RECOMMENDED BASIC MINIMUM PRINCIPLES & FEATURES FOR A PUBLIC DEFENDER SYSTEM

CHRI Submission to
Parliamentary Standing Committee on Personnel, Law and Grievances
&
The National Legal Services Authority
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INTRODUCTION:

In this submission note CHRI presents to NALSA and the Parliamentary Committee on Personnel, Public Grievances, Law and Justice, a broad framework on the guiding principles and important features for a public defender system that takes into account the most principally sound, practically possible and accountable models. Firstly, in order to further the constitutional imperative of ensuring life and liberty, to ensure fair trial, and to assist in taking forward the directions of the Parliamentary Committee on Personnel, Public Grievances, Law and Justice. Secondly, to ensure a comprehensive, effective and reliable system of criminal legal aid defence for all at all stages when any person, especially an indigent one, comes into contact with the criminal justice system. Such a system will also bring India into conformity with the principles laid down in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. In particular, where the principles seek that states must guarantee the basic right to legal aid of persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, while expanding legal aid to include others who come into contact with the criminal justice system and diversifying legal aid delivery schemes.[1]

Modalities of Proposed Public Defender System: We believe that in practical terms an efficient, accessible and inexpensive legal defender system with a permanent body of lawyers assisted by paralegals and empanelled lawyers will assist in removing present deficiencies of the system listed below. This might mean the consideration of new fits and fixtures that avoid the deficient aspects of the past but also draw upon some of the strengths schematically made available in past regulations and schemes of the NALSA such as – NALSA (Free and Competent Legal Services) Regulations, 2010 and NALSA (Legal Aid Clinics) Regulations, 2011 and NALSA Model Scheme on Legal Aid Counsel at Magistrate Courts and NALSA Paralegal Scheme (Revised).

I. **Operational Scope:** The proposed Public Defender System is visualised at all levels of the current legal services from taluka level to the Supreme Court in keeping with the existing structure of the legal services institutions in the country.

II. **Broad Structure & Key Functionaries**: The Public Defender System is visualised with the following appointments, infrastructure and supervisory systems:
   (a) two primary sets of public defenders
      - a set of public defender lawyers who constitute a permanent, salaried, independent cadre of criminal defence lawyers incentivised and trained to be exclusively available in court akin to the public prosecutor model and mandated to provide representation from the time of first production to all stages of the trial

[1] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Part A, 10

- a set of public defender lawyers appointed by the state with fixed tenure and fee to render service at each police station or a set of police stations, mandated to be available on call for representation, advice, and ensuring safety of suspect/accused

(b) a legal aid cell in each police station to facilitate response and representation for persons in police custody

(c) two sets of paralegals
- a set of paralegals with fixed tenure and fee to render service in the 24x7 legal aid cell in police stations as the link between the person in custody and the public defenders appointed to render service on call at police stations
- a set of paralegals appointed inside prisons

(d) a panel of expert lawyers for advice and guidance to public defenders and panel lawyers

(e) a panel of ready lawyers to substitute the presence of public defenders appointed for police station and court when required

(f) structural availability of lawyer-client meeting places in court and jail

(g) monitoring committees supervising the day to day work of the different functionaries

(h) committee for selection, promotion, tenure and evaluation of public defenders in court

III. **Institutional Linkages:** The proposed Public Defender System draws upon a new set of institutions, functionaries and duties for the success of this model in linkage with those already established, appointed or provided for under NALSA's pre-existing schemes for rendering legal aid services in court and prison. NALSA may consider utilising the latter with some adaptations and modifications by way of scaling up numbers, duties, incentives, coordination, monitoring and accountability alongside building in new requirements.

(a) New appointments, duties and institutional features to be developed by NALSA –

- a legal aid cell in each police station comprising of paralegals
- permanence of already appointed retainers and counsels in magistrate courts
- appointment of public defenders on call for services at police stations
- police station paralegals with the exclusive mandate to provide services to suspects and accused and link up with public defenders
- constitution of a selection committee and formulation of a process for permanent-salaried cadre of public defenders and tenure and fee-based public defenders
- evaluation committee for promotions and extension of tenure

(b) The old set of functionaries and institutional mechanisms that could be relied upon by NALSA are:

- Retainer lawyers (Regulation 8 (6) of the NALSA 2010 Regulations): Their number and role could be expanded and tenure made permanent as public defenders in court
- Counsels at Magistrate Court appointed under NALSA Model Scheme on Legal Aid Counsel at Magistrate: Their number and role could be expanded and tenure made permanent as public defenders in court
- Panel Lawyers in Front Office (Regulation 8 (10) of the NALSA 2010 Regulations): Could be adapted to provide services as public defenders available on call for police stations
- Monitoring Committee (Regulation 10 of NALSA Regulations 2010): Could be adapted to provide periodic supervision to the work of public defenders in court and police station
- Jail Visiting Lawyers (Regulation 5 of NALSA (Legal Aid Clinics) Regulation 2011)[2]
- Jail Paralegals (Regulation 6 of NALSA (Legal Aid Clinics) Regulation 2011)

CONTEXT:

Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.[3] The fundamental principle of access to justice for protection of one's life and liberty starts with the simple principle that everybody in custody is entitled to a lawyer. Clearly, the Indian Constitution provides it as a 'right of every person'[4] conforming it to the 'duty of the state'[5]. This resonates in the Criminal Procedure Code, 1973[6] as well as in the Legal Services Authority Act, 1987[7]. As soon as

[2] NALSA's meeting dated 21[s] March 2015 specifically mentions establishment of legal aid clinics in jails

[3] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

[4] Article 22(1) – No person who is arrested shall be detained in custody without being informed 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.

[5] 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.

[6] 41-D. Right of arrested person to meet an advocate of his choice during interrogation - When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.

[7] Section 12(g), Legal Services Authority Act, 1987 – Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is in custody, including

a person is arrested or detained by the police with a notice of appearance[8] there is actual chance of harm, loss of life, imposition of a grave disability and possibility of delay in first production before magistrate in the absence of representation in police custody. One of the biggest gaps in criminal legal aid defense is to be witnessed here.

While the legal services authorities' potential 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[9] is underutilized and underperformed for persons in custody in general[10], it is particularly so for those in police custody, in spite of the guarantees of the constitution, the statute and directions of the Supreme Court[11] in the Nandini Satpathy case. The malpractices that begin at the police station often persist during the first appearance in court; their consequences are felt on the entire trial and the accused, and rarely on duty holders as impunity regarding malpractices is enjoyed right across the board of the criminal justice system.

This culture may be largely attributed to entrenched asymmetrical power relations between the police and the deprived; longstanding infirmities generated by a system of poorly educated lawyers, poor quality appointments, deficient competencies and standards, distressing absence of lawyers during first production and remand hearings, adjournments and delays in trial, poor monitoring of representation and lawyer-client relationship, and an overburdened judiciary. In this context, in the absence of a state-aided defence system at police stations and courts with a set of permanent defence counsels easily available, competent and sensitized to oppose unnecessary detention and protect against harm at all stages, it becomes an uphill task to ensure early and easy access to justice and fair trial to the disempowered. Such state-aided defence models known as public defender models have been implemented in different parts of the world with varying advantages and disadvantages. In particular, we have studied and drawn upon the public defender systems operational in the American criminal justice context, different parts of Africa, in the UK, Canada, Israel, and others. We now recommend the principles and features of the proposed public defender system.

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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).

[8] Under Section 41A of the Code of Criminal Procedure, 1973

[9] Statement of Objects of the Legal Services Authority Act, 1987

[10] As per the Supreme court annual report out of the 1.77 crore beneficiaries of legal aid under NALSA since its inception, only 4.68 lakhs were persons in custody

[11] Nandini Satpathy v PL Dani, (1978) 2 SCC 424

BASIC MINIMUM PRINCIPLES FOR A PUBLIC DEFENDER SYSTEM

1. The Public Defender System, including the selection, funding and payment of defense counsel, to be independent.

2. Adequate resource to facilitate the functioning of the Public Defender System

3. Public defender scheme to complement the legal aid services and not replace the existing

4. The Public Defender system should be included as an integral part of the criminal justice system

5. Public Defender's ability, training, and experience match the complexity of the case

6. Public Defender to be provided sufficient time, adequate resources and a confidential space within which to meet with the client

7. Public Defender to work exclusively with the public defender office and the workload to be controlled to permit the rendering of quality

8. Public Defenders office to ensure continuous representation of client till the completion of proceedings in a court.

9. Supervision of the public defender system through monitoring mechanisms to ensure accountability and quality representation

10. Public Defender System to establish a grievance redressal mechanism for clients as well as the functionaries of the public defender system

RECOMMENDED BASIC MINIMUM PRINCIPLES & FEATURES FOR A PUBLIC DEFENDER SYSTEM

1. **The public defender system, including the selection, funding and payment of defense counsel, to be independent.**

   - The functioning of the public defender system, to be completely independent from the government and political parties. This independence should be reflected right from the stage of selection of defenders, allocation of cases, reporting and monitoring and other such areas.
   - The selection of defenders should be made on the basis of an open examination with specified eligibility criteria and not subject to any political interference
   - The appointment process should be clear, transparent and subject to public scrutiny.
   - Remuneration of public defenders should be adequate so as to discourage corruption.
   - No public defender to take up a case wherein there may be conflict of interests.
   - The promotions should be based on pre-decided performance parameters and free from any political interference.

2. **Adequate resource to facilitate the functioning of the Public Defender System**

   - The Public defender office to have adequate infrastructure and personnel (administrative staff, researchers, investigators)
   - Establishment of a 'Public defender Office' attached to each TLSC, DLSA, HCLSC and SCLSC.
   - Adequate resources for submission of filing fees, photocopies, printing and other miscellaneous costs pertaining to filing of applications in the court.
   - Adequate resources to ensure the safety and security of members of the public defender's office, especially in areas of conflict.
   - Appointment of public defenders, paralegals in police stations and jails and jail visiting lawyers of suitable qualification
   - Creation of a pool of 'expert lawyers' including senior counsels for representing clients charged with special laws or for other special cases and requirements

3. **Public defender scheme to complement the legal aid services by drawing upon existing functionaries and mechanisms.**
    - The public defense delivery system consists of both a defender office and the active participation of the lawyers and paralegals empanelled with legal services institutions as a part of various schemes. Some of the functionaries are already available within NALSA Schemes (retainers, counsels at magistrate courts, paralegals in jails, jail visiting lawyers).
    - Public defender office to operate from the premises of established legal services offices at talukas, districts, high court and the Supreme Court.

4. **The Public Defender system should be included as an integral part of the criminal justice system**

    - Parity to be maintained between the public defender system and the public prosecutor system with respect to recruitment, remuneration, permanency, promotions and training
    - The public defender system to have interlinkages with all the actors of the criminal justice system:

A. Link between Public Defender System and Police Station

- Public defence system to ensure representation and other legal assistance to persons who are arrested, detained, suspected of or charged with a criminal offence i.e. to all persons in custody from detention in police station to the finality of the proceedings.
- Establishment of a legal aid cell in every police station for legal assistance by a designated paralegal and representation by public defender lawyer during appearance under notice, arrest, interrogation, investigation and questioning
- The appointed paralegals to have suitable qualifications and should be stationed at police stations 24 hours in shifts/rota basis.
- The mandate of the paralegal and public defender at police station should be well defined
- Public Defender to be assigned and notified of appointment by the paralegal, within a stipulated period of time after clients' arrest, detention, or request for counsel
- Public Defender to appear in police station within a stipulated period of time after being notified of appointment
- Intimation of appointment of the defender along with his contact details to be duly communicated to client by the legal aid cell
- Sufficient time and adequate space to be given to the public defender and paralegal at the police station to meet accused before first

production and subsequent productions

- The 'first meeting' of the paralegal volunteer with the accused at the police station to make him aware of his rights, check his representation status and accordingly inform the legal services institutions or the public defender lawyer designated to the police station
- The 'first interaction' of the suspect/accused with the public defender to ensure that his case brief is taken by the defender in suitable formats
- The subsequent meetings of the accused with the public defender in police station to be during period of police remand to ensure safety and advice.
- Procedures and timelines to be in place for smooth flow of information and proper management of cases from legal aid cell in police station to public defender at court.

B. Link between Public Defender System and Court

- Appointment of public defenders with suitable qualification and training
- The number of defenders to be appointed should be based on the quantum of cases usually tried in the court.
- Creation of a pool of 'expert lawyers' for representing clients charged with special laws or other special cases and requirement
- There should be provision to ensure that there is no discontinuity in rendering of quality legal services in case of absence of designated defender or for any exigency especially for remand and bail hearings.
- The mandate of the public defender during different stages of the proceedings should be well defined
- The mandate of the public defender to document the case details, strategies, interventions and outcomes of the proceedings in suitable formats and submit regular reports
- Sufficient time and adequate space to be given to the public defender in court to meet accused before first production and subsequent productions in order to represent him effectively

C. Link between Public Defender System and Jail

- Appointment of paralegals (community paralegal / convict paralegal) with suitable qualifications as part of the legal aid clinics setup in every jail
- Paralegals to ensure legal aid needs of inmates and complete legal aid applications for appointment of legal aid lawyers/public defenders for unrepresented inmates.
- Public Defender office to promptly inform the jail authorities/inmate regarding appointment of lawyer and contact details.

- Public defender to visit client in jail at least once a month to take instructions for next hearing, check on his status and any complaints and to inform about status of case
- The jail visiting lawyer to regularly inform the public defender office for any legal assistance required by inmates

5. **Public Defender's ability, training, and experience match the complexity of the case**

- Adequate training for public defender in order to develop competencies to deal with police station and court practices, requirements in court.
- Public Defender is provided with and required to attend continuing legal education and be part of regular quality assurance programs.
- Creation of a pool of 'expert lawyers ' including senior counsels for representing clients charged with special laws or for other special cases and requirements

6. **Public Defender to be provided sufficient time, adequate resources and a confidential space within which to meet with the client.**

- Provision for basic infrastructure in police stations, courts and prisons to enable free interaction between the defender, paralegals and the persons in custody

7. **Public Defender to work exclusively with the public defender office and the workload to be controlled to permit the rendering of quality representation.**

- There should be a caseload standard for every defender. The standard should be so set that the quality of representation is not compromised. The number of defenders to be appointed is based on the quantum of unrepresented cases usually in the police station and court. If the caseload of the lawyer exceeds the standard, the services of the empanelled lawyers may be taken for the new unrepresented cases
- The public defender at the court should work exclusively on legal aid matters and should not take up private matters

8. **Public Defenders office to ensure continuous representation of client till the completion of proceedings in a court.**

- The same public defender to continuously represent the client till the completion of the criminal trial. In case of any exigency, if the public defender is unable to be present for a particular hearing, suitable arrangements to be made for representation
- Procedures to be laid down to hand over the case documents and relevant information to the public defender at the appellate court in cases where client seeks legal aid in filing his appeal.
- Similarly a public defender to represent the client during appeal/review/revision/application in High Court and in proceedings before Supreme Court
- If due to any exigency public defender is unable to continue to represent a client, then suitable ways of handing over documents and relevant information to be formulated.

9. Supervision of the public defender system through monitoring mechanisms to ensure accountability and quality representation

- Public defenders and paralegals to be supervised at all stages and all levels, with performance based incentives and disincentives, for accountability and periodically reviewed for quality and efficiency.
- Creation of a committee to oversee the progress of every case taken up by public defenders and allocate special cases to expert lawyers on case requirement basis
- Committee to also closely monitor the caseload and case outcome of every public defender
- Appropriate actions, including removal, to be taken if the performance of the defender is found not satisfactory or he has acted contrary to the spirit and objects of the Legal Services Authority Act, 1987 and regulations
- The performance evaluation of defenders should include consultations with the presiding officers of the courts, supervisory officers of the public defender office and feedback from the client

10. Public Defender System to establish a grievance redressal mechanism for clients as well as the functionaries of the public defender system

- Mechanisms to be formulated as regards the delivery of public defence to receive and resolve grievances from –
  - clients vis-à-vis the functionaries of the public defender system; and
  - the functionaries of the public defender system