

Theoretical Understanding Of Free Legal Aid – An Overview**Mrs. Amrita Chakraborty****Assistant Professor In Law****Kolkata Police Law Institute****Alipore****University of Calcutta****(Received:16September2022/Revised:1October2022/Accepted:10October2022/Published:31October2022))****Abstract**

Legal Aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system. Legal aid is regarded as central in providing access to justice by ensuring equality before the law, the right to counsel and the right to a fair trial. Legal aid is essential to guarantee equal access to justice for all. This paper has analyzed the development of legal aid movement in regard to right to legal aid. By the constitutional 42nd Amendment Act of 1976, a new provision was incorporated in the Constitution under Article 39A, for providing free Legal Aid and concept of equal justice found a place in our constitution Article 39A which was incorporated under part IV-Directive Principles of State Policy. By the virtue of judicial interpretation right to free legal aid is the subject matter of Fundamental Right through Article 21 of the Constitution of the India. . The paper analysed international status, entitlement of free legal aid, judicial attitude of free legal aid. The article concludes with certain recommendations for the development of the concept of free legal aid.

Keywords: Right to Legal Aid, Fundamental Right, Constitution, Legal Services Authority Act, NALSA.

Introduction

India is a modern state that has accepted the concept of 'welfare state'. Hence it has to work for the welfare of the general public. It is the function of the State to establish a just social order by enacting just laws and by providing equal opportunity to all to grow. The primary objective of any legal system is to maintain peace and harmony in the country and to deliver justice. Justice means 'fair, reasonable or just'¹. Every Government is constituted to respond to the needs and aspirations of the people and to remove social inequalities among its citizens. This promotes social justice among poor and the downtrodden. The concept of social justice must be the underlying principle in the administration of justice in the country.

Concept Of Legal Aid And Free Legal Aid

¹Andrew Higgins, Legal Aid and Access to Justice in England and India, National Law School of India Review

Legal aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system. Legal aid is regarded as central in providing access to justice by ensuring equality before the law, the right to counsel and the right to a fair trial.

"Pro bono" is the term for free legal help for someone who cannot afford to pay for legal assistance and is not entitled to legal aid. It comes from the Latin **"pro bono publico"** which means **"for the public good"**. Therefore, **Free Legal Aid** means free or expensive legal advice, assistance or representation provided to those who, because to their financial condition, otherwise would not be able to get.

“The Encyclopedia Britannica defines legal aid as phrase which is acquired by usage and court decisions, a specific meaning of giving to person of limited means grants or for nominal fees, advice or counsel to represent them in court in civil and criminal matters.”² Inability to consult or to be represented by a lawyer may amount to the same thing as being deprived of the security of law. “Rawls first principle of justice is that each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberties for all.”³ Legal Aid is the method adopted to ensure that no one is debarred from professional advice and help because of lack of funds. “Thus, the provisions of legal aid to the poor are based on humanitarian considerations and the main aim of these provisions is to help the poverty-stricken people who are socially and economically backward.”⁴

Lord Denning while observing that Legal Aid is a system of government funding for those who cannot afford to pay for advice, assistance and representation said: “The greatest revolution in the law since the post-second World has been the evolution of the mechanism of the system for legal aid. It means that in many cases the lawyers’ fees and expenses are paid for by the state: and not by the party concerned. It is a subject of such importance that I venture to look at the law about costs-as it was-as such it is-and as it should be.”⁵

Constitutional Commitment To Free Legal Aid

Article 14 guarantees equality before law and equal protection of laws. Equality before law necessarily involves the concept that all the parties to a legal proceeding must have an equal opportunity of access to the court and of presenting their cases to the court. For the indigent, who are unable to meet their economic needs, the justice access to the court would remain a

²Part 13 at p. 871, Quoted in Legal Aid Programme in India-A Constitutional Guarantee-AlkaShrivastav

³John Rawls: A Theory of Justice, Universal Law Publishing Co. Pvt. Ltd. Delhi, 2000

⁴Scott, C.H.: Legal Aid Past and Present, A Brief Bleak Picture, pp. 4-5.

⁵What Next in the Law: Lord Denning, London Butterworths, 1982.

myth because their inability to pay court fee and lawyer's fees etc. would also deny him access to the court. Therefore, under Article 14, rendering legal services to the poor litigant is not just a problem of procedural law but a question of a fundamental character. A person does not have the means of obtaining access to a court, justice become unequal. This inequality, instead of being lessened, has enormously increased in a welfare State which has spawned legislation of such complexity that the citizen often finds it difficult to know what his rights are and even more difficult, unless he has ample means, to defend them in a court.

Article **21** asserts the right to life and personal liberty. This right cannot be taken away except by procedure established by law. A procedure is fair and just only when it follows the principles of natural justice. Right to hearing is an integral part of natural justice. If the right to counsel is essential to fair trial then it is equally important to see that the accused has sufficient means to defend them. It has been observed and re-observed by the Apex Court of the Country that an accused person at least where the charge is of an offence punishable with imprisonment is entitled to be offered legal aid, if he is too poor to afford counsel. Further counsel for the accused must be given time and facility for preparing the defense. Breach of these safeguards of fair trial would invalidate the trial and conviction, even if the accused did not ask for legal aid.

Article **22(1)** provides that a person arrested should not be detained in custody without being informed of the grounds for such arrest and should not be denied the right to consult and be defended by a legal practitioner of his choice.

Article **38** urges that the State should strive to promote the welfare of the people by securing and protecting as effectively as it may be a social order in which justice: social, economic and political shall inform all the institutions of national life.

Article **39A** of the Constitution, inserted by 42nd Amendment of the Constitution in 1976, provides for equal justice and free legal aid. It commands the state to secure that the operation of 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 the opportunities for securing justice are not denied to any citizen by reason economic or other disabilities. Article 39 A of the Constitution of India provides for equal justice and free legal aid. It is, therefore clear that the State has been ordained to secure a legal system, which promotes justice on the basis of equal opportunity.

The Constitution provides for the post of an Attorney General of India to offer legal advice to the Union Government. He is appointed and can be dismissed by the President alone.

Likewise provisions are made in the Constitution for the appointment of the Advocate General of a State. He is entitled to attend all legislative sessions and take part in discussions on matters in which expert legal knowledge is required. His duty includes advising Government on legal matters pertaining to his state. These provisions do accord the due status to the legal aid and ample scope for developing legal aid jurisprudence through which human rights culture can be created and social justice can be assured as envisioned by founding fathers of the Constitution.

Legislative Methods Of Providing Free Legal Aid

Government has shown its concern over the existing position of justice delivery system. It has acknowledged the fact the poor and underprivileged sections of society have suffered the worst under the present system. There is a need for free legal aid to poor has been realized. Therefore it has incorporated legislative actions such as the **Legal Services Authorities Act, 1987** and set up bodies such as NALSA and SCLSC to ensure free legal aid to poor and under privileged.

The Legal Services Authorities Act, 1987

By the constitutional 42nd Amendment Act of 1976, a new provision was incorporated in the Constitution under Article 39A, for providing free Legal Aid and concept of equal justice found a place in our constitution Article 39A which was incorporated under part IV-Directive Principles of State Policy reads as under:-

"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".

The advent of Legal Services Authorities Act, 1987 gave a statutory status to **LokAdalats**, pursuant to the constitutional mandate in Article 39-A of the Constitution of India. It contains various provisions for settlement of disputes through LokAdalat. It is an Act to constitute legal services 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 organize LokAdalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

With the object of providing free legal aid, the Government of India had, by a resolution dated 26th September, 1980 appointed a Committee known as "Committee for Implementing Legal Aid Schemes" (CILAS) under the chairmanship of Mr. Justice P.N. Bhagwati (as he

then was) to monitor and implement legal aid programmes on an uniform basis in all the States and Union Territories. CILAS evolved a model scheme for legal aid programmes applicable throughout the country by which several legal aid and advice Boards were set up in the States and Union Territories.

Legal Services Authorities Act, 1987 is made to work towards the welfare of economically, socially and educationally backward sections of the society but the question that comes is whether the grass root reality is the same as it is provided in the papers. The Act is made to serve the people at grass root level or even at the Taluka level is mentioned in the Act but the reality is we are still a long way to go in these matters. This is not the situation only in our country but worldwide the situation remains the same. There are provisions in almost every country regarding this but in reality it is not effectively working.⁶

NALSA

National Legal Services Authority (NALSA) has been set up under section 3 of the Act to monitor and oversee the legal aid programmes throughout the country. In every State, a State Legal Services Authority has to be set up under section 6 of this Act for implementation of the legal aid programmes. At District and Taluk levels also, Legal Services Authorities/Committees are being established to ensure that Legal services are easily available even to the poorest amongst the poor throughout the country. The Supreme Court Legal Services Committee has been constituted under the Act for giving legal aid in the matters coming before the Supreme Court. In every High Court, Legal Services Committees are being established to provide free legal aid.

Supreme Court Legal Services Committee

To empower the marginalized sections of society by promoting legal awareness with the ultimate objective of establishing a just and equitable social order, the Supreme Court of India has set up Supreme Court Legal Services Committee (SCLSC). The SCLSC is headed by a Judge of the Supreme Court of India and has distinguished members nominated by the Chief Justice of India.

Other Provisions Relating To Legal Aid

i) Criminal Procedure Code, 1973-Section 304 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 defence at the expense of the State; and the section further empowers the State

⁶Global Study on Legal Aid, Global report of United Nations Development Program and United Nations Office on Drugs and Crimes

Government to extend the application of the above provision in relation to any class or trials before other courts in the State.

ii) Civil Procedure Code, 1908- Order 33 provides for filing of suits by indigent persons. It enables persons who are too poor to pay court-fees and allows them to institute suits without payment of requisite court fees.

iii) Universal Declaration Of Human Rights, 1948- Article 8 said that everyone has the right or an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law.

iv) International Covenant On Civil And Political Right, 1966- Article 14(3) guarantees to everyone: The right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him any such case if he does not have sufficient means to pay for it.

Judicial Attitude On Free Legal Aid

“Humanism, which is the source and strength of legality, is writ large in the theme of legal services to the poor in that part of our planet where backwardness and indigence have struck the hardest blows through the legal process itself on the lowly and the lost.”⁷

In **Janardhan Reddy v. State of Hyderabad**⁸ and **Tara Singh v State of Punjab**⁹, the court, while taking a very restrictive interpretation of statutory provisions giving a person the right to lawyer, opined that this was, “a privilege given to accused and it is his duty to ask for a lawyer if he wants to engage one or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity (to do so).” Even in capital punishment cases the early Supreme Court seemed relentless when it declared that “it cannot be laid down in every capital case where the accused is unrepresented the trial is vitiated.” Thus it can be pointed out that newly Independent India was not clear about the broad perspective of its legal aid programme. Although legal aid was recognized by the Courts as a fundamental right under Article 21 reversing their earlier stance, the scope and ambit of the right was not clear till this time. The step was taken in **Sunil Batra v. Delhi**

⁷Justice Krishna Iyer: Legal Aid to the Poor

⁸Janardhan Reddy v State of Hyderabad [1951] SC 217

⁹ Tara Singh v State of Punjab [1951] SC 411

Administration¹⁰, where the two situations in which a prisoner would be entitled for legal aid were given. First to seek justice from the prison authorities and second, to challenge the decision of such authorities in the court. Thus, the requirement of legal aid was brought about in not only judicial proceedings but also proceedings before the prison authorities which were administrative in nature. Justice Krishna Iyer. In **Maneka Gandhi v. Union of India**¹¹, courts in India widened their perspective with respect to the civil liberties. While disclosing shocking state of affairs and callousness of our legal and judicial system causing enormous misery and sufferings to the poor and illiterate citizens resulting into totally unjustified deprivation of personal liberty, Justice P.N. Bhagwati, made following observations:-

"This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programmes, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them."

In **M.H. Hoskot v. State of Maharashtra**¹², declared: If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal (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, power to assign counsel for such imprisoned individual 'for doing complete justice'.

The court has reiterated again in **HussainaraKhatoon v. State of Bihar**¹³ and said: "it is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. Free legal service to the poor and the needy is an essential element of any reasonable, fair and just procedure." The court invoked Article 39-A which provides for free legal aid and has interpreted Article 21 in the light of Article 39-A. The court upheld the right to free legal aid to be provided to the poor accused persons 'not in the permissive sense of Article 22(1) and its wider amplitude' but in the peremptory sense of article 21 confined to prison situations'. Two years thereafter, in the case of **Khatri v. State of Bihar**¹⁴, Justice P.N. Bhagwati while referring to the Supreme Court's mandate in the aforesaid HossainaraKhatun's case, made the following comments, in paragraph 4 of the said judgment:

¹⁰Sunil Batra v Delhi Administration [1978] 4 SCC 494

¹¹Maneka Gandhi v Union of India [1978] SC 597

¹²M. H. Hoskot v State of Maharashtra [1978] SC 1548

¹³HussainaraKhatoon v State of Bihar [1980] 1 SCC 98

¹⁴Khatri v State of Bihar [1981] SC 926

“It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence, and whatever is necessary for this purpose has to be done by the State.”

In 1986, in another case of **Sukhdas v. Union Territory of Arunachal Pradesh**¹⁵, Justice P.N. Bhagwati referring to the decision of HossainaraKhatun’s case and some other cases.

Recommendation

The new responsibilities of the Bench and the Bar must be assessed in the context of mass discontent and the dynamic rule of law as its answer. The Judiciary is a revered institution. Our judicial trust with social destiny can only be redeemed by a spread out and institutionalized legal services project adjusted to the conditions of our society¹⁶.

The following points could be taken into consideration for development of this concept in its essence:

1. Review of the working of Legal Aid System.
2. Review of the Alternative dispute Resolution System in the country.
3. Up gradation of Judicial Infrastructure, including computerization, and
4. Up gradation of Judicial Manpower.

Conclusion

The focus of Legal Aid is on distributive justice, effective implementation of welfare benefits and elimination of social and structural discrimination against the poor. It works in accordance with the Legal Services Authorities Act, 1987 which act as the guideline of the rendering of free justice. The discomfort of the bureaucracy arising out of the policing role of legal aid is understandable. In a Welfare State, the Government cannot be made available for litigation against itself to vindicate the legal rights of the poor. The criticism that legal aid litigation, aims at law reform thereby making the judiciary usurps the functions of the legislature is illogical and does not carry conviction in common law jurisprudence. “Whatever standards a man chooses to set for himself, be they religious, moral, social or purely rational

¹⁵Sukhdas v Union Territory of Arunachal Pradesh [1986] SC 991

¹⁶J. KrishnaIyer: Legal aid to the Poor.

in origin, it is the law which prescribes and governs his rights and duties towards the other members of the community. This somewhat arbitrary collection of principles he has very largely to take as he finds and in a modern society it tends to be so diverse and complex that the help of an expert is often essential not merely to enforce or defend legal rights but to recognize, identify and define them.”-**Mathews and Outton.**