

## Right To Legal Aid in India: A Critical Appraisal

**Dr. Bal Krishan Chawla**

**Lecturer, Seth G.L. Bihani SD Law P.G. College, Sri Ganganagar, Rajasthan,  
India.**

**Mrs. Shilpa Kwatra Chawla**

**Lecturer, Sacred Heart Convent School, Sri Ganganagar, Rajasthan, India.**

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### Abstract

*India is a democratic state where the rule of law is fundamental principle in its governance and is important since for the preservation of prevail. The importance of legal aid assumes a new dimension due to the fact that India is a developing country and in order to confront the problems, impediments and difficulties faced on the way to development and grown, legal aid for the poor and the destitute and deprived members of the society is an indispensable part of the system. The Constitution of India guarantees certain rights which are fundamental for the very existence and survival of the human beings. The preamble of Constitution of India itself spells out the various ideals. One of the ideals is Justice: social, economic and political. Article 39-A also casts a positive duty upon the State to provide and secure the justice to all and to ensure that justice is not denied because of economic and other disabilities. In consonance with the said Article 39-A of the Constitution of India, The Legal Services Authorities Act, 1987, which came into force on 09.11.1995, was enacted to provide free and competent legal services to the weaker sections of the society and to ensure that opportunities for securing justice are not denied to any citizen by reasons of economic or other disabilities. This paper is aimed to analyse the law and law and practice in relation to legal aid and the role of the Apex Court for protection of the right to legal aid in the present scenario with authentic references and case law.*

### Introduction

Legal aid constitutes an important part of the general notion of equal justice, equality before law and equal protection of law. The Constitution of India gives much emphasis on the intuitionism and rule of law. Even the Government is to function under the Constitution. The rule of law plays important role in the

administration of the country. It provides protection to the people against the arbitrary action of the administration. It provides protection to the individuals from unlawful action of the Government and its officers by compelling them to exercise their powers in accordance with the law. In India, the rule of law is regarded as a part of the basic structure of the Constitution<sup>1</sup> and also of natural justice. Free legal aid has been held to be necessary adjunct of the rule of law. If the poor persons fail to enforce their rights because of poverty, etc. they may lose faith in the administration of justice and instead of knocking the door of law and Courts to seek justice, they may try to settle their disputes on the streets

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<sup>1</sup> Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 SC. 2299

or to protect their rights by the muscle power and in such condition there will be anarchy and complete dearth of the rule of law.

Thus, legal aid to the poor and weak person, are necessary for the preservation of rule of law which is necessary for the existence of the orderly society. The Law Commission' has rightly observed that unless some provision is made for assisting the poor man for the payment of Court fees and the lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice. Thus, for the preservation of rule, law, and democracy and for making the Fundamental Rights including of right to equality and equal justice meaningful the legal aid to the poor and weak persons is necessary. This fact has been taken into consideration by the Court and it has been made clear that the right to free legal aid is included within the meaning of right to life and personal liberty under Article 21 of the Constitution of India.

With the establishment of modern liberal democracies beginning 20<sup>th</sup> Century, the case for equal justice became all the more crucial, particularly in the developing and under – developed world. It was realized that unless nations included equal justice and their constitutional obligation and work towards its realization zealously, equal justice would remain a glorious myth for the poor and the illiterate people. It was because of this that the question of equal justice and its variants as legal aid, prompt justice, cheap justice etc. became serious issues of discussion and deliberation and were ultimately given constitutional or legal status in many countries.

### Concept and Meaning of Legal Aid

Legal aid means giving to persons of limited means gratis, legal advice and legal assistance in civil and criminal matters in the courts of law. Its primary object is to make it impossible for any man, woman or child to be denied equal protection of the law simply because he or she is poor. Legal advice is co-related with legal aid. But legal advice is quite independent of any legal proceeding in any court of law or tribunal. Its nature is not only remedial but has preventive potential also.<sup>2</sup> Legal aid has been taken to mean the organized effort of the Bar, the community and the Government to provide the services of lawyers free or for a token charge to persons who cannot afford to pay lawyer's fee.<sup>3</sup>

The New Encyclopedia Britannica defines legal aid as: "The professional legal assistance given, either free or for a nominal sum, to indigent persons in need of such help. In the words of Justice P.N. Bhagwati :

*"the legal aid means providing an arrangement in the society so that the machinery of administration of justice becomes easily accessible and is not out of reach of those, who have to resort to it for enforcement of the rights given to them by law. In such an arrangement the poor and the illiterate should be able to approach the courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts."*<sup>4</sup>

Thus, legal aid is a social assistance or help extended to the one who is facing a legal problem but cannot afford, being handicapped by his scarce means and resources, to stand equal to his opposite party in his exercise to get justice. Legal aid has now been accepted as a function of the welfare state which implies affirmative action from the State, providing effective access to individuals and groups to avail themselves of legal entitlements. Legal aid is a service of the lawyers in gratis to the clients who do not have means to afford for litigation. If, poor persons are unable to approach the courts; it could be denial of equal protection of the law, simply because the aggrieved person has no means to

<sup>2</sup> B.N. Mani Tripathi, Jurisprudence, 357-58 (2002).

<sup>3</sup> The New Encyclopedia Britannica, Vol. VI, 122 (1974)

<sup>4</sup> Government of Gujrat, Report of the legal Aid Committee, 5 (1971).

approach the court. Hence legal aid has now been recognized as an essential part or function of the administration of justice particularly in democratic and socialistic structure of society and polity.

## **A. EXISTING PROVISIONS OF LEGAL AID**

### **Constitutional Provisions**

Preamble to the Indian Constitution invokes Justice-social, economic and political as the core principle. The innate relation of legal aid and justice accords the preamble as a strong citadel of legal aid. Equality, life and personal liberty and rule of law conjointly constitute a strong justification for the provision of legal aid to the indigent person. Article 14 of the Indian Constitution lays down the most fundamental postulate of legal aid that envisions "equality before law" and "equal protection of laws". Equality before law presupposes equality of access to court and equal protection of law is the corollary of the first. "Equality in the administration of justice" is said "to form the basis of our Constitution". Article 21 ordains that right to life and personal liberty cannot be taken away without the procedure established by law. The procedure is "just, fair and reasonable"<sup>5</sup> when it fulfils the demands of natural justice. A procedure can be just, fair and reasonable only when equal representation is guaranteed to the indigent through legal aid before the court of law. Article 22(1) guarantees "right to consult and to be defended by a legal practitioner of choice" to every person recognizes the indispensability of legal aid to an arrested person. The common cause of Articles 38 and 39 offers sounder justification for legal aid. Article 39A providing for "Equal Justice and Free Legal Aid" obligates the state "to provide legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".

The constitutional scheme providing for legal aid emerges from the substratum of the preamble, Articles 14, 21, 22(1), 38 and 39 but the direct provision for legal aid is couched in Article 39A. The right of an arrested person to be represented by a counsel was declared to be a fundamental right under Article 22(1) but no obligation was read under the Article on the state to provide counsel to an indigent accused as a matter of right. The right was interpreted in affording necessary opportunity to an accused person to engage a counsel if he so desires.<sup>6</sup>

Article 30A: Access to Courts and Tribunals and Speedy Justice:

- (1) Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent court or, where appropriate, another independent and impartial tribunal or forum.
- (2) The right to access to court shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunals or other for a and the state shall take all reasonable steps to achieve the said object.

## **B. STATUTORY PROVISIONS AND SCHEMES**

### **1. The Criminal Procedure Code**

The Criminal Procedure Code and the Civil Procedure Code also contain provisions in relation to the free legal aid. Section 304(1) of the Criminal Procedure Code provides that where in a trial before the Court of Session, the accused is not represented by a pleader and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defense at the expense of the State. Section 304(2) provides that the High Court may, with the approval of the State Government make rules for the mode of selecting pleaders for defence under aforesaid sub-section (1) of Section 304, the facilities to be allowed to such pleaders by the Courts, the

<sup>5</sup> Menka Gandhi Vs. Union of India, AIR 1978 SC 597.

<sup>6</sup> Janardhan Reddy Vs. State of Hyderabad, AIR 1951 SC 217

fees payable to such pleaders by the Courts, the fees payable to such pleaders by the Government and for carrying out the purposes of sub-section (1) stated above.

Sub-section (3) of Section 304, provides that the State Government may, by notification, direct that as from such date as may be specified in the notification that the aforesaid provisions of sub-section (1) and sub-section (2) of Section 304 shall apply in relation to any class of trials before other courts in the State as they apply in relation to trial before the Courts of Session.

Section 304, thus makes it clear that the State is under an obligation to provide legal assistance to a person charged with the offence triable before the Court of Session. It enables the State Government to direct that this provision shall apply in relation to any class of trials before other Courts in the State.

## **2. The Civil Procedure Code**

Order XXXIII of the Civil Procedure Code provides in respect of the suit by indigent person. On the application to sue as indigent person is being granted the plaintiff shall not be liable to pay court fee and in case he is not represented by a pleader, the Court may, if the circumstances of the case so requires, assign a pleader to him. This benefit has now been extended to the defendant also. According to Rule 18 of Order XXXIII and the provisions contained therein, the Central Government or State Government may make such supplementary provisions as it thinks fit for providing free legal services to those persons who have been submitted to sue as indigent persons. The Order XLIV makes provisions in respect of appeals by indigent person.

A separate legislation, the Legal Service Authority Act, has been passed so as to provide legal aid to the poor and weaker sections of the society. The provisions of the Act have been stated below.

## **3. Legal Services Authorities Act, 1987**

Legal Services Authorities Act was passed by the Parliament in 1987. It was enforced in November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. Passed against the backdrop of the case noted above, the Act gave a statutory base to legal aid programmes throughout the country on a uniform pattern for providing quicker and cheaper means of "access" for the poor. The Act envisaged establishing a nationwide uniform network for providing free and competent legal services and assistance to the weaker sections of the society on the basis of equal opportunity. The Act also ensured that opportunities for securing justice were not denied to any citizen by reason of economic or other disabilities. It provides for the constitution of a National Legal Services Authority and a Supreme Court Legal Services Committee for the Centre, State Legal Services Authority and a High Court Legal Services Committee for each State, District Legal Services Authority and a Taluka Legal Services Committee for every district.

One of the important achievements of the Act was that it established Lok Adalats (People's Courts) whose aim was to make justice accessible to the most common man by resolving disputes by compromise and settlement. It ensured that the operation of legal system promoted justice on the basis of equal opportunity. Lok Adalats have its roots in the history and culture of India. The introduction of Lok Adalats, or public Courts, gave a renewed strength to the justice delivery apparatus of India and gave a new platform to the underprivileged litigants to approach these courts and get their disputes settled.

### **Who are entitled to legal Services**

According to Section 12 of the Legal Services Authorities Act, 1987 every person who has to file or defend a case shall be entitled to legal services under this Act if that person is –

- a) a member of a Scheduled Caste or Scheduled Tribe; or

- b) a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution; or
- c) a woman or a child; or
- d) a person with disability as defined in clause (i) of Section 2 of the persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995; or
- e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethical violence, caste, atrocity, flood, drought, earthquake or industrial disaster; or
- f) an industrial workman; or
- g) in custody including custody in a protective home within the meaning of clause (g) of Section 2 of the Immoral Traffic (Prevention) Act, 1956 or in a children home within the meaning of clause (e) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000, or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of Section 2 of the Mental Health Act, 1987;

Or

- (h) in receipt of annual income less than nine thousand or such other higher amount as may be prescribed by the State Government if the case is before a Court other than the Supreme Court and less than twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court. Rule 12 of the National Legal Services Authority Rules, 1995 makes provision in relation to the upper limit of annual income of a person entitling him to legal services under clause (h) of section 12 if the case is before the Supreme Court.

Under The Legal Services Authorities Act, 1987 every citizen whose annual income does not exceed Rs. 25,000 is eligible for free legal aid in cases before subordinate courts and high courts. In cases before the Supreme Court, the limit is Rs. 50,000. This limit can be increased by the State Governments. Limitation as to the income does not apply in the case of persons belonging to the scheduled castes, scheduled tribes, women, children, mentally ill, disabled person, a victim of trafficking in human beings, victim of atrocity, flood, drought, earthquake or industrial disaster, an industrial workman, in custody, including custody in a protective home or in a juvenile home or in a psychiatric hospital or psychiatric nursing home.

#### **4. The Advocate Acts 1961**

The Bar Council of India rules accordingly cast a duty on every advocate of the country to render legal aid, Rule 41, under section VI provides as under. "Every advocate shall in the practice of the profession of law bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he can not pay for it fully or adequately and that within the limits of an Advocate's economic conditions, free legal assistance to the indigent and oppressed is one of the highest obligation an Advocate owes to society".

#### **5. Legal Aid and the Role of NALSA**

Over the years, NALSA has played a significant role in institutionalizing legal aid in India for the poor and powerless people. It has formulated a number of schemes to bring the poor people in the mainstream of national life and provide them with easy access to justice. NALSA implemented a 'Legal Aid Counsel Scheme' to enable legal assistance to the under trial prisoners who, due to the want of resources or other disabilities, cannot engage a counsel to defend them. Under the Act, now an under trial will have the right to be provided with a Legal Aid Counsel who will be attached to each Magisterial court. Legal Counsels provide assistance and defend a person who is not able to engage a counsel from the very beginning of the case, that is, from the time he or she is produced in a court. With the amendment of the Legal Services Authorities Act, 1987, now permanent Lok Adalats have been established under Section 19 of the Act in all the districts of the country. Under this scheme, the

Lok Adalat, are now organized regularly at designated venues, even away from court complexes and the cases which remain unsettled are taken up in the next Lok Adalat. Lok Adalats have thus acquired permanency and continuity and are no more occasional. Apart of this NALSA has enacted a counseling and conciliation scheme, legal aid camps, legal aid clinics and legal aids schemes and celebrating legal services day of awareness of legal aid.

### C. Judicial Pronouncements and Right to Legal Aid

Legal aid and speedy trial have now been held to be fundamental rights under Article 21 of the constitution available of all person and enforceable by the courts of India. Trough various pronouncements, the Supreme Court of India has been successful in creating legal aid jurisprudence and helping the poor people of our country. The role of the judiciary, of course is primarily to ensure the most effective and proper implementation of Rule of Law begins from the protection of fundamental Rights. The credibility of the judicial process and public faith in it is an index of civilization. The Apex Court has construed domestic laws in the light of the provisions of International Covenants which India has ratified.

- (a) In **Maneka Gandhi Vs. Union of India**<sup>7</sup> the court held that the procedure under Article 21 which deprived a person of his life or liberty should be just, fair and reasonable. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as just, fair and reasonable. It is only a lawyer who is conversant with law who can properly defend an accused. Further the court said that the provision relating to fundamental rights should be interpreted widely; Bhagwati, J., said:

*"The attempt of the court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction."*

- (b) In **Hussainara Khatoon Vs. Home Secretary, State of Bihar**<sup>8</sup> the supreme Court has observed that it is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty or indigence, to have free legal services provided to him by the state, and the state is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require. The court further held that if free services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 of the Constitution.
- (c) In **Sheela Barse Vs. State of Maharashtra**<sup>9</sup> the court held that legal assistance at the cast of the state should be given to indigent persons under police custody also, besides the under trials and convicts which is a constitutional imperative by Article 39-A and also by Article 14 and 21 of the Constitution.
- (d) In **Suk Das Vs. Union Territory**<sup>10</sup> the Court held that the bulk of the Indian people living in rural areas are illiterate and are not aware of their rights. Even literate people do not know what their rights are under the law. In the circumstances, it would make a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service. "Legal aid would be an idle formality if it was to depend upon a specific application by such poor or ignorant person for such legal assistance."

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<sup>7</sup> AIR 1978 SC 597

<sup>8</sup> AIR 1979 SC 1322

<sup>9</sup> AIR 1983 SC 378

<sup>10</sup> AIR 1986 SC 991

- (e) In **Ajmal Mohammad Amir Kasab @ Abu Mujahid Vs. State of Maharashtra**<sup>11</sup> A Bench of Justices Aftab Alam and C.K. Prasad gave this direction while upholding the death sentence handed out to Ajmal Kasab, the key accused in the Mumbai 26/11 terrorist attack case. The Apex Court observed:

*"The right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a Magistrate. It is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. All the Magistrates in the country are directed to faithfully discharge the aforesaid duty and obligation. It is further made clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings."*

Thus the implementation of rule of law is the basic responsibility of judiciary and it is the obligation of the judiciary to see that every aspect which is essential for proper implementation of rule of law ought to be taken care of. So far as criminal justice system is concerned every case which comes under the criminal justice system has to be tried fairly.

## CONCLUSION

The available provisions of legal aid, as we make out from our afore-going discussion, can be found by the Indians in the preambular objective of imparting social, economic and political justice, the fundamental rights bestowing right to equality before law and the equal protection of laws, the right to life and personal liberty which cannot be taken away except by a reasonable, fair and a just procedure established by law – the right embracing within itself the right to legal aid, otherwise provided as a directive principle of state policy, and a right to speedy justice, the right to counsel of one's choice in criminal proceedings and an easy flow of the benefits of constitutional rights to the poorest of the poor through the instrument of social action litigation. The right to a counsel at state expense is also statutorily available to an accused unrepresented by counsel in a session trial. The indigents are also entitled for free legal aid in civil cases. The schemes and statutes of the state governments, under the directive of Art. 39-A, provide for legal aid to the economically poor or socially deprived people through the state legal aid committees provided that such a poor qualifies the means test and has a prima-facie case. Speedy justice and an enduring one is delivered through Lok Adalats in all legal cases, pending in the law courts, when the parties decide to enter into a promised settlement. In a good number of legal matters, excluding the matrimonial, which are not of very serious nature or those involving heavy amounts, conciliatory, enduring and on-the-spot justice is also delivered in the villages of India through the medium of gram panchayats. Legal education and awareness are also a part of the available provisions of legal aid in India, which is dispensed by the state committees associating, to a limited extent, the voluntary organisations and the weaker groups of Indian population. To which extent the available provisions of legal aid in the Indian society are in congruence with our needs and aspirations also requires to be matched and measured.

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