early legal representation

"The right to free legal services is therefore, clearly an essential ingredient of "reasonable, fair and just", procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21." [Hussainara Khatoon (IV) v. State of Bihar]

"Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody."

"That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time."

"But even this right to free legal services would be illusory for an indigent accused unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State..... We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State....." [Khatri (II) v. State of Bihar 1981 CrLJ 470]

The central and state governments have deliberated upon the scope of the right to legal aid and its implementation and delivery mechanisms.⁶

⁵ Sheela Barse v State of Maharashtra, AIR 1983 SC 378

Some important expert committees on legal aid

- the committee appointed by the government of Gujarat in 1971 under the chairmanship of Justice P.N. Bhagwati
- the Expert Committee on Legal Aid appointed in 1973 (This committee was appointed by the Ministry of Law and Justice, Government of India under the chairmanship of Justice V.R. Krishna Iyer and submitted the report, *Processual Justice to the People*)
- the Juridicare Committee appointed in 1977 (This committee was appointed by the Government of India and consisted of Justices P.N.Bhagwati and V.R.Krishna Iyer and submitted the *Report on National Juridicare: Equal Justice – Social Justice*)

The 1977 Juridicare Committee was appointed with a view for establishing an adequate legal service programme in all the states on a uniform basis. This culminated in the appointment of the Committee for Implementing Legal Aid Schemes (CILAS), again by the government of India in 1980.

Scope of legal aid

All these committees recognised the right to legal aid as a fundamental right which has to be guaranteed by the State to ensure equal access to justice. Provision of legal aid was conceptualised as a mechanism to reduce the rigors of the criminal justice system and to ensure that all have equal access to justice through early and effective legal representation.

Bringing out the linkages between legal aid and problems of poverty in our socio-economic context, the committees said that:

- preventive and strategic legal aid is necessary to ensure social justice
- legal aid should also include law and institutional reform
- issues of law and poverty need to be addressed

Legal aid should be available at all stages in the CJS

It was recognised by these committees that:–

- legal aid should be made available at all stages in the criminal justice system as required by the fair trial standard – on arrest, during investigation, at trial and post trial
- Regular arrangement should be made for legal aid and advice to inmates of prisons and other custodial institutions.

Delivery mechanism

The committees stressed on the need for a ‘public sector’ in the legal profession to fill the gap in services to all created by a highly privatised bar. This was to be done by encouraging lawyers’ cooperatives. Law students should be involved for paralegal work. Legal aid

⁶ Access to Justice in India”. This paper is part of the ‘Overview Section” in this Reader.

institutions should be independent of executive control. They should be located within communities.

Role of Public Interest Litigation

- Undertrial prisoners languishing in prisons for periods beyond what they can be sentenced to if proven guilty;
- prisoners being blinded while in police custody;
- children of women prisoners being subjected to consequences of imprisonment of their mothers;
- mentally ill prisoners being imprisoned;
- incidents of custodial violence;

All the above incidents have been periodically brought to the public domain through PILs. The seventies and eighties in the post emergency era saw the Supreme Court, especially, Justices P.N. Bhagawati and Krishna Iyer, who had been part of the expert committees on legal aid, open an avenue for any public spirited person to approach the court seeking enforcement of fundamental rights of people who due to socio-economic reasons or loss of liberty cannot come before the court.

This was made possible by relaxation of the formal rule of *locus standi* to enable socially conscious citizens to initiate social action litigation on behalf of groups of people like under trials, mentally ill, bonded labourers to seek redressal for violation of their fundamental rights. This came to be known as public interest litigation (PIL).

Highlighting the importance of PIL, the supreme Court observed in the Asiad workers case,⁷

"....Public Interest Litigation is a strategic arm of the legal aid movement and it intended to bring justice within the reach of the poor masses...."

Through a series of judgments, the Supreme Court promoted legal aid as part of the larger agenda of access to justice.

The Supreme Court has given relief and issued directions to prevent such occurrences in future. All these cases threw up the importance of legal aid and an institutional mechanism for ensuring the right. Legal aid has been recognised as being very crucial to mitigate the rigors of the CJS, aggravated by social and economic disabilities.

⁷ *Peoples' Union for Democratic Rights v Union of India* AIR 1982 SC 1473.

“The legal position in regard to the right of undertrials to legal aid could be summed up thus:

- (a) the state is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time.
- (b) It is the duty of every judge of a criminal court before whom such prisoner is produced to inform him that he is entitled to be released on bail and to legal aid.
- (c) If an accused is not so informed the trial would be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the accused is liable to be set aside.
- (d) Release on personal bond of indigent undertrials could be resorted to in many cases where there is no substantial risk of non-appearance of the accused.
- (e) Every accused person has a fundamental right to speedy trial which is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.
- (f) An accused who is assigned a counsel at state expense may not have a choice of counsel but if such an accused remains unrepresented during the trial, the trial would stand vitiated.”

Source: Justice S. Muralidhar, Law, Poverty and Legal Aid: Access to Criminal Justice (New Delhi: LexisNexis Butterworths, 2004), chapter 5, pg 207.

Statutory provisions on Legal Aid

Constitutional Mandate

We are a deeply stratified society with divisions based on caste, economic capacity, opportunity, religion, gender and age. However, all of us are equal before the law and have equal protection of the law. Our constitution envisages substantive equality and not just formal equality.

Any legal system needs to be responsive to the prevailing social and economic context in order to earn credibility, legitimacy and the respect of its people. Provision of legal aid is one such mechanism to ensure that all have equal access to justice, and thereby respect for the law.

Every accused has the right to be represented by a lawyer of his/her choice under Article 22 (1) of our Constitution. The right to legal aid at the State's expense was introduced as a directive principle of state policy by a constitutional amendment in 1976. Article 39A makes it obligatory for the State to secure equal justice to all and provide free legal aid by appropriate laws or schemes.

Though the right to legal aid is an unenforceable directive principle, our judiciary has responded to the needs of the poor through creative interpretation of the right to equality and the right to life (Articles 14 and 21) made the right to legal aid a fundamental right by reading it into the right to life.⁸

⁸ M.H. Hoskot v State of Maharashtra, AIR 1978 SC 1548

Code of Criminal Procedure, 1973

The Code of Criminal Procedure (Cr.P.C.) was re-enacted in 1973 with the objective of providing a fair trial, a speedy trial and a fair deal to the poorer sections. In the new code, Section 304 of the Cr.P.C. which provides for legal aid to the accused before the sessions court only fails to fulfil these objectives. The Cr.P.C. does not provide for the right to legal aid in other criminal proceedings or at any of the other stages of the criminal process.

This is a major lacuna which has been remedied by numerous judicial pronouncements which have held that the right to legal aid will be available at all stages and in all criminal proceedings. Even though the Code does not recognise the right to legal aid in all criminal courts and at all stages beginning from arrest, the higher judiciary has from time and again reiterated the importance of legal aid at the police station and during 1st production.⁹

Legal Services Authorities Act, 1987

The Legal Services Authority Act (LSAA) was enacted in 1987, but was enforced only from 1996. The Act was enacted to constitute legal services authorities to provide:

- free legal services to the weaker sections and
- to organise *lok adalats*.

The Act prescribes:

- income criteria
- list of persons entitled to legal aid
- a hierarchical structure for the delivery of legal services

Legal services authorities at national, state, district and *taluk* levels have been constituted under the Act. The Supreme Court and High Courts have their own legal aid committees.

While the National Legal Services Authority (NLSA) can formulate legal aid schemes for the entire country, the State Legal Services Authorities (SLSA) also frame model schemes for their respective state. The SLSA and the District Legal Services Authorities also conduct legal aid clinics in prisons.

Beneficiaries under the Act

The Act lists out categories of persons who are entitled to legal services, irrespective of their income, namely:

- a member of a Scheduled Caste or Scheduled Tribe;
- a victim of trafficking in human beings or a beggar;
- a woman or a child;
- a person with disability;
- a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial dispute; or
- an industrial workman; or
- a person in custody, including custody in a protective home, or in a juvenile home, or in a psychiatric hospital or psychiatric nursing home; or

Apart from the above categories, any person who satisfies the prescribed income criteria will also be entitled to legal services under the Act

Reality Picture: Case study of the 15 daily wage labourers¹⁰

Despite the right of an accused to legal aid at all stages of a criminal proceeding being recognised as a fundamental right by the judiciary, the enforcement of the right needs to be further strengthened as the traverse of many indigent accused through the criminal justice system is marred by unequal access to justice .

Typically, arrests are, more often than not, made based on perceptions of the poor. Homeless persons – rickshaw pullers, migrant labourers, street children – are routinely arrested for petty crimes. Vagrancy is itself an offence under various state laws, such as, the Bombay Prevention of Begging Act. The poor are extremely vulnerable to being dragged into the criminal justice system and subjected to prolonged incarceration.

Labour Chowks are a common feature in many cities where daily wage labourers collect everyday in the hope of some contractor coming and hiring them for a job. More often than not they are taken as waiters for various celebrations during the festive season or taken as construction labourers during other months. There would be days when they would not be hired at all.

One such day a contractor came and told some daily wage labourers at the labor chowk in Chandini Chowk, Delhi, "*Company se maal uthana hai Jodhpur se aur iskeliye tumhein mein 400 rupiya doonga*" (*Have to pick up some things from Jodhpur and I will pay you 400Rs for that*). Rs. 400 was a lot of money as against Rs. 250 which they generally got paid on other days and so 15 of them agreed to go (including young children less than 18 years).

A glimpse into the lives of the arrested labourers

All the 15 labourers who were arrested had similar stories as to why they came to Delhi. Back in their villages, they would earn only Rs. 90 or 100 on a daily basis. When their friends used to come from the city, they would wear new clothes and come with mobile phones. This option seemed more attractive than spending their lives in rural areas. So they all came to the city and started earning a living from the labour market.

Throughout the day, they would work and in the night, they would go to government run night shelters called *Rain Basera* to sleep. On days when there was no work, they would go to nearby temples or *Gurudwara* for free food. Though most of them were unmarried and led a hand-to-mouth existence on a daily basis, 3 of them were single bread winners of their families. They said that this is the first time that they had ever come to a prison.

6 of them hailed from Uttar Pradesh, 3 from Bihar, 1 from Madhya Pradesh and 1 from Kolkatta.

The contractor said that they would have to travel 300 km and work only for one day. So all of them left in the evening, reached the next afternoon and loaded a pipeline from the road side into a vehicle.

While they were travelling back, sensing that there was a check post ahead, the driver along with the two contractors stopped the vehicle on the roadside saying they would get

¹⁰ This case is being handled by a CHRI lawyer.

something to eat for everyone. Once they left, they never returned. Instead, after 2 hours, a police van came and caught these 15 labourers for theft of government property.

Though they pleaded that they were innocent, they could not produce the contact number or the name of the contractor. When asked why they did not take the contact number of the contractor, they said that they never bothered to do that for any of their assignments in the past.

Failure of all safeguards

Rights of an arrested person

The amended Code contains statutory rights of an accused person which have a crucial bearing on a fair trial by providing certain safeguards to check the rampant abuse of the power to arrest. These rights include:

- the right to be issued a notice of appearance instead of being arrested (Section 41A)
- the right to meet an advocate of her/his choice during interrogation (Section 41 D)
- The right to have the arrest memo prepared as per Section 41B and scrutinized by the magistrate
- the right to be informed of the grounds of arrest and of the right to bail (Section 50)
- the right of information to any friend, relative or any other person nominated by the arrested person about the arrest and the place of detention (Section 50 A)
- the right to medical examination by a medical officer/registered medical practitioner soon after arrest (female medical practitioner in the case of a female accused) (Section 54)
- the right to be produced before a competent magistrate within 24 hours(excluding the time taken in the journey to the magistrate) (Section 56 read with Section 57)

The next morning, in a blatant violation of all constitutional and statutory safeguards, the police told the arrested persons that if they do some work by erecting some poles outside the police station, they would be set free the same evening. The labourers, in complete ignorance of their legal rights, did as they were told in the hope of earning their liberty.

Even after they had acceded to the illegal demands of the police and finished their work, they were still kept in the police station and transferred to another police station in Shergarh the next day. They were placed in police custody and some person was brought before them for identification (claiming that he could be the contractor). But he was not the same contractor and so the group could not identify him.

So the arrested labourers continued to be detained in police custody in violation of the mandatory requirement of production before a magistrate within 24 hours.

Non-application of the judicial mind by the magistrate under Section 167, Cr.P.C.

The arrested labourers were eventually taken to the concerned magistrate along with the person who had been brought for identification. The magistrate, without any application of the judicial mind, just glanced at them and said to the police constable, "*Theek hai, le jao*" (*It's ok, take them away*).

Now, if the prima facie accusation or information is not well founded and sufficient grounds do not exist for the magistrate to exercise his/her power of remand, in such cases, remand of the accused can be refused. A remand by the magistrate is an act of judicial discretion and is not an automatic one, to be exercised in a routine manner. Sufficient grounds must exist for the magistrate to exercise the power of remand.

The Code, under Section 167, confers the power on a magistrate to pass an order of remand detaining the accused to either police or judicial custody. This is meant to act as a check on unjustified and illegal arrest, thereby preventing unnecessary pre-trial detention. However, non-application of judicial mind resulting in mechanical passing of orders remanding the accused to custody has gained acceptance in criminal law practice.

The current practice wherein the magistrate does not ask any questions during the first appearance of the accused and grants remand to either custody without a proper perusal of the documents before him/her and without effective legal representation of the accused destroys the pillars of fair trial.

Duties imposed by the Code on the magistrate at the time of first production of an accused person

The magistrate has to:

- ensure that all the constitutional and statutory safeguards available to an accused person are complied with, including the right to legal aid, the right to be informed about the grounds of arrest, the right to have a family member/friend informed of the arrest and the right to medical examination
- ascertain from the accused person whether s/he has been informed about the grounds of arrest
- scrutinize the arrest memo
- inform the arrested person about the right to medical examination in case s/he has any complaint of torture or maltreatment in police custody
- look into the relevant portions of the case diary and ascertain the validity of the reasons for arresting the accused in case the offence is punishable with imprisonment for less than 7 years

Subsequent remands granted without production of the accused

They were then detained in judicial custody on 20th November, 2012 and were not produced in court even once due to non availability of police escorts. This violates the mandatory requirement under Section 167 that an order of remand can be passed detaining an accused to judicial custody for a maximum period of 15 days and the accused has to be produced before the magistrate before such an order of remand can be passed.

Out of these 15 labourers, 2 had been sent to a juvenile home and 2, whose family came to their rescue, were released on bail. The rest of them were very scared to inform their families as they did not want to put their family members in distress.

Consequence of Legal Aid Intervention

With CHRI efforts, two DLSA lawyers were appointed for these labourers [CR No. 179/12; U/S 379 IPC]. They were granted bail by CJM (Rural), but due to their economic condition, they were not able to produce the required surety.

CHRI then wrote to DLSA to allow a CHRI lawyer to represent them. After the appointment she went to Balesar on 11/2/2013 and filed an application under Section 436(2), Cr.P.C for release on personal bond. On subsequent dates of hearing all the accused were released on bail on their furnishing personal bonds. The case is going on.

Importance of Early and Effective Legal Intervention

Pre-trial stages where intervention by a legal aid lawyer can help in minimising detention

- At the police station when the person is detained or arrested
- During 1st production before a magistrate
- When the chargesheet is not filed within the stipulated 60/90 days

Possible outcomes of early legal representation

An empathetic legal aid lawyer representing the indigent labourers could have ameliorated, to some extent, the hardship and trauma caused to them by their arrest and subsequent detention. Effective legal representation by a legal aid lawyer would have ensured that all constitutional and statutory safeguards guaranteed to an accused person were available to the arrested labourers.

The above narrative highlights how the right to equality guaranteed as a fundamental right under the Constitution can get defeated in the criminal justice system by the denial of access to justice. It shows how impoverishment and lack of legal awareness can collectively produce gross injustice by violating the right to liberty so blatantly.

The narrative also reaffirms the imperativeness of effective and early representation in safeguarding the right to life and personal liberty. It throws up the following issues:

- The presence of a lawyer at the police station could have helped to clarify the position of the labourers and prevented their arrest
- A defence lawyer at the time of first production of the accused persons could have argued forcibly for discharge of the accused
- A defence lawyer could have moved an application for release on bail on personal bond

Conclusion

The right to legal aid needs no reaffirmation. What needs to be strengthened is the realisation of the right through effective mechanisms and schemes, with the active involvement of the legal profession.

The Law Commission, in its 131st Report on 'Role of the legal profession in the administration of justice' reiterates that "the role of the legal profession in strengthening administration of justice must be in consonance with the intendment underlying Article 39A." "...The profession must develop its own public sector." "...The leaders of the bar must show a deliberate concern with the fate of the poor and the indigent by volunteering to take up their cases in courts of law."

Rules framed under the Advocates Act too exhorts lawyers to provide legal aid and states that "...within the limits of a advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an advocate owes to society."¹¹

What a legal aid lawyer can do to empower her/his client

- Recognise that legal representation of the indigent client is in furtherance of the constitutional mandate under Article 39A
- Recognise that legal aid is not free service – the state is paying for it and the indigent client also incurs hidden costs
- Empathise with the indigent client
- Ensure that all legal safeguards are available to the indigent client as part of fair procedure and fair trial
- Provide necessary counselling to the client and family members
- Provide effective representation at the time of police detention and arrest and during 1st production and use Section 167 and the jurisprudence under it to resist remand to either custody or argue for discharge, in fit cases
- Apply for bail in a early and timely manner
- Use statutory provisions and jurisprudence to argue for release on personal bond

¹¹ Rule 46, Section VI, Bar Council of India Rules, Part VI, Rules governing advocates, Chapter II – Standards of Professional Conduct and Etiquette

Section II:
STATUTORY PROVISIONS

A.CONSTITUTION OF INDIA

Article 39A: 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

Article 21

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22 (1)

No person who is arrested shall be detained in custody without being informed, as soon as may not be, of the grounds for such arrest nor shall be denied the right to consult, and be defended by, a legal practitioner of his choice

Entry 3 in the State List/ Entry 11 in the Concurrent List

Legislative measure regarding Legal Aid may be taken by State Governments and the Centre Government. The scheme of Legal Aid may also be framed as a part of economic and social planning under entry 29 of the Concurrent List.

B. LEGAL SERVICES AUTHORITY ACT, 1987

Section 12

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is –

- a) a member of a Scheduled Caste or Scheduled Tribe;
- b) a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
- c) a woman or a child;
- d) a mentally ill or otherwise disabled person;
- e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- f) an industrial workman; or
- g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956); or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or

- h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Govt., if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Govt., if the case is before the Supreme Court."

(Rules have already been amended to enhance this income ceiling). According to section 2(1) (a) of the Act, legal aid can be provided to a person for a 'case' which includes a suit or any proceeding before a court. Section 2(1) (aaa) defines the 'court' as a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions. As per section 2(1)(c) 'legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter.

C. THE CODE OF CRIMINAL PROCEDURE, 1973

304. Legal aid to accused at State expense in certain cases.

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defense at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) the mode of selecting pleaders for defense under sub- section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session.

D. THE ADVOCATES ACT, 1961

6. Functions of State Bar Councils

(1) The functions of a State Bar Council shall be—

(a) to admit persons as advocates on its roll;

- (b) to prepare and maintain such roll;
- (c) to entertain and determine cases of misconduct against advocates on its roll;
- (d) to safeguard the rights, privileges and interests of advocates on its roll;
- (dd) to promote the growth of Bar Associations for the purposes of effective implementation of the welfare schemes referred to in clause (a) of sub-section (2) of this section clause (a) of sub-section (2) of section 7;
- (e) to promote and support law reform;
- (ee) to conduct seminars and organize talks on legal topics by eminent jurists and publish journals and paper of legal interest;
- (eee) to organize legal aid to the poor in the prescribed manner;
- (f) to manage and invest the funds of the Bar Council;
- (g) to provide for the election of its members;

9A. Constitution of legal aid Committees

- (1) A Bar Council may constitute one or more legal aid committees each of which shall consist of such number of members, not exceeding nine but not less than five, as may be prescribed.
- (2) The qualifications, the method of selection and the term of office of the members of legal aid committee shall be such as may be prescribed.

Section III:
TABLE OF JUDGEMENTS

TABLE OF JUDGEMENTS

S. NO.	NAME OF THE CASE	FACTS	ISSUES	DECISION
	Right to Counsel			
1.	<p>Nandini Satpathy v. P.L.Dani</p> <p>☞ (1978) 2 SCC 424</p> <p>☞ Supreme Court</p>	<p>A case under the Prevention of Corruption Act was filed against the petitioner. The police wanted to interrogate her by giving her a string of questions in writing. She refused to answer the questionnaire, on the grounds that it was a violation of her fundamental right against self-incrimination. The police insisted that she must answer their questions and booked her under Section 179 of the Indian Penal Code, 1860, which prescribes punishment for refusing to answer any question asked by a public servant authorized to ask that question.</p>	<p>Besides pondering upon other issues related to the rights of the accused, the Court was asked to deliberate upon the right of the accused to a counsel during interrogation and otherwise during his detention.</p>	<ul style="list-style-type: none"> • With regards to right to counsel, the Court held that the person being interrogated has the right to have a lawyer by her/his side if s/he so wishes. • Secondly, an accused person must be informed of the right to consult a lawyer at the time of questioning, irrespective of the fact whether s/he is under arrest or in detention.
2.	D.K. Basu vs. State of West	The Executive Chairman of	The Court was asked	The Court laid down specific guidelines

	<p>Bengal</p> <p>☞ <i>AIR 1997 SC 610</i> ☞ <i>Supreme Court</i></p>	<p>Legal Aid Services, West Bengal wrote a letter to the Supreme Court saying that torture and deaths in police custody were widespread and efforts are often made by the authorities to hush up the matter. It was treated as a writ by the Supreme Court.</p>	<p>to (i) develop custody jurisprudence and lay down principles for awarding compensation to the victims of police atrocities (ii) formulate means to ensure accountability of those responsible for such occurrences.</p>	<p>that must be followed while arresting and interrogating accused. Out of all the guidelines, the relevant ones are listed below.</p> <ul style="list-style-type: none"> ☞ The arrested person may be allowed to meet her/his lawyer during interrogation but not throughout the interrogation. ☞ Secondly, the time, place of arrest and venue of custody of the arrested person must be notified by telegraph to next friend or relative of the arrested person within 8-12 hours of arrest in case such person lives outside the district or town. The information should be given through the District Legal Aid Organization and police station of the area concerned.
3.	<p>Khatri (II) v. State of Bihar</p> <p>☞ <i>(1981) 1 SCC 627</i> ☞ <i>Supreme Court</i></p>	<p>Public interest litigation (PIL) was filed with regards to the right to free legal services to the accused when it is the duty of the State as explained Constitution of India, Articles 21 and 22. The PIL expressed displeasure over disregard of</p>	<p>The Court had to examine the right to free legal services to the accused when it is the duty of the State as explained in the Constitution of India, Articles 21 and</p>	<ul style="list-style-type: none"> • The Court held that the right to free legal services is implicit in the guarantee of Article 21 and the State is under a constitutional mandate meant to provide a lawyer to an accused person. • Secondly, the State cannot avoid its

		these directives given by the Supreme Court by the State of Bihar.	22.	<p>constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liability.</p> <ul style="list-style-type: none"> • Lastly, the State is under obligation to provide free legal aid during the first production of the accused before the magistrate as also when he is remanded from time to time.
4.	<p>State of Maharashtra vs. Mohd. Ajmal Kasab</p> <p>☞ <i>Confirmation Case No. 2 of 2010 in Session Case No. 175 of 2009 along with Cr. Appeal No. 738 of 2010 in Sessions Case No. 175 of 2009 along with Cr. Appeal No. 606 of 2010 in Sessions Case No. 175 of 2009</i></p>	<p>Ajmal Mohammad Amir Kasab, a Pakistani national, earned for himself five death penalties and an equal number of life terms in prison for committing multiple crimes of a horrendous kind in India. From the judgment of the (Greater Mumbai) High Court two appeals were made, stating that the Constitutional guarantee remained unsatisfied because of denial to the appellant of two valuable Constitutional rights/protections under Article 22 (right to counsel) and Article 20(3)(right against self-incrimination).</p>	<p>Whether delay in providing legal aid to the accused leads to denial of two valuable Constitutional rights under Article 22(right to counsel) and Article 20(3) (right against self-incrimination)?</p>	<ul style="list-style-type: none"> • Court held that the mere offer of legal aid is not the same as being made aware of one's Constitutional right to consult, and to be defended by, a legal practitioner, and that simply the offer of legal aid does not satisfy the Constitutional requirement. • It was also held that the Magistrate is required to inform the accused of his rights and only then he can be said to have made a Constitutionally acceptable choice either to have or not to have a lawyer or to make or not to make a confession. •

	Right to Legal Aid at the Appellate Stage			
5.	<p>Rajoo@Ramakant vs, State of M.P.</p> <p>❖ <i>Cr. Appeal No 140 of 2008</i></p> <p>❖ <i>Supreme Court of India</i></p>	<p>The Appellant was sentenced to 10 years of rigorous imprisonment by the Trial Court for gang raping a woman, which was upheld by the High Court. It was alleged by the Appellant that he wasn't represented ably in the High Court.</p>	<p>Whether the appellant is entitled, as a matter of right, to legal representation in High Court or any other appellate court?</p>	<p>Sections 12 and 13 of the Legal Services Authority Act do not make any distinction between the trial stage and the appellate stage for providing legal services. The same is also the constitutional mandate under Article 39-A. Hence, the High Court was directed to re-hear the case after providing able legal representation to the Appellant.</p>
6.	<p>MH Hoskot v State of Maharashtra</p> <p>☞ <i>(1978) 3 SSC 544</i></p> <p>☞ <i>Supreme Court</i></p>	<p>The petitioner convicted for offences of cheating and forgery, filed a special leave petition in the Supreme Court challenging the High Court order enhancing his punishment from one day simple imprisonment to 3 years rigorous imprisonment. In his petition, he also complained of the actions of the jail authorities denying him a copy of the judgment (which he obtained in 1978 i.e. 5 years after the pronouncement of the judgment against him).</p>	<p>The Court was moved to consider two main aspects of the criminal justice delivery system in India, namely, supply of a copy of the judgment to the prisoners in time to file an appeal and the provision of free legal services to a prisoner.</p>	<ul style="list-style-type: none"> • An important ingredient of fair procedure to a prisoner, who has to seek his liberation through the Court process, is lawyer's services. • The Court observed that the right of appeal for the legal illiterates becomes inconsequential in the absence of any statutory provision for free legal service to a prisoner. This negates the 'fair legal procedure' which is implicit in Article 21 of the constitution

	Competency of the Counsel			
7.	<p>Ranchod Mathur Wasawa vs. State of Gujarat</p> <p>☞ 1974 AIR 1143 ☞ Supreme Court</p>	<p>The amicus curae came into the picture on the day of the commencement of the trial. However, the cross examination of the witnesses did not suffer from any obstacles and the counsel was fully equipped when he came to the trial.</p>	<p>Does inadequacy of time on the counsel of the accused lead to grave injustice?</p>	<p>Sufficient time, complete papers should be made available to the advocate of the accused chosen so he may serve the cause of justice with all the help at his command. A sensitive approach on this should also be ensured by the Court to make the accused feel confident.</p>
8.	<p>Bal Bahadur v. Customs Officer</p> <p>☞ CrI. A. No. 12/2009 – Delhi HC ☞ Delhi High Court</p>	<p>Over a course of 8 years, one Private counsel, three amicus curae and one DLSA lawyer were engaged to defend the appellant(a Nepali national) who was charged under Narcotics Drug and Psychotropic Substances Act, 1985. There were laxities in his defence in terms of no cross-examination, absence of recovery witnesses at the hearings and mostly the insufficiency of time on the engaged counsel for the appellant</p>	<p>Does the competency of a counsel be altered depending upon the seriousness of offence and severity of punishment?</p>	<p>It shall not be disregarded that a poor accused is inept to engage a competent lawyer on his own and would naturally be unable to instruct the engaged lawyer. Hence, the Court suggested to the DLSA that it should prepare a separate panel of trial court lawyers comprising senior lawyers of not less than 10 years or more experience and associate lawyers of not less than 5 years' to defend the indigent accused facing trial for commission of offences punishable with sentence of seven years and more. A special set of fees may also be paid to such lawyers so that they can give of their best.</p>

	Right of the Counsel			
9.	<p>Moti Bai vs. State of Rajasthan</p> <p>☞ <i>AIR 1954 Raj 241</i></p> <p>☞ <i>Rajasthan High Court</i></p>	<p>The petitioner was arrested by the Police on suspicion of being involved in an offence under Section 6, Indian Wireless Telegraphy Act. The counsel of the accused prayed for an exclusive interview with the petitioner which was allowed by the DSP, however in the presence and within the hearing of the police.</p>	<p>Whether the Counsel has the right to interview the accused exclusively out of the presence of the police, however in the hearing of police?</p>	<p>The presence of the police is obviously needed so that the accused may not abscond from custody or do anything which may be objectionable otherwise. In order that such consultation may be effective, interviews must be allowed to his counsel, when asked for, out of the hearing of the police though within their presence.</p>
	Can incriminating evidence be a reason to deny the right to legal aid to the accused?			
10.	<p>Babubhai Udesinh Parmar v. State of Gujarat</p> <p>☞ <i>Appeal (crl.) 1635 of 2005</i></p> <p>☞ <i>Supreme Court of India</i></p>	<p>The appellant was convicted and sentenced for raping and murdering a girl on the basis of the confession extracted from him under Section 164 of CrPC which was made in 15 minutes. For three years there was no legal aid provided to him and the same was also not asked by the Magistrate during examination.</p>	<p>Whether the Court can take a stand of not offering legal aid services to the accused if there is a strong impression of him being guilty of the crime in a large number of cases?</p>	<p>The Court held that there was no direction from the Magistrate to provide free legal aid to the appellant. He had no opportunity to have independent advice. It further held that it does not mean that such legal assistance must be provided in each and every case but in a case of this nature where the appellant is said to have confessed in a large number of cases at the same time, the State could not have denied legal aid to him for a period of three years.</p>

	Free Legal Aid as Fair Procedure			
11.	<p>Ramchandra Nivrutty Mulak vs. The State of Maharashtra</p> <p>☞ <i>Cr. Appeal no. 487 of 2008</i></p> <p>☞ <i>Bombay High Court</i></p>	<p>The accused was unrepresented before the Sessions Court. The lawyer had a filed vakalatnama to withdraw from the case which the Court rejected and the matter proceeded without the accused having services of a legal practitioner during the course of trial.</p>	<p>Is there a duty cast on the trial court to ask the accused to engage a lawyer for the accused under legal aid scheme, when the lawyer appearing for the accused files application for withdrawal which is rejected by the Court?</p>	<ul style="list-style-type: none"> • The case where the accused is unrepresented and a case where accused is represented and the lawyer seeks to withdraw his appearance and does not attend trial stand on an equal footing. • Section 304, CrPC along with Article 21 has to be read together in spirit and not just in principle. Therefore, in a situation like this there is burden cast on the courts to inform the accused either to engage another lawyer or to inform him that he is entitled to free legal aid if he so desires.
12.	<p>Suk Das vs. Union Territory of Arunachal Pradesh</p> <p>☞ <i>1986 SC 991</i></p> <p>☞ <i>Supreme Court</i></p>	<p>Since no legal aid was provided to the indigent accused, they could not cross-examine the witnesses. As a result of which they were convicted and sentenced to undergo simple imprisonment for a period of 2 years. In an appeal to High Court, the Court held that the trial could not stand vitiated</p>	<p>Whether right to legal aid be lawfully denied if the accused did not apply for free legal aid?</p>	<ul style="list-style-type: none"> • The Court held in negative stating that due to widespread lack of legal awareness in India among both literates and illiterates, the proposition of application for free legal aid would render the right meaningless. • If the accused does not have a lawyer by his side in his trial, the trial stands vitiated.

		because the appellants did not ask for legal services. Hence, the appeal in Supreme Court.		
13.	<p>Commonwealth Human Rights Initiative vs. State of West Bengal & Ors.</p> <p>☞ <i>WP 56 of 2013</i></p> <p>☞ <i>Calcutta High Court</i></p>	Writ filed to pray that the accused persons shall be apprised of his right to engage a Legal Aid Lawyer. The panel of Legal Aid Lawyers shall be made available when the remand order is being made.	<ul style="list-style-type: none"> • Whether the panel of Legal Aid lawyers to be made available when the remand order is being made? • Whether the accused persons be apprised of their right to engage a Legal Aid lawyer? 	The Magistrates are bound to apprise the accused persons at the time of remand of their right to engage a legal aid lawyer at the expense of the State. It was also held that the availability of the panel of lawyers should be ensured by the concerned bodies/authorities.
14.	<p>Hussainara Khatoon & ors vs.</p> <p>Home secretary, State of Bihar</p> <p>☞ <i>AIR 1979 SC 1369</i></p> <p>☞ <i>Supreme Court</i></p>	A writ of habeas corpus was filed in the Supreme Court seeking directions to release a large number of under-trial prisoners languishing in the prisons of Bihar.	The Court dealt with the issue of State's constitutional obligations to assure speedy trial and providing of free legal aid to the accused.	<ul style="list-style-type: none"> • The Court held that the right to free legal aid is an inalienable element of 'reasonable, fair and just' procedure. Without it, a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. Therefore, the state government should provide under-trial prisoners a lawyer at its own cost for the purpose of making an application for bail.

	Vulnerable Community			
15.	<p>R.D. Upadhyay & Ors. vs. State of A.P. & Ors.</p> <p>☞ <i>AIR2006SC1946</i></p> <p>☞ <i>Supreme Court</i></p>	<p>Children, for none of their fault, have to stay in jail with their mothers. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in absence of the mother. The jail environment is certainly not congenial for development of the children.</p>	<p>Directions to be given for the development of children who are in jail with their mothers, either as undertrial prisoners or convicts.</p>	<p>Guidelines were given regarding the diet of mother and child, child birth in prison, pregnant women in prison, food, clothing, medical care, and education. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mother are complied with in letter and spirit.</p>
16.	<p>Sheela Barse v. State of Maharashtra</p> <p>☞ <i>AIR 1983 SC 378</i></p> <p>☞ <i>Supreme Court</i></p>	<p>Sheela Barse, a journalist, wrote to the Supreme Court saying that women in Bombay Central Jail have admitted that they had been assaulted in police lock-up. Given the seriousness of the allegations, the Court asked for a report. The report admitted that excesses against women were taking place and it also highlighted there were inadequate provisions for providing legal assistance.</p>	<p>The Court primarily dealt with the issue of providing legal assistance to not only women prisoners but to all prisoners lodged in jails in the State of Maharashtra.</p>	<ul style="list-style-type: none"> • The Court directed that the police must inform the nearest Legal Aid Committee as soon as an arrest is made and the person is taken to the lock-up. • Secondly, the Legal Aid Committee should take immediate steps to provide legal assistance to the arrested person at state cost, provided such person is willing to accept legal assistance.

Section IV:
STATE LEGAL AID SCHEMES

WEST BENGAL

A.SETUP OF PERMANENT LEGAL AID CLINICS IN CORRECTIONAL HOMES

Mir Dara Sheko, WBHJS
Member Secretary
STATE LEGAL SERVICES AUTHORITY
WEST BENGAL



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No. 122(192)/SLSA-24/10, Dt.:- 21.01.2013

To
The Chairman,
District Legal Services Authority
&

The Chief Judge/The District & Sessions Judge
Kolkata, Howrah, Hooghly, Burdwan, Purba Medinipur, Paschim Medinipur, Birbhum,
Bankura, North 24-Parganas, South 24-Parganas, Purulia, Nadia, Murshidabad,
Malda, Uttar Dinajpur, Dakshin Dinajpur, Jalpaiguri, Coochbehar and Darjeeling.

**Sub : Setting up Permanent Legal Aid Clinic compulsorily
to the Correctional Home within the district .**

Sir,

I am directed to request you to take **immediate step** to set up **Permanent Legal Aid Clinic** in the **District Correctional Home** as well as **Sub-Divisional Correctional Homes** of the District, so that, through the trained Para Legal Volunteers, such Permanent Legal Aid Clinics can function to deal with the problems of the inmates **either legal or otherwise** in the Correctional Homes of the District.

I am further directed to **obtain compliance report** from you as regards setting up such Permanent Legal Aid Clinics in the district and sub-division Correctional Homes of your district positively within 15th March, 2013, and to submit thereafter performance report bearing statements **month by month** with reference to number and category (viz. Male, Female, Schedule Caste, Schedule Tribe, etc.) of the beneficiaries.

Yours faithfully,

(Mir Dara Sheko)
Member Secretary
State Legal Services Authority, W.B.

LEGAL AID COUNSELS AT MAGISTRATES COURT

Mir Dara Sheko, WBHJS
Member Secretary
STATE LEGAL SERVICES AUTHORITY
WEST BENGAL



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Dt.:- 20.11.2012

No. 237(9)/LSA-286/06

To
✓ All the Chairmen,
District Legal Services Authorities
&

The Chief Judicial Magistrates/Additional Chief Judicial Magistrates of all Districts and
Sub-Divisions, West Bengal.

Sir,

As a result of visit of some Correctional Homes in and around Kolkata, as well as bringing the fact to the knowledge of this Authority by the Commonwealth Human Rights Initiative, it has come to the notice of this Authority that the compliance about the direction of the Hon'ble Supreme Court of India as held in the case of Md. Ajmal Md. Amir Kasab @ Abu Mujahid vs. State of Maharashtra (Criminal Appeal Nos. 1899-1900 of 2011) is yet to be followed in true letter and spirit by the concerned Courts.

The very relevant portion of Paragraph 484 of the said judgement is quoted for information to all concerned :-

"We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. **We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.**"

Therefore, I am directed to attach some relevant Paragraphs viz. 484 to 488 of said judgement with request to take note of the mandate of the Hon'ble Apex Court and to circulate the same amongst all Ld. Magistrates including Chief/Additional Judicial Magistrates of your judgeship, for their proper guidance and compliance.

I have been further directed to mention that in the event of any dereliction in the matter of compliance of the direction of the Hon'ble Apex Court, if it is brought to the notice of this Authority, necessary all steps shall be taken up from this end for creating **exemplary instance** amongst the Judicial Officers.

Yours faithfully,

Mir Dara Sheko
(Mir Dara Sheko)
Member Secretary

ALL Speed Post
Mir Dara Sheko, WBHJS
Member Secretary
STATE LEGAL SERVICES AUTHORITY
WEST BENGAL



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No. 939 (19) /SLSA-286/2006

Date : 24.04.2013

To
The Chairman
District Legal Services Authority,
&
The Chief Judge/District & Sessions Judge,
Kolkata, Howrah, Hooghly, Burdwan, Purba Medinipur, Paschim Medinipur, Birbhum, Bankura,
Purulia, North 24-Parganas, South 24-Parganas, Nadia, Murshidabad, Malda, Uttar Dinajpur, Dakshin
Dinajpur, Jalpaiguri, Coochbehar and Darjeeling.

Ref: Earlier letter No. 2327(96)/SLSA-286/2006, dt. 20.11.2012.

Sir,

I am directed to state that this Authority is still in a dilemma to ensure itself as to whether each and every Magistrate Court is having any Ld. Advocate, deputed by the local Legal Services Institution/Committee to stand for rendering advocacy in favour of the Under Trial Prisoner/Accused in custody, who is not having lawyer of his own.

It is needless to mention that by the mandate of the Hon'ble Supreme Court, the acts and activities of the Legal Services Institutions have been stretched to such an extent, so that the Authority can oversee the implementation of the guidelines through its districts or Sub-divisional outer-parts.

Therefore, once again by enclosing the scheme for Legal Aid Counsel in all the Court of Magistrates framed by the State Legal Services Authority, West Bengal in addition to the Model Scheme framed by NALSA, and the **consolidated rate of fees of the Legal Aid Counsels** of the Court of Magistrates situated at different districts of West Bengal, of course **for attending the UTPs/Accused in custody**, who is not having lawyer of his/her own, I do request to circulate the same to each and every Court of Magistrates at the Headquarters, and in Sub-Division, or Chowki, for information, for compliance, as regards engaging lawyer in the situation mentioned above, and to remove confusion about the payment of fees in favour of Ld. Advocates appearing on behalf of the accused persons of aforesaid status, which, of course, will have no semblance with the Government rate chart, as already circulated for dealing with stage-wise several cases by the categorized Lawyers.

Thanking you,

Yours faithfully,
Mir Dara Sheko
(Mir Dara Sheko)
Member Secretary
State Legal Services Authority, W.B.

Encl: As above (3 pages).

Scheme for " Legal Aid Counsel " in all
the Courts of Magistrates framed by the
State Legal Services Authority, W.B., in
addition to the Model Scheme framed by
the N A L S A .

1. Legal Aid Counsel has to remain present in the Court of Magistrate attached to him during remand hours and or on holidays during the remand hours.
2. The Legal Aid Counsel has to appear in the case of undefended accused who is in the custody and is produced before the magistrate with the consent of the accused concerned, for challenging the remand application, if the remand application is given by the investigating agency or he has to file a bail application.
3. Payment to the Legal Aid Counsel may be made after obtaining a certificate from the concerned Judicial Officers regarding attendance of the Counsel at the time of remand hour.
4. To ensure that the Legal Aid Counsel remains present in the Court during the remand hour or any other hour of the day as directed by the court, the Legal aid functionaries may insist for an attendance certificate issued by the Court to legal aid Counsel before making his payment for remand hour.
5. Certificate of merits / awards may be given to those Legal Aid Counsels whose performance is found to be outstanding.
6. The name and address of the Legal Aid Counsel may be displayed outside the Court to which he is attached with requisite information as to who are eligible under the Legal Services Authorities Act and no payment is required to be made by them to legal aid counsel.
7. In case of any complaint against Legal Aid Counsel regarding demand of fee or any other charges from an aided person, prompt action by way of removal of his name from the panel may be taken after making due inquiry and give a reasonable opportunity of hearing to the legal aid Counsel.
8. For the appointment for filing a complaint or defending the case or for filling appeal or revision the existing procedure be followed and the Advocate appointed for filing complaint or defending case or filing revision or appeal or writ may be paid at the prescribed rate, irrespective of the fees of legal aid counsel, as stated above.

As directed & approved by the
Executive Chairman, S.L.S.A.,
West Bengal.

(T.D.Banerjee)
Member-Secretary,
State Legal Services Authority,
West Bengal.

NALSA GUIDELINES – December 2011

DLSA SECRETARIES TO CONDUCT JAIL VISITS

19. Implementation of the Schemes of National Legal Services Authority by the State Legal Services Authorities.

National Legal Services Authority is empowered to frame the most effective and economical Schemes for the purpose of making legal services available under the Legal Services Authorities Act, 1987. Such Schemes are framed after elaborate discussions in the Central Authority, taking into account of the diverse situations prevailing in the different parts of India. The NALSA Schemes are circulated amongst all State Legal Services Authorities and District Legal Services Authorities and amongst the other legal services institutions.

The State Legal Services Authorities and the District Legal Services Authorities are primarily responsible for implementing such Schemes. However, in some cases the State Authorities and District Authorities may find it difficult to put the Schemes into practice in their areas on account of the demographical, geographical, financial or other reasons. The State Legal Services Authorities can feel free to inform the NALSA about the difficulties in implementation in any particular Scheme or any portion of it in the State or in any particular local area. NALSA, in such cases may allow the State Authority to implement such Schemes in the best practicable manner in such States/areas.

20. Jail Visits

The Secretary of the District Legal Services Authority by himself or along with the Chairman of the District Legal Services Authority shall make regular visits to the jails within the district. The purpose of the visits shall be to identify the following: (a) under-trial prisoners languishing for want of legal aid; (b) identify whether any convicts are undergoing imprisonment in the jail who were juveniles on the date of occurrence of the case charged against them; (c) to identify whether any non-criminal mentally ill persons are detained in the prisons; (d) to identify whether any juveniles are detained in the prisons; (e) to identify whether compliance of the order of the Supreme Court in *R.D. Upadhyay v. State of A.P.* (2007) 15 SCC 337; AIR 2006 SC 1946 in relation to the care of the children below the age of six years living with their mothers in the prisons [Hon'ble Supreme Court in this case has assigned a permanent duty on the Legal Services Authorities to conduct periodic inspections of all jails and to report compliance of the directions of the Court]; (f) any other matters specially brought to the attention of the District Legal Services Authority by any Court or by way of a complaint from other sources.

Appropriate remedial action by way of legal aid, shall be given to the persons detained in the jails either by way of providing lawyers or by writing to the superior authorities of the jail. Serious matters may be brought to the notice of the High Court by way of a report submitted to the Patron-in-Chief.

PLEA BARGAINING & LOK ADALATS IN JAIL COMPOUND

21. Plea Bargaining and use of ADR techniques for under-trial prisoners.

The provisions of Plea Bargaining introduced in Chapter XXI-A Code of Criminal Procedure Code, 1973 and organizing Lok Adalat for compoundable criminal matters shall be resorted to by the District Legal Services Authority. The report of the cases settled by invoking these provisions shall be sent to the State Legal Services Authority which shall consolidate the same and send reports to the National Legal Services Authority. The number of under-trials to whom legal aid has been given also shall be reported to the National Legal Services Authority every month, through its web-based monitoring system.

22. Establishment of Jail and Juvenile Lok Adalats.

Lok Adalats for settlement of compoundable criminal cases shall be held in the jails where under-trial prisoners are lodged and also in the observation homes where children in conflict with law are housed. District Authority/Taluk Legal Services Committees shall arrange to send the officers, para-legal volunteers, panel lawyers etc to visit the jails, Observation Homes in the district and to collect the details and case numbers relating to the under-trial prisoners and under-trial juveniles. After collecting details of the cases relating to the compoundable offences, the District Authority/Taluk Legal Services Committee shall liaise with the Presiding Officer of the Court/JJB concerned and get such cases referred to the Lok Adalat. Lok Adalats for such cases shall be organized, as far as practicable in the Jails/Observation Homes itself. The District Legal Services Authority shall ensure that the Taluk Legal Services Committees collect information from the Jails/JJBs within their jurisdiction as aforesaid and that Lok Adalats are organized as frequently as possible.

23. Legal Aid to victims of crime including juvenile/child victims.

At present much of the legal aid in criminal cases is focused on the accused persons. In our criminal jurisprudence, victims of crime do not get sufficient attention. Victims of crime face the court proceedings only as witnesses. Sometimes they figure in when the court awards compensation under Section 357 Code of Criminal Procedure, 1973. Section 357 A has been newly introduced in the Code of Criminal Procedure for awarding compensation to the victims.

The victims of crime are often traumatized physically and mentally. In grave crimes, they require assistance in rehabilitation and also in the proceedings in the court. Victims require legal aid by providing a lawyer to assist them for giving the best possible evidence before the Court. Under Section 301(2) Code of Criminal Procedure, such lawyer has to act under the directions of the public prosecutor. However, while appointing lawyers to the victims of crime, it has to be ascertained whether such victim is entitled to get free legal aid under Section 12 of the Legal Services Authorities Act. Specific instructions shall be given to the lawyer so

NALSA's Free & Competent legal Services Act 2010

PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART III, SECTION 4

MINISTRY OF LAW & JUSTICE

(DEPARTMENT OF LEGAL AFFAIRS)

NATIONAL LEGAL SERVICES AUTHORITY

NOTIFICATION

New Delhi, dated 9th September, 2010

No.L/61/10/NALSA. - *In exercise of the powers conferred by section 29 of the Legal Services Authorities Act, 1987 (39 of 1987) and in pursuance of the provisions in section 4 of the Act to make available free and competent legal services to the persons entitled thereto under section 12 of the said Act, the Central Authority hereby makes the following regulations, namely: -*

1. **Short title, extent and commencement.** - (1) These regulations may be called the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010.
 - (2) They shall be applicable to Supreme Court Legal Services Committee, State Legal Services Authorities, High Court Legal Services Committees, District Legal Services Authorities and Taluk Legal Services Committees in India.
 - (3) They shall come into force from the date of their publication in the Official Gazette.
2. **Definitions.** - (1) In these regulations, unless the context otherwise requires, -
 - (a) "Act" means the Legal Services Authorities Act, 1987 (39 of 1987);
 - (b) "Form" means a Form annexed to these Regulations;
 - (c) "front office" means a room in the Legal Services Institution where legal services are made available;

- (d) "legal practitioner" shall have the meaning assigned to it in clause (i) of section 2 of the Advocates Act, 1961 (25 of 1961);
 - (e) "Legal Services Institution" means the Supreme Court Legal Services Committee, a State Legal Services Authority, the High Court Legal Services Committee, District Legal Services Authority or the Taluk Legal Services Committee, as the case may be;
 - (f) "Para-Legal Volunteer" means a para-legal volunteer trained as such by a Legal Services Institution;
 - (g) "Secretary" means the Secretary of the Legal Services Institution;
 - (h) "section" means the section of the Act;
 - (i) "State regulation" means regulation made by the State Authorities under the Act.
2. All other words and expressions used but not defined in these regulations shall have the same meanings assigned to them in the Act.

3. Application for legal services.- (1) An application for legal services may be presented preferably in Form-I in the local language or English.

- (2) The applicant may furnish a summary of his grievances for which he seeks legal services, in a separate sheet along with the application.
- (3) An application, though not in Form-I, may also be entertained, if reasonably explains the facts to enable the applicant to seek legal services.
- (4) If the applicant is illiterate or unable to give the application on his or her own, the Legal Services Institutions may make arrangement for helping the applicant to fill up the application form and to prepare a note of his or her grievances.
- (5) Oral requests for legal services may also be entertained in the same manner as an application under sub-regulation (1) and (2).
- (6) An applicant advised by the para-legal volunteers, legal aid clubs, legal aid clinics and voluntary social service institutions shall also be considered for free legal services.
- (7) Requests received through e-mails and interactive on-line facility also may be considered for free legal services after verification of the identity of the applicant and on ensuring that he or she owns the authorship of the grievances projected.

4. **Legal Services Institution to have a front office.-** (1) All Legal Services Institutions shall have a front office to be manned by a panel lawyer and one or more para-legal volunteers available during office hours.
- (2) In the case of court based legal services, such lawyer shall after consideration of the application, forward the same to the Committee set up under regulation 7 and for other types of legal services, the panel lawyer in the front office may provide such legal services.
- (3) The panel lawyer in the front office shall render services like drafting notices, sending replies to lawyers' notices and drafting applications, petitions etc.
- (4) The panel lawyer in the front office may obtain secretarial assistance from the staff of the Legal Services Institutions.
- (5) In case of urgent matters, the panel lawyer in the front office may in consultation with the Member-Secretary or Secretary of the Legal Services Institutions provide legal assistance of appropriate nature:
- Provided that the Committee set up under regulation 7 may consider and approve the action taken by the panel lawyer in the front office.
5. **Proof of entitlement of free legal services. --** (1) An affidavit of the applicant that he falls under the categories of persons entitled to free legal services under section 12 shall ordinarily be sufficient.
- (2) The affidavit may be signed before a Judge, Magistrate, Notary Public, Advocate, Member of Parliament, Member of Legislative Assembly, elected representative of local bodies, Gazetted Officer, teacher of any school or college of Central Government, State Government or local bodies as the case may be.
- (3) The affidavit may be prepared on plain paper and it shall bear the seal of the person attesting it.
6. **Consequences of false or untrue details furnished by the applicant. -** The applicant shall be informed that if free legal services has been obtained by furnishing incorrect or false information or in a fraudulent manner, the legal services shall be stopped forthwith and that the expenses incurred by the Legal Services Institutions shall be recoverable from him or her.
7. **Scrutiny and evaluation of the application for free legal services. -** (1) There shall be a Committee to scrutinise and evaluate the application for legal

services, to be constituted by the Legal Services Institution at the level of Taluk, District, State and above.

- (2) The Committee shall be constituted by the Executive Chairman or Chairman of the Legal Services Institution and shall consist of, -
 - (i) the Member Secretary or Secretary of the Legal Services Institution as its Chairman and two members out of whom one may be a Judicial Officer preferably having working experience in the Legal Services Institution and;
 - (ii) a legal professional having at least fifteen years' standing at the Bar or Government pleader or Assistant Government Pleader or Public Prosecutor or Assistant Public Prosecutor, as the case may be.
- (3) The tenure of the members of the Committee shall ordinarily be two years which may be further extended for a maximum period of one year and the Member Secretary or Secretary of the Legal Services Institution shall, however, continue as the ex-officio Chairman of the Committee.
- (4) The Committee shall scrutinise and evaluate the application and decide whether the applicant is entitled to the legal services or not within a period of eight weeks from the date of receipt of the application.
- (5) If the applicant is not covered under the categories mentioned in section 12, he or she shall be advised to seek assistance from any other body or person rendering free legal services either voluntarily or under any other scheme.
- (6) The Legal Services Institution shall maintain a list of such agencies, institutions or persons who have expressed willingness to render free legal services.
- (7) Any person aggrieved by the decision or order of the Committee, he or she may prefer appeal to the Executive Chairman or Chairman of the Legal Services Institution and the decision or order in appeal shall be final.

8. **Selection of legal practitioners as panel lawyers.** - (1) Every Legal Services Institution shall invite applications from legal practitioners for their empanelment as panel lawyers and such applications shall be accompanied with proof of the professional experience with special reference to the type of cases which the applicant-legal practitioners may prefer to be entrusted with.

- (2) The applications received under sub-regulation (1) shall be scrutinised and selection of the panel lawyers shall be made by the Executive Chairman or Chairman of the Legal Services Institution in consultation with the Attorney-General (for the Supreme Court), Advocate-General (for the High Court), District Attorney or Government Pleader (for the District and Taluk level) and the respective Presidents of the Bar Associations as the case may be.
- (3) No legal practitioner having less than three years' experience at the Bar shall ordinarily be empanelled.
- (4) While preparing the panel of lawyers the competence, integrity, suitability and experience of such lawyers shall be taken into account.
- (5) The Executive Chairman or Chairman of the Legal Services Institution may maintain separate panels for dealing with different types of cases like, Civil, Criminal, Constitutional Law, Environmental Law, Labour Laws, Matrimonial disputes etc.
- (6) The Chairman of the Legal Services Institution may, in consultation with the Executive Chairman of the State Legal Services Authority or National Legal Services Authority as the case may be prepare a list of legal practitioners from among the panel lawyers to be designated as Retainers.
- (7) The Retainer lawyers shall be selected for a period fixed by the Executive Chairman on rotation basis or by any other method specified by the Executive Chairman.
- (8) The strength of Retainer lawyers shall not exceed, -
 - (a) 20 in the Supreme Court Legal Services Committee;
 - (b) 15 in the High Court Legal Services Committee;
 - (c) 10 in the District Legal Authority;
 - (d) 5 in the Taluk Legal Services Committee.
- (9) The honorarium payable to Retainer lawyer shall be, -
 - (a) Rs.10,000 per month in the case of Supreme Court Legal Services Committee;
 - (b) Rs.7,500 per month in the case of High Court Legal Services Committee;
 - (c) Rs.5,000 per month in the case of District Legal Services Authority;

- (d) Rs.3,000 per month in the case of the Taluk Legal Services Committee:

Provided that the honorarium specified in this sub-regulation is in addition to the honorarium or fee payable by the Legal Services Institution for each case entrusted to the Retainer lawyer.

- (10) The panel lawyers designated as Retainers shall devote their time exclusively for legal aid work and shall be always available to deal with legal aid cases and to man the front office or consultation office in the respective Legal Services Institution.
- (11) The panel prepared under sub-regulation (2) shall be re-constituted after a period of three years but the cases already entrusted to any panel lawyer shall not be withdrawn from him due to re-constitution of the panel.
- (12) The Legal Services Institution shall be at liberty for withdrawing any case from a Retainer during any stage of the proceedings.
- (13) If a panel lawyer is desirous of withdrawing from a case he shall state the reasons thereof to the Member-Secretary or the Secretary and the latter may permit the panel lawyer to do so.
- (14) The panel lawyer shall not ask for or receive any fee, remuneration or any valuable consideration in any manner, from the person to whom he had rendered legal services under these regulations.
- (15) If the panel lawyer engaged is not performing satisfactorily or has acted contrary to the object and spirit of the Act and these regulations, the Legal Services Institution shall take appropriate steps including withdrawal of the case from such lawyer and his removal from the panel.

9. Legal services by way of legal advice, consultation, drafting and conveyancing. - (1) The Executive Chairman or Chairman of the Legal Services Institution shall maintain a separate panel of senior lawyers, law firms, retired judicial officers, mediators, conciliators and law professors in the law universities or law colleges for providing legal advice and other legal services like drafting and conveyancing.

- (2) The services of the legal aid clinics in the rural areas and in the law colleges and law universities shall also be made use of.

- 10. Monitoring Committee.** - (1) Every Legal Services Institution shall set up a Monitoring Committee for close monitoring of the court based legal services rendered and the progress of the cases in legal aided matters.
- (2) The Monitoring Committee at the level of the Supreme Court or the High Court, as the case may be, shall consist of, -
- (i) the Chairman of the Supreme Court Legal Services Committee or Chairman of the High Court Legal Services Committee;
 - (ii) the Member-Secretary or Secretary of the Legal Services Institution;
 - (iii) a Senior Advocate to be nominated by the Patron-in-Chief of the Legal Services Institution.
- (3) The Monitoring Committee for the District or Taluk Legal Services Institution shall be constituted by the Executive Chairman of the State Legal Services Authority and shall consist of, -
- (i) the senior-most member of the Higher Judicial Services posted in the district concerned, as its Chairman;
 - (ii) the Member-Secretary or Secretary of the Legal Services Institution;
 - (iii) a legal practitioner having more than fifteen years' experience at the local Bar-to be nominated in consultation with the President of the local Bar Association:
- Provided that if the Executive Chairman is satisfied that there is no person of any of the categories mentioned in this sub-regulation, he may constitute the Monitoring Committee with such other persons as he may deem proper.

- 11. Functions of the Monitoring Committee.** - (1) Whenever legal services are provided to an applicant, the Member-Secretary or Secretary shall send the details in Form-II to the Monitoring Committee at the earliest.
- (2) The Legal Services Institution shall provide adequate staff and infrastructure to the Monitoring Committee for maintaining the records of the day-to-day progress of the legal aided cases.
- (3) The Legal Services Institution may request the Presiding Officer of the court to have access to the registers maintained by the court for ascertaining the progress of the cases.
- (4) The Monitoring Committee shall maintain a register for legal aided cases for recording the day-to-day postings, progress of the case and the end result (success or failure) in respect of cases for which legal aid

is allowed and the said register shall be scrutinised by the Chairman of the Committee every month.

- (5) The Monitoring Committee shall keep a watch of the day-to-day proceedings of the court by calling for reports from the panel lawyers, within such time as may be determined by the Committee.
- (6) If the progress of the case is not satisfactory, the Committee may advise the Legal Services Institution to take appropriate steps.

12. Monitoring Committee to submit bi-monthly reports. – (1) The Monitoring Committee shall submit bi-monthly reports containing its independent assessment on the progress of each and every legal aid case and the performance of the panel lawyer or Retainer lawyer, to the Executive Chairman or Chairman of the Legal Services Institution.

- (2) After evaluating the reports by the Committee, the Executive Chairman or Chairman of the Legal Services Institution shall decide the course of action to be taken in each case.
- (3) It shall be the duty of the Member-Secretary or Secretary of the Legal Services Institution to place the reports of the Monitoring Committee before the Executive Chairman or Chairman of the Legal Services Institution and to obtain orders.

13. Financial assistance. – (1) If a case for which legal aid has been granted requires additional expenditure like payment of court fee, the fee payable to the court appointed commissions, for summoning witnesses or documents, expenses for obtaining certified copies etc., the Legal Services Institution may take urgent steps for disbursement of the requisite amount on the advice of the panel lawyer or Monitoring Committee.

- (2) In the case of appeal or revision the Legal Services Institution may bear the expenses for obtaining certified copies of the judgment and case records.

14. Payment of fee to the panel lawyers. - (1) Panel lawyers shall be paid fee in accordance with the Schedule of fee, as approved under the State regulations.

- (2) The State Legal Services Authority and other Legal Services Institution shall effect periodic revision of the honorarium to be paid to panel lawyers for the different types of services rendered by them in legal aid cases.

- (3) As soon as the report of completion of the proceedings is received from the panel lawyer, the Legal Services Institution shall, without any delay, pay the fees and expenses payable to panel lawyer.

- 15. Special engagement of senior advocates in appropriate cases.** – (1) If the Monitoring Committee or Executive Chairman or Chairman of the Legal Services Institution is of the opinion that services of senior advocate, though not included in the approved panel of lawyers, has to be provided in any particular case the Legal Services Institution may engage such senior advocate. (2) Notwithstanding anything contained in the State regulations, the Executive Chairman or Chairmen of the Legal Services Institution may decide the honorarium for such senior advocate:

Provided that special engagement of senior advocates shall be only in cases of great public importance and for defending cases of very serious nature, affecting the life and liberty of the applicant.

- 16. Evaluation of the legal aid cases by the National Legal Services Authority and State Legal Services Authorities.** – (1) The Supreme Court Legal Services Committee shall send copies of the bi-monthly reports of the Monitoring Committee of the Supreme Court Legal Services Committee to the Central Authority.
- (2) The High Court Legal Services Committees, the State Legal Services Authorities shall submit copies of the bi-monthly reports of their Monitoring Committees to their Patron-in-Chief.
- (3) The District Legal Services Authorities and Taluk Legal Services Committees shall submit copies of the bi-monthly reports of their Monitoring Committees to the Executive Chairman of the State Legal Services Authority.
- (4) The State Legal Services Authorities shall also send consolidated half-yearly reports of the Monitoring Committees, indicating the success or failure of each of the legal aided cases, to the Central Authority.
- (5) In appropriate cases, the Executive Chairman of the National Legal Services Authority may nominate and authorise the members of its Central Authority to supervise, monitor or advise the Legal Services Institution for effective and successful implementation of these regulations.

(U. Sarathchandran)

Member-Secretary

Form -I
National Legal Services Authority
(Free and Competent Legal Services) Regulations, -2010

(see regulation-3)

The Form of Application for Legal Services
(this may be prepared in the regional language)

- Registration No. :
1. Name :
2. Permanent Address
3. Contact Address with phone no. if any,
e-mail ID, if any. :
4. Whether the applicant belongs to the category :
of persons mentioned in section -12 of the Act
5. Monthly income of the applicant :
6. Whether affidavit/proof has been produced
in support of income/eligibility u/s 12 of the Act :
7. Nature of legal aid or advise required :
8. A brief statement of the case, if court based :
legal services is required.

Signature of the applicant

Place:

Date:

Form-II

National Legal Services Authority
(Free and Competent Legal Services) Regulation, 2010
(see regulation-11)

Information furnished to the Monitoring Committee about the legal Services provided

- (i) Name of the Legal Services Institution. :
- (ii) Legal aid application number and date on which legal aid was given. :
- (iii) Name of the legal aid applicant. :
- (iv) Nature of case (civil, criminal, constitutional law etc.). :
- (v) Name and roll number of the lawyer assigned to the applicant. :
- (vi) Name of the Court in which the case is to be filed / defended. :
- (vii) The date of engaging the panel lawyer. :
- (viii) Whether any monetary assistance like, court fee, advocate commission fee, copying charges etc. has been given in advance? :
- (ix) Whether the case requires any interim orders or appointment of commission? :
- (x) Approximate expenditure for producing records, summoning of witnesses etc. :
- (xi) The expected time for conclusion of the proceedings in the Court. :

MEMBER-SECRETARY / SECRETARY

Dated:

National Legal Services Authority (Legal Aid Clinics) Scheme, 2010



NATIONAL LEGAL SERVICES AUTHORITY

NATIONAL LEGAL SERVICES AUTHORITY (LEGAL AID CLINICS) SCHEME, 2010

[Adopted in the Meeting of the Central Authority of NALSA held on 8.12.2010 at Supreme Court of India]

1. Introduction.

Legal Aid Clinics are intended to provide legal relief easily accessible to the indigent and backward sections of our society. They are almost on the lines of primary health centres where a doctor and other auxiliary medical staff provide basic health care to the people situated in village areas affected with poverty and social squalor. Like the doctors rendering health services to the people of the locality in the primary health centre, a lawyer manning the legal aid clinic provides legal services to the people. The thrust is on the basic legal services like legal advice and assisting in drafting of notices, replies, applications, petitions etc. The lawyer manning the legal aid clinic will also attempt to resolve the disputes of the people in the locality, preventing the disputes from maturing into litigation. This provides the lawyer in the legal aid clinic an opportunity to understand the difficulties faced by people in the distant villages' for access to justice. Legal aid clinics have to be manned by para-legal volunteers selected by the Legal Services Authorities and lawyers with a sense of commitment, sensibility and sensitiveness to the problems of common people.

Legal aid clinic is one of the thrust areas envisioned in the NALSA's *Quinquennial vision & strategy document*. NALSA plans to set up legal aid clinics in all villages.

2. Name of the Scheme.

The Scheme shall be called the National Legal Services Authority (Legal Aid Clinics) Scheme, 2010.

3. Objective.

The objective of the Scheme is to provide legal services to the poor, marginalised and weaker sections of the society as categorised in Section 12 the Legal Services Authorities Act 1987 (Central Act), especially to the people living in far away places including the places with geographical barriers, away from the seats of justice and the offices of the legal services institutions ['legal services institutions' means the Taluk/Sub-divisional/Mandal Legal Services Committees, District Legal Services Authorities, High Court Legal Services Committees, State Legal Services Authorities and Supreme Court Legal Services Committee established under the Legal Services Authorities Act, 1987].

The aim of the Scheme is to provide an inexpensive local machinery for rendering legal services of basic nature like legal advice, drafting of petitions, notices, replies, applications and other documents of legal importance and also for resolving the disputes of the local people by making the parties to see reason and thereby preventing the disputes reaching courts. In cases where legal services of a higher level is required the matter can be referred to the legal services institutions established under the Legal Services Authorities Act, 1987.

4. Location of Legal Aid Clinics.

The legal aid clinics established by the Legal Services Authorities shall be located at a place where the people in the locality can easily access. A room within the office building of the local body institutions like village *panchayat* shall be ideal.

5. Sign-board exhibiting the name of the Legal Aid Clinic.

There shall be a sign-board both in English and the local language, depicting the name of the legal aid clinic. The board shall display the working hours and the days on which the clinic will be open. Working hours of Legal Aid Clinics shall be decided by the legal services institutions having territorial jurisdiction in consultation with the District Legal Services Authority.

6. Assistance of the local body institutions in obtaining a convenient room for the Legal Aid Clinic.

The Legal Services Authorities shall persuade the local body institutions like village *panchayat*, *mandal* / block *panchayat*, municipality and corporation etc, to provide a room for the functioning of legal aid clinic. Since the legal aid clinic is for the benefit of the people in the locality, the local body institutions should be impressed upon the need to co-operate with the functioning of the legal aid clinics and to realise that

the legal aid clinic is aimed at promoting peace and welfare of the people in the locality.

7. Publicity.

The local body institutions shall be persuaded to give adequate publicity about the functioning of the legal aid clinic. The elected representatives of the local body institutions shall be persuaded to spread the message of the utility of the legal aid clinic to the people in his / her constituency / wards.

8. Infrastructure in the legal aid clinic.

Every legal aid clinic shall have at least the basic and essential furniture like a table and three or four chairs. The local body institutions shall be requested to provide the essential furniture for use in the legal aid clinic. Only in those places where legal aid clinics are not functioning in the office building of the local body institutions, the Legal Services Authorities need to purchase furniture.

If the Legal Services Authority has its own building to run the legal aid clinic, the infrastructural facilities shall be provided by such Authority.

9. All villages to have Legal Aid Clinics.

The District Legal Services Authority shall establish legal aid clinics in all villages, or for a cluster of villages, depending on the size of such villages, especially where the people face geographical, social and other barriers for access to the legal services institutions.

10. The personnel manning the Legal Aid Clinic.

Every legal aid clinic shall have one or more para-legal volunteers available during the working hours of the legal aid clinics.

11. Frequency of visit by lawyers in the Legal Aid Clinics.

Subject to the local requirements, the District Legal Services Authority may decide the frequency of the lawyer's visit in the legal aid clinics. If the situation demands for providing continual legal services, the District Legal Services Authority may consider arranging frequent visits of the lawyer in the legal aid clinic.

12. Selection of lawyers for manning the Legal Aid Clinics.

Qualified legal practitioners with skills for amicable settlement of disputes may be selected from the local bar for empanelment for serving in the legal aid clinic. The selection of lawyers shall be done by the nearest legal services institution having

territorial jurisdiction. Preference shall be given to women lawyers having practice of three years or more. A list of the panel lawyers shall be sent to the District Legal Services Authority.

Para-legal volunteer (s) trained by the Legal Services Authorities and holding the identity card issued by the Legal Services Authorities may be engaged to assist the lawyer in providing legal services in the legal aid clinics.

13. Legal Services in the Legal Aid Clinic.

Legal Services rendered at the legal aid clinic shall be of wide ranging in nature. Besides legal advice, other services like preparing applications for job card under the MGNREGA Scheme, liaison with the government offices and public authorities and helping the common people who come to the clinic for solving their problems with the officials, authorities and other institutions also shall form part of the legal services in the legal aid clinic (the list given is only indicative, not exhaustive). Legal aid clinic shall work like a single-window facility for helping the disadvantaged people to solve their problems where the operation of law comes into picture.

14 Administrative Control of Legal Aid Clinics.

Legal aid clinics shall be under the direct administrative control of the nearest legal services institution having territorial jurisdiction. The District Legal Services Authority shall have supervisory and advisory powers on all legal aid clinics functioning within the district.

The State Legal Services Authority shall have the power to issue guidelines on the working of the legal aid clinics.

15. Honorarium for the lawyers and para-legal volunteers rendering services in the Legal Aid Clinics.

In consultation with the District Legal Services Authority, the State Legal Services Authority shall fix the honorarium to be paid to the lawyers and para-legal volunteers rendering service in the legal aid clinics which shall not be less than Rs. 500/- per day for lawyers and Rs. 250/- for para-legal volunteers. Special consideration may be given in cases where the legal aid clinic is situated at difficult terrains and distant areas where transport facilities are scarce.

16. Maintenance of Records and Registers.

Lawyers and para-legal volunteers rendering service in the legal aid clinics shall record their attendance in the register maintained in the legal aid clinic. There shall be a register in every legal aid clinic for recording the name and address of the

seekers of legal services, name of the lawyer who render services in the legal aid clinic, nature of the service rendered, remarks of the lawyer and signatures of seekers of legal aid and the lawyers.

The records of the Legal Aid Clinics shall be under the custody of the Secretary of the Taluk Legal Services Committee/District Legal Services Authority having territorial jurisdiction.

The legal services institution having territorial jurisdiction may maintain other registers also in consultation with the District Legal Services Authority as the situation requires.

The nearest legal services institution having territorial jurisdiction shall be the custodian of all registers and it shall be the duty of the para-legal volunteers and the lawyer in the legal aid clinic to hand over the registers to such legal services institution, when called for.

17.Change of Lawyers.

The nearest legal services institution having territorial jurisdiction may maintain a panel of lawyers preferably from the local bar. The lawyers may be deputed to the legal aid clinic on a rotation basis. If the matter handled by a lawyer requires follow up and continuous attention for a long duration, the same lawyer who had handled the matter may be entrusted to continue the legal services.

18. Lawyer in the Legal Aid Clinic shall attempt to resolve disputes locally.

During the course of legal services, if the lawyer in the legal aid clinic feels that the dispute between two locally available parties can be resolved through proper advice or by employing ADR techniques, he / she shall make an effort to do so, without permitting the dispute maturing into litigation.

In appropriate cases the lawyers may request the nearest legal services institution having territorial jurisdiction to refer the dispute to Lok Adalat for a pre-litigation settlement.

In such cases the lawyer rendering legal services in the legal aid clinic shall ensure that the procedure prescribed in sub-section (2) of Section 20 Legal Services Authorities Act, 1987 is complied with.

The nearest legal services institution having territorial jurisdiction/ District Legal Services Authority may organise Lok Adalat at the legal aid clinic or near to its premises.

19. Use of Mobile Lok Adalat Vehicle.

The lawyer rendering legal services in the legal aid clinic may request the District Legal Services Authority to send the Mobile Lok Adalat Van with the members of the Lok Adalat Bench for visiting the legal aid clinic for settlement of the disputes identified by him. The Mobile Lok Adalat Van can also be used for the legal services to mentally ill and children.

The State Authority may fix a monthly ceiling for the fuel to be used in the Mobile Lok Adalat Vans. However, the Executive Chairman of the State Authority may grant relaxation, taking into account of the exigencies of the legal services to be performed.

20. Para-Legal Volunteers in the Legal Aid Clinics.

Para-Legal Volunteers selected and trained by the Legal Services Authorities may be deputed to work in the legal aid clinics for assisting the lawyer and the seekers of legal aid. As they gain experience, the services of para-legal volunteers can be used for drafting simple petitions, applications and for accompanying the seekers of legal aid to the government offices for interacting with the officials for solving the problems of such seekers of legal aid.

Para-legal volunteers may be encouraged to obtain diplomas and degrees in law for betterment of their prospects in the long run.

21. Legal Aid Clinics run by the Law Students.

The provisions in the above paragraphs shall *mutatis mutandis* be applicable to the student' legal aid clinics set up by the law colleges and law universities also. However, in such clinics the students in the final year classes may render legal services and the junior students may assist them.

The students legal aid clinic shall always be under the supervision of a faculty member who shall be present in such clinics for immediate consultation.

The students of law colleges and law universities also may make use of the other legal aid clinics established under this scheme.

22. Student may use the legal aid clinics set up under this scheme.

Law students of the law colleges / law universities may be engaged to adopt a village especially in the remote areas and organise legal aid camps. Such students may make use of the legal aid clinics set up under this scheme in consultation with the legal services institution having territorial jurisdiction in that area.

The students in the legal aid clinics may seek the assistance of the para-legal volunteers in the legal aid clinics.

23. The Student legal aid clinics may conduct surveys and prepare reports.

The student legal aid clinics working in the remote villages may conduct surveys of the legal services required for the people of that area including identification of the problems which call for a social justice litigation. For conducting surveys, members of the student legal aid clinic may seek the assistance of the para-legal volunteers and voluntary social welfare institutions working at the grass-root level.

The student legal aid clinics shall send reports to the State Legal Services Authorities with copies to the legal services institutions having territorial jurisdiction and also to the District Legal Services Authorities concerned.

24. Permanent Legal Aid Clinics attached to the Law Colleges and Law Universities.

Besides the student legal aid clinics in the rural areas, law colleges and law universities also may set up permanent legal aid clinics attached to their institutions. The State Legal Services Authority shall be informed about the establishing of such legal aid clinics. The State Legal Services Authority shall render the required technical assistance for such legal aid clinics and shall co-ordinate with the legal aid clinics so established.

25. Services of Para-Legal Volunteers trained by the Legal Services Authorities may be made available in the Legal Aid Clinics run by the Law Colleges and Law Universities.

Trained para-legal volunteers may be deputed to the legal aid clinics in law colleges and law universities for assisting the seekers of legal aid and for interacting with the students and the members of faculty.

26. The State Legal Services Authorities to conduct periodical review of the functioning of Legal Aid Clinics.

The State Legal Services Authorities shall conduct periodical review of the functioning of legal aid clinics.

The State Legal Services Authorities shall collect monthly reports from the District Legal Services Authorities, law colleges and law universities and review the functioning of legal aid clinics working in their jurisdiction.

The State Legal Services Authorities shall conduct periodical review of the working of such legal aid clinics at least once in three months or more frequently.

The State Legal Services Authorities shall issue directions from time to time for improving the services in the legal aid clinics to ensure that members of the weaker sections of the society are provided legal services in an efficient manner.

The State Legal Services Authorities shall send quarterly reports about the functioning of the Legal Aid Clinics within their jurisdiction to National Legal Services Authority.

* * * * *

U.SARATHCHANDRAN
MEMBER-SECRETARY
NATIONAL LEGAL SERVICES AUTHORITY

Implementation of Nalsa's Scheme for the Project of Para Legal Volunteers, 2009-2010

NATIONAL LEGAL SERVICES AUTHORITY

A SCHEME FOR THE PROJECT OF

PARA-LEGAL VOLUNTEERS

(Under the Plan of Action for the year 2009-2010)

The Project of Para-Legal Volunteers is aimed at imparting legal awareness to volunteers selected from certain target groups who in turn act as harbingers of legal awareness and legal aid to all sections of people. The Volunteers are expected to act as intermediaries between the common people and Legal Services institutions and thereby removing barriers of access to justice. Initially, the volunteers are identified from the NSS units in Colleges, creditworthy NGOs and credible social organizations and Women Self Help Groups. In order to achieve the desired results and to mould the volunteers into full-fledged Para-Legal Volunteers, the following guidelines are formulated:

MODALITIES

At the First Stage, every Taluka Legal Services Committee (TLSC) shall identify 5 volunteers from each Arts and Science College where legal literacy classes are conducted. This should be done with the help of the NSS programme officers of the college and in consultation with the Principal. Volunteers shall be of good character, with inclination for social service, law obedient and with a strong sense of legal rights and justice. At least one of the volunteers should be a female student. Names, addresses, and contact telephone nos of the volunteers selected from each college will be kept in the Register of Para-Legal Volunteers maintained by the TLSC.

In the Second stage, selection of volunteers is from the members of the social organizations and Women Self Help Groups. One member with the aforesaid qualities from each panchayat, shall be selected in consultation with the Chairperson of the local self government institutions. This can be done during the legal literacy classes by making advance announcement to the participants. Names, addresses and contact telephone numbers of the selected Para-Legal Volunteers should be noted in the Register.

TLSC may identify other suitable groups also from among whom Para-Legal Volunteers can be selected.

The Third stage is Training. Training programme shall be organized by the TLSC at the Taluka centers. The modalities of training may be decided by the TLSC in consultation with the District Legal Services Authority (DLSA). Training programme is to be planned in such a manner as to provide adequate exposure to the volunteers for generating legal awareness about the Constitutional and statutory rights and duties, general civil, criminal, substantial and procedural laws. Legal issues relating to the following topics also can be included in the Training Programme:

1. Women
2. Children's rights and abolition of child labour.
3. Students.
4. Farmers
5. Industrial and Agricultural Labour.
6. Prisoners
7. Victims of natural calamities and Communal violence.
8. Physically and mentally challenged persons.
9. Victims of trafficking.
10. Members of Scheduled castes and Scheduled Tribes.
11. Consumers.
12. Senior Citizens.
13. Bonded labour.
14. Domestic Violence.
15. Farmers' debt relief.
16. Other beneficiaries of the Legal Services Authorities Act.

The Legal Services Authorities Act 1987, Rules and Regulations framed there under should be an integral part of the training programme. The training should be so oriented as to enable the trainees to act as effective coordinators with the TLSC at the first instance and then with District Legal Services Authorities, High Court Legal Services Committee, State Authority and Supreme Court Legal Services Committee.

TRAINING TOPICS:

Rights of women under the following Acts and topics:

1. Hindu Marriage Act, Christian Marriage Act, Special Marriages Act, Muslim Women's Protection Act.
2. Child Marriage Restraint Act.

3. Family Courts Act.
4. Guardian and Wards Act.
5. Hindu Minority and Guardianship Act.
6. Maternity Benefit Act.
7. Medical Termination and Pregnancy Act.
8. Dowry Prohibition Act.
9. Dowry Harassment.
10. Domestic Violence.
11. S.125 Cr.P.C.
12. Harassment of Women.
13. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act.)
14. Consumer Protection Laws.
15. Labour Welfare Laws.
16. Procedure for claiming compensation for accident victims under Fatal Accidents Act, MV Act, W.C.Act and from railway Accident Claims Tribunal.
17. Bonded Labour (Abolition) Act.
18. F.I.R.
19. Arrest, Bail.
20. Rights of Prisoners.
21. Rights of accused in criminal cases.
22. Registration, Stamp duty.
23. Promissory Notes and Cheques.
24. Revenue Laws.
25. Rights of HIV/AIDS affected persons.
26. Govt. Orders promoting social welfare.
27. PILs.
28. LOK ADALATS, ADR system and free services under the Legal Services Authorities Act.
29. Any other topic the DLSA or TLSC consider to be of relevance to a particular local area.

PROCEDURE RELATING TO TRAINING.

1. Para-Legal Volunteer's training programme is to be conducted under the supervision of the Chairman and Secretary of the TLSC, in consultation with the DLSA.
2. As soon as the training is completed, the TLSC shall send a list of volunteers their names, address and contact details to the DLSA. A

- consolidated list of Para-Legal Volunteers in the district shall be prepared by the DLSA and submitted to the State Authority.
3. A review meeting of the Volunteers shall be conducted by the TLSC once in three months and a report shall be submitted to the DLSA within a week. A copy of the report shall be sent to the State Authority also.
 4. The TLSC may devise its own plan of action for utilization of the services of the Para-Legal Volunteers.
 5. The DLSA may allot a maximum of Rs.2000/- to the TLSC for each training session for providing refreshments to the trainees.
 6. The TLSC may utilize the services of serving/retired judicial officers, law teachers, lawyers, law students, revenue officials, officers of the social welfare department and the law graduates among the court staff as resource persons for the training programme.

Disqualifications of Para-Legal Volunteers and their removal

No person shall be eligible to work as Para-Legal Volunteer if he/she;

- a) fails to evince a sustained interest in the scheme or;
- b) has been adjudged insolvent or;
- c) is accused for an offence in a criminal case or convicted by a criminal court or;
- d) has become physically or mentally incapable of acting as a Para-Legal Volunteer or;
- e) has abused his/her position or committed misconduct in any manner as to render his/her continuance prejudicial to public interest or;
- f) has willfully refused to obey the instructions of the DLSA/TLSC or;

A Para-Legal Volunteer with any of the above disqualifications may be removed by the Chairman, TLSC. Such removal should be promptly reported to the DLSA and also to the State Authority.

Duties of Trained Para-Legal Volunteers.

1. Para-Legal Volunteer shall educate people, especially those belonging to weaker sections of the society to enable them to be aware of the right to live with human dignity, to enjoy all the Constitutionally and statutorily guaranteed rights, performing the duties and discharging obligations as per law.

2. Para-Legal Volunteers shall make people aware of the nature of their disputes/issues/problems and inform them that they can approach the TLSC/DLSA/HCLSC/SLSA/SCLSC and that they can resolve the dispute/issue/problems through these institutions.
3. Para-Legal Volunteers shall constantly keep a watch on transgressions of law or acts of injustice in their area of operation and bring them immediately to the notice of the TLSC through telephonic message or a written communication or in person to enable effective remedial action by the Committee.
4. Para-Legal Volunteers shall assist the DLSA/TLSC for organizing legal awareness camps in their area of operation.
5. Para-Legal Volunteers shall give information to the people of their locality about the legal services activities of SLSA/DLSA/TLSC/HCLSC/SCLSC and shall provide their addresses to the people so as to enable them to utilize the free services rendered by the above organizations to the eligible persons.
6. Para-Legal Volunteers shall generate awareness among people about the benefits of settlement of disputes through Lok Adalats, Conciliation, Mediation and Arbitration.
7. Para-Legal Volunteers shall propagate the facility of Pre-Litigation petitions in the TLSC/DLSA for inexpensive settlement of disputes.
8. Para-Legal Volunteers shall create awareness among citizens that if pending cases are settled through Lok Adalats the parties are entitled to refund of Court fee and that there is no appeal.
9. Para-Legal Volunteers shall make people aware of the benefits of inexpensive settlement of disputes relating to Public Utility Services like P&T, Telephones, Electricity, Water Supply, insurance and hospital services through Permanent Lok Adalats (PLA).
10. Para-Legal Volunteers shall submit monthly reports of their activities to the TLSC.
11. Para-Legal Volunteers shall see that publicity materials of legal services activities are exhibited at prominent places in their area of activity.

Expenses incurred by Para-Legal Volunteers.

Reasonable expenses incurred by Para-Legal Volunteers e.g. Bus/Train fare, Postage, Telephone charges etc., may be reimbursed by the TLSC/DLSA/SLSA, on production of proof and receipts may be obtained. Travel expenses limited to the lowest class by road/rail/steamer of the legal aid beneficiaries brought by the Para-Legal Volunteers also may be reimbursed at the discretion of the Chairman.

**AMENDMENTS BROUGHT IN AS PER THE DECISION TAKEN BY THE
CENTRAL AUTHORITY OF NALSA ON 03.05.2011**

- 1. Number of Para-Legal Volunteers (PLVs) to be identified by the District Legal Services Authorities and Taluk Legal Services Committees:**
 - (a) The Para-Legal Volunteers (PLVs) to be identified by the District Legal Services Authorities (DLSAs) shall be 100.
 - (b) The number of PLVs to be identified by the Taluk Legal Services Committees (TLSCs) shall be 50.

- 2. Monthly reports by Para-Legal Volunteers:**
 - (a) The PLVs shall submit monthly reports to the TLSCs and DLSAs as the case may be. The DLSAs shall collect reports from the TLSCs/Sub-Divisional Legal Services Committees and shall send such reports along with the reports of PLVs of DLSAs to the SLSAs. The SLSAs may fix a date in every month as the last date for submitting such reports.

- 3. Honorarium to the Para-Legal Volunteers.**
 - (a) An honorarium of Rs.250/- per day may be paid to all PLVs engaged for specific works like going to the remote villages, distribution of legal literacy materials, attending the legal aid clinics and 'front offices' of the Legal Services Institutions.
 - (b) In addition to the honorarium mentioned in Clause (a) above, where the PLVs have to undergo expenses for travel to places outside his / her base, the Legal Services Institutions would have to meet such expenses.
 - (c) The rate of daily honorarium payable to the PLVs for the aforementioned engagements in the metro cities may be as determined by the SLSAs.

- 4. Identity cards for the PLVs.**
 - (a) The identify cards issued to the PLVs would be valid initially for a period of one year only.
 - (b) The identify cards of PLVs shall specify the date of its expiry in the card itself.

- 5. Inclusion of Retired Judges to function as PLVs.**
 - (a) Persons like retired judges could also be considered to function as PLVs whenever their services are available.

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**AMENDMENTS BROUGHT IN AS PER THE DECISION TAKEN BY THE
CENTRAL AUTHORITY OF NALSA ON 03.05.2011**

- 6. Number of Para-Legal Volunteers (PLVs) to be identified by the District Legal Services Authorities and Taluk Legal Services Committees:**
 - (a) The Para-Legal Volunteers (PLVs) to be identified by the District Legal Services Authorities (DLSAs) shall be 100.
 - (b) The number of PLVs to be identified by the Taluk Legal Services Committees (TLSCs) shall be 50.

- 7. Monthly reports by Para-Legal Volunteers:**
 - (a) The PLVs shall submit monthly reports to the TLSCs and DLSAs as the case may be. The DLSAs shall collect reports from the TLSCs/Sub-Divisional Legal Services Committees and shall send such reports along with the reports of PLVs of DLSAs to the SLSAs. The SLSAs may fix a date in every month as the last date for submitting such reports.

- 8. Honorarium to the Para-Legal Volunteers.**
 - (a) An honorarium of Rs.250/- per day may be paid to all PLVs engaged for specific works like going to the remote villages, distribution of legal literacy materials, attending the legal aid clinics and 'front offices' of the Legal Services Institutions.
 - (b) In addition to the honorarium mentioned in Clause (a) above, where the PLVs have to undergo expenses for travel to places outside his / her base, the Legal Services Institutions would have to meet such expenses.
 - (c) The rate of daily honorarium payable to the PLVs for the aforementioned engagements in the metro cities may be as determined by the SLSAs.

- 9. Identity cards for the PLVs.**
 - (a) The identify cards issued to the PLVs would be valid initially for a period of one year only.
 - (b) The identify cards of PLVs shall specify the date of its expiry in the card itself.

- 10. Inclusion of Retired Judges to function as PLVs.**
 - (a) Persons like retired judges could also be considered to function as PLVs whenever their services are available.

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Section V:
WHAT DO THE
KEY JUDGMENTS SAY

[Right to Counsel in Police Station and Jail]

Sheela Barse Vs. State of Maharashtra

Hon'ble Judges/Coram: A.N. Sen, P.N. Bhagwati and R.S. Pathak, JJ.

☞ This writ petition is based on a letter addressed by Sheela Barse, a journalist, complaining of custodial violence to women prisoners whilst confined in the police lock up in the city of Bombay. The petitioner stated in her letter that she interviewed fifteen women prisoners in the Bombay Central Jail with the permission of the Inspector General of Prisons between 11 and 17th May, 1982 and five out of them told her that they had been assaulted by the police in the police lock up. Of these five who complained of having been assaulted by the police, the petitioner particularly mentioned the cases of two, namely, Devamma and Pushpa Paeen who were allegedly assaulted and tortured whilst they were in the police lock up. It is not necessary for the purpose of this writ petition to go into the various allegations in regard to the ill-treatment meted out to the women prisoners in the police lock up and particularly the torture and beating to which Devamma and Pushpa Paeen were said to have been subjected because we do not propose to investigate into the correctness of these allegations which have been disputed on behalf of the State of Maharashtra. But, since these allegations were made by the women prisoners interviewed by the petitioner and particularly by Devamma and Pushpa Paeen and there was no reason to believe that a journalist like the petitioner would invent or fabricate such allegations if they were not made to her by the women prisoners, this Court treated the letter of the petitioner as a writ petition and issued notice to the State of Maharashtra, Inspector General of Prisons, Maharashtra, Superintendent, Bombay Central Jail and the Inspector General of Police, Maharashtra calling upon them to show cause why the writ petition should not be allowed. It appears that on the returnable date of the show cause notice no affidavit was filed on behalf of any of the parties to whom show cause notice was issued and this Court therefore adjourned the hearing of the writ petition to enable the State of Maharashtra and other parties to file an affidavit in reply to the averments made in the letter of the petitioner. This Court also directed that in the meanwhile Dr. (Miss) A.R. Desai, Director of College of Social Work, Nirmala Niketan, Bombay will visit the Bombay Central Jail and interview women prisoners lodged there including Devamma and Pushpa Paeen without any one else being present at the time of interview and ascertain whether they had been subjected to any torture or ill-treatment and submit a report to this Court on or before 30th August, 1982. The State Government and the Inspector General of Prisons were directed to provide all facilities to Dr. Miss A.R. Desai to carry out this assignment entrusted to her. The object of assigning this commission to Dr. Miss A.R. Desai was to ascertain whether allegations of torture and ill-treatment as set out in the letter of the petitioner were, in fact, made by the women prisoners including Devamma and Pushpa Paeen to the petitioner and what was the truth in regard to such allegations. Pursuant to the order made by this Court, Dr. Miss A.R. Desai visited Bombay Central prison and after interviewing women prisoners lodged there, made a detailed report to this Court.

The Report is a highly interesting and instructive socio-legal document which provides an insight into the problems and difficulties facing women prisoners and we must express our sense of gratitude to Dr. Miss A.R. Desai for the trouble taken by her in submitting such a wonderfully thorough and perceptive report. We are not concerned here directly with the conditions prevailing in the Bombay Central Jail or other jails in the State of Maharashtra because the primary question which is raised in the letter of the petitioner relates to the safety and security of women prisoners in police lock up and their protection against torture and ill-treatment. But even so we would strongly recommend to the Inspector General of Prisons, Maharashtra that he may have a look at this Report made by Dr. Miss A.R. Desai and consider what further steps are necessary to be taken in order to improve the conditions in the Bombay Central Jail and other jails in the State of Maharashtra and to make life for the women prisoners more easily bearable by them.

There is only one matter about which we would like to give directions in this writ petition and that is in regard to the need to provide legal assistance not only to women prisoners but to all prisoners lodged in the jails in the State of Maharashtra. We have already had occasion to point out in several decisions given by this Court that legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Article 39 but also by Articles 14 and 21 of the Constitution. It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and Rule of Law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and Rule of Law are merely slogans or myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests.

Imagine the helpless condition of a prisoner who is lodged in a jail who does not know to whom he can turn for help in order to vindicate his innocence or defend his constitutional or legal rights or to protect himself against torture and ill-treatment or oppression and harassment at the hands of his custodians. It is also possible that he or the members of his family may have other problems where legal assistance is required but by reason of his being incarcerated, it may be difficult if not impossible for him or the members of his family to obtain proper legal advice or aid. It is therefore absolutely essential that legal assistance must be made available to prisoners in jails whether they be under-trial or convicted prisoners.

- ☞ The Report of Dr. Miss A.R. Desai shows that there is no adequate arrangement for providing legal assistance to women prisoners, and we dare say the situation which prevails in the matter of providing legal assistance in the case of women prisoners must also be the same in regard to male prisoners.

It is pointed out in the Report of Dr. Miss A.R. Desai that two prisoners in the Bombay Central Jail, one a German national and the other a That national were duped and defrauded by a lawyer, named Mohan Ajwani who misappropriated almost half the belongings of the German national and the jewellery of the That

national on the plea that he was retaining such belongings and jewellery for payment of his fees. We do not know whether this allegation made by these two German and That women prisoners is true or not but, if true, it is a matter of great shame for the legal profession and it needs to be thoroughly investigated.

The profession of law is a noble profession which has always regarded itself as a branch of social service and a lawyer owes a duty to the society to help people in distress and more so when those in distress are women and in jail. Lawyers must realise that law is not a pleasant retreat where we are concerned merely with mechanical interpretation of rules made by the legislature but it is a teeming open ended avenue through which most of the traffic of human existence passes. There are many casualties of this traffic and it is the function of the legal profession to help these casualties in a spirit of dedication and service. It is for the lawyers to minimise the numbers of those casualties who still go without legal assistance. The lawyers must positively reach out to those sections of humanity who are poor, illiterate and ignorant and who, when they are placed in a crisis such as an accusation of crime or arrest or imprisonment, do not know what to do or where to go or to whom to turn. If lawyers, instead of coming to the rescue of persons in distress, exploit and prey upon them, the legal profession will come into disrepute and large masses of people in the country would lose faith in lawyers and that would be destructive of democracy and Rule of Law. If it is true-that these two German and That women prisoners were treated by Mohan Ajwani in the manner alleged by them-and this is a question on which we do not wish to express any opinion exparte it deserves the strongest condemnation. We would therefore direct that the allegations made by the two German and That women prisoners as set out in paragraph 9.2 of the Report of Dr. Miss A.R. Desai be referred to the Maharashtra State Bar Council for taking such action as may be deemed fit.

☞ But, this incident highlights the need for setting up a machinery for providing legal assistance to prisoners in jails. There is fortunately a legal aid organisation in the State of Maharashtra beaded by the Maharashtra State Board of Legal Aid and Advice which has set up committees at the High Court and district levels. We would therefore direct the Inspector General of Prisons in Maharashtra to issue a circular to all Superintendents of Police in Maharashtra requiring them-

- (1) to send a list of all under-trial prisoners to the Legal Aid Committee of the district in which the jail is situated giving particulars of the date of entry of the under-trial prisoners in the jail and to the extent possible, of the offences with which they are charged and showing separately male prisoners and female prisoners.
- (2) to furnish to the concerned District Legal Aid Committee a list giving particulars of the persons arrested on suspicion under Section 41 of the CrPC who have been in jail beyond a period of 15 days.
- (3) to provide facilities to the lawyers nominated by the concerned District Legal Aid Committee to enter the jail and to interview the prisoners who have expressed their desire to have their assistance.

- (4) to furnish to the lawyers nominated by the concerned District Legal Aid Committee whatever information is required by them in regard to the prisoners in jail.
- (5) to put up notices at prominent places in the jail that lawyers nominated by the concerned District Legal Aid Committee would be visiting the jail on particular days and that any prisoner who desires to have their assistance can meet them and avail of their counselling services; and
- (6) to allow any prisoner who desires to meet the lawyers nominated by the concerned District Legal Aid Committee to interview and meet such lawyers regarding any matter for which he requires legal assistance and such interview should be within sight but out of hearing of any jail official.

☞ We would also direct that in order to effectively carry out these directions which are being given by us to the Inspector General of Prisons, the Maharashtra State Board of Legal Aid and Advice will instruct the District Legal Aid Committees of the districts in which jails are situated to nominate a couple of selected lawyers practising in the district Court to visit the jail or jails in the district at least once in a fortnight with a view to ascertaining whether the law laid down by the Supreme Court and the High Court of Maharashtra in regard to the rights of prisoners including the right to apply for bail and the right to legal aid is being properly and effectively implemented and to interview the prisoners who have expressed their desire to obtain legal assistance and to provide them such legal assistance as may be necessary for the purpose of applying for release on bail or parole and ensuring them adequate legal representation in Courts, including filing or preparation of appeals or revision applications against convictions and legal aid and advice in regard to any other problems which may be facing them or the members of their families.

The Maharashtra State Board of Legal Aid & Advice will call for periodic reports from the district legal aid committees with a view to ensuring that these directions given by us are being properly carried out. We would also direct the Maharashtra State Board of Legal Aid and Advice to pay an honorarium of Rs. 25/- per lawyer for every visit to the jail together with reasonable travelling expenses from the court house to jail and back. These directions in so far as the city of Bombay is concerned, shall be carried out by substituting the High Court Legal Aid Committee for the District Legal Aid Committee, since there is no District Legal aid committee in the city of Bombay but the Legal Aid Programme is carried out by the High Court Legal Aid Committee. We may point out that this procedure is being followed with immense benefit to the prisoners in jails by the Tamil Nadu State Legal Aid & Advice Board.

[Right to Legal Aid as Reasonable, Fair Procedure, Right to Counsel at the time of First Production & Right to Compensation for Violation of these Rights]

Khatri and others vs. State of Bihar & ors.

Bench: Bhagwati, P.N. (j) Sen, A.P. (j)

P.N. Bhagwati, J.

☞ Before we deal with the main contentions urged before us on behalf of the parties, we must dispose of one serious question which raises a rather difficult problem and which has to be resolved with some immediacy. The problem is not so much a legal problem as a human one and it arises because the blinded prisoners who are undergoing treatment in the Rajendra Prasad Ophthalmic Institute, New Delhi are likely to be discharged from that Institute since their vision is so totally impaired that it is not possible to restore it by any medical or surgical treatment, and the question is wherever they can go. Mrs. Hingorani, on behalf of the blinded prisoners, expressed apprehension that it may not be safe for them to go back to Bhagalpur, particularly when investigation into the offences of blinding was still in progress and some arrangement should, therefore, be made for housing them in New Delhi at the cost of the State.

We cannot definitely state that the apprehension expressed by Mrs. Hingorani is totally unfounded nor can we say at the present stage that it is justified, but we feel that at least until the next date of hearing, it would be desirable not to send the blinded prisoners back to Bhagalpur. We would, therefore, suggest that the blinded prisoners who are discharged from the Rajendra Prasad Ophthalmic Institute, New Delhi should be kept in the Home which is being run by the Blind Relief Association of Delhi on the Lal Bahadur Shastri Marg, New Delhi and the State of Bihar should bear the cost of their boarding and lodging in that Home. We hope and trust and, in fact, we would strongly recommend that the Blind Relief Association of Delhi will accept these blinded prisoners in the Home run by them and look(sic) after them until the next hearing of the petition. The State of Bihar will pay by way of advance or otherwise as may be required the costs, charges and expenses of maintaining the blinded prisoners in such Home.

☞ The other question raised by Mrs. Hingorani on behalf of the blinded prisoners was whether the State was liable to pay compensation to the blinded prisoners for violation of their Fundamental Right under Article 21 of the Constitution.

She contended that the blinded prisoners were deprived of their eye sight by the Police Officers who were Government servants acting on behalf of the State and since this constituted a violation of the constitutional right under Article 21, the state was liable to pay compensation to the blinded prisoners.

The liability to compensate a person deprived of his life or personal liberty otherwise than in accordance with procedure established by law was, according to Mrs. Hingorani, implicit in Article 21. Mr. K.G. Bhagat on behalf of the State, however, contended that it was not yet established that the blinding of the prisoners was done by the Police and that the investigation was in progress and he further urged that even if blinding was done by the police and there was violation of the constitutional right enshrined in Article 21, the State could not be held liable to pay compensation to the persons wronged.

These rival arguments raised a question of great constitutional importance as to what relief can a court give for violation of the constitutional right guaranteed in Article 21. The court can certainly injunct the State from depriving a person of his life or personal liberty except in accordance with procedure established by law, but if life or personal liberty is violated otherwise than in accordance with such procedure, is the court helpless to grant relief to the person who has suffered- such deprivation? Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious Fundamental Right to life and personal liberty.

These were the issues raised before us on the contention of Mrs. Hingorani, and to our mind, they are issues of the gravest constitutional importance involving as they do, the exploration of a new dimension of the right to life and personal liberty. We, therefore, intimated to the counsel appearing on behalf of the parties that we would hear detailed arguments on these issues at the next hearing of the writ petition and proceed to lay down the correct implications of the constitutional right in Article 21 in the light of the dynamic constitutional jurisprudence which we are evolving in this Court.

☞ That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various judicial magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the judicial magistrate nor at the time when the remand orders were passed, was any legal representation available to most of the blinded prisoners.

The records of the judicial magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the judicial magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost.

The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail.

It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatonn's case MANU/SC/0121/1979 : 1979CriLJ1045 . This Court has pointed out in Hussainara Khatoon's case (supra) which was decided as far back as 9th March, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer.

It is unfortunate that though this Court declared the right to legal aid as a Fundamental Right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence.

We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional declaration in Article 141 that the law declared by this Court shall be binding through-out the territory of India. Mr. K.G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to (sic) indigent accused but he suggested that the State might find it difficult to do so owing to financial constraints.

We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for his purpose has to be done by the State...

...Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate.

It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time.

☞ But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness

that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The magistrate or the sessions judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the judicial magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the magistrates and Session Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State.

Unless he is not willing to take advantage every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State...

☞ We would also like to advert to one more matter before we close and that is rather a serious matter. It appears from the record that one blinded prisoner by the name of Umesh Yadav sent a petition to the District and Sessions Judge, Bhagalpur, on 30th July, 1980 complaining that he had been blinded by Shri B. K. Sharma, District Superintendent of Police and since he had no money to prosecute this police officer, he should be provided a lawyer at Government expense so that he might be able to bring the police atrocities before the court and seek justice. Ten other blinded prisoners also made a similar petition and all these petitions were forwarded to the District & Sessions Judge on 30th July, 1980. The District & Sessions Judge by this letter dated 5th August, 1980, addressed to the Superintendent of the Bhagalpur Central Jail stated that there was no provision in the CrPC under which legal assistance could be provided to the blinded prisoners who had made a petition to him and that he had forwarded their petitions to the chief judicial magistrate for necessary action. The Chief Judicial Magistrate also expressed this inability to do anything in the matter. It appears that the Superintendent of the Bhagalpur Central Jail also sent the petitions of these blinded prisoners to the Inspector General of Prisons, Patna on 30th July, 1980 with a request that this matter should be brought to the notice of the State Government. The Inspector General of Prisons forwarded these petitions to the Home Department. The Inspector General of Prisons was also informed by three blinded prisoners on 9th September 1980 when he visited the Banks Jail that they had been blinded by the police and the Inspector General of Prisons observed in his inspection note that it would be necessary to place the matter before the Government so that, the police atrocities may be stopped. The facts

disclose a very disturbing state of affairs. In the first place we find it difficult to appreciate why the Chief Judicial Magistrate to whom the petitions of these blinded prisoners had been forwarded by the District & Sessions Judge did not act upon the complaint contained in these petitions and either take cognizance of the offence revealed in these petitions or order investigation by the higher police officers. ' The information appearing in these petitions disclosed very serious offences alleged to have been committed by the Police and the Chief Judicial Magistrate should not have nonchalantly ignored these petitions and expressed , his inability to do anything in the matter. But apart from that, one thing is certain that within a few days after 30th July 80 the Home Department did come to know from the Inspector General of Prisons that according to the blinded prisoners who had sent their petitions, they had been blinded by the Police, and from the inspection note of the Inspector General of Police it would seem reasonable to assume that he must have brought the matter to the notice of the Government. We should like to know from the Inspector General of Prisons as to who was the individual or which was the department of the State Government to whose notice he brought this matter and what steps did the State Government take on receipt of the petitions of the blinded prisoners forwarded by the Inspector General of Prisons as also on the matter being brought to their attention by the Inspector General of Prisons as observed by him in his inspection note. We should like the State Government to inform us clearly and precisely as to what steps they took after 30th July, 1980 to bring the guilty to book and to stop recurrence of such atrocities. We want to have this information because we should like to satisfy ourselves whether the Windings which took place in October 1980 could have been prevented by the State Government by taking appropriate steps on receipt of information in regard to the complaint of the blinded prisoners from the Inspector General of Prisons.

[Vulnerable Groups & Legal Aid]

Sheela Barse Vs. State of Maharashtra

Hon'ble Judges/Coram: A.N. Sen, P.N. Bhagwati and R.S. Pathak, JJ.

☞ We may now take up the question as to how protection can be accorded to the women prisoners in police lock ups. We put forward several suggestions to the learned Advocate appearing on behalf of the petitioner and the State of Maharashtra in the course of the hearing and there was a meaningful and constructive debate in Court. The State of Maharashtra offered its full co-operation to the Court in laying down the guidelines which should be followed so far as women prisoners in police lock ups are concerned and most of the suggestions made by us were readily accepted by the State of Maharashtra. We propose to give the following directions as a result of meaningful and constructive debate in Court in regard to various aspects of the question argued before us.

- (i) We would direct that four or five police lock ups should be selected in reasonably good localities where only female suspects should be kept and they should be guarded by female constables. Female suspects should not be kept in police lock up in which male suspects are detained. The State of Maharashtra has intimated to us that there are already three cells where

female suspects are kept, and are guarded by female constables and has assured the Court that two more cells with similar arrangements will be provided exclusively for female suspects.

- (ii) We would further direct that interrogation of females should be carried out only in the presence of female police officers/constables.
- (iii) Whenever a person is arrested by the police without warrant, he must be immediately informed of the grounds of his arrest and in case of every arrest it must immediately be made known to the arrested person that he is entitled to apply for bail. The Maharashtra State Board of Legal Aid & Advice will forthwith get a pamphlet prepared setting out the legal rights of an arrested person and the State of Maharashtra will bring out sufficient number of printed copies of the pamphlet in Marathi which is the languages of the people in the State of Maharashtra as also in Hindi and English and printed copies of the pamphlet in all the three languages shall be affixed in each cell in every police lock up and shall be read out to the arrested person in any of the three languages which he understands as soon as he is brought to the police station.
- (iv) We would also direct that whenever a person is arrested by the police and taken to the police lock up, the police will immediately give an intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance. The State Government will provide necessary funds to the concerned Legal Aid Committee for carrying out this direction.
- (v) We would direct that in the city of Bombay, a City Sessions Judge, to be nominated by the principal Judge of the City Civil Court, preferably a lady Judge, if there is one, shall make surprise visits to police lock ups in the city periodically with a view to providing the arrested persons an opportunity to air their grievances and ascertaining what are the conditions in the police lock ups and whether the requisite facilities are being provided and the provisions of law are being observed and the directions given by us are being carried out. If it is found as a result of inspection that there are any lapses on the part of the police authorities, the City Sessions Judge shall bring them to the notice of the Commissioner of Police and if necessary to the notice of the Home Department and if even this approach fails, the City Sessions Judge may draw the attention of the Chief Justice of the High Court of Maharashtra to such lapses. This direction in regard to police lock ups at the districts head quarters, shall be carried out by the Sessions Judge of the district concerned.
- (vi) We would direct that as soon as a person is arrested, the police must immediately obtain from him the name of any relative or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform him about the arrest; and lastly,

(vii) We would direct that the magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or mal-treatment in police custody and inform him that he has right under Section 54 of the CrPC 1973 to be medically examined. We are aware that Section 54 of the CrPC 1973 undoubtedly provides for examination of an arrested person by a medical practitioner at the request of the arrested person and it is a right conferred on the arrested person. But very often the arrested person is not aware of this right and on account of, his ignorance, he is unable to exercise this right even though he may have been tortured or maltreated by the police in police lock up. It is for this reason that we are giving a specific direction requiring the magistrate to inform the arrested person about this right of medical examination in case he has any complaint of torture or mal-treatment in police custody.

☞ We have no doubt that if these directions which are being given by us are carried out both in letter and spirit, they will afford considerable protection to prisoners in police lock ups and save them from possible torture or ill-treatment. The writ petition will stand disposed of in terms of this order.

Legal-Aid to Vulnerable Communities:-

R.D. Upadhyay v. State of Andhra Pradesh and Ors.

(A.I.R. 2006 SC 1946)

- Concerned by the plight of the undertrial prisoners languishing in various jails in the country, various directions were issued by this Court from time to time. Presently, we are considering mainly the issue of directions for the development of children who are in jail with their mothers, who are in jail either as undertrial prisoners or convicts. Children, for none of their fault, but per force, have to stay in jail with their mothers. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in absence of the mother. The jail environment are certainly not congenial for development of the children.
- For the care, welfare and development of the children, special and specific provisions have been made both in Part III and IV of the Constitution of India, besides other provisions in these parts which are also significant. The best interest of the child has been regarded as a primary consideration in our Constitution. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 15(3) provides that this shall not prevent the State from making any special provision for women and children. Article 21A inserted by 86th Constitutional Amendment provides for free and compulsory education to all children of the age of six to fourteen years. Article 24 prohibits employment of children below the age of fourteen years in any factory or mine or engagement in other hazardous

employment. The other provisions of Part III that may be noted are Articles [14](#), [21](#) and [23](#). Article [14](#) provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article [21](#) provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article [23](#) prohibits trafficking in human beings and forced labour. We may also note some provisions of Part IV of the Constitution. Article [39\(e\)](#) directs the State to ensure that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article [39\(f\)](#) directs the State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Article [42](#) provides that the State shall make provision for securing just and humane conditions of work and maternity relief. Article [45](#) stipulates that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. Article [46](#) provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Article [47](#) provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

- The National Institute of Criminology and Forensic Sciences conducted a research study of children of women prisoners in Indian jails. The salient features of the study brought to the notice of all Governments in February 2002, are:

(i) The general impression gathered was the most of these children were living in really difficult conditions and suffering from diverse deprivations relating to food, healthcare, accommodation, education, recreation, etc.

(ii) No appropriate programmes were found to be in place in any jail, for their proper bio-psycho-social development. Their looking after was mostly left to their mothers. No trained staff was found in any jail to take care of these children.

(iii) It was observed that in many jails, women inmates with children were not given any special or extra meals. In some cases, occasionally, some extra food, mostly in the form of a glass of milk, was available to children. In some jails, separate food was being provided only to grown up children, over the age of five years. But the quality of food would be same as supplied to adult prisoners.

(iv) No special consideration was reported to be given to child bearing women inmates, in matters of good or other facilities. The same food and the same facilities were given to all

women inmates, irrespective of the fact whether their children were also living with them or not.

(v) No separate or specialised medical facilities for children were available in jails.

(vi) Barring a few, most mother prisoners considered that their stay in jails would have a negative impact on the physical as well as mental development of their children.

(vii) Crowded environment, lack of appropriate food, shelter and above all, deprivation of affection of other members of the family, particularly the father was generally perceived by the mothers as big stumbling blocks for the proper development of their children in the formative years of life.

(viii) Mother prisoners identified six areas where urgent improvement was necessary for proper upkeep of their children. They related to food, medical facilities, accommodation, education, recreation and separation of their children from habitual offenders.

(ix) No prison office was deployed on the exclusive duty of looking after these children or their mothers. They had to perform this duty alongside many other duties including administrative work, discipline maintenance, security-related jobs etc. None of them was reported to have undergone any special training in looking after the children in jails.

- Some of the important suggestions emanating from the study are:

(i) In many States, small children were living in sub-jails which were not at all equipped to keep children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper bio-psycho-social growth of children.

(ii) Before sending a woman in stage of pregnancy, to a jail, the concerned authorities must ensure that particular jail has got the basic minimum facilities for child delivery as well as for providing pre-natal and post-natal care for both to the mother and the child.

(iii) The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crime including violent crimes, is certainly harmful for such children in their personality development. Children are, therefore, required to be separated from such an environment on priority basis, in all such jails.

(iv) A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children to them on regular basis.

(v) Children of women prisoner should be provided with clothes, bed sheets, etc. in multiple sets. Separate utensils of suitable size and material should also be provided to each mother-prisoner for giving food to her child.

(vi) Medical care for every child living in a jail has to be fully ensured. Also, in the event of a women prisoner falling ill herself, alternative arrangements for looking after the child should be made by the jail staff.

(vii) Adequate arrangements should be available in all jails to impart education, both formal and informal, to every child of the women inmates. Diversified recreational programmes/facilities should also be made available to the children of different age groups.

(viii) A child living in a jail along with her incarcerated mother is not desirable at all. In fact, this should be as only the last resort when all other possibilities of keeping the child under safe custody elsewhere have been tried and have failed. In any case, it should be a continuous endeavour of all the sectors of the criminal justice system that the least number of children are following their mothers to live in jails.

- The State Governments and Union Territories were requested to consider the aforesaid suggestions for implementation. By filing IA Nos. 1 and 7, the attention of this Court has been drawn to the plight of little children on account of the arrest of their mothers for certain criminal offences.

I.A. No. 1 was filed by Women's Action Research and Legal Action for Women (WARLAW), through its program coordinator, Ms. Babita Verma stating that more than 70% of the women prisoners are married and have children. At the time of arrest of the women prisoners having children, indiscriminate arrest is not confined only to women/mother prisoners but such arrest is automatically extended to these children who are of tender age and there is no one to look after the child and take care of the child without their mother. Such children are perforce subjected to a kind of arrest for no offence committed by them. Further, the atmosphere in jail is not congenial for a healthy upbringing of such children. There are two non-Governmental organizations (NGO's), namely Mahila Pratiraksha Mandal and Navjyoti who are counsellors. Adjoining the jail premises at Delhi there is Nari Niketan which is a women's reform home. Some of the children who are detained in jail are sent to Kirti Nagar Children's home for their studies. The arrangement pertaining to the education and looking after of these children is not adequate. To the best of the information of the applicant, there is no specific provision or regulation in Jail Manual for facilitating the mother prisoners to meet the children. It is for the family protection of these women prisoners including their minor children that the trial period of undertrials shall be minimized and a period of two years shall be fixed.

- It was suggested that arrest of women suspects be made only by lady police. Such arrests should be sparingly made as it adversely affects innocent children who are taken into custody with their mother. To avoid arrest of innocent children the care and custody of such children may be handed over to voluntary organizations which can assist in the growth of children in a congenial and healthy atmosphere. Periodic meeting rights should be available to the women/mother prisoners in order to mother the healthy upkeep of the children.
- A letter dated 8th March, 2000 written by a 6 years old girl child, studying in upper KG in a school at Bangalore, to Chief Justice of India enclosing an article 'Dogged by Death in Jail' in a women's magazine dated 20th January, 2000 narrating plight of children in jail with their mothers, was registered as IA No. 7. The article, inter alia, notes that the fate of the women undertrials is more pitiable because some of them

live with their tiny tots whether born at home or inside the jail and that a visitor to jail is sure to see a series of moving scenes.

- The order dated 20th March, 2001 notes that the learned Solicitor General shares the concern of the Court regarding the plight of the children in jail and the submission that with a view to frame some guidelines and issue instructions, it would be necessary to first ascertain the number of female prisoners in each of the jails, in each of the States/union Territories, the offences for which they have been arrested; the duration of their detention and whether children with any of those female prisoners are also lodged in jail. The Court directed the States and Union Territories to disclose on affidavit the following:

(i) The number of female prisoners (undertrial) together with the nature of offence for which they have been detained;

(ii) Period of their detention;

(iii) Children, if any, who are with the mothers lodged in the jail;

(iv) Number of convicted female prisoners and whether any children are also lodged with such convicts in the jails;

(v) Whether any facilities are available in the jail concerned for taking care of such children and, if so, the type of facilities.

- Specific suggestions have been put forward vis-a-vis children once they reach the confines of the prison. The minimum is the existence of a Balwadi for such children, and a crèches for those under the age of two. The Balwadi should be manned by a trained Balwadi teacher and should have the facilities of a visiting psychiatrist and pediatrician. A full-time nurse could also be made available. Immunization should take place on a regular basis. If the child is sick and needs to be taken outside the prison, the mother should be allowed to accompany the child. The Balwadi would provide free space, toys and games for children. It can also organize programmes on mother and child care, hygiene and family life for mothers. It has also been suggested that these facilities should be located outside, but attached to the prison. This would combat the negative psychological impact of the prison environment and expose the children to 'normal' figures not found in the women's barracks. It is also suggested that specialized clothing including winter-wear and bedding including plastic sheets should be provided to children. Concerns have also been raised regarding the issuance of a birth certificate that mentions the prison as the place of birth of a child born in prison. It is suggested that child's residence should be mentioned as the place of birth and not the prison.
- Emphasis has been placed on the diet of such children. It recommends that a special diet be prescribed, as per the norms suggested by a nutrition or child development

expert body such as the National Institute of Public Cooperation and Child Development. The diet should be standardized according to the age of the child and not prescribed as uniform irrespective of the age of the child. The special needs of the child should be kept in mind, for instance, milk needs to be kept fresh which will not be the case if it is handed out only once in the morning. Toned milk may be required or boiled water may need to be provided. For satisfying these needs and providing a satisfactory diet may even require the creation of a separate kitchen unit for children.

- Several suggestions have been made vis-a-vis the judiciary, legal aid authorities, the Department of Women and Child Development/Welfare and the Juvenile Justice Administration (under the Juvenile Justice Act) and the Probation Department in relation to the welfare measures that can be taken for children of undertrial and incarcerated prisoners, both living within and outside the jail premises.
- The Union of India, in its affidavit, has pointed out that it has taken several measures for the benefit of children in general, including children of women prisoners in this larger group. These measures include 'Sarva Shiksha Yojna', Reproductive and Child Health Programme, and Integrated Child Development Projects and passing of the Juvenile Justice (Care and Protection of Children) Act, 2000 for the welfare of children in general.
- The Union of India noted that the "National Expert Committee on Women Prisoners", headed by Justice V.R. Krishnaiyer, framed a draft Model Prison Manual. Chapter XXIII of this manual makes special provision for children of women prisoners. This manual was circulated to the States and Union Territories for incorporation into the existing jail manuals. It is significant to note that this committee has made important suggestions regarding the rights of women prisoners who are pregnant, as also regarding child birth in prison. It has also made suggestions regarding the age up to which children of women prisoners can reside in prison, their welfare through a crèches and nursery, provision of adequate clothes suiting the climatic conditions, regular medical examination, education and recreation, nutrition for children and pregnant and nursing mothers.
- However, on the basis of various affidavits submitted by various State Governments and Union Territories, as well as the Union of India, it becomes apparent that children of women prisoners who are living in jail require additional protection. In many respects, they suffer the consequences of neglect. While some States have taken certain positive measures to look after the interests of these children, but a lot more is required to be done in the States and Union Territories for looking after the interest of the children. It is in this light that it becomes necessary to issue directions so as to

ensure that the minimum standards are met by all States and Union Territories vis-a-vis the children of women prisoners living in prison.

- In light of various reports referred to above, affidavits of various State Governments, Union Territories, Union of India and submissions made, we issue the following guidelines:

1. A child shall not be treated as an undertrial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.

2. Pregnancy:

a. Before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre- natal and post-natal care for both, the mother and the child.

b. When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on.

c. Gynaecological examination of female prisoners shall be performed in the District Government Hospital. Proper pre-natal and post-natal care shall be provided to the prisoner as per medical advice.

3. Child birth in prison:

a. As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.

b. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.

c. As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

4. Female prisoners and their children:

a. Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.

b. No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to physical distance.

c. Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.

d. Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.

e. When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the concerned relative(s) be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.

5. Food, clothing, medical care and shelter:

a. Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales.

b. State/U.T. Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.

c. A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis.

d. Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.

e. Clean drinking water must be provided to the children. This water must be periodically checked.

f. Children shall be regularly examined by the Lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.

g. In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.

h. Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.

i. Children of prisoners shall have the right of visitation.

j. The Prison Superintendent shall be empowered in special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.

6. Education and recreation for children of female prisoners:

a. The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crhches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.

b. There shall be a crhche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crhche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crhche and nursery outside the prison premises.

7. In many states, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.

8. The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crimes including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.

9. Diet:

Dietary scale for institutionalized infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Paediatrics) and Fellowship in Neonatology (USA) has been submitted by Mr. Sanjay Parikh. The document submitted recommends exclusive breastfeeding on the demand of the baby day and night. If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby. It is emphasized that *"dilution is not recommended; especially for low socio-economic groups who are also illiterate, ignorant, their children are already malnourished and are prone to gastroenteritis and other infections due to poor living conditions and unhygienic food habits. Also, where the drinking water is not safe/reliable since source of drinking water is a question mark. Over-dilution will provide more water than milk to the child and hence will lead to malnutrition and infections. This in turn will lead to growth retardation and developmental delay both physically and mentally."* It is noted that since an average Indian mother produces approximately 600 - 800 ml. milk per day (depending on her own nutritional state), the child should be provided at least 600 ml. of undiluted fresh milk over 24 hours if the breast milk is not available. The report also refers to the "Dietary Guidelines for Indians - A Manual," published in 1998 by the National Institute of Nutrition, Council of

Medical Research, Hyderabad, for a balanced diet for infants and children ranging from 6 months to 6 years of age. It recommends the following portions for children from the ages of 6-12 months, 1-3 years and 4-6 years, respectively: Cereals and Millets - 45, 60-120 and 150-210 grams respectively; Pulses - 15, 30 and 45 grams respectively; Milk - 500 ml (unless breast fed, in which case 200 ml); Roots and Tubers - 50, 50 and 100 grams respectively; Green Leafy Vegetables - 25, 50 and 50 grams respectively; Other Vegetables - 25, 50 and 50 grams respectively; Fruits - 100 grams; Sugar - 25, 25 and 30 grams respectively; and Fats/Oils (Visible) - 10, 20 and 25 grams respectively. One portion of pulse may be exchanged with one portion (50 grams) of egg/meat/ chicken/fish. It is essential that the above food groups to be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

10. Jail Manual and/or other relevant Rules, Regulations, instructions etc. shall be suitably amended within three months so as to comply with the above directions. If in some jails, better facilities are being provided, same shall continue.

11. Schemes and laws relating to welfare and development of such children shall be implemented in letter and spirit. State Legislatures may consider passing of necessary legislations, wherever necessary, having regard to what is noticed in this judgment.

12. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mother are complied with in letter and spirit.

13. The Courts dealing with cases of women prisoners whose children are in prison with their mothers are directed to give priority to such cases and decide their cases expeditiously.

14. Copy of the judgment shall be sent to Union of India, all State Governments/Union Territories, High Courts.

15. Compliance report stating steps taken by Union of India, State Governments, Union territories and State Legal Services Authorities shall be filed in four months whereafter matter shall be listed for directions.

Right to Legal Aid and Competent Representation

The State of Maharashtra v. Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid.

- Mr. Solkar submitted that A1-Kasab was denied a fair and reasonable opportunity to defend his case because services of experienced lawyer were not made available to him. He submitted that the appointed lawyer was not given time to study the case and the case was concluded in a great hurry causing grave prejudice to A1-Kasab. Counsel submitted that vital evidence was not brought on record and, therefore, the case must be remanded for retrial or additional evidence needs to be taken on record by this court. Counsel submitted that the alleged confessional statement has been extracted from A1-Kasab by the police by exerting pressure on him. It is not a true and voluntary statement. A1-Kasab has retracted it and, hence, it

should not have been relied upon for any purpose. Similarly, plea of guilty of A1-Kasab was retracted by him and, therefore, learned Sessions Judge erred in using it against him. Counsel submitted that the prosecution has failed to prove its case beyond reasonable doubt. Counsel relied upon several judgments in support of his case to which we shall soon advert.

- We shall start with Mr. Solkar's submission that A1-Kasab was not given a fair opportunity to defend the prosecution case and, hence, it is necessary to remand the case to the trial court.
- In this connection, counsel took us to Appendix B of Chapter V of the Criminal Manual. He relied on Rules 6 and 7 and particularly sub-rules (5) and (6) of Rule 7. Rule 6 pertains to panel of legal practitioners for Legal Aid. Mr. Solkar submitted that as per Rule 6, the appointment of a legal practitioner for the unrepresented accused person shall be made from a panel of legal practitioners constituted for each court by the Presiding Officer of the Court in consultation with the President and the Office bearers of the Bar Association. He submitted that where the offence is punishable with sentence of death or imprisonment for seven years or more, a senior advocate with a junior advocate from the panel shall be appointed for defending the unrepresented accused and as far as possible, the Presiding Officer shall not make an appointment from outside the panel but he may do so for any exceptional reason to be recorded in writing.
- Mr. Solkar submitted that this procedure ought to have been meticulously followed by learned Sessions Judge, which he has not done. Relying on the judgment of the Orissa High Court in Pitambar Dehury & Ors. V.State of Orissa, 1985 Cri.L.J. 424, judgment of the Madhya Pradesh High Court in Sagri v. State of Madhya Pradesh, III-1991 (1) Crimes 580 and judgment of the Allahabad High Court in Ram Awadh v.State of U.P., 1999 Cri.L.J. 4083, Mr. Solkar submitted that the advocate has not to be merely a senior advocate, but he must also have sufficient experience in criminal matters. He may not be a designated senior advocate but he should necessarily have several years of practice to his credit. Counsel submitted that the record does not show that learned Sessions Judge went through the panel of lawyers and made the appointment after due deliberation. He submitted that A1-Kasab was deprived of the services of a competent lawyer.
- It is not possible for us to accept this submission. Initially, Ms. Anjali Waghmare was appointed as amicus curiae for A1-Kasab. However, by order dated 15/4/2009 passed on application (Ex-7), her appointment was revoked because, it appears that an allegation was made that she had appeared for one of the victims. In the said order, learned Sessions Judge has stated that he had gone through the list of

advocates on the panel of free legal aid maintained by the Registrar, Sessions Court, Greater Bombay. He has observed that some of them had met him in his chamber. Pertinent observation of learned Sessions Judge must be noted. He has stated that considering the nature of the case, the magnitude thereof and voluminous record, it was necessary to appoint a lawyer who has the ability to handle the case of this nature competently and with due diligence. He has expressed that it was, therefore, necessary to convey a message to the President of the Bar Association to find out as to whether any lawyer who is not on the panel, is ready to appear for A1-Kasab. He requested Mr. Kazmi, who was present in the court to convey this message to the President of the Bar. He, thereafter, adjourned the matter to 16/4/2009.

- The order passed by learned Sessions Judge on 16/4/2009 is also a reasoned order. It notes that the President of the Bar Association, learned advocates Mr. Sudeep Pasbola, Mr. Dave, Mr. Randhir Kale, Mr. Suhas Gaikwad, Mrs. Arundhati Walavalkar, Mr. Pravin Singhal, Mr. Abbas Kazmi and Mr. Yug Choudhari were present. He has recorded that he had a meeting with them for about 15 to 20 minutes regarding the issue of providing free legal aid to A1-Kasab and the discussion proved to be fruitful. He has recorded that after due deliberations with the lawyers who were present in the chamber, it was decided that Mr. Kazmi shall represent A1-Kasab. Learned Sessions Judge has observed that Mr. Kazmi is not a lawyer on the panel of lawyers maintained by the Principal Judge of City Civil and Sessions Court, Greater Mumbai but he has referred to what he had stated in his order dated 15/4/2009 that considering the nature of the case, the magnitude thereof and the voluminous record, it was necessary to appoint a competent lawyer though he may not be on the panel. He has then considered the question whether lawyers who are not on the panel can be appointed. He has rightly relied on the judgment of the Madhya Pradesh High Court in Chandra Prakash Gajurel v. Inspector of Police, Chennai, 2006 Cri.L.J.1791 where the submission that lawyer who is not on the panel cannot be appointed, was rejected. Learned Sessions Judge has also referred to another judgment of this court in Criminal Appeal No.487 of 2008 in Ramchandra Nivrutti Mulak v. State of Maharashtra on question of fees to be paid to the amicus curiae lawyer and observed that the Government should consider granting reasonable fees to the appointed lawyer.
- Having perused the above orders, we are of the opinion that learned Sessions Judge was alive to the need to appoint a competent lawyer to defend an accused who is facing serious charges like murder, waging of war, etc. He has considered whether a counsel who is not on the panel, could be appointed for the accused or not. He had a discussion with the President of the Bar of Sessions Court and other lawyers and after due deliberation, he has appointed Mr. Kazmi. It may be stated here that Rule 6 of Appendix B of Chapter V of the Criminal Manual states that as far as possible, the Presiding Officer shall not make an appointment from outside the panel, but he may do so for any exceptional reason to be recorded in writing. Therefore, this Rule vests discretion in learned Sessions Judge to appoint a counsel from outside the panel. He has to only give reasons for it. In this case, learned Sessions Judge has while

exercising discretion given reasons. It cannot be said that learned Sessions Judge has appointed Kazmi without taking into consideration the salutary principle that a fair and reasonable opportunity has to be given to an accused to defend his case. It is not contended by Mr. Solkar that Mr. Kazmi is a junior lawyer or that he had no sufficient experience. It is true that at times, Mr. Kazmi has not chosen to cross-examine certain witnesses but at times, he has cross-examined some witnesses at length. It cannot be inferred from the fact that because Mr. Kazmi chose not to cross-examine certain witnesses that he showed lack of competence in handling the present case. We also find that learned Sessions Judge has also examined Court Witnesses and, wherever necessary, he has asked questions to the witnesses. There is, therefore, no miscarriage of justice.

- In Pitamber Dehury, the Orissa High Court has referred to the judgment of the Supreme Court in Ranchod Mathur Wasawa v. State of Gujarat, AIR 1974 SC 1143 where the Supreme Court has stressed the need to appoint competent State counsel for undefended accused in grave cases. It was observed that indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases. The Supreme Court has further observed that sufficient time and complete papers should also be made available, so that the advocate chosen may serve the cause of justice with all the ability at his command. In Sagri, the Madhya Pradesh High Court has reiterated the same view. In Ram Awadh, the Allahabad High Court has observed that when the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law. It is further observed that where the accused is facing a murder charge, his case should be handled by a competent person and not by a novice or one who has no professional expertise. It is further observed that the duty of a judge is to discern the truth. It is observed that a defence lawyer plays an important role in bringing out the truth before the court by cross-examining the witnesses and placing relevant material or evidence before the court. It is further observed that the absence of proper cross-examination may, at times, result in miscarriage of justice and the court has to guard against such an eventuality. Reliance was placed on the judgment of the Supreme Court in Ranchod Wasawa, to which we have made a reference hereinabove.
- There can be no dispute about the need to make services of a competent experienced lawyer available to an accused who is facing serious charges like murder, waging of war, etc. As we have already stated, we are unable to come to a conclusion that learned Sessions Judge has not kept these principles in mind. The orders passed by him which we have quoted hereinabove indicate that after due application of mind, he appointed Mr. Kazmi. Besides, learned Sessions Judge has himself monitored the proceedings effectively, examined court witnesses and, whenever necessary, he has asked questions. The submission of Mr. Solkar that A1-Kasab was not provided a competent lawyer or any prejudice was caused to him must, therefore, be rejected.

- Mr. Solkar drew our attention to sub-rules (5) and (6) of Rule 7. Sub-rule (5) states that if any advocate after having agreed to serve on a panel neglects or refuses to accept an appointment, he shall forthwith cease to be a member of the panel and shall be debarred from being reappointed on the panel. If an advocate refuses or neglects an appointment, his name shall be reported by the Presiding Officer of the court to the Bar Council of Maharashtra. Sub-rule (6) states that if any legal practitioner after accepting an appointment, neglects or refuses to discharge his duties properly, the authority which sanctioned the appointment shall remove the legal practitioner and appoint another in his place. Mr. Solkar submitted that Mr. Kazmi should have been removed at the earliest and another competent officer should have been appointed in his place.
- It appears that after almost all important witnesses were examined and the question of taking affidavits of formal witnesses such as claimants of dead bodies was being considered, Mr. Kazmi did not assist learned Sessions Judge properly. He stated that he did not care for those affidavits. He seemed to have made certain gestures which offended learned Sessions Judge. Looking to his attitude and gestures, on 30/11/2009 at the fag end of the trial, learned Sessions Judge revoked order appointing Mr. Kazmi and, in his place, he appointed Mr. Pawar who was assisting Mr. Kazmi and was well conversant with the facts. Learned Sessions Judge has observed that since Mr. Pawar knows Marathi language, Mr. Kazmi took assistance from him and, as such, Mr. Pawar could conduct the case. Thus, the procedure contemplated in sub-rule 6 of Rule 7 was followed when necessary by appointing another advocate who was conversant with the facts so that A1-Kasab's interest will not be jeopardized.
- On the question of remand, Mr. Solkar placed reliance on Zahira Sheikh, which is popularly known as Best Bakery case. This case arose out of a bizarre incident where, out of communal frenzy, a mob set fire to a bakery and killed innocent people. In that case, prosecution was faulty and biased. Witnesses were threatened and the trial court had adopted a perfunctory approach. The Supreme Court was convinced about the improper conduct of the trial. The Supreme Court was of the view that there was ample evidence on record glaringly demonstrating subversion of justice delivery system. In view of the fact that there was no congenial and conducive atmosphere in the State of Gujarat, the Supreme Court transferred the case to Mumbai for retrial. While doing this, the Supreme Court reminded the courts of their participatory role in a trial. Reference was made to Section 311 of the Code and Section 165 of the Evidence Act which confer vast powers on the presiding officer of the court to elicit all necessary materials and to monitor the proceedings in aid of justice. The Supreme Court stressed the need to have fair prosecutors. The Supreme Court also referred to Section 391 of the Code which allows appellate court to take additional evidence, if found necessary. It is in the context of the peculiar facts before it that the Supreme Court held that failure to accord fair hearing to the accused or to the prosecution

violates even the minimum standard of due process of law. Though, there can be no dispute about the principles laid down by the Supreme Court, by no stretch of imagination, facts of the present case can be equated with the facts in Zahira Sheikh.

- Mr. Solkar submitted that it was incumbent upon learned Magistrate to ascertain from A1-Kasab as to for how long he was in police custody prior to the recording of his statement. She has not done so. Learned Magistrate has, therefore, not ascertained whether he was under the influence of the police and was forced to make a statement. Mr. Solkar drew our attention to the evidence of PW-607 PI Mahale, who has stated that he last interrogated A1-Kasab in the night between 16/2/2009 and 17/2/2009. Therefore, on 17/2/2009 when A1-Kasab was produced before learned Magistrate he was under the influence of police. Mr. Solkar further submitted that PW-607 PI Mahale has stated that A1-Kasab had first expressed his willingness to make a confessional statement in December, 2008. It was, therefore, necessary to record his statement immediately. Mr. Solkar submitted that the delay in recording the confession clearly indicates that the confession was concocted. Mr. Solkar further submitted that services of a lawyer ought to have been made available to A1-Kasab even before 17/2/2009 when he was produced before learned Magistrate because the lawyer would have explained to him the implication of making a judicial confession. Mr. Solkar submitted that the alleged confession indicates that A1-Kasab was not repentant. Therefore, it cannot be called a confession. Mr. Solkar further submitted that on 17/2/2009 A1-Kasab was produced before learned Magistrate for the first time. On that day, she is stated to have asked him certain questions as required by the High Court Criminal Manual and Section 164 of the Code. Mr. Solkar contended that learned Magistrate should have asked the same questions again to A1-Kasab when he was produced before her on 18/2/2009 and on 21/2/2009. Failure to do so has eroded the evidentiary value of the alleged judicial confession.
- Mr. Solkar submitted that the prosecution has to first prove its case. Judicial confession can only be used in aid of proved facts. It has to be true and voluntary. He submitted that the judicial confession has to be read as a whole. It must be corroborated in material particulars. Mr. Solkar submitted that A1-Kasab's alleged judicial confession contains details which are not corroborated by any evidence on record. Therefore, it will have to be rejected in its entirety. In support of his submissions, Mr. Solkar relied on the judgments in State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru 2005 SCC (Cri.) 1715; Dhananjaya Reddy v. State of Karnataka, (2001) 4 SCC 9; Kehar Singh v. State (Delhi Admin.) AIR 1936 PC 253(2); Mazahar Ali & Anr. v. State 1976 Cri. L.J. 1629; State v. Mitu 1977 Cri. L.J. 1018; Ganesh Prasad Singh v. State of Orissa 1987 Cri. L.J. 1345 and State of Orissa v. Duleswar Bank, 2008 Cri. L.J. 1065.
- She then gave him 48 hours' time for reflection, informed him about it and remanded him to judicial custody. She told him that during that period, he will be kept in

judicial custody. He signed on this questionnaire. He also put his thumb impression thereon. On 20/2/2009, he was again produced before PW-218 Ms. Sawant-Waghule. Noting made by learned Magistrate on 20/2/2009 shows that she again asked the same questions to A1-Kasab in order to ascertain whether he wants to give his confession voluntarily. After satisfying herself from his answers that he was ready to give confession voluntarily, she started recording his confession on 20/2/2009. In the noting dated 21/2/2009 made by learned Magistrate at the beginning of Part II of the confession, she has stated that A1-Kasab was produced from judicial custody. She has noted that she satisfied herself that there was no policeman in the court's chamber where the proceedings could be heard or seen, except her typist Mr. Kadam and her court's Head Constable Mr. Antu Chavan, who were not concerned with the investigation and who were necessary to guard the accused. Recording of confession was completed on 21/2/2009. Certificate II dated 21/2/2009 issued by learned Magistrate and appended to judicial confession dated 21/2/2009 clearly states that learned Magistrate had explained to A1-Kasab that he was not bound to make confession and that, if he confesses, the confession may be used against him. She has further stated that the confession was taken in her presence and was read out to A1-Kasab and admitted by him to be correct and containing a full and true account of statement made by him. She has further stated that she believed that the confession was voluntarily made. Certificate III issued by her and which is appended to confessional statement dated 21/2/2009 states the grounds on which learned Magistrate felt that the confession was genuine. The grounds stated by her are: (a) she had explained the questions to A1-Kasab and he had given reply to each and every question freely; (b) where time was required A1-Kasab asked for time freely without hesitation and then himself explained the events and (c) during the recording of confession, he was calm and stable. Learned Magistrate has noted the precautions taken by her as follows: (a) she informed him that he was no more in police custody and she is not concerned with the police investigation; (b) she had put him in the custody of her court staff during the recording of confession and (c) she had given him sufficient time for reflection. She has concluded the certificate by confirming that she had given 72 hours' time for reflection to A1-Kasab before recording the confession. She has also stated that after the confession, A1-Kasab was remanded to judicial custody. She has also stated that as a precaution, in addition to his signature, she has taken A1-Kasab's right hand thumb impression.

- We have perused the evidence of PW-218 Ms. Sawant-Waghule and we are of the opinion that learned Magistrate has taken adequate care while recording the confessional statement of A1-Kasab. She had given him sufficient time for reflection. Her evidence indicates that except her personal staff, no person from any investigating agency or police officer was in her chamber when the confession was being recorded. Her evidence is in tune with her order dated 17/2/2009, the noting made by her on 18/2/2009, 20/2/2009 and 21/2/2009 and the certificates appended by her to the confessional statements.

- We have gone through the cross-examination of PW-218 Ms. Sawant-Waghule. The defence has not been able to make any dent in her evidence. The defence has not elicited anything in the cross-examination from which it can be said that she had not followed the provisions of Section 164 of the Code or of the High Court Criminal Manual. She comes across as a very truthful witness. No allegation is made against her that she forced A1-Kasab to give confessional statement. We have no hesitation in placing implicit reliance on this witness. We are of the opinion that learned Magistrate has ensured that requirements of Section 164 of the Code are satisfied.
- In Abdul Kadar Allarakhia , this court has observed that, if the accused makes a statement that he is guilty of the offence charged, before the question of its acceptance by the court can arise, the court must ordinarily be satisfied that the statement has been made with full understanding of the plea and of the implications of the plea. This court has further observed that it is desirable to record a complete statement of the accused to find out what he exactly means by pleading guilty. This court has further observed that a plea made by the accused before the judge at the commencement of the sessions case cannot stand in a worse position than a confession made by the accused himself before a Magistrate under Section 164 of the Code, or a statement made by the accused admitting his guilt to the court of the committing Magistrate. This court has further observed that such plea could not be effaced from the record and in reality forms part of the record. The following observations of this court need to be quoted.

“Where, therefore, the accused pleads guilty, and the Judge is satisfied that the accused understands fully the implications of his plea, then the plea must be recorded. After recording the plea, it is open to the Judge either to convict or not to convict the accused upon that plea, and as a matter of practice it is desirable to proceed with the trial as if the plea was one of not guilty, lest the evidence may disclose that the facts proved do not, in law, constitute an offence of murder but some lesser offence. But in such cases, the plea remains a plea of guilt, and the trial proceeds for the purpose of ascertaining the circumstances which had resulted in the death and to find out whether the accused can, in law, be said to have committed murder.”

In view of the above, in our opinion, learned Sessions Judge has rightly made the plea a part of record.

- In the light of the above judgments, learned Sessions Judge adopted a very prudent approach and, instead of accepting the plea of guilty which was partial, and convicting A1-Kasab, he proceeded with the trial to ascertain his involvement. Learned Sessions Judge did not examine A1-Kasab under Section 313(a) of the Code at that stage, because according to him that would have caused prejudice to him. Learned Sessions Judge had the advantage of seeing the demeanor of A1-Kasab. He was, therefore, in a better position to evaluate credibility of his plea (as to demeanor see Babu v. State of Kerala, (2010) 9 SCC 189). We are, therefore, of the opinion, that learned Sessions Judge’s observation that A1-Kasab was absolutely comfortable and he made the statement voluntarily will have to be accepted. Learned Sessions Judge has observed that A1-Kasab told him that he was not mentally and physically tortured in jail. We have no reason to disbelieve this statement.

Section VI:
WHAT DOES THE
LAW COMMISSION SAY

128th Law Commission ReporT

❖ **High Cost of Litigation – A Barrier**

“One of the impediments in access to justice has been identified as the economic barrier which, in simple terms, means high costs of litigation. It has become so counter-productive that numerous litigants, it is apprehended, may, for want of wherewithal, suffer injustice, giving up the idea to approach the court because of the prohibitive costs.”⁸

❖ **Introduction of Article 39A**

“This disturbing phenomenon of rising cost of litigation attracted the attention of the Parliament. While Constitution mandated that the State shall secure and protect, as effectively as it may, a social order in which justice shall inform all the institutions of national life, there was no effective provision in the Constitution for translating this promise into reality. Article 39A was introduced in the Constitution in the year 1976. It provided that 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. In introducing this article, Parliament showed its awareness that by numerous statutes, rights, privileges and concessions have been conferred on the economically and socially disadvantaged sections of the society but they themselves are not in a position by their own effort to enforce rights or enjoy the privileges and concessions. And till that is done, it cannot be said that the legal system promotes justice because justice system is an integral part of the legal system of the country. No one who has a right must be denied the benefit of it. There must be forum for enforcement and vindication of this right. Access to forum must be unimpeded either by geographical, physical or economic barriers. The justice system must be easily accessible to each and every one from whatever strata of society he comes. Economic or any other disability should not become a barrier to access to justice. Economic

⁸ Page 3, Para 1.3, Chapter I –Introduction, Law Commission Report 128 – Cost of Litigation

incapacity for enforcing rights must be remedied. It can be done in two ways: (i) considerably reduce the cost of litigation; and (ii) extend help by legal aid scheme wherever it is possible."⁹

❖ **Article 39A vis-à-vis Lawyer's Fees**

"Therefore, article 39A provided for setting up free legal aid schemes to at least deal with one component of the cost of litigation, namely, lawyer's fees. But there are numerous components of cost litigation and each will have to be adequately and scientifically examined to demarcate areas where there is enough leeway for reducing the cost of litigation."¹⁰

❖ **Kinds of expenditure to be borne by the litigant**

"Before attempting to ascertain the areas where the expenses are incurred by the litigants in initiating or prosecuting or defending litigation, it would be worthwhile to recall the broad heads under which the litigants have to bear expenditure in prosecuting or defending litigation. They may be broadly grouped as under:-

- (1) Advocates' fees, including the fees for serving notice wherever it is necessary;
- (2) Court fees and process fees;
- (3) Travelling expenses, etc., of litigants and witnesses;
- (4) Costs for obtaining copies of documents, typing and other miscellaneous expenses;
- (5) Costs on account of adjournments; and
- (6) Costs payable by the vanquished party to the successful party.¹¹

❖ **The Value of right to Legal Aid**

"The Law Commission is aware that there is a class of litigants to whom the quantum of costs is not at all a relevant factor in pursuing litigation. In fact when the opponent is from an economically impoverished class, the well-to-do opponent, irrespective of the cost of litigation, will pursue it relentlessly either to tire out the

⁹ Page 6, Para 1.5, Chapter I –Introduction, Law Commission Report 128 – Cost of Litigation

¹⁰ Page 7, Para 1.6, Chapter I –Introduction, Law Commission Report 128 – Cost of Litigation

¹¹ Para 2.1, Page 11, Chapter II, Components of Cost of Litigation, 128th Law Commission Report – Cost of Litigation

impoverished litigant or to impose upon him an unfair and unjust compromise. It is for this class of litigants coming from the impoverished segment of society and designated as economically disadvantaged class of litigants, for whose benefit rights have been created or privileges and concession have been conferred by statutory and Executive orders but who are denied the same and are unable to enforce the same through justice system on account of economic barrier, that the Law Commission is concerned.”¹²

❖ Court Fee

“The Committee¹³ recommended rate of court fee on writ petitions under article 225 of the Constitution as under:-

i)	<u>Habeas Corpus</u>	No Fee
ii)	Fundamental rights	Rs. 100
iii)	Tax matters	Rs. 500.
iv)	Miscellaneous matters	Rs. 250.

Undoubtedly the committee was fully justified in recommending no court fee on a petition for a writ of habeas corpus. And the Law Commission accords its full support to that recommendation.”¹⁴

¹² Para 2.2, Page 12-13, Chapter II, Components of Cost of Litigation, 128th Law Commission Report – Cost of Litigation

¹³ The Consultative Committee attached to Ministry of Law and Justice, at its meeting in June 1980, set up a Sub-Committee to go into the question of court fees in trial courts.

¹⁴ Para 3.21, Page 56-57, Chapter III, Court Fee as a Component of Cost of Litigation and Its Rationalisation, 128th Law Commission Report, Cost of Litigation

❖ *Devaluation of Legal Profession*

"The non-professional voluntary bodies have a different tale to tell. One respondent stated that 'people are openly saying that the legal profession is no longer service-oriented that it is only profit-oriented and the lawyers are out only to squeeze the clients to the maximum extent possible.' Another voluntary body devoted to providing legal aid to the needy women, opined in a similar reframe that 'the contemporary legal profession has fallen in the popular estimation because of the greed for money, lengthening of the case for years together for small reasons and even changing their loyalty to the other party for the sake of money only. Sometimes lawyers of both sides join hands to make both the parties compromise even if the clients have to suffer the loss. Majority of the lawyers harass their clients for more and more fees, false bills while not taking the required interest in the case.'¹⁵

❖ *Promoting the quality of justice*

"...in our country, the role of legal profession has to be assessed in the context of the constitutional mandate as set out in Article 39A of the Constitution. It is the duty of the State to 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. The role of legal profession in strengthening administration of justice must be in consonance with the intendment underlying article 39A. in other words, in an adversary system as in vogue in law courts being the fulcrum of administration of justice, the role of legal profession must ensure equal opportunity to all litigants in search of justice. In process, opportunity for securing justice should not be denied to any citizen by any reason of economic or other disabilities. Legal profession is expected to ensure that anyone who has not the economic wherewithal to seek justice must not turn away from law courts on the only ground that he is unable to incur necessary expenditure for securing justice. Equally important is the fact that social disabilities should not deny access to centers of justice of which legal profession is an integral and inseparable adjunct. The State, which has conferred a monopoly on the legal profession by permitting it to regulate its own admission, qualification for admission and be the regulator of its own internal discipline, should so conduct itself as affording every facility for securing justice. To discharge this obligation, the legal profession must make its services available to those needy who otherwise cannot afford to pay the cost of legal services. Costs as also their social disabilities may not come in the way of legal profession assisting such persons from securing justice. The

¹⁵ Para 2.6, Page 8, Chapter 2, Debate

profession must develop its own public sector. Briefly stated, ways and means must be devised so that the profession plays a meaningful role in promoting the quality of justice and to bring about such changes in society as are in consonance with the egalitarian goals, to which we are committed both constitutionally as also as our policy objectives. Within these parameters, the role of legal profession in strengthening administration of justice must be spelt out."¹⁶

❖ ***Lawyer-Client Relationship***

"It is unquestionable that in any organized profession, there are bound to be some persons who are unable to maintain the high standard of profession. In some cases, evidence reveals a sordid state of affairs in lawyer-client relationship. This itself cannot be sufficient to condemn the profession as a whole but this aspect cannot be ignored also. It is here the question of accountability of the profession to the litigant and system comes to fore. The leaders of the Bar must show a deliberate concern with the fate of the poor and the indigent by volunteering to take up their cases in courts of law. They must also take up the role of questioning the credentials of persons who do not maintain high professional standards, its accountability by introspection or by internal regulation of the profession. It must submit itself to social audit. It is too much to expect a litigant coming from rural areas to understand what is expected of his lawyer and to complain against him if he feels cheated and thereafter to prosecute his complaint before the Bar Council. It is for the profession to provide a self-regulating mechanism whereby it takes notice of an errant lawyer and deals with him without anyone coming forward to law a complaint. This would be its first and foremost task, namely, to perform its duties both towards the profession and the wider society. Maintenance of the irreducible minimum standards of profession cannot be left to members of the society complaining against anyone. That is a tall order. Accountability can be provided or by a self-regulating mechanism. This must also include an improper or unprofessional behavior in the court that would be impairing the system."¹⁷

❖ ***Justice to all***

"Closely allied to the question of prescribing the floor and ceiling in fees chargeable by members of the legal profession for rendering service to litigants is the question of providing totally free service to a class of litigants who are unable even to pay the minimum fees. The philosophy underlying article 39A of the Constitution has to be translated into an action oriented programme. Even if the ceiling and floor in fees are prescribed, there will be still be members of our society who would suffer denial of justice because they can ill-afford the fees payable to the legal profession. The fee would be a barrier to access to justice. Article 39A was a promise to them, when it was said that the State shall ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. If such seekers of

¹⁶ Para 3.4, Page 13/14, Chapter III, Conclusions and Recommendations

¹⁷ Para 3.8, Para 14, Chapter III, Conclusions and Recommendations

justice who cannot even afford to pay the minimum fees would suffer denial of justice on account of economic disability, article 39A would stand violated. To make effective the intendment underlying article 39A, the legal profession has to gear up to provide service to such seekers of justice. The legal profession is, to all intents and purposes, in private sector. The medical profession is also in private sector but free public hospitals have been set up where anyone can get medical service without the obligation to pay any fees. The poorest can have access to such to hospitals. Unfortunately, till today, there is no public sector in legal profession. It is the duty and obligation of the organized legal profession to set up its public sector unit where the services of its members would be available to those needy who cannot afford to pay the fees for their services. Legal aid scheme operated by the Government of India to some extent helps in this behalf. However, concrete measures have to be taken to set up public sector clinics, operated by members of the legal profession, where anyone who is needy and cannot afford to pay the fees of the private sector can walk in and not only get advice but even initiate proceedings for seeking justice. This is an overdue measure which the legal profession must undertake. To some extent this will also resolve the problem of accountability.”¹⁸

¹⁸ Para 3.30, Page 20, Conclusions and Recommendations

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❖ **Human Rights bases to approach to development demands**

"If injustices and discriminations in society are the main reason for poverty, then as an effective operational mechanism, the human rights-based approach to development demands:

- Participation and transparency in decision-making – this implies making participation throughout the development process a right and the obligation of the State and other actors to create an enabling environment for participation of all stakeholders;
- Non-discrimination – this implies that equity and equality cut across all rights and are the key ingredients for development and poverty reduction;
- Empowerment – this implies empowering people to exercise their human rights through the use of tools such as legal and political action to make progress in more conventional development areas;
- Accountability of actors – this implies accountability of public and private institutions and actors to promote, protect and fulfill human rights and to be held accountable if these are not enforced."¹⁹

❖ **All persons equal before law**

"Law must protect rights. Any dispute about them is not to be resolved through the exercise of some arbitrary discretion, but through the adjudication by competent, impartial and independent processes. These procedures will ensure full equality and fairness to all parties, and determine the questions in accordance with clear, specific and pre-existing laws, known and openly proclaimed. All persons are equal before the law, and are entitled to equal protection. The rule of law ensures that no one is above the law, and that there will be no impunity for human rights violations."²⁰

❖ **Free Legal Aid as a matter of right**

"An accused who cannot afford legal assistance is entitled to free legal aid at the cost of the State. This right is part of the fair, just and reasonable procedure under article 21. The court must inform the accused of his right to be represented by a lawyer through legal aid and at the expense of the State. Failure to do so will vitiate his trial and his conviction can be set aside. (*Suk Das vs. Union Territory of Arunachal Pradesh, (1986)2SCC401*)"²¹

❖ **Public Interest Litigation**

¹⁹ Para 1.10, Page 15/16, Chapter I, Extreme Poverty: Denial of Human Rights

²⁰ Para 1.15, Page 18, Chapter I, Extreme Poverty: Denial of Human Rights

²¹ Para 3.22, Page 31, Chapter III, Expanse of Article 21 of the Constitution

"Public interest litigation is a strategic arm of the legal aid movement, intended to bring justice within the reach of the poor masses, who fall within the low-visibility area of humanity. Public interest litigation is brought before the court not for the purpose of enforcing the rights of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantageous position should not go unnoticed and un-redressed."²²

❖ **Voluntary legal aid**

"To help the poor litigants, article 39A of the Constitution provides, inter alia, that the State shall provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Invoking the said article and the Universal Declaration of Human Rights, the Supreme Court held that it is the duty of the State to provide amicus curiae to defend an indigent accused. The Court also held that he would be meted out with unequal defence, if, as is common knowledge, a youngster from the Bar who has either a little experience or no experience is assigned to defend him and, therefore, it is high time that senior counsel practicing in the court concerned should volunteer to defend such indigent accused as a part of their professional duty. (*Kishore Chand vs. State of Himachal Pradesh*, (1991)1SC286)"²³

²² Para 3.24, Page 32, Chapter III, Expanse of Article 21 of the Constitution

²³ Para 3.31, Page 35, Chapter III, Expanse of Article 21 of the Constitution

Section VII:
ADVISORIES ISSUED BY THE
MINISTRY OF HOME AFFAIRS

Overcrowding in Prison (09.05.2011)

No.17011/2/2010-PR

**Government of India/Bharat Sarkar
Ministry of Home Affairs/Grih Mantralaya**

North Block, New Delhi

Dated the 9th May 2011 To

The Principal Secretary (Prison) / Secretary (Home) (In-charge of
Prisons) - All State Governments / UTs

DGs/ IGs incharge of prisons- All State Governments / UTs.

Subject: Overcrowding in prisons-regarding

Sir,

Overcrowding in prison is one of the most challenging problems faced by Criminal Justice Systems worldwide. Prison overcrowding is more often a consequence of the way in which criminal justice is administered than a result of rising crime rates. The over-use of pre-trial detention, along with strict sentencing practices, are two main contributory factors. Overcrowding undermines the ability of prison systems to meet the basic needs of prisoners, such as healthcare, food, and accommodation. This also endangers the basic rights of prisoners, including the right to have adequate standards of living and the right to the highest attainable standards of physical and mental health. Prison overcrowding brings in its wake a host of serious problems to prison administration. It not only create security problem but also causes severe strain on the essential services, results in serious health hazards and disrupts penal reformation and rehabilitation programme. In an overcrowded prison segregation of hardened criminals and their separation from mild offenders become impossible. Prison overcrowding compels prisoners to be kept under conditions unacceptable to the United Nations Standard Minimum Rules for treatment of offenders to which India is a signatory.

NATIONAL SCENARIO

1 The problem of overcrowding in prisons in India has been in existence since long. However, it is not uniform in all prisons of India. The District Prisons are more

overcrowded than the other Prisons. As per the statistics published by the National Crime Record Bureau, as on 31.12.2008, there were 384753 prisoners in various prisons of the country against its total authorized capacity of 297777 prisoners. Out of this, the number of undertrial prisoners was 257928 which constitute 67% of the total prison population. The prison in India is overcrowded to the extent of 129%. While in some States, there was no overcrowding, the jails of some States are still heavily overcrowded.

2 In order to address the aforesaid issue, an all India Conference of Correctional Administrators was held in New Delhi on 8th-9th September 2010. One of the agenda for discussion was the issue of "Overcrowding- Reducing the number of undertrials" and it was strongly felt that the States need to take measures to reduce overcrowding in prisons. Some of the initiatives taken by the Central and some State Govts are also highlighted below.

INITIATIVES TAKEN BY THE GOVERNMENT OF INDIA

4. Although Prisons is a State subject, for reducing number of undertrials, the Government of India has taken various administrative and legislative measures. Some of the measures taken are illustrated below:

(a) Establishment of **Fast Track Courts (FTCs)** for expeditious disposal of long pending cases in the Sessions Courts. The FTCs were established to expeditiously dispose of long pending cases in the Sessions Courts and long pending cases of undertrial prisoners. The Government accorded approval for the setting up of 1562 FTCs upto 31.3.2010. FTCs were created exclusively to deal with cases

involving senior citizens, abuse of women and the disabled to expedite the disposal of session trial cases.

(b) To reduce the delay in the disposal of criminal trials and appeals and also to alleviate the suffering of under-trial prisoners, the concept of **plea-bargaining** was introduced in the Code of Criminal Procedure 1973 by way of Criminal Law (Amendment) Act 2005.

(c) Launch of **National Mission for Justice Delivery and Legal Reforms**. Under the Mission, the Hon'ble Chief Justices of High Courts have been requested to reduce the number of undertrial prisoners by two-thirds during the period January-July 2010.

(d) **Amendment in section 436 and insertion of a new section viz 436A in the Criminal Procedure Code**. Under Section 436, a person accused of a bailable offence can be detained in prison for a maximum period of 7 days and also a person who is unable to furnish bail within 7 days could be released on personal bond without

surety. Under section 436A, an undertrial has a right to seek bail on serving one half of the maximum possible sentence. No one can be detained in prison for a period exceeding maximum possible sentence. This provision is, however, not applicable for those who are charged with offences punishable with death sentence.

(e) Under section 167 of Cr.P.C. the maximum period for completing police investigations and filing charge sheet (for offence punishable with 10 years or more or death) is 90 days, whereas for all other offences, the period is 60 days. The undertrial prisoner is entitled to seek release on bail, if investigation is not completed within the stipulated period.

(f) Creation of additional capacity of prisons through the Scheme of Modernisation of Prisons. Under the scheme, the Government of India has provided financial assistance of Rs 1800 crores to the States/UTs for construction of new jails, construction of additional

barracks, repair/renovation of existing jails, construction of staff quarters and improvement of water and sanitation in jails.

(g) The Government of India has provided an amount of Rs 5000 crore as grant for the period 2010-11 to 2014-15 for bringing about improvement in administration of justice. Out of this, Rs 100 crore has been earmarked for Lok Adalats and Rs 200 crore for providing legal aid.

(h) Thereafter Finance Commission has recommended a total amount of Rs. 609 crore for construction and upgradation of prisons for the States of Andhra Pradesh (Rs. 90 crore), Arunachal Pradesh (Rs. 10 crore), Chhattisgarh (Rs. 150 crore), Kerala (Rs. 154 crore), Maharashtra (Rs. 60 crore), Mizoram (Rs. 30 crore), Orissa (Rs. 100 crore) and Tripura (Rs. 15 crore).

STEPS TAKEN BY VARIOUS STATE GOVERNMENTS

5. During the conference, the States/UTs have also highlighted various measures taken by them in order to reduce overcrowding in prisons. Some of these, as detailed below, are definitely worth considering by the other States /UTs as these shall go a long way in bringing about reduction in number of undertrials:

(a) Use of plea bargaining methods.

(b) Holding of Lok Adalats

(c) Implementation of section 436 and 436 A of Cr.P.C.

(d) Regular visits of High Court judges/ Secretary, District Legal Services Authority to district prisons .

(e) Regular monthly coordination meetings between the District Judge, Superintendent of Police, Prosecution and Superintendent of Prisons wherein pending cases of undertrials are discussed for expediting disposal.

- (f) Preparation of list of undertrial prisoners and the status of the cases court-wise and prison-wise. Identical cases in which the undertrial prisoners can be released, can be pursued vigorously both legal aid and prison authorities.
- (g) Those cases of undertrial where the maximum punishment prescribed for the offence committed is upto seven years are put up by the jail authorities before the visiting judge every three months for review of their cases for release on bail.
- (h) Formation of Undertrial Review Committee in every District with the District Session Judge as the Chairman and Superintendent of Police and Superintendent of Prison as members to review the cases of undertrial every three months, of those lodged for more than 3 months.
- (i) Engaging competent legal counsels for indigent undertrial prisoners
- (j) Requesting court for reductions of surety amount where the amount is beyond means of the undertrial prisoners.
- (k) Taking up cases of seriously sick prisoners with the trial courts for their release on bail, as per law.
- (l) Providing legal aid through the Legal Aid Cell and use of video conferencing facilities by which the advocates of different District and High Courts can have interaction with the prisoners in jails to facilitate provision of legal aid.
- (m) In the case of undertrial from other States, local surety is not insisted upon and it shall be sufficient on verification of the identities and actual places of residence of the undertrials outside the State and their sureties to release them on personal bonds, or with or without sureties, as the case may be.
- (n) Release of undertrial under section 4(3) of Probation of Offenders Act.
- (o) Probation officers contacts families of the undertrial prisoners in cases where bail has been granted but not availed due to various reasons by arranging bailers to expedite release of undertrials.

ACTION REQUIRED TO BE TAKEN BY STATE GOVERNMENTS

6. Apart from implementing the various measures taken by the Government of India for reduction of undertrials as mentioned above, the States/UTs are advised to consider the best practices being followed in this regard by various States/ UTs towards reduction of undertrial prisoners. The States/UTs are also advised to explore alternatives to imprisonment. Instead of sentencing offenders to prison, alternative sentencing should be made by way of imposing fine, community sentencing. The Government of Andhra Pradesh has recently introduced 'Community Service of Offenders Act, 2010' which is a new initiative in Penal Reforms. The said Act provides for imposition of 'Community Service' instead of sentence of imprisonment on offenders in certain cases. The Act applies only to offenders found guilty of minor offences in which imprisonment of not more than

one year is envisaged. The States/UTs are advised to carry out suitable legislation for providing alternatives to imprisonment. Apart from above, the States/UTs may also consider taking following actions:

(a) A survey of all such cases covered under section 436 and 436A may be carried out every six months by the prison authorities and presented before the magistrate/ judges concerned in each district, by sending such lists to the District Legal Services Authorities (SLSAs).

(b) With regard to the provision of legal aid for release on bail, reduction of bail amount etc, the State Legal Service Authority (SLSAs) should direct the (DSLAs) in the state to arrange for lawyers for the unrepresented undertrial prisoners through their legal aid panels.

(c) Fee to lawyers in the legal aid panel may be enhanced so as to attract services of better quality of legal aid lawyers.

(d) Greater use of Probation of Offenders Act, 1958 by the judiciary, as a means to decongest prisons by releasing young, first time and less serious offenders on probation.

(e) NGOs should be encouraged to do legal guidance work and link up with DLSAs to arrange legal aid for unrepresented undertrial prisoners. The SLSAs may organize para- legal training of such NGOs in the State in collaboration with academic institutions.

(f) implementation of guidelines issued by the Mumbai High Court in Rajendra Bidkar vs State of Maharashtra & Ors (CWO no. 386 of 2004) with regard to production of undertrial prisoners through the video conferencing facility.

7. All the State/UTs are advised to consider adopting these practices for efficient and effective management of prisons, as also to reduce overcrowding in prisons and to ensure reformation & rehabilitation of prison inmates in the true spirit of correctional administration.

The receipt of this letter may please be acknowledged.

Yours faithfully

Sd/

[Dr (Smt.) Praveen Kumari Singh]

Director (SR)

Telefax: 23092161

Comprehensive Advisory on Prison administration (17.07.2009)

No.17014/3/2009-PR

Government of India/Bharat Sarkar

Ministry of Home Affairs/Grih Mantralaya

North Block, New Delhi dated the 17th of July 2009.

To

The Principal Secretary (Prison) / Secretary (Home) (In-charge of Prisons) - All State Governments / UTs

DGs/ IGs incharge of prisons- All State Governments / UTs.

Subject: Prison Administration- regarding

Sir,

As you are aware 'Prisons' is a State subject under Entry-4 (Prison Reformatories, Borstal Institutions and other institutions of like nature) in the State List (List-II) of the Seventh Schedule to the Constitution of India. Therefore, the management and administration of Prisons falls in the domain of the State Governments. The Prisons are governed by, inter alia, The Prisons Act, 1894 and the Prison Manuals/ Rules/ Regulations framed by the respective State Governments from time to time.

2. The Indian prison system has been under the close scrutiny of judiciary / District Magistrates who have been given a responsibility to closely monitor the administration and management of prisons under their jurisdiction and to inspect the same periodically. The Central Government has, from time to time, been interacting with the State Governments through advisories, conferences and meetings etc on various aspects of prison administration including appropriate security measures in prisons.
3. As you are aware, various Committees, Commissions and Working Groups had been constituted in the past by the Government of India to study and make suggestions for improving the prison conditions and administration, inter alia, with a view to making them more conducive to the reformation and rehabilitation of prisoners. Some of the important committees are as under:

¾ All India Jail Manual Committee (1957),

¾ Working Group on Prisons (1972),

¾ All India Prison Reforms Committee (1980-83) known as Mulla

Committee,

- ¾ All India Group on Prison Administration, Security and Discipline known as R.K. Kapoor Committee (1986) and
- ¾ National Expert Committee on Women Prisoners known as Justice Krishna Iyer Committee (1987) etc.

These committees made a number of recommendations to improve the conditions of prisons, prisoners and prison personnel. Some of the important recommendations are annexed as Annexure-I. Since most of the recommendations of these committees pertained to the State Governments/UT Administrations, these were forwarded to the State Governments by the Ministry of Home Affairs for taking appropriate action. In 2001, the Ministry of Home Affairs through BPR&D also circulated a detailed questionnaire relating to actionable recommendations of these committees.

Model Prison Manual

4. Keeping in view the directions given by the Hon'ble Supreme Court in the case of Ramamurthy vs State of Karnataka (1996) and also taking into account the recommendations of various committees regarding the need for bringing uniformity in laws relating to prisons, Government of India constituted All India Model Prison Manual Committee headed by Director General of BPR&D to prepare a Model Prison Manual for the Superintendence and Management of Prisons in India. The "**Model Prison Manual**" so prepared was circulated to all the State Governments/UT Administrations in December 2003 for adoption for effective and efficient superintendence and management of prisons. This manual is an exhaustive document and has been prepared after wide consultations with the State Governments. It is, however, learnt that only a few States have so far adopted the model prison manual in its true spirit. The Parliamentary sub-committee on modernization of prisons has recently visited many states and has shown their disappointment on the poor adoption of the Model Prison Manual by the State Governments. They have asked the Government of India to take initiative for ensuring that the State Governments adopt the Model Prison Manual. You are accordingly once again advised to go through the Model Prison Manual and consider its adoption as per the requirements and suitability to the State.

Court Judgments

- 5.** From time to time various High Courts and Supreme Court have given wide ranging judgments on conditions of prisoners, prisons and the rights of

prisoners. Some of these path-breaking judgments/ rulings are important for the rank and file of prison officials/ State Governments. A compilation of such judgments was brought out by the BPR&D in 2000 in which an attempt was made to identify and document some latest rulings/ judgments of the Supreme Court/ High Courts relating to the area of prison administration. The same was thereafter revised and updated in 2007. This compilation is also available at the BPR&D website (www.bprd.gov.in). The same was also circulated to all the State Governments /UT Administrations to make this document more user friendly, important operational points of these rulings/ judgments were culled out and compiled. Some of the important judgments are annexed as Annexure-II.

6. In order to comply with and give effect to the important directions of the Hon'ble Supreme Court/High Courts, the Government of India has

- i) Introduced section 436A in Cr.PC to liberalize the bail conditions;
- ii) Introduced section 265A in Cr.PC for plea bargaining;
- iii) Initiated the Scheme for Prison Modernization in 2002 in order to reduce overcrowding, improve hygiene conditions as also provide better facilities to prisoners and prison personnel.

7. Government of India has prepared a Draft Policy Paper on Prisons with the approval of the Home Minister in order to broadly address the agreed upon objectives in incarceration and the measures to be implemented by the various State/UT Governments. The policy objectives as well as the measures required to be taken by the State /UT Governments are annexed as Annexure-III.

8. The Sub Committee of the Department Related Parliamentary Standing Committee of the Ministry of Home Affairs presented to the Rajya Sabha on 26.02.2009 in their report of Modernization of Prison Scheme has also made certain observations, on which action needs to be taken. The report has already been circulated to all States for their comments and necessary action. Some of the important observations are annexed as Annexure-IV.

9. The National Human Rights Commission has also been issuing suitable instructions from time to time to all the States/ UTs against the violation of human rights in prisons and take suitable steps in this regard.

10. For the strengthening of security arrangements in jails, the Government of

India has also been advising the State Governments vide advisories dated 21.9.1998 and 17.8.2006 for taking adequate and effective measures for tightening security and to ensure that prisoners are not in possession of prohibited items like mobile phones, weapons etc. The State Governments are requested to take appropriate measures in the light of the aforesaid advisories.

11. Recently in the case of Jaswant Singh v/s State (Criminal Appeal No. 257/2004), the Hon'ble Delhi High Court vide its order dated 30.9.2008 has directed to issue instructions for devising a foolproof system to avoid any lapse while transferring convicts/ accused persons from one jail to another. In the instant case, the prisoner had been released pre-maturely by the jail officials on being transferred from one jail to another.

12. As for the human resources who are actually going to man these prisons , it is recommended that the State shall consider:

- Establishing well equipped training infrastructure in the state, with adequate skilled and well qualified instructional staff, to cater to the normal needs of basic and in-service training for the prison staff in different discipline.
- Availing slots for in-service training being offered in ICA, Chandigarh, NICFS, New Delhi, RICA, Vellore and other institutes sponsored by BPR&D/MHA.
- Deputing prison officials for training in specialized institutes in India and abroad in consultation with BPR&D and MHA.
- Creating adequate posts for prison staff as per norms in different categories commensurate with operational needs of safe custody, reformation, rehabilitation, health care, legal assistance etc.
- Filling up all the vacancies, presently running up to 17.58% (2006) within time bound frame and ensure proper cadre management through timely trainings, promotions recruitments etc.
- Acknowledging the role of good work done by prison officers/ officials individually or in a team by way of a suitable reward schemes.
- Rewarding those prison staff during whose tenure the prison shows remarkable improvement in term of elimination of or significant reduction, in the incidence of unnatural deaths, indiscipline by prisoners; number of prisoners pursuing educational and vocational programmes, implementation of Section 436-A and 265-A to 265-L CrPC, 1973 etc.
- Nominating deserving prison officers for the award of Correctional Service Medals on the occasion of Independence/Republic Day and presenting the

recipients such medals in ceremonial functions like State Day, Independence Day/Republic Day etc.

13. All the State Governments/ UT administrations are requested to take effective measures in the light of the recommendations made by the various committees/ court judgments, the Model Prison Manual and advisories issued by the Government of India from time to time for the effective and smooth functioning of the prisons.

14. The receipt of this letter may please be acknowledged.

Yours faithfully,
Sd/-

(Nirmaljeet Singh Kalsi)

Joint Secretary (CS)
Telefax:011-23092630

Advisory on the policy for the treatment of terminally ill prisoners / inmates (13.08.2010)

MOST IMMEDIATE

**No.V-17014/5/2010-PR
GOVERNMENT OF INDIA/BHARAT SARKAR
MINISTRY OF HOME AFFAIRS/GRIH MANTRALAYA
(CS DIVISION)**

North Block, New Delhi, 13th August, 2010.

To

**The Chief Secretary,
The Principal Secretary (Prisons)/ Principal Secretary (Home-in-charge
of Prisons),
All State Governments and UT Administrations.**

Subject: Advisory on the policy for the treatment of terminally ill prisoners / inmates (TIPs) -regarding

Sir/Madam.

The Hon'ble High Court of Delhi, taking suo motu cognizance to deal with the issue of terminally sick inmates in the prisons all over India in Writ Petition (Crl) no. 201/2009 (Court on its own motion v/s State NCT of Delhi), has given directions to the Union of India to formulate a concrete policy towards the treatment of terminally ill prisoners languishing in prisons. "Terminal illness" is a medical term to describe an active and progressive illness that cannot be cured or adequately treated and that is reasonably expected to result in the death of the patient. It is also described as a malignant disease for which there is no cure and the prognosis is fatal. As defined by the American Cancer Society, "Terminal illness" is an irreversible illness that, without life-sustaining procedures, will result in death in the near future or a state of permanent unconsciousness from which recovery is unlikely. Some examples, among others, of terminal illness may include advanced cancer, advanced heart disease, full blown AIDS etc.

2. 'Prisons' is a State subject under Entry-4 (Prison Reformatories, Borstal Institutions and other institutions of like nature) in the State List (List-II) of the Seventh Schedule to the Constitution of India. Therefore, the management and administration of prisons falls in the domain of the State

Governments and UT Administrations. Prisons are governed by inter alia, the Prisons Act, 1894 and Prison Rules, as adopted/ amended by the respective State Governments and UT Administrations from time to time and the Pension Manuals framed by them. It is, therefore, for the State Government/UT Administration concerned to devise appropriate policies and procedures to identify and deal with the special needs of their terminally ill prisoners (TIPs) in a manner that respects their human rights, ensures their dignity as well as takes into account the needs of security and safety of the community. Such policies and procedures should, however, address the special medical care needs/requirements of TIPs, the formulation of clear criterion for their release, parole, furlough etc. on compassionate ground and facilitate interaction with their families and friends.

3. The Government of India is deeply concerned about the terminally ill prisoners in all the States/ UTs of the country and would, therefore, advise the State Governments and UT Administrations to take the following steps for effective management of terminally ill prisoners within their jurisdiction:-

- (i) As a first step, identify all the terminally ill prisoners/inmates (TIPs) in all the prisons of the State/UT. For this purpose a special District Level Medical Board and State Level Medical Board with suitable medical experts may be constituted within 30 days. All cases of terminal illness of prisoners/inmates may be examined, identified and certified by the District level Medical Board within the next 60 days subject to any guidelines prescribed by the Medical Council of India (MCI), Ministry of Health and Family Welfare and the Health and Family Welfare Department of the State/UT concerned regarding terminal illness and confirmed by the State level Medical Board within say 15 days thereafter.
- (ii) All patients with terminal illness have special medical needs relating to their disease. Such patients also need special psychological counseling and spiritual support since they face the prospect and trauma of impending death. Such needs are further intensified in the isolated environment of a prison, where the medical needs of each TIP must also be identified in consultation with the District State Medical Board. State Governments and UT Administrations are responsible for making available/providing reasonable medical care facilities/aid to the TIPs on a need basis, either in the prison or through a specialty / super-specialty

Government hospital or in the nearest Medical Centre, as would be available to a free person outside the prison. All TIPs should be, as far as possible, shifted to a prison in a place where maximum/best medical care facilities could be made available to them.

(iii) TIPs also have special needs in terms of adequate and timely legal representation at various stages of their judicial custody, trial in the Courts and Conviction. Many TIPs, especially those in an advanced stage of terminal illness, may have been abandoned by their families or may have family links disrupted due to long sentence or age. Such prisoners must be given access to legal counsel, including free legal aid services, if indigent, during the entire process of criminal justice. Such access to free legal services is vital for defendants with terminal illness, particularly with regard to their rights for non-custodial sanctions and measures such as bail, suspended sentences on compassionate grounds or their rights to the requisite medical care in prisons.

(iv) For the purpose of legal recourse, the TIPs may be categorized as persons in judicial custody, under trials and convicts. Taking into account the limited medical care facilities which could be made available in prisons, and also in view of the special needs of TIPs, State Governments and UT Administrations must resort to all possible legal measures to enable TIPs to live the remaining part of their lives with dignity, in peace and in the close vicinity of their family members and close friends. Some of the indicative measures are as follows:-

- a. For all TIPs who are in judicial custody the investigating policy officer/officer in-charge of the case should be advised to make all efforts to complete the investigation of the cases, as far as possible, before the prescribed limit of 90 days.
- b. The Jail Superintendent /Investigating police officer/Officer in-charge of the case must bring to the notice of the Hon'ble Trial Court the medical condition of the TIP concerned during the process of trial for taking a sympathetic view while considering their requests for bail and expeditious disposal of the case etc. so that the Hon'ble Court may pass appropriate orders as deemed fit.
- c. Cases of such TIPs should also be submitted before the inspecting Judges of District Courts or during visit of judges of Hon'ble Supreme Court/High Courts so

that the Hon'ble Judges may take a view and may consider such cases for a Judicial Review as deemed fit.

d. Provisions for non-custodial measures and alternatives to imprisonment could also be pleaded before the Court for TIPs in case they do not pose any risk to the society. Alternatively, such TIPs could be shifted to the open jails as far as possible under a court order.

e. To enable TIPs to receive the support of family and friends during the extremely distressing period prior to death, the State Governments and UT Administrations may consider amendments in their Prison Acts/Rules/Manuals to make special provisions on compassionate grounds for more frequent visits by their family members and friends, their release on parole or other similar provisions for the remaining period of the sentence.

f. The State Governments/UT Administrations may also consider release of such prisoners as a part of general amnesty. Provisions of special leave may be made applicable to TIPs, as is prescribed in Prison Manuals of the respective States.

g. The TIPs and their families should be made aware of the special powers of the President and Governor under Article 72 and 161 of the Constitution of India, respectively, to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State, and in certain cases of the Union, extends and all necessary help must be rendered to enable such TIPs to submit a petition to the President or the Governor, as the case may be.

h. Cooperation of community health care services, NGOs and civil society must also be sought and facilitated to ensure proper care of TIPs in the prison and continuity of care following their release from the prison.

i. The correctional needs of such prisoners are also different as it is not the social reintegration which is relevant, but there is a need for psycho-spiritual support and adequate human contact to help them maintain their mental balances. TIPs should, therefore, be placed as close to their homes as possible to enable regular visits from their family members and friends.

(v) Foreigner TIPs should be identified separately under each of the categories of judicial custody, undertrials and convicts so as to deal with their cases in a focused and expeditious manner as indicated below:

a. While all facilities available to Indian TIPs would also be available to Foreigner TIPs, the State Governments and UT Administrations must immediately take up the cases of the convicted foreign TIPs with the Government of India for repatriation to their respective countries as per the provisions of the Repatriation of Prisoners Act 2003 and Repatriation of Prisoners Rule, 2004. Under the Repatriation of Prisoners Act, 2003, bilateral agreements have been signed by Government of

India with a number of countries for the repatriation of sentenced persons from India to that country or vice versa and efforts are being made to sign similar agreements with other countries.

b. Even if no bilateral agreement exists with a foreign country, the repatriation of a convicted foreign TIP must be taken up immediately by the State Government/UT Administration concerned through the Ministry of Home Affairs and Ministry of External Affairs, Government of India through diplomatic channels on humanitarian grounds.

c. The cases of foreign TIPs, who are under judicial custody/undertrials, should also be taken up with the respective trial Courts on priority on the lines suggested for the similarly placed Indian TIPs. Their cases should be submitted expeditiously to the Hon'ble Courts for Judicial Review and the Hon'ble Courts may like to dispose of such cases as deemed fit.

(vi) The State Governments/UT Administrations are, therefore, advised to amend legislation/ rules and make policies and procedures to provide for community sanctions and measures for TIPs, at all stages of the criminal justice process, to enable them to receive the medical care they need and to die in dignity, surrounded by their family members and friends rather than in the desolate environment of prisons. Such amendment in legislation/rules/policies/procedures should, as a minimum, include clear criteria and procedures relating to:

f. Facilities /enabling cooperation of community health care services, NGOs and civil society to ensure proper care in the prisons and continuity of care following release of TIPs.

a. Identification and certification of TIPs by a competent authority;

b. Segregation of such terminally ill prisoners/inmates (TIPs), and assessment of their special medical, psychological, legal and social needs and

c. Making reasonable and adequate provisions for such special needs, including special health care facilities within the legal administrative and financial constraints of the State;

d. Transfer of TIPs to prison with better medical care facilities Government / civilian hospitals, open jails etc. on need basis

e. Free legal assistance to TIPs in judicial custody/undertrials;

9. All the State Governments/UT Administrations are requested to take effective measures in this regard. The aforesaid measures are only indicative and the State Governments/UT Administrations may take any additional

measures for the terminally ill prisoners/inmates. This Ministry may also be kept apprised of any special measures/mechanisms introduced in their respective jurisdictions so that the same could be circulated to the other State Governments and UT Administrations for consideration/adoption.

10. The receipt of this letter may kindly be acknowledged.

Yours faithfully, Sd/-
(Dr. Nirmaljeet Singh Kalsi)
Joint Secretary to the Govt. of
India Tele. No. 23092630

Commonwealth Human Rights Initiative's (CHRI)

Who we are

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. In 1987, several Commonwealth associations founded CHRI because they felt that while the member countries had both a common set of values and legal principles from which to work and a forum within which to promote human rights, there was relatively little focus on human rights issues.

CHRI's objectives are to promote awareness of and adherence to the Harare Commonwealth Declaration, the Universal Declaration of Human Rights, and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

Through its biennial CHOGM reports and periodic fact finding missions CHRI continually draws attention to progress and setbacks in human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, member-state governments and civil society associations. By holding workshops and developing linkages, CHRI's approach throughout is to act as a catalyst for activity around its priority concerns.

CHRI is accredited to the Commonwealth and, since 2002, also holds Observer Status with the African Commission on Human and Peoples' Rights.

CHRI has also been granted Special Consultative Status with the Economic and Social Council of the United Nations in July 2005.

Our Mandate

"The degree of civilization in a society can be judged by entering its prisons"
Fyodor Dostoevsky, 1821-1881

The Indian criminal justice system seems to be dealing with two broad categories of people: those who live above the law and those who are absolutely crushed by it. Prisoners are one of the weakest constituencies in the society. They have no voting rights, have very limited access to the outside world, and are under the complete control of the prison authority. They cannot speak with the press, write letters or speak with their families without the permission and/or censorship by the prison department. In India, majority of these voiceless people remain in prison pending trial or conviction. Most recent statistics reveal that over 65% of the prisoners are under-trials and they may continue to be held in overcrowded prisons for years. The occupancy in prisons exceeds by 41.4% over and above its sanctioned capacity. A

huge majority of these under-trial prisoners are poor. They are denied bail for want of monetary security. And trials take years. Often, they have no lawyers, live in pathetic conditions, do not have access to adequate medical care, and are likely to be tortured or exploited. Many times, the legal aid lawyers and prison officials are also unaware of the existing legal standards. The system fails the prisoners at every turn and often times the agencies blame each other for non-performance and unaccountability.

The Prison Reform Programme is focused on increasing transparency of a traditionally closed system and exposing malpractice. The programme aims to improve prison conditions, reform prison management, enhance accountability and foster an attitude of cooperation between the various agencies of the criminal justice system in place of the prevailing indifference and discrimination. It seeks to achieve its goals through research, legal analysis and advice, advocacy, capacity building, network building and conference facilitation. Over the years, we have worked in different parts of the country including Andhra Pradesh, Chhattisgarh, Karnataka, Madhya Pradesh, Maharashtra, Orissa, Rajasthan, and West Bengal. A major area of our work is focused on highlighting failures of the legal system that result in terrible overcrowding and unconscionably long pre-trial detention and prison overstay, and engaging in interventions to ease this. Another area of concentration is aimed at reviving the prison oversight systems that have completely failed. We believe that attention to these areas will bring improvements to the administration of prisons as well as have a knock on effect on the administration of justice overall.

Work on Pre-trial Detention in West Bengal

As part of its mandate to ensure that the working of the criminal justice system promotes fair trial and prevents unnecessary detention, Commonwealth Human Rights Initiative (CHRI) has been working in the state of West Bengal since 2009. In addition to conducting a series of micro studies on status of legal aid and court observation exercises to understand and record court practices related to pre-trial detention such as court production, remand and bail, CHRI has filed public interest litigations in the Calcutta High Court on the issue of juveniles, production of accused persons and repatriation of Bangladesh Nationals.

Our experience shows that a large percentage of undertrials have no access to effective legal representation or legal aid, or representation was obtained after the first production, sometimes at the time of filing of the chargesheet. Also there is a poor lawyer-client relationship, as even those undertrials who had legal representation could only meet their respective lawyer in the courts. Also in most cases under-trials start out with having a private lawyer, but soon after, due to lack of income they are unable to retain them and thus go unrepresented for the remaining course of the trial.

With an aim to improving early access to counsel and effective representation, CHRI has also been conducting legal aid clinics in collaboration with the National University of Juridical Sciences, Kolkata in Dum Dum Central Correctional Home, Presidency Correctional Home and Alipore Central Correctional Home. This was done with the objective to strengthen the legal aid structure inside correctional homes and to demonstrate a legal aid environment where no suspect/accused goes unrepresented.

The legal aid clinic's area of work ranges from identifying illegal and unnecessary detentions, providing legal representation through referrals to SLSA, providing legal counselling and guidance whenever sought by the inmates and conducting legal aid awareness activities inside the prison. The clinic regularly communicates with the SLSA to bring to fore the current problems in the system.

