

**LEGAL AID AND LEGAL LITERATURE
SCHEME IN NEPAL**

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LEGAL AID AND LEGAL LITERACY SCHEME IN NEPAL

**A report for ICJ/Nepal Section
in cooperation with
International Commission of Jurists/Geneva**

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I am happy to introduce this report on Legal Aid and Legal Literacy Scheme in Nepal prepared for ICJ/Nepal Section in cooperation with International Commission of Jurists/Geneva.

This is an output based on the several consultation and seminar workshops organised by International Commission of Jurists/Nepal to assess the existing state of legal aid and legal literacy in Nepal. This report, I hope, will be able to account for the situation in respect of legal aid scheme including the Twinning Programme implemented by Nepal Bar Association in cooperation with Norwegian Bar Association.

I am indebted to International Commission of Jurists/Geneva for entrusting ICJ/Nepal Section to be associated with the Activity.

Thanks are due to Mr. Mukti Rijal, Dr. Amir Ratna Shrestha and Mr. Krishna Man Pradhan Director of ICJ/Nepal Section for their efforts in the preparation of the report. I also express thanks to Mr. Ganesh Man Shrestha, Computer Programmer and other who cooperated in the preparation and publication of the report.

Madhu Prasad Sharma
Chairman
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December 1994

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INTRODUCTION

Setting

International Commission of Jurists/Nepal Section is a non-governmental organisation devoted to promoting the understanding and observance of the Rule of Law and the legal protection of human rights. It is commissioned by ICJ/Geneva to conduct seminar workshops on legal aid and legal literacy and prepare an introductory report about the same. International Commission of Jurists/Nepal Section implemented the activities during 1994.

Legal aid and legal literacy have been much discussed about theme in Nepal for the last few years. Professional and non-governmental organisations have been involved in the activities in the sphere of legal aid and legal literacy. This report seeks to account for the current state of legal aid and legal literacy in the country.

Methodology

The report draws upon the primary and secondary data sources. The secondary data sources are primarily the journals, working papers, books and reports from which this report borrowed the relevant informations. Besides, International Commission of Jurists/Nepal Section conducted consultation exercises with lawyers, law commission officials, judge in addition to the seminar

workshops in different parts of the country. The seminar workshops organised in Janakpur and Palpa brought together lawyers, judges and legal aid lawyers and furnished suggestions in respect of legal aid and legal literacy in Nepal. The report takes an overview of the existing state of legal aid legal literacy in Nepal.

Chapter Scheme

The report consists of six chapters. The first chapter outlines conceptual framework of legal aid with reference to the place of legal aid in the international instruments. It also pinpoints some drawbacks of the court-oriented legal aid system. The second chapter suggests for an emphasis on legal resources capability development as an alternate approach to legal aid and legal literacy.

The third, fourth and fifth chapters of the report takes a look at the evolution and existing system of legal aid in Nepal. The role of law campus, lawyers, Nepal Bar Association is briefly reviewed. The concluding chapter provides a list of suggestions and recommendations in the domain of legal aid and legal literacy scheme in Nepal.

Limitations

The report is mainly based on the ideas and informations generated in the interactions seminar workshops conducted by ICJ/Nepal Section.

Chapter 1

CONCEPTUAL FRAMEWORK OF LEGAL AID

Legal Aid Defined

“Legal aid” signifies assistance to indigent person in legal action. Such help includes preparing legal documents, pleadings etc. and making representation in the courts or judicial authorities for defending interests. This course of action surely assists indigent person to enable him or her get justice. Thus, legal aid maintains close relationship with two factors namely indigent person and justice. In fact, the sanctity of legal aid is based on these two factors, indigent person and justice. Justice should be awarded without any discriminations. If justice is denied, law is said to be not prevailing. Thus, it can be said that justice may be called justice only if it is denied to no man, however unpopular his cause was or heinous charges levelled against him or her may be. Effective legal aid programme can help in providing justice to the needy. In other words, effective legal aid programme is an effective means in the realization of principles of justice.

It is not necessary that person involved in cases, either civil or criminal, should have knowledge on law or the provisions of law. Since law is a specialised or technical subject, not all persons can be expected to have idea on the legal intricacies. And even if a person involved in legal

action has knowledge of law he may not be in a position to defend his case. Further a common man is mainly the object of the adverse consequences. He/she may be confused by the multiplicity of the body of laws involving cumbersome procedures. Added to are the exorbitant fees demanded by the lawyers which are far beyond the reach of a common man. Hence, the rapid and complex development of legal system makes the requirement of legal aid in each case. Extending help of lawyers to needy free of cost reflects the philosophy of legal aid in modern society. An American lawyer John Adams had made an elaborate analysis on the philosophy of legal aid.¹ John Adams had devoted long years of precious time to defend helpless and indigent clients.

The philosophy of legal aid is more applicable in criminal cases than in civil cases. Legal aid is more demanding and desirable in criminal cases as the consequences of miscarriage of justice are grave if persons involved in criminal cases, so as to say, accused live below poverty line. This means that the accused who is too poor to engage a lawyer for his/her defence is not assured of equal protection of laws and fair trial according to the sovereign principles of natural justice. This hard fact adds to the imperatives of the legal aid to the indigent accused who but for such timely help may languish in jail.

¹ Surya P. S. Dhungel, Legal Aid - Concept to Conceptualize, 14 Nep. L. Rev. 14 (1980).

Legal Aid and Justice

A famous Indian poet has opined that the law is mere farce, only rich people can enjoy the fun by spending money.² Justice should not be denied to anyone. All from rich to poor and from criminal to innocent must feel that they received a fair trial when appearing before court. The legal system must mean same to the poor as it means to the rich. All must have equal and free access to justice. Legal aid is the only way to do so. The Supreme Court of United States of America made landmark decisions in this regard. The first case was the **Powell v. Alabama**³ in which the constitutional interpretation requiring the state to furnish counsel had been done. And again the Supreme Court of United States of America reiterated in the case of **Gideon v. Wainwright**⁴ that a lawyer must be provided to the needy. The court repudiated the rule denying lawyers to the accused who were too poor to get a lawyer to defend in felony cases. The court held in its historical Gideon case that "a defendant had the right to assistance of counsel in every felony prosecution in a state court and that a lawyer must be provided to him by the state if he could not afford counsel."⁵ Thus, the person involved in legal action must be given legal aid in order to make him able to defend his case properly. A fair trial can not be expected in absence of lawyers from even simple parties to the litigation. Thus, a needy party to the litigation should be assigned a lawyer under the legal aid programme. Burden of making legal aid

² N. L. Mitra, "Towards a Relevant Legal Aid Logic and Strategy in India," 1 NLSJ 81 (1989).

³ 287 US 45 (1932).

⁴ 372 US 355 (1963).

⁵ *Ibid.*

available and effective lies on the state. The simple reason is that a state is viewed as a preserver of the natural rights.

The necessity of the legal aid has been stated as:⁶

It can be thought of in a civilised community for a moment that any citizen put in a jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No court could be expected or expect itself, to sit and hear such a trial.

State has to render justice to all, whether rich or poor. State should not make any distinction among its peoples on the basis of wealth, power and prestige. All the persons and citizens are equal in the eye of law irrespective of their financial position, but economic inequality has made justice beyond reach of the weaker section of the people. Destitute parties to the litigation are unequal, practically in some of the cases, in the eye of law due to the inaccessibility of justice. The simple reason is that such person can not afford a lawyer to defend his or her case. In these circumstances, such destitute party to the litigation has no alternative except to cry for legal aid. Otherwise, the indigent persons will not be able to get judicial redress.

Justice is not a marketable commodity for which one should have to pay a price to get the justice. Once justice is treated like a marketable commodity to the highest bidder, it ceases to be justice. It becomes the antithesis of justice. One of the primary obligation of the state is to direct the operation of its legal system in such a way as to ensure

⁶ Alan Barth, *The Price of Liberty* (New York: Da Capo, 1961) p. 154.

justice to all its persons and citizens irrespective of their economic condition. Thus, it is duty of state to provide equal justice by providing a lawyer under a legal aid system. Legal aid is, thus, an inalienable element of fair trial. Legal aid is really nothing but equal justice in action. Legal aid is, in fact, delivery system of justice. Ostensibly, it is a duty of any democratic country towards its destitute people to provide lawyers at the state cost. The role of the legal aid is very important in providing equal justice to all the destitute persons. A procedure which does not make available legal services to destitute person cannot be regarded as equitable, reasonable and just.

In the absence of legal aid to the destitute party to litigation, judge can hardly protect the interest. Therefore, legal aid is an essential ingredient for due process of law. Necessity of legal aid can not be ignored. Absence of legal aid means the deprivation of justice. Leeman Abott has rightly said that if the doors of the court rooms are open only to rich who can unlock with a golden key and closed to poor, the firebrand of revolution will be lighted and put into the hands of men who will be justified in the revolution which is to follow. Legal assistance should, therefore, enable individuals to seek specialist legal advice on matters of law.

In the absence of effective legal aid programme, poor people are bound to be deprived of justice. They will not be able to pay lawyers' charge. Courts will be like a five star hotel open to all but accessible only to rich. Thus, the courts must be for poor people too. Legal aid is the only medium through which the courts could deliver justice for poor also. State should be very careful while implementing the legal aid programme. Necessary rules and regulations

should be enacted for proper implementation of the legal aid programme. The observation of former Chief Justice of the Supreme Court of India justice P. N. Bhagwati is noteworthy in this context. He regretted that the introduction of a comprehensive legal service programme failed to invoke any response.⁷ Further he observed that:⁸

The poor, too, have civil and political rights and the rule of law is meant for them and although till today it exists only on paper and not in reality. The time has now come when the courts must be the courts of poor and struggling masses of the country. They must shed their character as upholders of status quo.

This shows the some judges are prepared to break the class barriers to provide justice to the poor. This could be possible only by extending the legal aid system massively to needy.

The basic problem with the legal aid system is its financial aspect. This problem especially lies with the voluntary organisation engaged in the legal aid activities. The question arises whether such organisation should be supported financially by the State? The question was dealt by the Supreme Court of India in **Centre for Legal Research and Others v. State of Kerala**.⁹ Chief Justice, as he then was, P. N. Bhagwati observed in the case that:

⁷ **Hussainara Khaton v. State of Bihar**. AIR 1979 SC 1369.

⁸ **People's Union for Democratic Rights v. Union of India (Asriad case)**, AIR 1982 SC 1477-78.

⁹ AIR 1986 SC 2195.

“We are, therefore, definitely of the view that voluntary organisation and social action groups must be encouraged and supported by the state in operating the legal aid programme. It is now acknowledged throughout the country that the legal aid programme which is needed for the purpose of reaching social justice to the people can not afford to remain confined to the traditional or litigation oriented legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep that we may call strategic legal aid programme consisting of promotions of legal literacy, organisation of legal aid camps, encouragement of public interest litigation and holding of *Lok Adalats* or *Niti Melas* for bringing about settlements of disputes whether pending in courts or outside. The assistance of voluntary agencies and social action groups must, therefore, be taken by the state for the purpose of operating the legal aid programme in its wider and most comprehensive sense and this is an obligation...”

The Supreme Court of India called upon the senior lawyers to take up the legal aid scheme in their hand so that justice reaches to poor. In the words of the court:¹⁰

Though Article 39A of the Constitution provides fundamental rights to equal justice and free legal aid and though the state provides amicus curie to defend

¹⁰ *Kishore Chand v. State of Hamanchal Pradesh*, 1990 Cr. L. J. 2296 SC.

the indigent accused, he would be meted out with unequal defence; if, as is common knowledge, the youngster from the Bar who has either a little experience to defend him. It is high time that the senior counsel practising in the court concerned, volunteer to defend such indigent accused as a part of their professional duty.

The observations of the Supreme Court of India are very relevant in the formulating the philosophy of legal aid.

Legal Aid in International Law

Some of the international instruments relating to the human rights have envisaged standard provisions for legal aid which are as follows:

- (a) Standard of Minimum Rules for the Treatment of Prisoners, 1955¹¹

Article 93 of this instrument ensured free legal aid to an accused where such legal aid system is available. The Article does not prohibit to provide legal aid to other destitute persons other than accused.

¹¹ This instrument was adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955 and approved by the Economic and Social Council by its Resolution 663 XXIV of 31 July 1957 and 2076 (LXIII) of 13 May 1977.

- (b) International Covenant on Civil and Political Rights, 1966¹²

Article 14 of this instrument provides for a set of right regarding criminal justice. Noteworthy in this connection is Article 14(d) envisages to assign a lawyer to an indigent accused. Again, this provision does not prohibit to extend legal aid to other persons other than accused.

- (3) Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988.¹³

Principle 17(2) of the Instrument ensured to provide a lawyer under legal aid system in case a detained person could not afford a lawyers of his choice due to his poverty to be tried in his presence and to defend himself in person or through legal assistance of his own choice, to be informed, if he does not have legal assistance, of this rights, and to have legal assistance assigned to him in any case where the interest of justice so require, and without by him in any such case if he does not have sufficient means to pay for it.

¹² This instrument was adopted by the General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

¹³ This instrument was adopted by the General Assembly by resolution 43/173 of 9 December 1988.

Critique of Legal Aid

Critics of the legal aid have opined that the legal aid is misdirected charity and self contradictory policy of the state. In view of the critics state is playing a dubious character in the name of the legal aid. State spends a lot of money to prove the accused as a guilty in the one hand, and on the other hand state spends a lot of money to prove the accused as innocent. Why then state should spend money to prove that he is not guilty? But this criticism does not hold string because every accused and destitute person has right to put his version and defend his case in the court of law. Moreover, the property should not weaken his ability to prove his innocence. Legal aid is nothing but equal justice. It is a service which owes by a democratic state to its people. It should not be viewed as charity.

Inequity of the legal aid has been a subject of wider criticism, because indigent accused and destitute parties to the litigation used to get a young and in experienced lawyer under the legal aid scheme. Young lawyers will not be able to use higher legal techniques or wide range of technical skills, tools and research into law and legal problems. Also the young lawyers are less experienced in criminal trial practice, they are not able to provide effective legal counselling to the indigent accused or destitute persons, even though they are completely and conscientiously aware of their responsibility. Moreover, every young lawyers receives a bulk of assignment which hampers them to do depths study in each and every case. They will not get sufficient time to analyse the assigned case properly. Thus, indigent accused and destitute persons are bound to be in an effective defence. The result is that double standards of

justice: such as one for those who can afford to hire a competent and senior lawyer and other for those who must rely on the legal counsel provided for them by a court assigned under legal aid scheme. The gap between double standard of justice could be reduced if indigent accused and destitute persons be assigned of at least able and competent counsel. There are also instances where professional negligence may have contributed to the dismissal of the claims of destitute persons.

Chapter 2

LEGAL RESOURCES CAPABILITIES

A Creative Approach of Justice Delivery

The formal traditional type legal aid suffers from some deficiencies and is also constrained by several factors. It is directed towards legal representation of claims by individuals in disputes which are interpersonal in nature. The traditional legal aid which is obtained in practice does not have the capacity to respond to the group or collective interests. It does not have the capacity to direct itself towards the representation of group or class interest.

Moreover, the traditional legal aid is confined to the formal judicial arena. And the modes of advocacy are normally limited to the preparation of legal pleadings and oral representation in the courts. The existing legal aid scheme is reactive as it responds passively to the problems of those who reach to the legal aid dispensing office. Many poor and indigent people do not know about the existence of the legal aid scheme and several people who seek legal aid may not meet strict conditions laid down for it.

Another criticism often levelled against the traditional legal aid scheme is that the services offered are not even and judicious. The personnel engaged in the performance of professional tasks are often inexperienced or poorly

motivated in view of the low remuneration and lack of professional competence.¹

In fact, a new model of legal assistance to poor and needy people is desirable. The new model of legal assistance should rather help build legal resource capabilities. It rests on the community to formulate its own tactics and strategies involving resource to law. The emphasis should be on a system of the delivery of legal knowledge and skills. It should be founded upon the principle of participatory involvement and control of the community. The elements of this model should include.²

- 1) Emphasis on collective demands and group interest.
- 2) Establishment of legal aid clinics in that they actively seek out the grievance of poverty groups and advocate their interests.
- 3) Expansion of the areas of group advocacy to include administrative, legislative and other spheres of policy articulation and implementation.
- 4) Multiplication of the types of assistance to include counselling, the structuring of transactions and formation of associations.
5. Restructuring of the delivery system to include participatory involvement of potential beneficiaries. Such participation is to take the form of management of legal aid schemes, dissemination of information

¹ Neelam Chiruchelvam "The Legal Needs of the Poor: Towards an Alternative Model of Group Advocacy" published in the report of the **Conference on Development, Human Rights and Rule of Law** held in Hague on 27 April - 1 May 1985.

² Id. at 210.

about social welfare schemes and redistributive legislation and an encouragement of self-help.

Besides, legal resources capability development presupposes identification of the differential legal needs of different groups of poor people. For this para legal professionals should be spotted and trained to ensure that they are responsive to differential needs. Para legals can act as legal facilitators in the community.

Under the ambit of the legal resources capability come the legislations, social welfare polices. They should be examined and their implementation closely scrutinised. It is extremely important that the legal assistant or paraprofessionals are attuned to undertake the tasks. They should be strongly motivated to work with the poverty groups.

Potential law and legal system as a resource for victim of inequity and injustice should be realised. For this a transformation of the existing approach to legal assistance is required. It is through such an approach to group advocacy that the grievances of the socially deprived and economically disadvantaged can be converted into enforceable claims.³

Legal resources capability enhancement should encompass both court-oriented legal aid and strategic legal aid. Legal aid system should play the role of concientization to make poor aware of their rights. Strategic legal aid comprises

³ Id. at 206.

legal literacy programmes, alternate dispute resolution through mediation and compromise, scouting and training to legal aid lawyers and so on.⁴

Thus, a creative approach is needed so that the provision of legal services reach to the poor people. They should be enabled to understand law, organise themselves and articulate their demands for which the role of lawyers, law teachers, students is highly desirable.

⁴ Kusum Shrestha, based on the remarks at the National Seminar on Legal Aid organised by Nepal Law Society, published in Law Bulletin, Issue - 12, Year -5.

Chapter 3

LEGAL AID SCHEME IN NEPAL

Background

The people of Nepal, like English Jurist Bracton said “are not under men but under law and under god.”¹ However, prior to 1951 when the country was under the domination of autocratic rule, there was no separation of power between three organs of the government and concept of rule of law was not in force. After the democratic revolution of 1951 the despotic Rana rule collapsed and an Interim Constitution was promulgated. The Interim basic law of the land, 1951 established the concept of rule of law and independence of judiciary.

The first full-fledged democratic constitution was promulgated in 1958 which recognised the major elements of democracy as rule of law, fundamental rights of citizens, judicial independence and so on. However, the Constitution was shortlived. The partyless polity was introduced in the country and constitutionally it was a big retreat. In 1962 Constitution of Nepal was promulgated based on the partylessness and monolithic structure.

¹ Kalyan Shrestha, “The Court System Under the Constitution of Nepal,” 18 *Essays on Constitutional Law*, 22, (1994)

The thirty-year long partyless rule collapsed in 1991 under the weight of popular discontent. The Constitution of the Kingdom of Nepal, 1990 was promulgated. The constitution is an advanced and democratic basic law of land this country has ever got. The fundamental rights guaranteed in the constitution accompanied by writ jurisdiction of the Supreme Court have laid down a strong base for the protection of the fundamental rights of the citizen in the country. It has provided for legal aid or support to poor and indigent people. The Constitution of the Kingdom of Nepal, 1990 has explicitly mentioned about the promotion of legal aid system. Article 26(14) of the Part IV of the Present Constitution has given recognition to legal aid. It obliges the state to pursue a policy of providing free legal aid to indigent persons for their legal representation in keeping with the principle of Rule of Law. Moreover, the Civil Code, 1963 that lays down the general substantive and procedural provisions for the administration of justice. Section 18 of the Court Procedure of the Civil Code provides for the right of the court to hear the case of an indigent with humane priority. Similarly, Section 205 of the Civil Code stipulates an indigent person unable to file appeal can be acquitted of the charge provided others accused of the same offence are given an acquittal after hearing an appeal on the decision of the subordinate court.

Legal aid & *Baitanik Vakil* system

The concept of legal aid is put into practice in this country from the time of the establishment of judiciary in the modern sense of term. The legal aid scheme was

institutionalised by the decision of Full Court of *Pradhan Nyayalaya*.²

Legal aid was meant to be delivered to the disadvantaged, deprived and underprivileged sections of the Nepalese society. However, the legal aid scheme under the auspices of *Pradhan Nyayalaya* had some conditions. According to the decision of the *Pradhan Nyayalaya* the destitute persons of more than 60 years old and less than 16 years old were eligible for the legal aid.³ As a result other general poor, destitute Nepalese people were deprived of legal assistance. Besides, those who were eligible for legal aid were given opportunity of pleading their case at free of cost.

Later, Supreme Court initiated the system of appointing a lawyer for poor and destitute person. Such lawyers were paid for their services on the monthly basis. However, the remuneration paid to them was nominal. The duty of such lawyers was to plead the case on behalf of his poor and destitute client in the court. In other words paid lawyer system was established under the legal aid programme. The system has been continued and rather expanded. Presently, three tiers of the courts are established in the judicial system of Nepal. However, the paid lawyer system is not affected by the judiciary. As the regional courts were established the lawyers were provided on payroll basis from 2032 B.S. From the fiscal year 2044-45 B.S. the paid lawyer system had been introduced in the all zonal courts of the kingdom.

² B. K. Mainali "Legal Aid in Nepal", 7 *Asian L. J.* 98 (1984)

³ Bhim Rawal, "Free Legal Aid: Development, Recognition and Its Possibilities with Reference to Nepal," 49 *Nyayadoot* 3 (Pt. II) 2045 B.S.

One lawyer in every courts were appointed by the respective courts. The judges have their views about concern that the legal aid system be introduced in the district court also. The Tenth Eastern Regional Judges Conference, held in 1988 A. D. adopted a resolution that the paid lawyer system should be launched in all the districts courts.⁴

Presently, there are 88 lawyers on the payroll and they are provided to all District Courts, Appellate courts & the Supreme Court. The advocates receive Rs. 1000/- per month while pleaders get Rs. 750 a month. This remuneration was determined in 2042/2043 B. S. The government incurs a sum of Rs. 10 lakh and 56 thousands annually in this regard. It's high time to undertake an assessment of the impact and utility of the *Biatanik Vakil System*.⁵

⁴ Eastern Regional Court Souvenir 1988, Dhankuta, p. 2.

⁵ Based on a suggestion provided in the consultation exercise held on legal aid in Kathmandu, April 24, 1994.

Chapter 4

LEGAL AID & STRATEGIC LEGAL AID

Role of Professional Associations' and NGOs

Besides, the *Baitanik Vakil* (Lawyers on the Pay Roll) system provided in the court professional associations like Nepal Bar Association and other non-governmental organisations have contributed to the evolution and development of free legal aid in the country.

Nepal Bar Association has a history more or less connected with the development of independent judicial system in the country. After the popular democratic change of 1951 AD, as the evolution of judiciary formally received impetus, lawyers also gained recognition as an essentially active agent in the administration of justice. In 1956, the Supreme Court Act, Rules were promulgated. Lawyers were enrolled for the first time and provided licence for practice. The first effort to create Bar Association was made then. But in 1962, Nepal Bar Association was formally established. In 1969 Law Practitioners' Act and Rules were brought into force.

Section 12 of the Law Practitioners Rules explicitly stipulates "It is the duty of the law practitioners to work for speedier administration of justice and assist in the enforcement of people's fundamental rights."

Nepal Bar Association gradually woke up to the need of dispensing legal aid to indigent and poor people. In 1992 Nepal Bar Association drafted rules for free legal aid and brought to the public. In the Rules, indigents eligible for free legal aid have been defined. It also provided that indigents will be eligible to receive legal aid and the expenses incurred shall be borne out of the fund created by Nepal Bar Association. Legal Aid Committee had been proposed in the Rules and indigent persons unable to finance the cost of litigations are required to report to the legal aid committee for the assistance.

Lawyers' Conferences

First All Nepal Lawyers Conference was convened in the early seventies. The conference passed a resolution to constitute a national committee for legal aid to indigent and poor people. A panel to activate the legal aid in a more effective way was constituted under the chairmanship of Moti Kaji Sthapit, a lawyer.

In 2037 BS. Second All Lawyers National Conference was organised in Birgunj. The conference also discussed different aspects of legal aid and examined about how the legal aid could be made more effective.

In 2040 BS. Third All Lawyers National Conference held in Kathmandu stressed the need to effectively implement legal aid programmes and institute the programme down to district and zonal court levels. Pursuant to the resolution adopted in the conference, it was decided to form a central advisory body for legal aid. Advocate Krishna Prasad Bhandari, Ichchha Harash Bajracharya, Thakur Prasad

Kharel, Sarbargya Ratna Tuldhar were assigned to head the bodies concerning the promotion of legal aid for each development region that is eastern, central, western, far western regions respectively.

However, the endeavours in respect of legal aid were not able to achieve their objectives fully.

Twinning Programme for Legal Aid

The Nepal Bar Association - Norwegian Bar Association twinning cooperation resulted in the establishment of Legal Aid Project in 1988. Cooperation has completed its seventh year. The project activities have been able to enhance the importance of legal aid activities and involve the members of bar and bench in imparting legal aid. This will ultimately create an appropriate base for giving continuity to legal aid activities.

The twinning concept contemplates the close and direct cooperation between a developing world Bar Association and a bar association of a developed. Representatives of the respective groups should meet and discuss the needs of the "Developing Bar".

The Norwegian Agency for International Development (NORAD) is involved in making the cooperation possible. The strategic objective of this scheme is to empower the weaker section of the society. Free legal aid service is rendered to the members of weaker sections of the community who are poor and economically disadvantaged and need support for asserting or defending their genuine legal rights in the courts and other judicial authorities.

Nepal Bar Association has developed certain criteria for providing free legal aid from the project. Nature of the case and economic conditions of the person are basically taken into account in rendering free legal aid services. For example, in criminal cases legal aid is provided only to the accused who are in detention, in civil cases, this service is rendered to poor and needy persons in litigation involving partition, divorce, maintenance, maltreatment, labour problems. In litigations involving loan transactions, legal aid service is provided in favour of poor borrower. Besides, public or group interest cases and litigations relating to landless peasants also fit in the criteria developed for dispensing free legal aid from the project. A nine member legal aid committee was formed to formulate policies and provide direction to the legal aid activities. Moreover, a nine member legal aid implementation committee was formed to oversee the implementation of legal aid activities.

Necessary staff were recruited in carrying out day to day functioning of the project. The major aspects of free legal aid project are to provide free legal aid to indigent litigants, conduct legal literacy and legal education activities, organize seminars, colloquiums on different areas of law and standardise the publication of *Nyayadoot*. The programme and activities of Legal Aid Project (LAP) can be summarised as follows—

- Legal literacy activities
- Litigation/counselling services
- Special legal aid programmes for women
- Legal education for girl students

- Paralegal training.
- Publication of *Nyayadoot* (Bar Journal)
- Seminars
- Talk Programmes

Legal aid programme implementation directory has been formulated to execute the legal aid activities pursuant to the agreement between Nepal Bar Association and Norwegian Bar Association. The directory lays down a clearly stated formulation in respect of planning, organising and offering legal aid, legal education and literacy activities. The directory provides for use of systematic procedures to identify and analyse the needs of the target groups and offer services to them. Legal aid services is provided through a panel of lawerys who are paid on case basis.

The project head office is in Kathmandu while branch offices have been located in Bara, Sunsari Banke, Dolakha and Palpa district. Altogether 3316 cases have been handled by the Legal Aid Project while 2699 legal counselling services have been provided to the needy people till 1994.

Engaged in legal literacy and strategic legal aid activities are several non-governmental organisations including Nepal Bar Association. The Legal Aid Project of the Nepal Bar Association also conducts legal literacy campaign. A preliminary survey is conducted to assess the type of legal problems and the literacy classes are carried out to suit to the needs of the people. The programme is popularly known as grass root programme.¹

¹ Bharat Raj Upreti, "An Introduction to IBA Twinning Programme" launched in Nepal, a paper presented in Regional Conference for Officials of Southern Asian Bar Associations and Law Societies, organised by International Bar Association, held in Kathmandu, 17-20 January 1993.

The legal literacy classes conducted under the auspices of Nepal Bar Association are designed for two days. Special primer on different aspects of law is developed and distributed to the participants.

The other component of the strategic legal aid are seminars and talk programmes. Administrators, policy makers, police officials, judges have been involved in the seminars in order to impress upon the importance of legal aid.

Other non-governmental organisation involved very significantly in the area of legal literacy is Society for Under-privileged Section of the Society (SUSS). It has developed quite a lot of resource materials for conducting strategic legal aid activities in the rural areas of the country. Its target groups is women who face traditional exploitations and discriminations in the society and deprived of their rights due to different socio-cultural constraints.

Non-governmental organisations committed to rule of law and Human Rights organisations, consumer rights defence organisations have also significantly contributed in the area of legal literacy and strategic legal aid programme. Moreover, community development projects and other schemes have adopted legal literacy as part of their efforts to strengthen the entitlement and capacity of the weaker section of the society. Differential needs of the different target groups have been assessed and contents have been designed for the sake.

Chapter 5

CLINICAL LEGAL EDUCATION

In fact, the history of formal legal education is not long in Nepal. However, two major events are said to be very significant in the development of legal education. The first is the provision of studying the subject of law in *Sresta Pathasala* which was established in 1970 B.S. The second is the opening of the law college in Nepal in 2011 B. S. under the initiative of the private individuals. The objective of establishing *Sresta Pathasala* was to produce clerk, scribes and manpower able to handle the legal aspects of civil administration (*Muluki Prashashan*).

The law college that was established was affiliated to the Patna University of India. Many Indian laws and legal system were taught in the college. The *Sresta Pathasala* was scrapped in 2011 BS and the law college was affiliated with Tribhuvan University.

Though Bachelor level in legal education was commenced in 2016 BS, very few could be benefitted from the law colleges as it only catered to the people in Kathmandu and Morang. In Nepal, New Education System Plan was introduced in 2030 BS with a view to restructure the framework of legal education and make it qualitative, practice based and competitive. The Nepal Law College was renamed as Nepal Law Campus and incorporated

under the Institute of Law of the Tribhuvan University. The five year law course was introduced providing two years for Proficiency Certificate Level and three years for Bachelor level. The New Education System Plan intended to raise the quality of legal education and standardized it but nothing of the sort could be realized.

Moot Court, legal research and methodology, internship comprise some of the aspects in restructuring the curriculum of legal education to make law education based on practice, and standards.¹

Following the restoration of multiparty democracy in the country in 1990, a new thinking was made to provide quality contents in legal education. The National Education Commission formed after the restoration of multiparty democracy to formulate education policy suited to the democratic context in the country. The report of the National Education Commission has taken the poor state of the Nepalese legal education into account. It has also recommended for the abolition of the Proficiency Certificate Level in Law and allow entry into bachelor level education in law only after the completion of bachelor in arts or commerce or other disciplines.

At present 20 law campuses have been functioning under the Tribhuvan university and over 40 private law campuses are affiliated with the Tribhuvan University.

¹ Based on the paper of Madhav Prasad Acharya, A Critical Assessment on the Testing & Evaluation System of Legal Education in Nepal, Seminar Proceedings Report published by ICJ/Nepal Section, Dec. 1992.

However, proficiency Certificate Level in Law is being scrapped in consideration to the need of arresting the decline in legal education standards and quality. Moreover, much talked about Post Graduate studies in law has not been started yet as a result of which higher level education programme in law has not been instituted. Even as post-graduate studies programme in law is started, given the existing physical and academic infrastructures, the quality will not further.

The structure of the law campus curriculum is content oriented and the teaching methodology is largely lecture based. It is called as socratic method of teaching where the student is expected to be prepared for any question on a given topic. There is no provision of imparting clinical legal education except moot court.

Clinical legal education as a new method has been promoted in many countries. The concept of clinical legal education entails both formal and non-formal methods to help students work on actual cases or problems. The method of clinical legal education provides stimulation, motivation, practical and technical skills, more realistic perspective about law, extrapolation of theory from actual experiences, uplift of professional responsibility and standards.

Clinical legal education also provides an opportunity of acquaintance of students with advocacy skills and expose lawyers to social realities.

Law faculty under the Institute of Law had initiated a programme with a view to conduct clinical legal

education, in the campuses affiliated to it around 2043 BS. Under this programme it was aimed that the student could obtain competence and efficiency regarding legal profession under the guidance of a legal teacher. This was an appreciable move as it could be utilised to provide free legal aid to the economically backward and disadvantaged classes of the Society. However, the clinical legal education started then could not be pushed forth.

Another programme of the clinical legal education has been conducted by the Faculty of Law of Tribhuvan University not very long back. The minimum qualification for the participants is third year level study of the Bachelor of Law. The basis of admission for the trainees has been the academic performance during the previous year. The participants were trained in the following themes as given.²

- Tutorial programme	one month
- Trial advocacy	17 weeks
- Court Observation	two weeks
- Seminars	two weeks

However, the clinical legal education programme lacks the specific objectives. Another question in this connection is the sustainability of the programme as it has been operated under the sponsorship of donors. The students of the third year bachelor level are too busy with programmes like internship. It can be argued that involving them as

² Satish Krishna Kharel, Clinical Legal Education: An Assessment and Perspective Legal Education in Nepal, Seminar Proceedings Report, p. 63, published by International Commission of Jurists/Nepal Section 1992.

participants in the clinical legal education can add extra burden to them as they are busy with internship and studies.

Moreover, the potentials of law campuses in the field of legal aid has not been utilised. Law campus students can be employed to handle some cases so that they could be exposed to the elements of practical aspects of legal knowledge. Law students can be provided opportunities to participate in socio-legal research activities on law and alternative dispute resolution areas.

Moreover, Law Campuses can be utilised in carrying out legal literacy activities which has not been done in Nepal. In fact legal education in Nepal has failed to reflect the changing role of law in the democratic development of Nepalese society. Nor did legal education impart skills and orientation appropriate to equip law persons for the task of social engineering. The picture of the legal education considered into the Fourteenth Report of Law commission of India is appropriate in the Nepalese context too. The report succinctly states.

“It is not surprising that in this chaotic state of offence in a number of these institutions there is hardly a pretence at teaching. This character is followed by law examinations held by the universities many of which were tests of memory and poor ones at that, which students, manage to pass by cramming short summaries published by enterprising publishers ... The result is a plethora of LL. B. half-baked lawyers who do not know even the elements of law and who are let loose upon society as drones and parasite in different parts of the country.”

Chapter 6

LEGAL AID & LEGAL LITERACY

(Individual Role of Lawyers)

The Bar Council Act has come into operation in Nepal recently. It lays down code of conduct for lawyers. In accordance with the provision of the Bar Council Act lawyers failing to maintain standards will have to face action. Recently, Bar Council has initiated action against the lawyers alleged to have breached the code of conduct.

A lawyer is always expected to act honourably and with integrity. He/she is supposed to abide by minimum level of norms and conduct.

Lawyers play meaningful role in the administration of justice. They have an ethical duty to avoid litigation whenever reasonably possible and to refrain from pressing bad cases. International Code of Ethics for lawyers has laid down that the lawyers should, when in the client's interest, endeavour to reach a solution by settlement out of court rather than start legal proceedings.¹

The lawyers are also supposed to avoiding litigiousness, not requesting for postponement and adjournments once a

¹ Quoted in Professional Ethics of Lawyers by Cyrene Siriwardhana Law & Society Trust, Fortnightly Review Vol. IV Issue 30, July 1994.

case is fixed for hearing. Moreover, lawyers must not take unfair advantage of the client by overcharging for the work done and to be done.

Social perception of lawyers

In most Third World countries, it is found that the legal systems are structured in favour of powerful and wealthy. A major obstacle to improving the responsiveness of legal systems to problems of poor is that legal systems still tend to presume that wealth and access should be correlated.

The processes of law generally generate delays and expenses which often inflict inordinate hardships on litigants.² The laws are often hard for rural people to understand and the institutions which produce or reproduce and interpret law are often distant both socially and geographically from rural communities. The rights, certainty and formal equality promised by jurists may seem illusory due to endless round of hassles and litigations.

Lawyers and legal professions today tend to be very much part of the social problems. The professionalization of the delivery of legal service has led inevitably to lawyers developing their manipulative skills on behalf of the highest bidder of such services.³

² Ibid. p. 194.

³ Clarence C. Dias, "Realizing the Right to Development: The importance of Legal Resources" a paper presented at a conference held in the Hague on 27 April - 1 May 1985.

In Nepalese context, the social perception of law and lawyers is not positive and people fear law and the lawyers. There is a saying popular in the Nepalese social milieu which is "*Nepal ko Kanoon Thula Bada le Janoon*" that is 'Big roost alone know the provisions of Nepalese law'. Ignorance and avoidance of law, incapacity to use it have made the people to perceive law as opposed to their interests. There is another popular saying in the Nepalese context that reflects the popular aversion to the law and lawyers. In Nepal, the reason behind the aversion and negative image of lawyers is monopolization of information and knowledge of law and lack of innovative resources and motivation to help generate legal resources.

Legal profession in the modern sense of the term is of recent origin and development. After the democratic change in 1951 when the autocratic family rule of the Ranas was abolished, the concept of independent judiciary and legal profession received due recognition. After the law college was established for imparting formal legal education in the country in late fifties, legal profession evolved and developed. Prior to this the court recognized *vakils* and pleaders worked as interpreters and counsellors of law. Some special short term course (*Char Pass*) was organized to imparting basic training on the fundamentals of the law of the land.

Lawyers & legal aid

Though the overall perception of people on law and lawyers can not be said satisfying, some lawyers in their individual capacity have involved in the legal aid activities. The legal aid imparted by lawyers in individual

capacity to the poor and disadvantaged comprised representing the court freely, pleading and counselling. Today some lawyes especially in their individual capacity have rendered legal aid. However, it is not adequate. Lawyers need to involve more in assisting the poor and disadvantaged sections of the society and apportion some of the earnings to legal aid in making it sustainable.

Lawyers have the duty to assist in protecting and enforcing the human rights of poor people.

Lawyers must be independent of all external influences and pressure on them. They must advise their clients and act for them impartially regardless of the interests of any other person, company or authority. Lawyers must not engage in any other business or occupation if by doing so they may cease to be independent.⁴

⁴ The IBA's International Code of Ethics, 1988.

Chapter 7

CONCLUSION & RECOMMENDATIONS

Free legal aid has greater relevance in the context of a poor country like Nepal. It helps in fostering the protection of human rights and promoting the rule of law in the country. Legal aid should however be reinforced by the efforts to develop legal resources capability of the community. The proposed Legal Aid Act, of which the draft has been already prepared, should be enacted and the court-oriented legal aid and strategic legal aid need to be combined to give new thrust to legal resource capability of the weaker and defenceless strata of the society.

The Legal Aid Act draft prepared by Nepal Bar Association aimed at creating a National Legal Aid Scheme. The scheme is necessary to put into effect in order to avoid duplication of legal aid and legal literacy activities. There should be coordination and a kind of complementarities in the role of different organisations involved in legal aid and legal literacy functions. However, litigation aspect should not be entrusted to be handled by non-governmental organisation.

There is no proper recording of the lawyers who are involved in legal aid activities on a voluntary basis. It is necessary to maintain a list of lawyers who are engaged in the legal aid as a sort of recognition to their activities.

The effectiveness of the *Baitanik Vakil* (Lawyers on the Pay Roll) is questioned time and again. It is said that the provision has become a kind of legal aid for lawyers not for the needy indigent litigants. Moreover, new entrants to the profession are enrolled as *Baitanik Vakil* as a kind of apprenticeship. Children, women and other weaker sections of the society should be defended by competent lawyers.¹

The *Baitanik Vakil* lack motivations and incentives too. They should be inspired and motivated to take up profession as a service to the needy section of the society.

Another problem facing the legal aid programme is the lack of the organisation dedicated to training para legals. Without legal motivator, para legals initiatives in the area of legal aid can not succeed at all. Para legals can have a seminal role in reaching legal aid and defending the interests of needy people in the rural areas.

As the current system of *Baitanik Vakil* has not been effective enough, those needy people who are entitled to be benefitted from legal aid have not been identified. Women are the exploited and oppressed lot in the society. Despite the constitutional provisions guaranteeing equality for women, they are yet to be meted out with justice. Women as they constitute over half of the country's population, should be accorded primacy in respect of legal aid and legal literacy activities.

¹ Based on the suggestions provided at the consultation meeting held in Kathmandu, April 24, 1994.

There are nearly quite a number of law colleges in the country. But they are underutilised in respect of legal aid and legal literacy activities. Law college students can be utilised as an important vehicle in providing legal aid and imparting legal literacy to the target people.

Legal education should be incorporated in the curriculum of secondary level education so that it can help spreading legal knowledge at different levels.

Though non-governmental organisation (NGOs) have of late, been engaged in legal literacy activities they are not very effective. Follow up activities are necessary in this connection.²

Moreover, laws should be reformed in order to overcome the structural obstacles of justice to the needy and indigent people.

² Based on the recommendation at the Seminar on legal aid by International Commission of Jurists/Nepal Section held in Palpa, Sept. 12, 1994.

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