

## CONSTITUTIONAL PROVISIONS FOR LEGAL AID IN INDIA

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### Introduction

The concept of seeking justice cannot be equated with value of dollars.<sup>1</sup>

India is a country with poor and illiterate masses. Majority of the Indians are not aware of their legal and constitutional rights. Even if they come to know of their rights, they are in a helpless position because they cannot afford to engage the services of a legal counsel, which has become a costly affair. With a view to provide free legal aid to the deserving sections of the society, the Parliament of India has incorporated a specific Directive Principle *viz.*, Article 39-A by the 42<sup>nd</sup> Amendment of the Constitution in 1976.

Legal aid is a constitutional right supported by Articles 21 and 39-A of the Constitution of India. Article 21 of the Indian Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

Further, Article 39-A directs the State to ensure that the operation of the legal system promotes justice on a basis of equal opportunities, 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 right to get justice starts from the point when a person is either victimized by some unlawful act or is alleged accused of some unlawful commissions or

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<sup>1</sup> Blackmun, J. in *Jackson v. Bishop*, 404 F 2<sup>d</sup> 571 (8<sup>th</sup> Cir 1968).

omissions. We stay in a society governed by rule of law where in the basic canons of natural justice are given supreme value. The most important aspect of the concept of natural justice is, giving a person the right to be heard in fair trial. Fair trial within its very wide ambit incorporates many things which are very widely discussed and deliberated upon by the authors in the later sections of the article. But the most important of all these is right to be represented by someone having knowledge of law. A country like India, where poverty and illiteracy have permanent abode, we cannot think of a situation wherein a person who is a party to a suit or a criminal matter can represent him or can be part of hearing which is the most essential segment of natural justice, unless he is represented by someone knowing law, that is an advocate or a lawyer. As mentioned earlier in a country which is badly struck by poverty and destitution, very few of the grand citizenry can actually think of appointing a practicing lawyer paying hefty sum of money to represent his case. Though the advocates by virtue of professional ethics are supposed to take up the matter of anyone seeking their assistance, without considering how much they are going to be paid and what is the merit involved in the matter, yet in this era of dissolution of all ethics and virtue no one can demand the professionals of advocacy are any exception; and thus in recent times generally, the main motto of advocacy like any other profession is to earn money.

But we have the germ of free legal aid enshrined in our law of the land from very long time. Section 304 of Code of Criminal Procedure in India<sup>2</sup> and Article 39-A<sup>3</sup> coupled

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<sup>2</sup> Legal aid to accused at State expense in certain areas:

(1) 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.

(2) The High Court may, with the previous approval of the State Government make rule providing for-

(a) The mode of selecting pleaders for defence under sub-section (2);

(b) The facilities to be allowed to such pleaders by the courts;

(c) The fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials

with Articles 14<sup>4</sup> and 21<sup>5</sup> of Indian Constitution have placed it a very important place altogether. Contribution of Justice V.R. Krishna Iyer and Justice Bhagwati working under the novel notion of Judicial Activism has actually expanded the dimension of free legal aid to a far greater horizon.

The contribution of Justice V.R. Krishna Iyer towards the development and incorporation of the concept of legal aid in the Indian legal system has been tremendous. His report titled *Provisional Justice to Poor* has gone a step further in enabling the recognition of the poor for the purpose of giving legal aid. In a report on free legal aid in 1971, Justice Bhagwati observed that: "Even while retaining the adversary system, some changes may be effected whereby the judge is given greater participatory role in the trial so as to place poor, as far as possible, on a footing of equality with the rich in the administration of justice."

The Apex Court of India while upholding the constitutional mandate has given some epoch breaking judgments like *M.H. Hoskot v. State of Maharashtra*,<sup>6</sup> *Hussainara Khatoon v. State of Bihar*<sup>7</sup> and *Khatri (II) v. State of Bihar*<sup>8</sup> thereby strengthening the notion of free legal aid in India. In the various parts of the article the authors will try to see that how the free legal aid has developed in India during last few decades and emerged out as one of the most important facet of various other concomitants of right to life.

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before other courts in the State as they apply in relation to trials before the Courts of Session.

- 3 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.
- 4 Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
- 5 Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.
- 6 AIR 1978 SC 1548.
- 7 AIR 1979 SC 1377.
- 8 AIR 1981 SC 928.

### **Right to Fair Trial and Free Legal Aid as a Fundamental Concomitant**

In order to have an idea regarding the right to have fair trial, we can have a look on various human right conventions and charters at global level. The authors have in brief mentioned few important provisions on the concept of fair trial from some of the very important human right conventions like Universal Declaration on Human Right, United Nations Convention on Civil and Political Right, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

#### **Universal Declaration of Human Rights, 1948<sup>9</sup>**

**Article 11(1):** Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defense.

#### **International Covenant on Civil and Political Rights, 1966<sup>10</sup>**

**Article 14(2):** Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

**Article 14(3):** In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

**(a)** To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

**(b)** To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

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<sup>9</sup> Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly on 10<sup>th</sup> December 1948.

<sup>10</sup> The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on December 16, 1966, and in force from March 23, 1976.

(c) To be tried without undue delay;

(d) 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 this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay it;

(e) To examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have free assistance of an interpreter if he cannot understand or speak the language used in court.

**The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950<sup>11</sup>**

**Article 6:** Right to Fair Trial. It reads:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) To be informed promptly, in a language which he understands in detail, of the nature and cause of the accusation against him;

(b) To have adequate time and facilities for the preparation of his defense;

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<sup>11</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR) is an international treaty to protect human rights and fundamental freedoms in Europe.

(c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

All the conventions and charters mentioned above talks about a criminal justice system which does not incriminate a person unless his crime is proved beyond all doubt. The accused should be given all opportunity to represent his case in proper way in public trial, and then only a person may be held guilty.

All these rights mentioned in all this supremely important international documents related to fair trial will be of no use if a person is not given proper scope to represent himself. In a world where though the ignorance of law is no excuse, yet very few are actually aware about the law in truest sense of term, no one can represent himself or herself properly unless that person is assisted by someone acquainted with the terms and jargons of law. Thus to prevent the notion of fair trial from becoming dead letter the alleged accused or retractor of law is required to be represented by someone who knows and can practice law that is an advocate or a lawyer.

### **Free Legal Aid in India**

The right to legal aid is a basic concomitant of right to get fair trial, one of the fundamental human rights. Now as the authors have strived to write a paper on Indian scenario, this right becomes the right of significant importance.

India is a country unfrequented with illiteracy, poverty and innocuousness of wide range of people who know nothing about the nitty-gritty's of legal world. They come

to know about the proceedings and requirements of law only when they are faced with any charge; it may be criminal or civil, or whenever they are the victims themselves. Lack of awareness has even prevented the literate people from knowing the requisites of legal world. It was very well depicted by Nilam Katara, the courageous mother of slain Nitish Katara, the victim of one of India's most celebrated murder, wherein a politician's daughter was in love with Nitish Katara, a man from modest background, and it did not go well with her unduly powerful and notorious politician father and the gruesome murder of that man took place. Just after the incident Ms. Nilam Katara, mother of deceased Nitish Katara whose husband was suffering from paralytic attack had to tryst with her destiny all alone in search of justice. She was not from law background and she had to suffer a lot because of these, as every now and then her efforts used to get hindered due to the stringent and formalistic legal proceedings in India. Though coming from a very educated upper-middle class background and herself being quite educated, she had to face inexplicable agony while she was fighting for justice of her deceased son. Later on in an interview she depicted her anguishes and pains to attain the justice and urged to include certain basic aspects of law as a part of primary and secondary education so that people would know a little about the law by which they are governed, and do not become exposed to a hitherto before unknown world once when they are going through most taxing time-frame of their life.

Hence, the above motioned incident can make one thing clear that is, Indian population baring a particular section of people knows very little about the vast legal system by which they are governed and where ignorance of any of those law from that magnanimous repository of laws, cannot be put forth as an excuse.

Under such circumstance the need of those who know the law becomes really important and when we think about the illiterate and poverty stricken mass which actually covers the lion share of the great Indian population, the need of such people increases by leaps and bounds that to at a free of cost. This is why the Apex Court of the country, that is Supreme Court of India by

realizing the need of the free legal assistance has played very vital role in making the same as one of the basic right.

Here the authors wish to clarify one thing, that the law of the land has already has within its edifice the concept of *amicus curie*, the literal meaning of the same says an adviser to the court on some matter of law who is not a party to the case. If it is explained taking into consideration the practical contexts than it will refer to a person appointed by court to look into the matter of a party before a court who is not represented by any lawyer.

In India, the provision relating to the same is given in section 304 of the Code of Criminal Procedure, 1973:

**(1)** 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.

**(2)** The High Court may, with the previous approval of the State Government make rule providing for-

**(a)** The mode of selecting pleaders for defense under sub-section (2);

**(b)** The facilities to be allowed to such pleaders by the courts;

**(c)** The fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

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

Article 39-A of the Constitution of India also speaks about free legal assistance. The above stated article

depicts that, 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. Thus, the noble thought of free legal aid is there in the basic laws of the land for long. 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. All this constitutional obligations are actually furthering the goal enshrined in section 304 of the Criminal Procedure Code, 1973 where in constitutional duty to provide legal aid arises from the time the accused is produced before the Magistrate for the first time and continues whenever he is produced for remand.<sup>12</sup>

Since 1952, the Government of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Government for legal aid schemes. In different States legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati, the then Judge of the Supreme Court of India. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. The introduction of *Lok Adalats* added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. In 1987, Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally

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<sup>12</sup> Pathak, Varun, *A Brief History of Legal Aid*, <http://www.legalserviceindia.com/articles/laid.htm>. Accessed on February 27, 2012.

enforced on 9<sup>th</sup> of November 1995 after certain amendments were introduced therein by the Amendment Act of 1994.<sup>13</sup>

Justice V.R. Krishna Iyer and Justice P.N. Bhagwati have also contributed to the development of Legal Aid through Reports called *Processionals Justice to Poor* in 1971 and *National Judicature: Equal Justice - Social Justice, Ministry of Law and Justice and Company Affairs* in 1977.

Keeping in mind the need of Indian population, the Legislature has also formulated the Legal Services Authorities Act, 1987 which also initiated the concept of *Lok Adalat* in India. In 1987, the Legal Services Authorities Act was enacted to give a statutory base to the legal aid programmes throughout the country on a uniform pattern. The Act was finally enforced on 9<sup>th</sup> November 1995 after certain amendments were introduced in the Amendment Act of 1994.<sup>14</sup>

### **Landmark Cases Generating Legal Aid Movement in India**

In *M.H. Hoskot v. State of Maharashtra*,<sup>15</sup> the Supreme Court laid down some banning prescription for free legal aid to prisoners which are to be followed by all courts in India, such as furnishing of free transcript of judgment in time, to the sentences; where the prisoner seeks to file an appeal or revision, every facility for exercising such right shall be made available by jail administration, and if a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, there is implicit in the court under Article 142,<sup>16</sup> read with Articles 21<sup>17</sup> and 39-A of

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<sup>13</sup> *Supra* Note 7.

<sup>14</sup> *Supra* Note 12.

<sup>15</sup> (1978) 3 SCC 544.

<sup>16</sup> Article 142: Enforcement of decrees and orders of Supreme Court and unless as to discovery, *etc.* (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

the Constitution, the power to assign counsel to the prisoner provided he does not object to the lawyer named by the court.

In *Khatri (II) v. State of Bihar*,<sup>18</sup> the Court ruled that: “The Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty and indigence, he is entitled to obtain free legal aid at the cost of the State. We deplored that, in that case, where the accused were blinded prisoners the Judicial Magistrate failed to discharge his obligation and contended himself by merely observing that no legal representation had been asked for by the blinded prisoners and hence was provided. We accordingly directed the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty and indigence that he is entitled to free legal services at the cost of the State unless he is not willing to take advantage of the free legal aid provided by the State. We also give a general direction to every State in the country .....to make the provision for grant of free legal service to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situations, the only qualification being that the offence charge against an accused is such that on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representations.”<sup>19</sup>

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(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

<sup>17</sup> Article 21: Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

<sup>18</sup> (1981) 1 SCC 635.

<sup>19</sup> Mamta Rao, *Public Interest Litigation: Legal Aid and Lok Adalats*, Second Edition, Eastern Book Company, Lucknow, 2004, p 352.

Bhagwati, J has observed in *Hussainara Khatoon v. State of Bihar*<sup>20</sup> that: “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 reasonable, fair and just.”<sup>21</sup>

In *Sheela Barse v. State of Maharashtra*,<sup>22</sup> the Supreme Court while deciding an issue on protection to women prisoners and other detenués in police lock-ups *inter alia* observed the following regarding Legal Aid and Advice:

“(1) Whenever a person is arrested by the police without warrant, he must be immediately informed of the grounds of his arrest and in every case of arrest it must be immediately be made known to the arrested person that he is entitled to apply for the bail. The Maharashtra State Board of Legal Aid and Advice will forthwith get a pamphlet prepared setting out the legal rights of an arrested person and the State of Maharashtra will bring out sufficient number of printed copies of the pamphlet in Marathi which is the language of the people in the State of Maharashtra, also in Hindi and English and printed copies of the pamphlet in all the three languages shall be affixed in each cell in every police lock-up and shall be read out to the arrested person in any of the three languages which he understands as soon as he is brought to the police station.”<sup>23</sup>

(2) Whenever a person is arrested by the police and taken to the police lock-up the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee. Such Committee of Legal Aid will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance. The State Government will provide necessary funds to the

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<sup>20</sup> AIR 1979 SC 1369.

<sup>21</sup> Jain, M.P., *Indian Constitutional Law*, LexisNexis Butterworths Wadhwa, Nagpur, 2010, p 1205.

<sup>22</sup> (1983) 2 SCC 96.

<sup>23</sup> Rao, Mamta, *Public Interest Litigation: Legal Aid and Lok Adalats*, Second Edition, Eastern Book Company, Lucknow, 2004, p 353.

concerned Legal Aid Committee for carrying out this direction.”<sup>24</sup>

In *State of Maharashtra v. M.P. Vashi*,<sup>25</sup> while interpreting Article 39-A held that in a fit case the court can direct the ruling politicians to carry out the Directive Principles of State Policy even though these are stated to be non justiciable in a court of law. Further, there is inaction or slow action by the politicians and administrative officers, the judiciary must intervene. The Apex Court clubbed legal aid with legal education and directed the State to revamp and restructure the deteriorating standards in legal education. The Supreme Court, in this case, directed the State to provide grant-in-aid to recognized law colleges so as to enable them to function effectively and in a meaningful manner and turn out sufficient number of well trained or properly equipped law graduates. That in turn will enable the State to provide free legal aid and ensure that opportunities for securing justice are not denied to any citizen on account of any disability. These aspects necessarily flow from Articles 21 and 39-A of the Constitution.

### **Conclusion**

Our judicial system is standing on the premises of one single most important canon of natural justice, that is no one can be punished unheard. That requirement of hearing can never be justified unless the person seeking justice has represented his case properly. Here our criminal jurisprudence follows a very interesting anecdote, *i.e.*, let thousands of criminal to get liberated but don't punish a single innocent. So according our very magnanimous judicial scheme no alleged accused shall be considered as guilty unless his guilt is proved beyond all doubt. Keeping in mind all the above aspects which actually make our judicial system so unique, it can be said with certainty that an party to a suit or criminal case should be represented properly in the public hearing and he should be definitely assisted by a lawyer or an advocate as the author has already described, the dimensions of law is so complex and manifold. In a country like India that legal assistance should be a

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<sup>24</sup> *Ibid.*

<sup>25</sup> (1955) 5 SCC 730.

fundamental requirement and hence should be available at free of cost to needy masses in search of justice. Our Apex Court has in times and again made very apt attempts to implement this philosophy which is already prevailing in our legal system from the beginning. Legislature has done their bit by creating Legal Services Authorities Act, 1987. Jurist has contributed in this respect by submitting their valued suggestions in various report in given subjects.

In brief, it can be said that a lot has done in this regard to satisfy the basic need of a just society. Yet a lot of things are required to be done to make the notion of free legal aid a reality to the greater portion of the population. The most important requirement in this respect is creation of legal awareness amongst the people from all walks of life. The legal jargons are required to be made legible to the greater masses. Most importantly public spirited lawyers are the need of the hour to carry forward the very noble mission of providing justice to people belonging to all segments of society. Then only the very noble and idealistic end of this notion called legal aid will be fully attained.