

LEGAL AID IS A HUMAN RIGHT TO ACCESS TO JUSTICE: IT IS “NEITHER A FACILITY GIVEN BY GOVERNMENT NOR A CHARITY OF PERSON OR ORGANIZATION”

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Abstract

Legal aid is internationally recognized as a fundamental human right of access of individual to fairness and impartiality of justice. It is essential to materialize the politico-legal notion of equality, which calls for treatment of every individual on equal footings. The responsibility of legal practitioners and their assistants to provide legal aid is a matter of ethically guided ‘professionalism’. Hence, no legal aid can be considered adequate and efficient unless it imbibes all necessary elements of professionalism. Therefore, no one simply jump into a mission of legal aid without fully acquired professional skills and arts of legal professionalism.

Introduction

However, in developing countries like Nepal, the notion of legal professionalism is largely misconstrued. Being overwhelmingly influenced by the Western legal professional elitism, the meaning of ‘practicing law and providing legal aid’ in countries like Nepal has been wrongly oriented. Elusiveness of the definition of legal professionalism is a serious problem if it is viewed from the point of view of the ‘theory of law as means of social engineering’. The elusiveness in definition of legal profession starts from the very moment of a student is entered the law school. Often, students are encouraged to define legal professionalism in very broad and abstract notion encompassing such ideals and qualities as good judgment, civility, maturity, competence, zealous advocacy, intelligence, honesty, and integrity. The service to the needy people and the responsibility of gearing up the social transformation has never been emphasized. In this paradigm of the definition, the legal professionalism is chosen generally due to its ‘influence in politics and attached personal benefit in career’. Legal profession is considered elitist, thus an instrument of placing persons on supper hierarchy of the society. In this context, students of law find nothing but a vigorous, ongoing debate over the meaning of professionalism.¹ The delusion students are subjected to face in this context is not only a matter of disenchantment, but also a factor

¹. There are myriad of definitions provided for professionalism. For instance, Jerome J. Shestak, President of American Bar Association in 1998, stated that "(a) professional lawyer is an expert in law pursuing a learned art in the service to clients and in the spirit of public service, and engaging in these pursuits as a part of a common calling to promote justice and public well". American Bar Association, *Forward to PROMOTING PROFESSIONALISM; ABA PROGRAMS, PLANS AND STRATEGIES* 3 919980. Professionalism has also been defined as 'the set of norms, traditions, and practices that lawyers have constructed to establish and maintain their identities as professionals and their jurisdiction over legal work. Robert L. Nelson and David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS/LAWYERS' PRACTICE: Transformations in the American Legal Profession* 1, 5 (Robert L. Nelson et. al. eds., 1992). Definition also denotes self-regulation o professional membership and conduct.

to push them into a danger of anarchy in belief, disorganized in pursuit of practice and visionless in development of career. The context of the society may be one of the most important elements for defining legal professional pragmatically, thus addressing the need of social engineering. It is an undeniable fact that legal professionalism is an elastic concept; its unanimous definition is, if not impossible, difficult, but if someone looks it with a focus on service the legal profession is supposed to provide to the disenfranchised persons, the definition of legal professionalism can be saved abstraction. Hence, it can be defined as a pursuit of the learned art in the spirit of a public service, with priority of focus on the disenfranchised persons.² The concept of legal is, therefore, an instrument of human rights protection.

Legal professionalism comprises some indispensable fundamentals or elements. It embraces the realm of ethics, but also reaches far beyond. It also encompasses principles of appropriate conducts of lawyers and paralegals. Further, it contains set of inspirational ideals for an effective advocate, counselor, officer of the court and member of the bar. But all of them are intrinsically inspired by the necessity and public service and positive social transformation. The public service and positive social transformation call for protection of a system of democracy, rule of law and access to system of governance.

In the context of less developed and less literate society where vast majority of people are marginalized, the legal professionalism is supposed to encompass additional elements or qualities, the responsibility or accountability to protect and preserve general public from discrimination, subordination and many different forms of injustice. The protection of common people from prerogatives of rulers and upper-strata people is the most important element of legal professionalism. Especially, to protect common people from the so-called 'formalism' of the State institutions is equally important responsibility of the legal professionalism. This doctrine believes that legal rules and institutions are for the sake of people, but the people for the sake of legal rules and institutions. The significance of the legal aid is thus obvious.

Thus, the legal professionalism in countries like ours stands in forefront of social and restorative justice. The emphasis on objective justice is the core thrust of the legal aid philosophy. To protect common people from both the formal and informal system of discrimination, subordination and injustice is the prime goal of the 'mission of legal aid'. The legal aid, therefore, does not simply mean a practice of lawyers defending the client in the court. The legal aid in a country like Nepal is expected to be a 'democratic and humanistic attitude' of lawyers. Unfortunately, these dynamics and dimensions of the legal professionalism are seriously affected by the prevailing notion of politics within the legal profession. One of the major factors for this problem lies on the pattern of legal education in itself. In Nepal, legal education is inherently dominated by the colonial paradigm. It emphasizes the skills of interpretation of rule but not the pragmatic and pro-human rights application. As a matter of fact, the issue 'professionalism' hardly matters within the legal profession.

PROBLEMS OF LEGAL PROFESSION IN NEPAL

Overlooking of the fact of 'a good person paradigm: As referred to above, the problem of legal in any given society is inevitably associated with the situation of its legal profession, which is, in turn, is largely an outcome of its legal education system. In

². "... *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, Report of the Commission on Professionalism to the Board of Governors and the House Delegates of the American Bar Association (August 1986).

Nepal, the legal education in Government invested colleges is limited to the study of the contents of substantive laws and their interpretation. The non-governmental sector of legal education is in its infancy and has very little influence in the legal profession. Consequently, the scope of knowledge of law is limited to the indoctrination of the Western jurisprudential principles, many of which have no contextual validity or significance. This method has even failed to address basic requirements of developing lawyers' skill in legal analysis, reasoning, and oral advocacy.³ The doctrinal units of courses emphasize the ability of lawyer to think like a lawyer (an orator) and to make legal arguments with all niceties of complexity, clarify legal issues by adversarial process and choose from among judicial precedents the one most relevant to a particular question of legal interpretation. This makes lawyers to 'think themselves like a 'grinding machine', which produces designed products. The creativity in connection with the social relevancy and necessity is fully ignored. A lawyer is there thought to be a professional to 'vomit fire' - a ruthless speaker. This paradigm of profession overlooks the sensitivity of person to human dignity and needs. This system nurtures a 'notion of professionalism' which emphasizes the 'vibrancy of a lawyer' but not the 'humanity within a lawyer'. The legal aid lawyer is a lawyer of the 'second category', who believes that only a good person can be good lawyer. It implies that it is not necessary for a good lawyer to be a good person too. But a good person can definitely be a good lawyer too.

Indoctrination of traditional colonial idealism: In country like Nepal, as a common phenomenon, lawyers, from the time they law students, have absorbed messages that being a lawyer means being a person different from the rest of the society. This notion is an outcome of the traditions inculcated by the common law colonial phenomena. Obviously, this ideology of the legal profession separates lawyers as an integral part of the grassroots population or reality. This notion is also instrumental in emphasizing the elitist character of the legal profession. It is, therefore, believed that the legal profession is 'a *manish* (male) profession; it is a profession of rich people; and it is a profession of people who are educated in foreign law schools, and so on. This notion is evident in deeply rooted belief that 'lawyer educated in Oxford and Harvard' is unquestioningly better. It is why we often hear people talking that: (a) legal profession is not fit for women, (2) so-called lower caste people and those who have no loud and horrific speech cannot be good lawyers; (3) children who are smart in doing silly things should go to legal education; (d) persons who have studied in foreign universities can have better recognition. We can introspect ourselves in matter of the situation of legal aid as a right of people in our society by applying these indicators to view legal professionalism. The findings would be definitely discouraging. The above mentioned ideology of legal professionalism obviously the 'communitarian' character of the legal profession.⁴ The

³. Mark Neal Aronson in his article *Thinking like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 1-2 (2000), puts: "The traditional law school curriculum emphasizes thinking about what the law is and should be". What seriously lacks in traditional methods or curriculum is the emphasis on 'critical and empirical' understanding of the function of law and lawyers' roles in rendering the profession of law practice responsive to community's need.

⁴. A proverb that 'a horse can not make a compromise with fodder' is popularly used in the classroom. Similarly, it is also popularly said that 'a new entrant in the legal profession should work hard without expectation of remuneration of fees, so he only works but no money. An established lawyer has work and the money both. A senior lawyer has only money but no need of hard work. These kinds of wrong messages passed on to students in the classrooms have seriously affected professional responsibility of lawyers. In Nepal, senior or established lawyers are neither interested in pro-bono service nor appearance in lower level courts for argument. Hence, in majority of trial level cases the junior lawyers appears with a great risk of miscarriage of justice.

traditional paradigm of professionalism is responsible for the following pervasive weaknesses of legal professionalism in Nepal:

- Generally, the lawyers view that they are in superior or dominant position in attorney-client relation. This psyche makes them vulnerable to dictate their clients of the remedy and process to follow for.
- Usually, the relation between lawyers and client is absolutely hierarchical- often lawyers address their clients using derogative and low-status reflective verbal communication.
- Similarly, the lawyers are not sensitive to the emotional or psychological stress the client is subjected to. The socio-economic and financial impacts of the disputes on clients are generally overlooked by lawyers.
- As a usual practice, the lawyers are engaged into dealing with clients through their juniors, but they are charged high fees irrespective of who is directly involved in dealing with them.
- As discussed earlier, the legal profession is viewed as an 'elitist' profession rather than the communitarian one. So that the tendency of the lawyers avoiding strategic advocacy of community's interest or rights as an obligation of the legal professional is phenomenal.

These wrong attributes, in turn, seriously affect the community's trust and confidence on the legal profession and it ultimately spoils people's confidence on justice system itself. These wrong traits of lawyers' professionalism are directly accountable for promoting the deeply rooted formalism⁵ or dogmatism' in the process of justice in Nepal, which obviously:

- Obstruct the unrestricted and easy access of marginalized or weaker sections of people to justice and
- Overlooks the necessity of reforming justice system in order to make it accessible to common people without any formal or informal hindrances.

The significance of the legal is rested in these points. The mission of legal aid conceptually advocates the following ideologies to address these setbacks of the legal profession:

- To promote public interests by safeguarding the interests of weaker sections of the population.
- To get rid of excessive formalism and dogmatism in justice process that hinders common or weaker sections of people in easy and unrestricted access to justice.
- To build a communitarian foundation of the legal professionalism.
- To promote a system of contextual legal education and training.

⁵ . Amy R. Mashburn in *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U.L. Rev. 657-70 (1994) has rightly stated that affluent business lawyers in America had an aristocratic vision; their mission was to establish lawyers as an intellectual elite in the eyes of the public. This trend also equally applies to lawyers practicing public laws like constitution involving political issues. This section through its close political association with politicians is not only keen to form a disguised political 'elite' class of lawyers, but also vulnerable to foster systematic abuse of power by defending vested interests of those in powers. The influence of affluent business lawyers and politically vulnerable lawyers in legal professionalism is a legacy inherited from the west is emerging strongly in legal profession of the developing countries. The legal education in our society is so far largely unheeded to address this problem.

Merely an appearance in the court to defend the client's interest is what is emphasized by the mission of legal aid in a country like Nepal. This should be inherently 'strategic' in nature.

RIGHT TO LEGAL AID AND ACCESS TO JUSTICE:

As it has been discussed above, one can very much see that the legal profession along with the judicial system in Nepal, which might be a truth in other countries in the region too, is predominantly elitist and influenced by stereotyped hierarchical societal structure. The psyche or misconception that the legal profession is an appropriate profession only for elite male has seriously affected the process of induction of commoners into the legal profession. Since the profession is exaggeratingly romanticized as an indicative of high class status. Therefore, its concern with access to justice for all is suspected. Of course, the Bar Associations in SAARC region are found highly sensitive of the civil and political rights. However, their involvement in protection and promotion of the economic, social and development rights of people is negligible. Why it is so? The obvious reason is that the 'civil and political rights' are priority requirements of the elite class. Indeed, no Bar Association can have its meaning in absence of democracy. The larger community's concern, however, is the economic and social rights or justice in absence of which the civil and political rights have no meaning at all. The free legal aid for elite controlled Bar is thus a romanticized phenomenon too- it has been taken by lawyers as their benevolence or greatness. Most importantly, the free legal aid has been an extra bonanza for lawyers to earn recognition of the 'civil society member'. It is also giving an opportunity for leaders of the Bar for pleasure trips of developed countries.

The concern for the community responsive legal education is a point from where the journey of communitarian legal aid starts. This is important and necessary for breaking the misconceptions looming large in the legal profession of countries like Nepal. In this regard, a rightly designed legal aid program should start intervening by popularizing the right of access to justice. The promotion of opportunity for deprived or marginalized class of students to legal education is the pre-condition for institutionalizing the concept of strategic legal aid. The legal aid organizations, the NaLAN in particular, are expected to campaign for this strategic policy. They have to work for collaboration in building an access for the students from these communities.

This approach will play a catalectic to develop community responsiveness legal professionalism. . By ensuring induction of marginalized community into the legal profession and exposing them to the larger interest of the community, this approach will enhance the access of ordinary people to justice. This approach will also contribute to the development of a "pro-bono" or free-legal aid scheme by supplying human resource from the given community. For this objective, the legal aid organizations must effectively press the government to fund the scheme of scholarship to students from marginalized community. NaLAN is conscious of this scheme.

Training and continuous legal education for lawyers is equally important approach to strengthen 'pro-bono' or free-legal aid scheme. This approach would inspire lawyers to transform their traditional attitude to the legal profession and also volunteer to take initiatives of defending the needy persons. The role of Bar Council is important in this regard. Hence, legal aid organizations under the umbrella of NaLAN should negotiate with the Bar Council of Nepal to promptly take this initiative.

NECESSITY OF NETWORKING OF LEGAL AID LAWYERS AND ORGANIZATIONS

An effort for legal aid organizations is crucial for expanding the concept as well as activities concerning pro-bono legal aid. With this idea, CeLRRd in partnership with Danish Institute for Human Rights (DIHR) embarked into an action of developing a national network of legal aid lawyers. While this network has now taken a concrete shape, its functional efficiency is yet to be strengthened. This network is expected to be instrumental in bringing young and energetic lawyers and legal aid organizations in working relation. The prime objective of the network is to

- Use of international human rights instruments in courts for defending rights of people
- Promote special responsibilities and code of conducts of legal aid lawyers, with focus on public defense system
- Strengthen special skills of legal aid lawyers
- Update managerial skills required for effective implementation of the legal aid scheme, and
- Popularize the voluntary participation of professional law practitioners to engage in pro-bono legal aid service of the marginalized and needy people.

The network, however, has not been fully instrumental in bringing legal aid organizations in an effective platform of collaboration. Therefore, it should venture to build collaboration for institutionalizing the pro-bono legal aid.

CONCLUSION AND RECOMMENDATIONS

It is viewed that 'the development of a community based legal aid scheme' is dependent on multi-dimensional approaches. The positive and pragmatic change in the meaning and dimensions of the legal professionalism is a pre-condition. The legal education system of Nepal, the one provided by the government controlled colleges in particular, is a major factor for importing colonial elitist notion of legal professionalism. The notion needs to be addressed by strengthening an improved, scientific and contextual legal education system.

As everybody knows, the government, in a country like Nepal, is hardly interested to invest in sectors of social reforms, especially in those areas which demand for rights based approach. Investment in such sector is considered 'non-productive' and 'non-developmental'. Most of the legal aid programs are thus funded by foreign donors, which necessarily bring their agenda and priorities in disregard of the needs of beneficiaries. On the other hand, any projects that are depended on foreign donors are ended once the funding is stopped. The legal aid program implemented by Nepal bar Association is a right example, which is still dependent on the funding by Norwegian Bar Association. Hence, the legal aid movement in Nepal should strategically advocate for increased funding and institutionalization of the pro-bono legal aid scheme as a duty of the State. As a matter of fact, the pro-bono legal aid mission should not be viewed as a project- it should rather be necessarily viewed as a right of access to justice. .

As an entrenched ideology, the pro-bono legal aid is based on the concept of benefit of the larger community that has been neglected or marginalized. It is the benefit of the people that works as the 'driving force' of the pro-bono-legal aid. In no way, it is a

paradise of the lawyers to 'career advertisement'. This issue needs to be effectively discussed followed by a comprehensive code of conducts of the pro-bono-legal aid lawyers.

No legal aid scheme is possible to be sustainable without addressing the 'contextuality' of the legal profession. The 'romantic objectives and paradigms' of the legal profession in our region are an obstacle for the development of 'communitarian legal professionalism'. The legal aid mission must take this problem seriously.

Preparation of young generation of lawyers to take the 'socially responsive' legal professionalism is a beginning to build a plausible edifice of the legal aid mission. This approach necessarily calls for definition of legal aid as basic human rights. The new generation of lawyers, therefore, needs to be trained in this line. NaLAN in future is recommended to work simultaneously to promote young generation of lawyers for pro-bono legal aid service as well as to launch a mission of integrating pro-bono legal aid into the campaign of promoting human rights and addressing the culture of impunity.