NOTES AND COMMENTS

LEGAL AID—LITIGATIONAL OR EDUCATIONAL· AN INDIAN EXPERIMENT

IN THE traditional sense legal aid is understood as financial assistance to a person who wishes to assert or defend his rights in a court of law and who would not be able to do so without such assistance in view of his financial means. An experiment in India, started in 1981, aims at what has been termed strategic or preventive legal aid.

There are several practical aims of such a legal aid scheme which is being administered by the Committee for Implementing Legal Aid Schemes (CILAS), appointed by the Government of India in 1981, whose chairman is Justice P. N. Bhagwati, Chief Justice of India. Perhaps the most important among such aims is the creation of an awareness among the poor as to their rights and provision of mechanism for the implementation of those rights. As if to stress the urgency of the task or the educational and confrontational aspect of his function, Justice Bhagwati in his capacity as chairman of the CILAS says: "We must constantly remind ourselves that if we do not bring about revolution through law, there may be revolution against law."[1]

Among the tasks of the Indian legal aid movement have been stated the following which seek to provide a philosophical justification or *raison d'etre* of the movement:

> 1. Changing the attitudes of lawyers, judges and law enforcement agencies towards the poor and the exploited and ... social action groups ... engaged in promotion and protection of such people.
> 2. Suggesting, upon adequate reflection and analysis, changes in the structure and functions of legal institutions in ways which would prevent legal processes and systems from becoming an engine for oppression of the poor and weaker sections of the society.
> 3. Identifying programmes and organisations (governmental and non-governmental) which are endeavouring to foster self-reliance, rights conciousness, and organisation of the weaker sections of the society. ...
> 4. Working out ways and means by which legal services programme could effectively relate itself to the fulfilment of basic minimum needs programme... .[2]

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1. "From the Chairman", *Legal Aid Newsletter* 2 (August 1981).
2. Upendra Baxi, "Report of a Workshop of Social Action Groups on Implementation of Legal Services Held on 8 & 9 May, 1981 (New Delhi)", in *id.* at 12.

These are all worthwhile objectives but the strategy of social action groups should not be allowed to pass without comment. This strategy, imported from the United States, can be useful so long as it is related to Indian needs and aspirations. In any case if a pressure group seeks to exert some influence over those who oppress the poor, the peculiar Indian context demands not Marxist or other type of confrontation but harmonisation with the village and urban hierarchy on the basis of changing their hearts. It is through this method alone that attitudes of the lawyers, judges and law enforcement agencies can be changed. And it is for this reason that on the one hand a non-political approach such as that of *Sarvodaya* (welfare of all) is peculiarly suited for India because of the Indian genius; on the other hand, the social action group strategy, as its adherents would readily admit, is, like Marxism, political from the beginning to the end. The latter may be equally suitable. But a lawyer cannot afford to ignore the vital socio-economic picture of India which is heavily over-populated and which is acutely short of natural resources including land, and so is heavily dependent on other countries for raw materials such as oil and most sources of energy. No amount of social activism can overcome such problems which become apparent on a macro-analysis of the socio-economic picture of India where a population of the size of Australia is being added every year in the face of such scarcity of resources. It would thus be better if such macro-analysis and consequent remedial measures were to find adequate place in the dicussion of the CILAS on strategic or preventive legal aid and on the socio-economic conditions of India to which reference has often been made by it.

Thus, it is stated by the chairman of CILAS that having regard to "the socio-economic conditions" prevailing in the country, court-oritented or litigation-oriented programme is wholly inadequate. He goes on to state the following as practical aims of a preventive legal aid programme:

First, promotion of legal literacy and creation of legal awareness among the weaker sections of the community. "It is only through an awareness af rights and benefits conferred by law on citizens that the poor can assert their rights and repel any attacks against the suppression of rights.

Second, organisation of legal aid camps by the state legal aid boards for carrying legal services to the door steps of the people.

Third, training of para-legal persons for the purpose of providing support to the legal aid programme. A crash training programme for training women social workers. Creation of a cadre of bare-foot lawyers who support the legal aid network so as to bring justice to the poor and, in turn, provide feed-back to the respective state legal aid boards.

Fourth, setting up legal aid clinics in universities and law colleges with a view to utilising the untapped resources of the student community in constructive channels for providing aid to the poor. Introduction of the subject of Law and Poverty in LL. B. curriculum with the active support

and co-operation of the Bar Council of India. Students must be exposed to "the socio-economic realities" of Indian life and of the use of law for the improvement of the lot of the common man and as "an instrument of socio-economic change."

Fifth, the use of law for public interest litigation through class action.[3]

Again, these are all attractive and worthwhile objectives. Yet it must be stated that an ordinary LL.B. student in India is already exposed to socio-economic realities of India in the macro-analytical sense described adove. Similarly, creation of legal awareness as to one's rights is attainable only if the aforesaid long-term and macro-aspects are kept in view. Otherwise, if philosophical aspects are overlooked, the remedy may not produce a *lasting* solution and attacks on the poor will be seen to recur precisely because the content of such rights is seen in a narrow pedantic sense and not in a truly socio-economic sense. Finally, public interest litigation through class action is not unknown in other countries. It is of course effective in India in bringing problems of sections of the poor before the courts, an example being the case of *Sanjit Roy* v. *State of Rajasthan*[4] which established that forced labour prohibited by article 23 of the Constitution includes not only physical or legal force but force arising from the compulsion of economic circumstances which leave no choice of alternatives to a person in want and compels him to provide labour or service even though the renumeration received for it is less than the minimum wage set by law. And this position is strengthened by the Supreme Court's radical extension of the doctrine of *locus standi* so as to include even letters by an aggrieved individual *or* any other citizen having sfficient interest as a legitimate basis for acceptance and consideration as a writ petition by the court especially when the aggrieved individual is unable, socially or economically, to pursue his case.[5] The effectiveness of this strategy of course remains despite the immense socio-economic problems facing the hugely overpopulated country.

In defence of preventive legal aid the CILAS says that "the traditional legal service programme can function effectively only if there is real legal equality and that in its turn presupposes relative social and economic equality."[6] Does this mean that in the United States and the United Kingdom, where large social and economic inequalities exist, there is no legal equality and traditional legal aid programme does not work? Further, it is said that the traditional legal aid fails to realise that unjust social structure causes violation of human rights of the poor and hence injustice.

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3. See *Legal Aid Newsletters* (September 1981-March 1982).

4. A.I.R. 1983 S.C. 328. See also *People's Union for Democratic Rights* v. *Union of India*, A.I.R. 1982 S.C. 1473.

5. *S.P. Gupta* v. *Union of India*, A.I.R. 1982 S.C. 149 at 189, 194; *People's Union for Democratic Rights*, *id.* at 1483.

6. "From the Chairman", *Legal Aid Newsletter* 1 (November 1982).

Quite rightly the expression "human rights" is presumably meant to refer to such basic rights as right to life, right to freedom from torture, right to freedom from inhuman or degrading treatment, right to freedom of expression and would include the right to means of livelihood in the economic sense. If so, to blame the social structure in the Marxist sense is right but is not enough. People's attitudes are a determining factor in such regard, and a remedy must be found. That consists, as stated earlier, in *Sarvodaya* philosophy of small self-sufficient village republics as a means to community development and not in talking about right to participation and development in isolation as an objective. That is why though it is correct to point out inadequacies of the traditional legal aid and to treat it as concerned merely with corrective justice, one ought to be careful even in talking of distributive justice in the sense of redistributing the existing cake instead of increasing its size to meet the demands of ever-increasing population.

The CILAS keeps on referring to socio economic factors in the context of poverty and the need to restructure socio-economic institutions with a view to removing poverty by making the poor effective participants in the developmental process and to achieve its confrontational aim. According to it: "[The existing law] is willing to strike but afraid to wound powerful sections of the community....Much of the socio-economic legislation...has remained paper tiger without teeth and claws."[7] It is right to point out the role of law in the preservation and protection of socio-economic institutions and it is for this reason that the law has a role to play. Socio-economic institutions cannot be altered simply by legislation. Nevertheless, law has a vital role to play. That objective is attainable also through a long and arduous process of education of the rural and urban elite and this includes education of the bureaucracy with a view to changing its attitude towards the poor. There are no magic solutions. It is this educational process through organisation of seminars and contacts on a person-to-person basis which is vital. It is here that voluntary groups dedicated to achieving a society of self-sufficient local communities through cooperation have a role to play. Such groups ought to be purely educational and can engage in the strategy of confrontation in a peaceful way. This is what the Founding Fathers intended, and rightly so, in view of the success which they as national independence leaders had brought to bear in educating the masses, including the *elite*, in India through cooperation; the non-cooperation movement was an evidence of peaceful and harmonious attitude towards British people and the British Government, even though confrontation existed.

It is correct that the CILAS accepts the significance of the educational process in its task thus: "The educational effort must become a signifi-

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7. *Id.* at 2.

cant factor contributing to the social development of the poor."[8] But why then restrict the educational effort to the poor? What about educating the *elite* and the bureaucracy? The CILAS has obviously not given adequate thought to this aspect of education. Certainly, education of the poor brings in confidence in them and, *inter alia*, an awareness of their legal rights. But education of those concerned with implementation of those rights can be equally important. On such a view its suggestion for corporate lawyers to participate "in a type of dialogue with their clients not only in one-to-one situations but also through trade associations and common groups" seems useful tactically if regard is had to the need for "instilling" in the poor "confidence in the legal process and capacity to use legal process for solving their problems and advancing their interests". However, its usefulness is limited by the fact that the use of the legal process is peripheral to social and economic problems of the poor which need a much wider perspective for their resolution. Nevertheless, a recognition of the importance of education is clearly right on the part of the CILAS.

The CILAS' stress on participation of the poor in the development programme has already been considered. But its emphasis at the same time on self-reliance as a virtue to be inculcated needs elucidation because while participation easily fits in with the confrontational strategy of a social action group, self-reliance is a peculiarly Indian quality in the Gandhian sense of full and free development of the individual acting in cooperation with others on a free and equal basis. The point is that glorification of participation may not be easily reconcilable with the strict doctrine of individual self-reliance which even in the West has its curious counterpart in the *laissez faire* doctrine of the present British Government. The word 'glorification' is consciously used because ordinary participation can be and is consistent with self-reliance. It is only when participation is designed, as those who support strategic legal aid *seem* to do, to an excessive degree that difficulties arise, for then every loan or improvement, hand pump or primary school is seen to have political implications.

The merit of preventive legal aid is that it stresses the principle of accountability at the local level on the basis of correct information as a precondition of a successful plan. Yet this connot be done without bringing about a conflict situation between the hierarchy (Establishment) and the rural and urban poor. Roy,[9] a social activist in India, thus seems to be on the right path when he says: "We know that fundamental change is not possible without conflict with the powers that be but we believe that this must be faced. We disagree about the timing of the inevitable conflict...."[10] The "conflict" theory, however, seems to assume that

8. "From the Chairman", *Legal Aid Newsletter* 2 (February 1983).
9. Of Tilonia Social Work and Research Centre.
10. Bunker Roy, *The Listener* (7 July 1983).

there are no benefits which the government has conferred on the village and urban poor. Here one could point out the rural development plans since Independence which at least to some extent have contributed to the well-being of villagers. All of them have not been useless. To assume that *no* benefit has accrued from government plans because of alleged malpractices of village officials thus seems to be an exaggeration.

If the CILAS is to succeed in the long run its terms of reference ought to emphasise cooperation among social activists and conflict with the hierarchy as the cornerstone of its philosophy. If such a view of its functions is taken, then it would be possible to develop *lasting* liberal democratic institutions of the Western type in India. The irony is not that the diagnosis by CILAS of the ills of India is accurate or that the same cannot be said of its cure; it is that the hierarchy still does not see its way. Thus, Dhavan is right to emphasise the point that lives of the disadvantaged are caught up with legal artefacts like the police, land registration, credit distribution, access to facilitative resources and the conditions which determine the bondage of their labour.[11] He goes on to speculate whether the state in India will allow social action groups to house their optimism in such adjudicative processes. One hopes the state will allow. Moreover, as he says, the CILAS should abandon a narrow black letter view of law for a much wider view which concerns itself with what law actually means at social level, the institutions through which it operates and the ideology which it generates.[12] For this purpose a central information and resource centre and a drawing together of various groups to share resources, insights and strategies have been suggested respectively by Marc Galanter and Dhavan.[13] It is thus right to be active in one's conduct in the sense of passive resistance in defence of one's rights collectively just as the *Chipko* movement (where women bound themselves to trees in order to prevent contractors from cutting trees down) does. There is every sense, therefore, in, as Dhavan says, not "de-emphasizing any of the limitations and suspicions of the new legal activism" and in recognising that the Indian state needs to be "negotiated" at several ideological and institutional levels, not by middle class entrepreneurs but by the disadvantaged themselves.[14] On the credit side, the Indian legal activism and the legal aid movement has contributed to Indian jurisprudence by emphasising that pure legal positivism cannot resolve problems of the poor. And it has given new emphasis and new priority to the expectations of the poor from the legal system.

On reflection it would appear that a policy of educating the poor

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11. Rajeev Dhavan, "Managing Legal Activism: Reflecting on India's Legal Aid Programme", p. 19 (1984) (unpblished paper).
12. *Id.* at 26.
13. *Id.* at 28.
14. *Id.* at 31.

in their legal rights and entitlements and of training the social action groups with a view to acting in conflict with the village and urban hierarchy (Establishment) is basically correct. For the hierarchy in the Indian society, including the bureaucracy, is so constituted that it does not understand any other language and so is unable to give effect to the legal rights and entitlements of the poor in any other way so as to attain the objectives of directive principles of state policy under the Constitution concerning social justice including redistribution of the material resources of the community. The CILAS and Roy and other social activists are thus basically right in their emphasis on a policy of bringing about a conflict situation which makes the Establishment adopt the correct attitude towards the poor. Similarly, public interest litigation, though it is necessarily of an *ad hoc* nature, is not only educational but it also compels the Establishment as a whole to treat the poor as human beings with the dignity to which they are entitled, as the test cases relating to forced labour clearly seek to do by exerting deterrent effect on all employers and preventing them from exploiting cheap labour. The Indian experiment needs to be given every encouragement and assistance by lawyers, judges and all right-thinking persons interested in seeing that justice is done to the poor. For it has identified the issues accurately and has adopted the right strategy through the concept of strategic legal aid or of preventive legal aid. Any criticisms of such aid in this paper are thus intended to be constructive with a view to promoting the task of the CILAS.

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