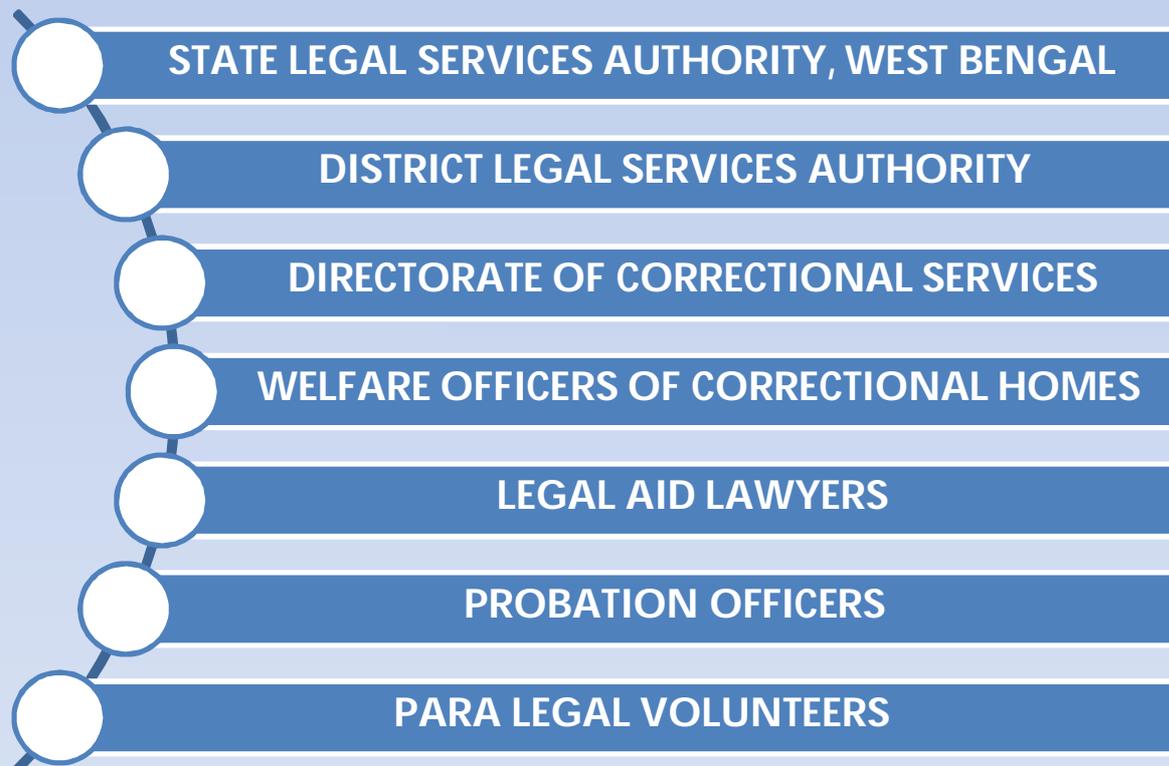


CHRI 2015



ACCESS TO LEGAL AID IN WEST BENGAL

A REPORT ON PROCEEDINGS



COMMONWEALTH HUMAN RIGHTS INITIATIVE

working for the practical realisation of human rights in the countries of the commonwealth

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"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

~ U.S. Supreme Court Justice Hugo Black, 1964

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CONTEXT & BACKGROUND

The Indian Constitution provides for several safeguards and rights to a person to protect his personal liberty against any unjustified and unlawful action by the State. Personal liberty is a sacred and cherished right under the Constitution. Article 22 not only guarantees every individual protection against arbitrary arrest and detention, it also declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice.

The right to legal representation in a criminal justice system is a widely accepted principle of law. This also features as an essential component of the right to a fair trial, thereby providing the accused a fair and effective interface with the criminal justice administration. Thus, representation by a lawyer of one's own choice is a pre-requisite for fair trial. For those unable to afford a lawyer, the right to free legal aid at the state's cost is crucial, to breathe life into the notion of access to justice. This is guaranteed under Indian Law by virtue of Article 39A of the Constitution of India which mandates the State to provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The Legal Services Authorities Act 1987 extends the right to legal aid to all persons in custody¹.

Legal aid services if provided at the earliest stages of the criminal process safeguard the rights of those detained and protect him from abuse and arbitrary detention. An individual's entitlement to legal aid has been elucidated by the apex court in the recent judgment of *Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid Vs. State of Maharashtra*². The court observed,

"... We 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.....according to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the chargesheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial.

¹Section 12, The Legal Services Authorities Act 1987.

² (2012) 9 SCC 1

Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused”.

The duty of magistrates in this regard has also been explained by the Supreme Court in the case of *Khatri & Others Vs. State of Bihar & Ors*,

“...the (sic) 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, in West Bengal practice differs from theory and it is seen that in most courts, it is only after a substantial period of detention, if it comes to the notice of the concerned Magistrate that the accused person is unrepresented, does he inform the concerned legal aid services authority for appointment of a legal aid lawyer. Even though mechanisms exist for application for legal aid lawyers from within correctional homes, it is often seen that the legal services authorities or concerned court do not exchange any information with regard to appointment of lawyers or status of the cases. This lack of coordination between the working of various stakeholders of the legal aid system especially the legal services authority, correctional home authorities, legal aid lawyers and inmates, magnifies the problem.

This has not only led to numerous problems in ensuring effective access to legal aid but also resulted in a sense of distrust amongst inmates regarding the legal aid services in the state. One often finds, during interactions with inmates, that an accused is wary of the quality of legal services he would be provided if he doesn't have to pay money, thus making him reluctant to apply for legal aid services even if doesn't have the means to

afford a lawyer of his own choice. This notion is further supported by the fact that feedback on performance of legal aid lawyers is often poor and below accepted standards. It is apparent that the lack of any strict reporting or monitoring mechanisms within the legal services authorities has resulted into this situation.

This situation necessitated that some consideration be placed on bringing together the key stakeholders in ensuring effective to legal aid services to accused persons with a special focus on those who are in detention in correctional homes across the state. The one day consultation on Access to Legal Aid in West Bengal was thus, an attempt to bring together the key stakeholders to discuss key issues and address gaps in the functioning of the legal aid system in West Bengal and provide a forum for solution based collaboration and problem solving.

Representatives from the State Legal Services Authority, Secretaries of the District Legal Services Authority, Superintendent and Welfare Officer of Correctional Homes, Probation officers, Legal Aid Lawyers and Paralegal volunteers attached with the Permanent Legal Aid Clinics in Correctional homes from 6 districts of West Bengal viz. South 24 Parganas, North 24 Parganas, Howrah, Kolkata, Hooghly and Paschim Midnapore attended the consultation. The consultation was jointly organised by the Commonwealth Human Rights Initiative & Human Rights Law Network.

The Consultation was divided into three sessions, while the first session dealt with the key principles of legal aid, the second session invited the welfare officers to make short presentations on the status of legal aid services in their correctional homes, while the third sessions sought to interactive and solution oriented. The scheme of the consultation was:

- Session I - Access to Legal Aid in the Criminal Justice System: Key Principles & Importance of Ensuring Early Access to Legal Aid
- Session II - Status of Legal Aid Services in Correctional Homes in West Bengal: Current Issues
- Session III - Ensuring Effective Access to Legal Aid Services for Accused Persons in West Bengal: Solutions

SESSION I: ACCESS TO LEGAL AID IN THE CRIMINAL JUSTICE SYSTEM: KEY PRINCIPLES & IMPORTANCE OF ENSURING EARLY ACCESS TO LEGAL AID

This session was presided over by Hon'ble Justice Ruma Pal, former Judge, Supreme Court of India & Member of the Executive Committee of the Commonwealth Human Rights Initiative; Hon'ble Justice Joymalya Bagchi, Judge, Calcutta High Court; Shri Adhir Sharma, Additional Director General of Correctional Services; Mr. Debashish Banerjee, Human Rights Law Network; and Ms. Madhurima Dhanuka, Consultant, Prison Reforms Programme, Commonwealth Human Rights Initiative.

Inaugural Address: The session started off with the inaugural address by Mr Adhir Sharma. Mr Sharma shared his concerns with the participants regarding the present state of the criminal justice system in West Bengal. He shared the broad overview of the Correctional Services in West Bengal with the participants and informed that there are at present 58³ correctional homes in the state, with a capacity of approximately 20900. The actual capacity of the homes varies from 22000 – 24000 on any given day. This leads to the problem of overcrowding as well as cases of prison overstay. A cursory look at the map shows us that West Bengal shares its international boundary with Bangladesh. Close to 12-15% of the population of the inmates in the Correctional Homes can be attributed to those apprehended when crossing the border. Additionally, another cause for overcrowding of the prisons is due to the large number of under-trials in the correctional homes. Being the custodians of arrested/accused persons; provision of access to legal aid to the inmates is paramount. Steps are being taken on a regular basis when confronted with circumstances warranting the intervention of the Welfare Officer for appointment of legal aid lawyers. With the lapse of time, the process has smoothed but gaps continue to remain which need to be addressed at this forum.

With legal services being provided from the office of the District Legal Services Authority, the effectiveness of the representation is moot. Lack of physical production has been noted to be an area of flux. Even with the legal services being provided, physical production is not being assured. At this juncture, law comes to the rescue in the form of Sec 167 of the Code of Criminal Procedure. Duties are placed upon the Magistrate to interact with the accused and ascertain whether he has been informed of his grounds of arrest, right to medical examination, right to legal aid, ensuring constitutional and statutory safeguards, which are being routinely stifled. The current practice entails the Magistrate to ask no question during the first appearance and grant remands without

³ 58 correctional homes in West Bengal including central correctional homes (6), sub-correctional homes (33), district correctional homes (12), special correctional homes (3), women's correctional homes (2), open-air correctional homes (2).

even the proper perusal of the documents put before him/her. This is further eroded by the lack of legal representation of the accused.

With knowledge sharing and building, organising awareness camps and greater interaction right to legal aid is known among the inmates. Recourse to appointment of legal aid lawyers has spirally increased over the years due to spread of knowledge as to who can apply and as well as the economic condition of the inmate. With the increased usage of the statute, legal aid lawyers are being appointed for the applicants/ accused; but the intimation or information of the lawyer and his details seldom arrives. Greater involvement of the DLSA is required to successfully implement the Legal Services Authority Act. An area of challenge is the lack of regular communication between the legal aid lawyer appointed and his/ her client. In the absence of this channel of communication, effective and fair legal representation would not be achieved and fair trial rights undermined. In this background, therefore, even though the vision of complete and successful provision of legal aid to all the willing inmates is lauded, but the effective implementation is awaited.

Welcome address: The inaugural address was followed by the welcome address which was delivered by Hon'ble Justice Ruma Pal. Being a member of the Executive Committee of CHRI, Justice Pal introduced the same as an independent, non-partisan and non-governmental organisation, ensuring the practical realisation of human rights in the Commonwealth. Established in 1986 and having a special consultative status with the UN's ECOSOC, it focuses on access to justice with programmes on prison and police reforms. A conscious decision of CHRI is not to take up individual cases as routine, barring a few instances. The rationale being to address the challenges and problem currently present in the system which is faced by the inmates as a whole. Therefore, by rectifying the system, an individual will not stand to have his rights violated. Coupled with both research and advocacy, steps towards ensuring transparency in the system would be welcomed.

Amidst its various other contributions through research and advocacy, CHRI in collaboration with the National University of Juridical Sciences, Kolkata has been successfully running the *Shadhinota* project. The starting point was in regularising the process of appointment of legal aid lawyers for the inmates who had no legal representation. Also, in collaboration with the Correctional Services Department of West Bengal CHRI has designed posters explaining the legal aid process and the steps from arrest to securing bail. These focus on the information on rights of prisoners, duties of each stakeholder in the criminal justice system with respect to the accused.

She further added that overcrowding in the Correctional Homes presents a major issue in West Bengal and steps must be taken to remedy it immediately. Roughly, about 2/3rds of

the prison population accounts for under-trials in the Correctional Homes. She identified a few problems like long periods of pre-trial detention and prison over stays between the authorities and suggested that steps need to be taken. CHRI assists in forwarding information leading up to status determination of Foreign National Persons who account for 14% of the inmate population in the Correctional Homes. Extension of legal aid and representation for the mentally ill and juveniles has also been an area of intervention.

In her opinion, one of the most significant contributions has been the development of the software named EPOD – Evaluation of Period of Detention of Undertrial Prisoners – which essentially is a prison management software and provides for a very quick and readily available information. A more recent revamping of the software name EPIC – Evaluation of Prisoner Information & Cases - which can calculate the eligibility of prisoners u/s 167, 436, 436A Cr.P.C and prepare lists of those who are charged with petty offences and can opt for plea bargaining. Also, two legal aid plays which discuss the rights of legal aid and rights of victims which would impact the minds of the inmates when shown. All these interventions and resources, if fully utilised, should go a long way for improving the prison administration.

Keynote address: The inaugural address was followed by the keynote address which was delivered by Justice Joymalya Bagchi, Judge, Calcutta High Court. He stressed upon the relevance of the consultation which is to discuss the status of access to legal aid in West Bengal, and stated that it is paramount to appreciate that legal aid has become a right of an inmate. Creating and upholding this access to legal aid for the prisoner is a priority. Even though, the right of an inmate to access legal aid has been recognised in a plethora of judgments of the higher judiciary, a worrying element remains in the form of a very high proportion, specifically 65%, of the inmate population being undertrials. If a rough assessment is made about their socio economic background it would erase all doubts that they hail from the minority portion of the population and socio-economically poor. On a larger pane, the numbers portray high percentages and in many cases even 25 – 33% of a minuscule representation in the entire population of India. These numbers prove that even though we have driven home the concept of right to legal aid, it has still not been a home run. Few of the fundamental rights may be temporarily suspended for an accused/ convict, but the right to legal aid is never suspended. With great persuasion and effort, Supreme Court has affirmed and upheld the right to legal aid. Coupled with this is the Legal Services Authority Act, to give effect to the mandate of right to legal aid.

During the initial years, the Supreme Court was sceptical in carving out the right to legal aid but the struggle to acknowledge the international standard had been commenced from the judgment in *Janardhan Reddy v. State of Hyderabad*,⁴ where it was urged that there was no fair trial as the persons accused were not afforded any opportunity to defend

⁴ AIR 1951 SC 217.

themselves by instructing a counsel. This had rendered them undefended throughout the trial. The 'due process of law' argument had been urged. The Supreme Court had observed that though it is highly desirable that an accused be able to defend himself/herself but the American concept of 'due process of law' is not being followed and cannot be taken as a basis in deciding. The Supreme Court also acknowledged that present provision Sec. 303 must be construed in such a manner to include the provision for legal representation in capital cases for defence. This marked the start of recognizing the necessity of legal representation.

With the amendment of Sec 304 of the Code of Criminal Procedure, a duty was cast upon the State to provide legal aid to the prisoners at the expense of the State. Where the accused was not represented by a counsel and it appeared to the Court that the accused does not have means to engage a lawyer, the Court **shall** be assigning a lawyer for his defence. Therefore, at this juncture it was only the economic rationale which was forwarded for an accused to be assigned a lawyer for his defence.

The decision of the Supreme Court in the case of *Maneka Gandhi v. Union of India*,⁵ brought highlighted that the procedure being resorted to for depriving a person of his life or liberty should be fair, reasonable and just. Hence, this would construe that if a criminal case is being decided against an accused in the absence of a counsel, it would violate Article 21 of the Constitution as for depriving the accused to not get a legal representative for his defence would deprive him of his chance to forward a defence.

With the institution of the principles of fair, reasonable and just doctrine, the next leap taken by the Apex Court was by expanding the ambit of Article 21 of the Constitution to include the right to legal aid in *Hussainara Khatoon (IV) v Home Secretary, State of Bihar*⁶. The Court opined that the fairness contemplated under Article 21 would be impaired where the procedural law does not provide speedy justice, pre-trial release on bail on his personal bond, not offered legal aid and if indigent, offered free legal aid to defend his case. Further fructifying the decision, the Supreme Court emphasized that state governments cannot avoid their constitutional obligation to provide free legal service to the poor in *Khatri v. State of Bihar II*⁷. A trial of an indigent accused without a proper legal representative would be vitiated and conviction will be set aside. Providing the needy and poor free legal service is essential to a reasonable, fair and justified procedure.

The judiciary when carving out the right to legal aid for the accused took another step forward in *Sheela Barse v. Union of India*,⁸ wherein the Court directed that surprise visits should be paid to the police lock-ups by a judge of the City court appointed by the

⁵AIR 1978 SC 597.

⁶(1980) 1 SCC 98.

⁷(1981) 1 SCC 635.

⁸ (1986) 3 SCC 596.

Principal Judge. Additionally, information about legal aid be made available at these places in the vernacular language. The same is yet to be translated into reality.

In 1986, in another case of *Sukhdas v. Union Territory of Arunachal Pradesh*,⁹ Justice Bhagwati, referring to the decision of *Hossainara Khatoon's* case and some other observed that illiterate people are not made aware of their rights and entitlements and due to this they are exploited and deprived of their rights and benefits. They are unable to approach a lawyer for consultation and advice and their poverty magnifies their legal difficulties. This can be removed by creating legal awareness amongst the poor. Therefore, it would be a mockery if it would be left to the poor and indigent accused to ask for free legal aid, making right to legal aid a paper promise.

It was in the above backdrop that the Parliament passed the Legal Services Authorities Act, 1987, which was published in the Gazette of India Extraordinary Part II, Section I No. 55 dated 12th October, 1987. Although the Act was passed in 1987, the provisions of the Act, except Chapter III, were enforced with effect only from 9.11.1995 by the Central Government Notification S.O.893 (E) dated 9th November 1995. Chapter III, under the heading "State Legal Services Authorities" was enforced in different States under different Notifications in the years 1995-1998.

Sec 12 of the Legal Services Authorities Act, 1987¹⁰ prescribes the criteria for giving legal services to the eligible persons. Looking ahead from the economic criteria alone, other categories have also been included and earmarked for giving legal service. Sec 2(1)(a) of the Act, provides that legal aid can be provided to a person for a 'case' which includes a suit or any proceeding before a court. The Act in Sec 2(1) (aaa) has defined '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. The Act also defines legal service in Sec 2(1) (c) which includes rendering of

⁹AIR 1986 S.C. 991

¹⁰Every 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 begar 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.

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.

Legal Services Authorities, after examining the eligibility criteria of an applicant, provides him with a counsel at the expense of the State. The person to whom legal aid is provided is not called upon to spend anything on the litigation once supported by the Legal Services Authority. The Act has taken into consideration the guidelines issued in *DK Basu v. State of West Bengal*,¹¹ with respect to the imperative duty to consult and intimate the accused/ inmate to get a free legal aid lawyer appointed for his/ her defence.

In the *Afzal Guru case*¹², where the petitioner claimed deprivation of a fair trial because the legal aid lawyers provided to him, were alleged to be both incompetent and openly hostile. He had provided a list of four lawyers which he contacted for his defence, but each of them had refused. He had been given the chance to cross-examine the witnesses which he had utilised. But the court rejected his plea of insufficient defence. Relying upon the *Strickland* test laid down in *Strickland v. Washington*,¹³ which had laid down a two-prong approach to determine if the legal assistance was adequate. It would require, one, that the counsel's performance, and two this deficiency in performance prejudiced the defence so seriously as to deprive him of a fair trial. The court strengthened the right of an accused to have a legal representation and in any case, under the above circumstances, the trial would be held vitiated as being against fair trial norms.

The recent decision of *Kasab*¹⁴ also discussed when the right to legal aid lawyer should be operationalized to reflect the true import of the provision. The judgment goes on to hold that the right to legal aid starts only at time of production and not at the police station. A clear distinction has been created and reasons have been afforded that legal aid should kick in only at the production stage. The wedge created leaves us with a gap between having the right to a lawyer at the time of arrest and a right to legal aid at the time of production. Discussing upon the repercussions of this decision it was noted that the right to legal aid has been diluted by creating two circumstances and only one meriting the access to a legal aid lawyer for representation.

In the decision of *Mohd Hussain*¹⁵, the Supreme Court where the moot issue was speedy justice v. legal representation. The accused had been in the prison for 14 years without a legal counsel and had been convicted and sentenced to death. The Supreme Court held that the case has to be remanded back as there had not been a legal representation and the denial could not be justified.

¹¹ AIR 1997 SC 610.

¹² (2005) 11 SCC 600.

¹³ 466 U.S. 668 [1984].

¹⁴ AIR 2012 SC 3565.

¹⁵ AIR 2012 SC 750.

Justice Bagchi emphasised that a very pertinent aspect of practically realising the mandate of the Legal Services Act would be in appointing senior and experienced lawyers as otherwise it would not be a fair representation of the interests of the client and would in turn be a fraud upon the system. Therefore, the DLSA and SLSA must prepare a panel from which lawyers who have an adequate experience be chosen in dealing with criminal trials. Interested junior lawyers may be engaged to be introduced as well. They must be given the due chance by being mentored to work in realising their mandate at a later stage.

Concluding, he shared a few suggestions to remedy the state of affairs with legal aid:

- Handing out pamphlets at Police Stations, Correctional Homes with respect to the rights of the accused in pursuance to *Sheela Barse's*¹⁶ decision.
- Information of who is arrested and other particulars be accessible easily which is also mandated as per Sec 41C of Cr.P.C.
- Production is turning out to be difficult for the magistrates, therefore one should utilise technology i.e. Video Conferencing facilities or use private applications such as Skype but all procedural safeguards must be followed before opting for it.
- Legal Aid Clinics to be established and made functional in the Correctional Homes.

¹⁶Supra n 8.

SESSION II - STATUS OF LEGAL AID SERVICES IN CORRECTIONAL HOMES IN WEST BENGAL: CURRENT ISSUES

This session aimed to bring out the current status of legal aid services in the correctional homes. In furtherance of this objective the welfare officers who attended the consultation were given a set of questions based on which they were to make a presentation on the current status of services in their correctional homes. This session was of prime importance to the consultation, as it facilitated interactions between the two stakeholders of the system and led them to exchange notes on the areas of challenges and areas where improvement is most needed. Inputs from the interactions are detailed herewith.

Each of the Welfare Officers presented their areas of concern when discharging their functions with respect to legal aid.

CH \ Problem	Alipore Women CH	Hooghly DCH	Presidency CCH	Howrah DCH	Dum Dum CCH	Alipore CCH
Inmates not regularly updated regarding the status of their case	√		√	√	√	√
Interaction between the lawyer and the inmate is missing.	√			√	√	√
Cases of lawyers asking for money from the families	√					
Sense of responsibility	√ [Women being vulnerable]					
Private Lawyer v. Legal Aid Lawyer	√	√	√			√
Mentally Ill Prisoners	√					
Legal aid lawyers and Para-legal lawyers – Where	<i>Regular interaction with PLV.</i>	√ [No PLV; Lawyers	√	√	√	√

are they?		are coming]				
Communications between the stakeholders	√		√	√		√
Legal aid camps and visits		√	√ [<i>Very few held</i>]	√	√	√
Codination between more than 1 district authorities			√			
Setting up of Permanent Legal Aid Clinics			√	√	√	√
Lok Adalats for inmates held for petty offences	√		√	√		
Counselling of the inmate						
Solution for Habitual/ repeat offenders and juveniles				√		
Legal Aid – High Court	√				√	√
High Levels of UTP		√		√		
Appointment of Legal Aid Lawyer				√		

The discussion started by the Welfare Officers about their common as well as specific challenges was ensued by a very positive interaction and dialogue with the DLSA Secretaries. The Secretaries acknowledged the presence of these challenges faced by the Welfare Officers and shared both their concerns and promised assistance. They also stated that it is very important that the issues that are faced by the welfare officers be brought to the immediate notice of the secretaries and that the welfare officers. They encouraged the welfare officers to be in touch with them on a regular basis.

SESSION III - ENSURING EFFECTIVE ACCESS TO LEGAL AID SERVICES FOR ACCUSED PERSONS IN WEST BENGAL: SOLUTIONS

The preceding session set the foundation for this session, which was solution oriented and sought to think of appropriate remedies to the specific challenges faced by each correctional home in ensuring effective access to legal aid to its inmates. The presence of representatives from the legal service authorities, correctional officers, legal aid lawyers, para-legal volunteers and probation officers, assisted in the process of churning out practical and reasonable solutions to the issues raised in the previous session.

This session was moderated by Ms Madhurima Dhanuka, Consultant, CHRI. To ensure effective access to accused persons, she emphasised that it would be best to divide the discussion into three stages namely, pre-trial, trial and appellate stage. Effective access to legal aid must be ensured at each of all of these stages as it is a necessary and vital component of the right to fair trial. She explained that the focus of the discussion was to **firstly**, recognise the challenges or roadblocks at each of the three stages with respect to effective access to legal aid; and **secondly**, put forward practical solutions that may be adopted to ensure effective access to legal aid.

The mapping of the challenges at these stages was fixed against the following parameters – representation, quality and accountability.

PRE-TRIAL STAGE

Appointments: Every person is entitled to be represented by a lawyer at the time of his arrest. This choice would also include the right to be represented by a legal aid lawyer, thus it is the duty of the legal services authority to ensure every accused has access to a lawyer at the pre-trial stage as well. Absence of effective legal representation at this stage may have grave consequences, like arbitrary arrests, torture, no production within statutory 24 hour period, and no physical production wherein the accused is only taken to court lock up, these in turn would end up in unnecessary detention of vulnerable persons such as juveniles, mentally ill etc.

Solutions: Some practical solutions to resolve these problems are listed below:-

- Implementation of the Revised Scheme for Para-Legal Volunteers issued by NALSA. In accordance with the scheme para-legal volunteers should be trained and attached to each police station. They can inform arrested persons of their rights after arrest and ensure that the arrested person gets legal assistance through the nearest legal services institutions.
- List containing names of panel/legal aid lawyers be made available in each police station and each production court

- Implementation of Scheme on Legal Aid Counsel in all court of Magistrates by SLSA, West Bengal
- Implementation of NALSA Model Scheme on bail and remand lawyers
- The Correctional Home should maintain a register, and at the time of the case table¹⁷, whether the inmate was represented by lawyer at time of production or not should be duly noted in the register. Forthwith, the welfare officer should send applications to the DLSA Secretary for those who were unrepresented and also a monthly report on the number of such cases should be sent to the Directorate as well as to the State Legal Services Authority.

Quality & Accountability: While it is important to ensure legal representation of all accused persons, it is as imperative to ensure that the representation is effective i.e. ensure that the lawyer doesn't neglect the client on account of it being a legal aid case. Ensuring quality of legal representation of the inmate often poses a challenge, especially with the lack of any monitoring mechanism in place to ensure accountability of lawyers or any grievance redressal/feedback mechanisms for the client.

Often lack of training of legal aid lawyers on remand and bail leads to poor representation at the hearing, wherein it is seen that no opposition in instances of routine remand or when an application for bail is made, the interaction between lawyer and client is absent. There are also instances wherein the details of lawyer not made available to client or there is demand for money from client and/or his/her family.

Solutions: To ensure a minimum standard of quality and accountability on behalf of the lawyers appointed, the following may be resorted to:

- Training on remand and bail should be mandatory for lawyers attached to SLSA scheme on Legal Aid Counsels.
- Setup of a Mechanism for obtaining the feedback from the client regarding his lawyer and also from the judicial magistrates regarding their performance in the court.
- Stricter monitoring of cases by SLSA/DLSA through performance evaluation forms and random case evaluation.

TRIAL STAGE

Appointments: At the trial stage there is a need to streamline the process of application and appointment of legal aid lawyers. Whom should the application be addressed to? Is it the concerned court or DLSA? Who appoints the legal aid lawyer – Court or DLSA?

¹⁷*Case-Table* is a term commonly used in correctional homes of West Bengal. Each day in the morning the Superintendent and Controller of a correctional home holds a session with the newly admitted inmates and provides them basic inform regarding their detention and stay in correctional home.

These are some questions that need clarification. This ambiguity also leads to time delay in appointment of the legal aid lawyer, which might end up in prolonged unnecessary detention of an indigent accused person. Even when appointments are made, they are not intimated to the client or correctional home. Some mechanism must be devised to do this in a routine and timely manner.

Also there are many cases wherein while the accused had a lawyer during the initial stages of his trial, subsequently due to lack of money he is unable to pay the fees of his lawyer and thus left unrepresented and is left with no option but to apply for legal aid lawyer. In such cases, he finds it difficult to obtain the no objection from his lawyer as well as copies of his trial documents.

Solutions:

- List with names and details of panel lawyers be made available in the correctional home.
- Apprise inmates to always keep photocopy of all case papers with them or with family.
- Para legal volunteers to conduct regular legal aid clinics in correctional homes.
- Streamline process of application for legal aid lawyers.
- Intimation of lawyers name and details made along with production warrant, so that records easily available to correctional home staff.
- Appointment of jail visiting lawyers – to render advice to inmates.
- Provide copy of causelist containing ordersheet to each correctional home on a weekly basis so that inmates can be informed about the status of their case.

Quality & Accountability: The concerns are similar to those discussed in the pre-trial stage. The Welfare Officers have also raised concerns over the quality and accountability of the legal aid lawyers during their presentations. Primarily the issues that have been raised are with respect to lack of interaction between client and lawyer, lawyers not visiting correctional homes, lawyers not appearing in court at time of hearing, no monitoring mechanisms or client feedback mechanisms to ensure quality.

Solutions: In addition to the setup of a mechanism for obtaining feedback from client regarding his lawyer and also judicial magistrates regarding the performance of lawyer in court, one can also setup grievance redressal box within Correctional Home. One must place emphasis on inculcating strict procedures of reporting by lawyers to the DLSA/SDLAs. In addition one can explore the use of case trackers and technological initiatives in order to setup a mechanism to

- Be intimated when a lawyer does not appear in court on date of hearing

- Evaluate performance of lawyers which includes forms with feedback from client and judicial officers
- To take action against legal aid lawyers who charge money
- Record proceedings by legal aid lawyer after each hearing

APPELLATE STAGE

Appointments: Some of the concerns that may be or already have been faced by the Welfare Officers at Appellate stage have been collated after interacting with them. Here again one sees there is need to streamline the appointment process, as there is lack of clarity on whom to apply to? Is it the High Court Legal Services Committee or the VIIth Registrar, Criminal Appellate Side of the Calcutta High Court or to the State legal services authorities? It is often seen that there is no response from the Supreme Court Legal Services Committee, which often leads to huge delay in filing of appeals in the Supreme Court. Here again ones sees that there is non-communication of lawyers details to inmates/correctional home as well as non-communication of case status to inmates/correctional home. One further issues is to costs of affidavits and other documents, the clients are often asked to procure the documents whereas they have no means to do the same.

Solutions: The following may resolve the above concerns:

- Streamline process of application for legal aid lawyers – The State Legal Services Authority should decide whether applications are to be made to HCLSC or 7th Registrar.
- Timely and regular intimation of lawyers name and details to correctional home
- Details of lawyers in panel of HCLSC to made available to each correctional home
- Appointment of jail visiting lawyers – to render advice to inmates regarding appeal
- Use of technology to ensure inmates can be informed about the status of their case

Quality & Accountability: As regards the quality and accountability of the legal lawyer appointed at the appellate stage, some concerns have been raised, which are similar to those that one comes across in the other stages.

Solutions: Setting up of a mechanism for obtaining feedback from client regarding his lawyer may go a long way in resolving the above problems. However, as no representative from the High Court Legal Services Committee could attend, no concrete

solutions could be worked out for these issues and it was decided that these will be taken up with the appropriate authorities in due course.

At the close, Mr. Adhir Sharma, suggested that the network that exists between the DLSA Secretary's and the legal aid lawyers need to take the welfare officers into the loop so that there is continuous interaction. Many of the concerns that have been raised and shared by the welfare officers seem to be linked with the absence of information sharing and coordination amongst them. He emphasised that this could be achieved by making the e-court project a successful venture. While some states have utilised this venture and some have not, and West Bengal squarely, falls in the latter category.

CONCLUSION

An effective State funded legal aid system is vital to assist the indigent accused persons to effectively protect their rights and seek justice. State machinery and civil society has a great role to play in securing effective legal services to those detained in Correctional Homes. Without access being provided to them, the marginalised will continue to face arbitrary and long pre-trial detention, torture, coerced confessions, wrongful convictions, stigma, health and livelihood impacts and other abuses.

Interaction between the members of State and District Legal Services Authority with the Officers of the Correctional Homes is instrumental to ensure effective access to legal aid services in the state. The consultation was a first in its kind which aimed at providing practical and achievable solutions to address issues related to ensuring effective access of legal aid services to accused persons in West Bengal. A summary of the solutions discussed and recommendations made for each stage of the criminal trial during the consultation is given below:-

Legal Services Authority

1. Immediately setup the Permanent Legal Aid Clinics in the Correctional Homes, where they have not been setup so far. For instance, Presidency CH does not have any legal aid clinic and the need is imminent.
1. Emphasis should be placed on organising more awareness camps inside the correctional homes.
2. Regular visits of correctional homes by the respective legal aid lawyers may be taken up for consideration.
3. Intimation upon appointment of legal aid lawyers should be promptly made available to inmates and welfare officers.
4. Reporting mechanisms on cases should be strengthened.
5. Many of the correctional homes have mentally ill inmates who have been staying for close to 20 to 30 years. Their cases should be taken up for considerations of discharge or bail u/s 328-330 Cr.P.C.
6. Utilise software like EPOD and EPIC for creating lists for inmates eligible under 436, 436A Cr.P.C, compoundable offences, petty offences, offences eligible for plea bargaining.
7. Direction may be issued to the legal aid lawyers in cases where the inmate can't pay the bail bond, to apply to the concerned Court to seeking release of inmates without bail bonds/waiver of conditions.

Welfare Officers

1. Communications from the Welfare Officers to legal services authorities with respect to legal services should be regular and frequent.

2. Feedback mechanisms on cases should be strengthened.

Probation Officers

1. Assist the legal services authorities in finding the families of mentally ill prisoners so that their cases can be reviewed by the courts, and where possible they may be discharged or granted bail u/s 328-330 Cr.P.C.

Legal Aid Lawyers

1. Should devise mechanism for strengthening reporting and feedback on court hearings and cases.
2. Should interact with their clients on a regular basis or inform the families or correctional home officers regarding status of the case.

Para legal Volunteers

1. Visit the police station and court lock ups in their vicinity and inform arrested persons of their rights.
2. Immediately inform the legal services authority in cases where accused desires legal aid lawyer or is unrepresented at the police station or at time of production.
3. Visit the correctional homes in their district and interact with the inmates, inform them about their rights, ventilate their grievances, take feedback on legal services etc.

RECOMMENDATIONS

		PRE-TRIAL STAGE	
		Problems	Solutions
REPRESENTATION		<ul style="list-style-type: none"> • Lack of awareness of rights of accused at time of arrest • Time delay in appointment of lawyer for unrepresented cases at time of production • Details of lawyers not available to magistrates to ensure timely appointment and representation • No lawyers attached to magistrate court with specialised knowledge on remand & bail • No mechanism to ensure that no case goes unrepresented at production 	<ul style="list-style-type: none"> • Each police station must have a para legal volunteer attached who can inform arrested persons of their rights after arrest. • List containing the names of panel lawyers be made available in each - police station and production court. • Implementation of Scheme on Legal Aid Counsel in all court of Magistrates & NALSA Model Scheme of remand and bail lawyers • Each Correctional Home may maintain a register to record whether an inmate was represented by a lawyer at the time of production, if not, this be duly notified to the DLSA every month.
		<p style="text-align: center;">Problems</p> <ul style="list-style-type: none"> • Lack of training of legal aid lawyers on remand and bail • No opposition of routine remand or application for bail is made. • No interaction of lawyer and client. • Details of lawyer not made available to client. • Growing instances where financial demands have been placed before the clients. • No monitoring mechanism in place to ensure accountability of lawyers • Absence of a grievance redressal mechanism for client. 	<p style="text-align: center;">Solutions</p> <ul style="list-style-type: none"> • Training on remand and bail should be mandatory for lawyers attached to SLSA scheme on Legal Aid Counsels • Setup of a Mechanism for obtaining feedback from client regarding his lawyer and also judicial magistrates regarding the performance of lawyer in court • Stricter monitoring of cases by SLSA/DLSA through performance evaluation forms and on random case evaluation basis.
QUALITY & ACCOUNTABILITY			

TRIAL STAGE					
REPRESENTATION	Solutions				
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APPELLATE STAGE		
REPRESENTATION, QUALITY & ACCOUNTABILITY	Problems	Solutions
	<ul style="list-style-type: none"> • Huge barrier presents itself in the form of question “whom to apply?” “Whether the HCLSC or 7th Registrar?” • Lack of response of Supreme Court Legal Services Committee • Who will appoint lawyer? –HCLSC or 7th Registrar • Non communication of lawyers details to inmates/correctional home • Non communication of case status to inmates/correctional home • Who will bear cost for affidavits and other documents • No interaction of lawyer and client • Lawyers do not visit correctional home • Details of lawyer not made available to client • Demand of money from client • Lawyers do not appear in court • No monitoring mechanism in place to ensure accountability of lawyers 	<ul style="list-style-type: none"> • Streamline process of application for legal aid lawyers. SLSA to decide whether applications are to be made to HCLSC or 7th Registrar. • Timely and regular intimation of lawyers name and details to correctional home • Details of lawyers in panel of HCLSC to made available to each correctional home • Appointment of jail visiting lawyers – to render advice to inmates regarding appeal • Use of technology to ensure inmates can be informed about the status of their case with the help of High Court Informatics Dept. • Setup of a Mechanism for obtaining feedback from client regarding his lawyer

About CHRI



" The degree of civilization in a society can be judged by entering its prisons"

Fyodor Dostoevsky, 1821-1881

The Prison Reform Programme of Commonwealth Human Rights Initiative (CHRI) is focused on increasing transparency of a traditionally closed system. 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. 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 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.

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 reports and periodic investigations, CHRI continually draws attention to progress and setbacks to 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. Through its public education programmes, policy dialogues, comparative research, advocacy and networking, CHRI's approach throughout is to act as a catalyst around its priority issues.

CHRI is based in New Delhi, India and has offices in London, UK and Accra, Ghana.

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