

# **BALL.B 10<sup>th</sup> semester, School of Law, KU**

## **Legal Aid:**

### **Concept of Legal Aid and Constitutional Mandate; Historical Perspective of Legal Aid in India**

#### **The Concept of Legal Aid and Constitutional Mandate**

Legal Aid implies giving free legal services to the poor and needy who cannot afford the services of a lawyer for the conduct of a case or a legal proceeding in any court, tribunal or before an authority. Legal Aid is the method adopted to ensure that no one is deprived of professional advice and help because of lack of funds. Therefore, the main object is to provide equal justice is to be made available to the poor, down trodden and weaker section of society. In this regard Justice P.N. Bhagwati rightly observed that:

“The legal aid means providing an arrangement in the society so that the missionary of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of its given to them by law, the poor and 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. Legal aid should be available to the poor and illiterate, who don't have access to courts. One need not be a litigant to seek aid by means of legal aid.”

Therefore, legal aid is to be made available to the poor and needy by providing a system of government funding for those who cannot afford the cost of litigation.

Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society. It is worthy to mention that the Constitution of India provides (Art 39), that State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. Constitution of India also makes it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all (Articles 14 and 22(1) of the Indian Constitution).

The Supreme Court of India got a major opportunity to make an emphatic pronouncement regarding the rights of the poor and indigent in judgment of *Hussainara Khatoon V. St of Bihar* (1980)1SCC98, where the petitioner brought to the notice of Supreme Court that most of the under trails have already under gone the punishment much more than what they would have got had they been convicted without any delay. The delay was caused due to inability of the persons involved to engage a legal counsel to defend them in the court and the main reason behind their inability was their poverty. Thus, in this case the court pointed out that Article 39-A emphasized that free legal service was an inalienable element of reasonable, fair and just‘ procedure and that the right to free legal services was implicit in the guarantee of Article 21.

Two years later, in the case of *Khatri v. State of Bihar* ( AIR 1981 SC 262.), the court answered the question the right to free legal aid to poor or indigent accused who are incapable of engaging lawyers. It held that the state is constitutionally bound to provide such aid not only at the stage of trial but also when they are first produced before the magistrate or remanded from time to time and that such a right cannot be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. Magistrates and Sessions Judges must inform the accused of such rights. The right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require. The State cannot avoid this obligation by pleading financial or administrative inability or that none of the aggrieved prisoners asked for any legal aid.

In *Suk Das v. Union Territory of Arunachal Pradesh* (AIR 1986 SC 991) , Justice P.N. Bhagwati, emphasized the need of the creating the legal awareness to the poor as they do not know the their rights more particularly right to free legal aid and further observed that in India most of the people are living in rural areas are illiterates and are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness they are not approaching a lawyer for consultation and advise. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant and they cannot even help themselves. That is why promotion of legal literacy has always been recognized as one of the principal items of the program of the legal aid movement in the country. I would say that even right to education would not fulfill its real objective if education about legal entitlements is not made

accessible to people and our constitutional promise of bringing justice to the door steps of the people would remain an illusion.

Justice Krishna Iyer, had rightly said that :if a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to the Supreme Court for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, the power to assign counsel for such imprisoned individual for doing complete justice‘(M.H. Hoskot v. State of Maharashtra (1978) 3 SCC 81).

It is a statutorily recognized public duty of each great branch of government to obey the rule of law and uphold the constitution by making rules to effectuate legislation meant to help the poor (Order 33, Rule 9A, Code Civil Procedure, 1908.)

Though the law has been enacted to protect the poor the governments are lazy to implement the enacted law. The same was observed by Supreme Court in State of Haryana v. Darshana Devi (AIR 1972 SC 855) , that "the poor shall not be priced out of the justice market by insistence on court-fee and refusal to apply the exemptive provisions of order XXXIII, CPC.

Thus, the system of Legal Aid is principally designed to help the poor, socially deprived and backward classes of our population, who because of their poverty or illiteracy suffer from legal incompetence, i.e., an inability to further and protect their interests through active assertion of legal rights. Therefore, the idea of legal aid, comprehends within its ambit all those measures which are adopted to reduce the legal incompetence of this handicapped section of population. Prof. Menon merits attention as he necessitates the study of legal aid as a dynamic concept which relates law to 'Social Justice.' Taking Legal Aid as an aspect of social justice would mean that it is not only an integral part of administration of justice

through courts but is also related to other aspects dealing with promotion of legal literacy which would help in removing legal incompetence and making the people aware of their legal rights and entitlements.

Equal access to justice, can only be achieved if the weaker sections of the society are provided free legal assistance. It is only then that the constitutional principle of equality before law and equal protection of the Laws can be given a real and purposeful meaning. However, it was not until 1976 that in India, this philosophy of Free legal Service was embodied and given a shape of constitutional obligation in Art. 39-A of the Constitution of India. Article 39-A reads: "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular provide, for Legal Aid, by suitable legislations or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." In other words, the Directive Principles make it obligatory for the State to provide Free Legal Aid to needy and indigent people so that justice is not denied to them merely because of poverty.

Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system, which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that Constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society. Legal assistance is implicit in Article 142 read with Articles 21 and 39A to assign counsel for such imprisoned "individual" for doing complete justice.

The Apex Court caution that now time come for Indian judiciary to sensitize themselves to the need of doing justice to the large masses of people to whom

justice has been denied by a cruel and heartless society for generations (Sunil Batra v. Delhi Administration, AIR, 1978 SC 1675) and made its stand clear that this new change has to come if the judicial system is to become effective instrument of equal justice, for without it, it cannot survive for long.

A separate legislation, The Legal Services Authority Act, 1987 has been enacted to constitute the Legal Service Authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and to organise Lok Adalats to secure that the operation of the legal system promotes justice. The Legal Services Authorities Act establishes statutory legal services authorities at the National, State and District level. It makes provisions in relation to Lok Adalat. The main object of the Lok Adalat is to provide quick justice at less expense.

Legal assistance from State can be claimed as a matter of right, therefore, the word legal- service is being used in place of legal-aid. Legal Services' are of two types: A) Pre-litigation Legal Services and B) Post-litigation Legal Services.

Pre-litigation legal services include: i) Legal education ii) Legal advice iii) Legal Awareness, iv) Pre-litigation settlement etc.

Post-Litigation Legal Services Traditionally legal aid has been provided at post-litigation stage. Post litigation legal services include – appointment of lawyer for indigent, reimbursement of process fee, witnesses' expenditure, court fee etc. by the State.

## **Historical Development of Legal Aid in India**

The concept of providing aid to the people under disability in a judicial process existed very much in the British mind which was further nourished by the global developments and 'socio legal' consciousness. The spirit found formal expressions during the process of codification in British India after the passing of the Charter Act of 1833 and the introduction of the Institute of Law Commission in the year 1834 (Law Commission of India, Fourteenth Report, Vol I, 1958).

In 1878, The Criminal Procedure Code, 1878 was enacted where some leverage was extended to the accused under sec. 340 of the code, acknowledging the right of the accused to be defended by a pleader, i.e. to be engaged by the accused at his own cost. However, under the Criminal rules of practice of High Court, legal aid was available at the states cost to the poor and indigent accused in cases involving capital punishment only.

On the other hand, in the civil processual system of justice, the code of civil procedure 1908, by way of Order XXXIII, provided the provisions of legal aid in the pauper suits without payment of court fees. A person is said to be a pauper when he does not possess sufficient means to enable him to pay the fees prescribed by law for the plaint in the suit.

History records that in 1924, at Bombay, a legal aid society was registered as an outcome of the community efforts of some enlightened, philanthropic lawyers to provide free legal services to the poor. The social consciousness and demand for legal aid in India received a boost when in 1944, a Committee, under the Chairmanship of Lord Rushcliffe, was appointed to enquire what facilities at that time existed in England and Wales for giving legal advice and assistance to the poor persons and to make such recommendations, as appeared to be desirable, for the purpose of securing that poor persons in need of legal advice may have such facilities at their disposal and also for modifying and improving, so far as seems expedient, the existing system whereby legal aid is made available to poor persons in the conduct of litigation in which they are concerned, whether in civil and criminal courts. The Rushcliffe Committee submitted its report in 1945, the main recommendations made therein may be reproduced below :

1. Legal aid should be available in all the courts and in such manner as will enable persons in need to have access to the professional help they require;

2. This provision should not be limited to those who are normally classed as poor but include a wider income group.
3. Those who cannot afford to pay anything for legal aid should receive this free of cost. There should be a scale of contributions for those who can pay something towards costs;
4. The cost of the scheme should be borne by the state, but the scheme should not be administered either as a department of state or by local authorities;
5. The legal profession should be responsible for the administration of the scheme, except that part of it dealt with under the Poor Prisoner's Defence Act;
6. Barristers and solicitors should receive adequate remunerations for their services;
7. The term 'poor' person' should be discarded and the term "assisted person" adopted.

On acceptance of the recommendations of the Rushcliffe Committee, the British Parliament passed the LEGAL AID AND ADVICE ACT 1949. / Encouraged by the appointment of the Rushcliffe Committee in England and submission of report by the Committee on the subject of Legal Advice and assistance to the poor, the dynamic Bombay Legal Aid Society, immediately, in the same year, invited the attention of the Government to the said report and suggested for the appointment of a similar Committee in India to examine the question of legal aid to the poor, and the problem of legal aid.

### ***After Independence***

India became independent on 15th August, 1947 and Constitution of India was adopted on 26th November, 1949 declaring India as a sovereign democratic republic which promised to secure Justice, Liberty, Equality, Fraternity and the dignity of the individual. The Preamble to the Constitution of India solemnly promises to secure to all its citizen : "JUSTICE, social, economic and political; LIBERTY, of thought, expression, belief, faith and worship EQUALITY of status and of opportunity; and to promote among them all. FRATERNITY assuring the dignity of the individual".



The welfare and social justice are the polity of India and the Legal aid is a service, which the modern welfare states owe to its citizens. After independence legal aid has been the subject of inquiry of several high level committee, appointed by the states and the Central Government, some of which are discussed below :

***Report of the Bombay Govt, committee on Legal aid and advice, 1949***

The Government of Bombay appointed a Committee in 1949 under the Chairmanship of Justice N.H. Bhagwati to consider the question of the grant of legal aid. in civil and criminal proceedings to poor persons, persons of limited means and persons belonging to backward classes and to make recommendations for making justice more easily accessible to these persons.

Some of the important opinions and suggestions made by the committee are appended below : a) It is emphasised that legal aid is a service, which the modern welfare state owes to its citizen.

b) The problem of legal aid under modern conception of the obligations of the state is to be treated on a par with other social insurance schemes like old age pensions, free educations, free medical relief and therefore, the state must take upon itself the responsibility of providing legal aid to poor persons and persons of limited means.

c) The Committee recommended that in the extended scheme of legal aid, persons belonging to backward classes and other scheduled Tribes should be presumed to be prima facie entitled to legal aid at the state's cost.

d) It was recommended that legal aid should be given not only to the plaintiff or petitioners or complainants but also to the defendants, respondents and accused in all courts.

e) With respect to the test to be applied before grant of legal aid the committee recommended (i) means test (ii) prima facie case test and laid down the details in this respect.

f) The committee recommended for the creation of a legal aid fund.

g) The administration of the scheme of legal aid should be in the hands of legal aid committees formed for specified areas all over the state.

***Bengal Committee***

The committee considered the question of granting state aid to indigent litigants and the report embodied a complete scheme for legal aid along with valuable recommendations like the Bombay committee.

### ***Law Minister's Conference in 1957***

The question of providing Legal Aid to the poor was raised and discussed at the Law Minister's Conference, held in 1957, where the following conclusion were made :

- i) Each state should formulate a scheme for legal aid to the poor;

- ii) The scheme may envisage appointment of committees at different levels to entertain applications from the poor for legal aid, and to examine whether the applicant have a prima facie case and deserve aid;

- iii) The scheme should enable requisitioning of the services of every member of the bar upto six cases in a year;

- iv) At the experimental stage, the scheme may be framed by executive orders;

- v) Each state should forward to the Ministry of Law the schemes formulated by it.

In 1958 the Law Commission submitted it's Fourteenth report to the Government on reforms of judicial administration where a full chapter was devoted to legal aid. The commission stated : "The rendering of legal aid to poor litigants is not a minor problem of procedural law but a question of fundamental Character. The Commission, headed by Mr. M.C. Sitalvad, made the following important recommendations and suggestions :

1. Free legal aid to the poor persons and a person of limited means is a service, which the modem state and in particular a welfare state owes to its citizens. The state must, therefore, accept this obligation and make available funds for providing such legal aid to poor persons and persons of limited means.

2. The legal profession must in the main, if not entirely, accept the responsibility for the administration and working of schemes of legal aid. This responsibility should be discharged by the profession by organising and by serving on bodies which will render legal aid, and representing in courts poor persons or persons of limited means on the payment of only a proportion of the fees payable on taxation.

3. The legal profession owes a moral and social obligation to poor members of

society, which it must discharge by every member of the profession doing a certain amount of legal work free for poor persons.

4. The scheme for legal aid to poor persons and persons of limited means outlined by the Committee on legal Aid and Advice appointed by the Government of Bombay in 1949 and the scheme, outlined by the West Bengal Committee should with suitable modifications made in the light of local needs and conditions, be adopted by all states as soon as financial conditions permit.

5. The states should, pending the implementation of such schemes, make provisions for legal aid in gradual stages.

6. Measures in furtherance of legal aid ... should be adopted immediately.

7. Bar Associations should take immediate measures to render legal aid on a voluntary basis.

### ***International Commission of Jurists, 1959***

A committee on 'judicial and legal profession under the rule of law' at New Delhi Congress of International Commission of Jurists expressed the view that "the State have an obligation to provide legal aid to those who are unable to pay for it if the rights and remedies of individual under the rule of law were to be given practical reality.

### ***The Central Government Scheme, 1960***

In 1960 the Central Government drew up a scheme for legal aid. the chief features of the scheme were : a) The legal aid scheme should be given statutory force.

The State Governments in a conference of state Law Ministers in 1962 again expressed their inability to bear the financial burden involved in the scheme.

In 1961-1964 the legal aid received attention of the Government in the Report of the Commission for SC and ST where they were identified as a class belonging to lowliest of the low in the socio-economic set up.

### ***National Conference on Legal Aid, 1970***

A conference known as National Conference on Legal Aid, 1970 was convened in 1970 (by the Institute of Constitutional & Parliamentary studies) to consider the matter of Legal Aid and the schemes for the same. In the conference it was agreed upon that there was urgent need of providing legal aid widely and the conference wanted a law for imposing a statutory obligation on the state to provide legal aid to the poor. In the follow up action of the recommendations, made in the National Legal Aid Conference, the Government of India had to introduce in Parliament, in 1970 an Amendment to the Advocate's Act, 1961, (Advocate's Amendment Bill 1970 Bill No. 40 of 1970) whereby the Bar Council was called upon to take the responsibility of legal aid without getting financial assistance from the Government.

***Report of the Expert Committee appointed by Central Government 1973  
(Krishna Iyer Committee)***

The Government of India appointed the Expert Committee on Legal Aid by an order dated 27 October, 1972 under the Chairmanship of Justice V.R. Krishna Iyer for giving suggestions & making recommendations on the issues relating to legal aid viz. : a) to consider the question of making available to the weaker sections of the community and persons of limited means in general and citizens belonging to the socially and educationally backward classes in particular, facilities for :

i) legal advice so as to bring among them an awareness of their constitutional and legal rights and just obligations and for the avoidance of vexatious and unnecessary litigation; and

ii) legal aid in proceedings before civil, criminal and revenue courts so as to make justice more easily available to all sections of the community; b) to formulate, having regard to the resources available, a scheme for legal advice and aid for the purposes aforesaid; and c) to recommend the time and manner in which the scheme may be implemented.

In 1973, a new Criminal Procedure Code, 1973 was, enacted. In the new Code, provision of Section 303 provided that "any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this code, may of

right be defended by a pleader of his choice” and Section 304 was inserted to specifically provide legal aid to the accused having no sufficient means to engage a pleader, at state expense in certain cases.

### ***Central Government Committee, 1976***

In 1976 the Central Government appointed another committee, consisting of Justice P.N. Bhagwati, as Chairman and Justice V.R. Krishna Iyer as member, with a view to establish an adequate and vigorous legal service programme in all the states of the country on an uniform basis. The wider conception of legal aid, as postulated by the committee include:

(i) spreading awareness and consciousness among the poor about their rights and benefits

(ii) treatment of the class problems of the poor such as fighting against all institutions which deny to them participation and share in the income and wealth of the community, fulfillment of basic needs like food and essential requirements, housing problems, allocation of resources for their health and education, criminal law which suppresses them in the name of law and order;

(iii) socio-legal research into the legal and non-legal problems of the poor and

(iv) helping the poor to organise themselves so that they can assert their rights.

### ***Incorporation of Legal Aid in the Constitution of India***

The successive reports of the committees, appointed for study and implementation of legal aid services; conferences; global views; respect for human rights; rapid strides towards achievement of socio-economic goals and social justice, landmark judgements and observations of the Supreme Court in regard to equal justice and providing legal aid as the constitutional obligation of the state, and strong awareness in general of the necessity and urgency of providing legal aid, stimulated the government to give “Legal Aid” a statutory expression in the Constitution.

Following the Swaran Singh Committee’s recommendation, “Free Legal Aid” got specific expression and the constitutional status by 42nd Amendment of the Constitution by incorporating it in PART IV of the Constitution, as an essential

part of equal justice, and therefore, a new and exclusive provision of Article 39A was inserted in 1976. Simultaneously, Entry No. 11A was incorporated in the concurrent list pertaining to Administration of Justice so that both the Central and State Government could legislate on the matters relating to legal aid, imposing constitutional obligations on both the Centre and State. Article 39A states as under: Article 39A : “EQUAL JUSTICE AND FREE LEGAL AID : The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”.

Significantly in 1976 Civil Procedure Code Amendment Act, 1976 was passed, amending widely the several provisions of the Civil Procedure Code including Order XXXIII and XLIV relating to providing legal aid to the indigent persons. The benefits of legal aid, as granted earlier to the indigent plaintiff for instituting suits is now made available to the indigent defendants also by inserting Rule 17 which provides that any defendant, who desires to plead a set off or counter claim may be allowed to set up such claim as an indigent persons. Simultaneously, rule 18 in Order XXXIII, Civil Procedure Code has also been inserted by the said Amendment Act which provides that subject to the provisions of Order XXXIII, the Central or State Government may make such supplementary provisions as it thinks fit for providing free legal services to those who have been submitted to sue as indigent persons.

It may be mentioned that many states, either by statute or by Rules have been providing legal aid to certain categories of litigants from different time since even before the submission of the Gujrat Committee’s report and thereafter. Some of the rules framed by different states making provisions for granting legal aid may be cited as under:

1. Maharashtra Legal Aid to backward Classes Rules, 1963. 2. Pondichery legal aid to the Poor Scheduled Castes Rules, 1971. 3. The Gujrat legal aid Rules, 1972 : Gujrat legal advice Rules, 1972. 4. Jammu & Kashmir Scheduled Castes (Grant of legal aid) Revised Rules, 1971 : J & K legal aid to persons serving in Defence Forces Rules 1973