



EQUAL JUSTICE AND FREE LEGAL AID (ARTICLE 39-A) A CONSTITUTIONAL COMMITMENT

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INTRODUCTION

When India has declared itself a democratic state, it owes a paramount duty to provide equal justice to all. One way to achieve this objective is to provide legal services to those who on account of various reasons are not able to get justice. Keeping this in view numerous legislative measures are introduced by the Indian parliament for the upliftment of weaker sections of the society. 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 authority¹. At present, legal aid finds special place in our constitution. The concept of legal aid has its roots in this very provision of the constitution. So long as socio-economic and other forms of inequality exists, the implementation of National Charter becomes impossible, until we evolve a process of administration of justice where economic difference is not a factor for getting justice². Our constitution guarantees Justice – social, economic and political to each citizen as enshrined in the Preamble. In fact mere assurance of political justice is of no substance if the citizens are denied their social and economic rights. Similarly, mere social justice is meaningless in the absence of just

distribution of economic resources along with equitable access to the opportunities.³

Justice Sabharwal former Chief Justice of India has rightly said – “Given that the justice is defined in terms of rights, access person to approach the appropriate authority and effectively claim the enforcement of rights. Thus, access to justice, in more real terms, would include the sum total of all those rights and remedies available to a person through which he can seek the enforcement of his or her rights.”

HISTORICAL BACKGROUND

Legal aid has a close relationship with the welfare state, and the provision of legal aid by a state is influenced by attitudes towards welfare. Legal aid is a welfare provision by the state to people who could otherwise not afford counsel from the legal system. Legal aid also helps to ensure that welfare provisions are enforced by providing people entitled to welfare provisions, such as social housing, with access to legal advice and the courts.

Historically, legal aid has played a strong role in ensuring respect for economic, social and cultural rights which are engaged in relation to social security, housing, social care, health and education service provision, which may be provided publicly or privately, as well as employment law anti- discrimination

¹ Rai kailash ,Public Interest Lawyering Legal Aid and Para- Legal Services, Central Law Publications, Allahabad, 2005.

² Sarfaraj Ahmed Khan , Lok Adalat ; An Effective Alternative Dispute Resolution Mechanism, Published by APH, New Delhi, 2006, p. 14

³ Y. K. Sabharwal.,” Role of law and legal institutions in the Alleviation of poverty and deprivation” Inaugural address in golden jubilee regional seminar of Indian Law Institute at Cuttack , Orissa on 9th September 2006.



legislation. This led to an emphasis on individual enforcement to achieve the realization of rights for all.⁴

Most liberal democracies in the world consider that it is necessary to provide some level of legal aid to persons who otherwise unable to afford legal representation. If legal aid is not provided to such persons it would deprive them of their right to access to the court system. Alternately, they would also be at a disadvantageous situation when the state or any other individual will take them to the court. This would violate the principles of equality before the law and due process under the rule of law. Some people use the label of “Judicare” for legal aid.

In the 1950s and 1960s, the role of the welfare state changed, and social goals were no longer assumed to be common goals. Individuals were free to pursue their own goals. The welfare state in this time expanded, along with legal aid provisions, as concerns emerged over the power of welfare providers and professionals. In the 1960s and 1970s, demand rose for the right of individuals to legally enforce economic, social and cultural rights and the welfare provisions they as individuals were entitled to. Mechanisms emerged through which citizens could legally enforce their economic, social and cultural rights, and welfare lawyers used legal aid to advise those on low income when dealing with state officials. Legal aid was extended from family law to a wide range of economic, social and cultural rights.⁵

In the 1980s, the role of the classic welfare state was no longer regarded as necessarily positive, and welfare was increasingly provided by private entities. Legal aid was increasingly provided through private providers, but they remained focused on providing assistance in court cases. Citizens were increasingly regarded as consumers. This resulted in tension, as legal aid was not designed to offer advice to those seeking redress through administrative complaints processes.⁶

RIGHT TO FREE LEGAL AID AND THE INDIAN CONSTITUTION

The constitution of India is a sacred document of Nation. The constitution is known as the basic law of the land from which all other laws derive their sanctity or validity. Therefore, Constitution is a living and

⁴ Regan ,Francis (1999). The Transformation of Legal Aid ; comparative and Historical studies. Oxford University Press . pp. 89-90.

⁵ Regan Francis 1999, The Transformation of Legal Aid, pp. 90-91

⁶ Regan Francis 1999, The Transformation of Legal Aid, pp. 91

growing law means it is able to cope with the newer situations and development.

Constitution of India, the treasure of Wisdom, was drafted and handed over to the citizens of this country by those who were passionately driven by our dream of securing social, economic and political justice. Their notion of justice was based on the principle of Equality before Law. We have an expanding Constitution which learns from the past, manages the present and care for the future.⁷

In a welfare state like India where people are known for its diversity, it is the obligation of the state to ensure equal administration of justice as it is a sine que non of fair administration of justice. That is why, when it is felt that a special situation has risen and the present constitutional provisions are not adequate to meet up that situation and cannot deal with the new development effectively, then the parliament amends it from time to time, and legal aid is such one provision which was incorporated in the constitution by the 42nd Amendment in the year 1976.⁸

Under the Indian constitution, there is no express provision of legal aid as a fundamental right, but there are many instructions in our constitution directly or indirectly regarding legal aid.

Naming legal aid as a human right, and by recognizing it under the constitution of India as a fundamental right, a three-judge Bench of the Apex court of the country, in **Gopalanchari vs. State of Kerala**⁹, remained the courts to preserve and promote this right.

So, before the incorporation of Article 39-A, in order to secure equality of status, opportunity as well as social justice to all the citizens of India various provisions were in force under Preamble, Article 14, Article 21, Article 32, Article 38 and Article 226 of the constitution.

LEGAL AID UNDER PREAMBLE

The Preamble to an Act sets out the main objectives which the legislatures intended to achieve.¹⁰ It is a sort of introduction to the statute in many times is

⁷ Anand, Dr. A.S., ‘ Speech on the occasion of Law day ‘ on 26th November 1998, Nyaya Deep, the official News letter of National Legal Services Authority , New Delhi-110011, vol-2, Issue- 1, January 1999, p.21, para II

⁸ Shastri, S.C., Environmental Law, Eastern Book Company 1267, Kashmere Gate, Old Hindu College Building, Delhi- 110006, second edition 2005, p. 39.

⁹ AIR 1981 SC 674, 1981 SCR(1) 1271

¹⁰ Subba, Rao. C.J., in I.C. Golak Nath vs. State of Punjab, AIR 1967 SC 1643.



very helpful to understand the policy and legislative intent. It expresses “What we had thought or dreamt for so long”.¹¹ The constitution makers gave to the Preamble “The place of pride”. It embodies in a solemn form all the ideals and aspirations for which the country had struggled during the British regime.¹²

Preamble of India provides for securing all citizens equality of status and opportunity along with justice-social, economic and political. Both the objectives have inter-connection. Equality promotes justice and justice promotes equality. We cannot expect justice without the support of equality. Equality in a country like India where differences among people prevail because of social, economic and political factors is a far cry without the support of provisions like legal aid. Legal aid brings less advantageous people at par with affluent counterpart so that they could get equal opportunity to seek justice.

Combining the ideals of political, social, and economic justice with that of equality and fraternity in the preamble, Gandhi described as “The India of My Dream”, namely-whose making they have an effective voice: an India in which all communities shall live in perfect harmony”.¹³

LEGAL AID UNDER PART 3 OF CONSTITUTION

Apart from preamble access to justice also get assistance from fundamental rights. Fundamental rights enshrined under part 3 of the constitution are the tools to achieve the objectives laid down in the preamble. These are basic, natural and inalienable rights which are essential for growth and development of human beings which ultimately leads to growth and development of nation.

Articles 14, 21, 22 provides for the free legal aid. Most important is that the rights guaranteed by Articles 14 and 21 are enjoyable not only by the Indian citizens but by every person who lives in India. Thus legal aid though directly is not fundamental right under the Constitution of India; it is the inalienable part of it.

‘Access to justice’ in our constitution is placed on the high pedestal of fundamental rights. It is an inbuilt content of Article 14. If in accessing justice, the common man has to encounter barriers and impediments, the equality clause becomes a mere

¹¹ Sir Alladi Krishnaswami – Constituent assembly debates. VOL 10. 417.

¹² Shelat and Grover, J.J., In Keshavanda Bharti vs. State of Kerala, AIR 1973 SC 1461.

¹³ M.K. Gandhi - India of My Dreams, R.K. Prabhu (Compiled), Navajivan Publishing House, Ahmedabad, (Originally Published 1947), pp. 9-10.

promise on paper. If access to justice is gagged in a judiciary and the judges do nothing to remove the obstacles, such a system cease to be an independent judicial system.¹⁴

In Keshavananda Bharti vs. State of Kerala,¹⁵ the supreme court of India has taken a view that, the fundamental rights and directive principles aim at bringing about a social revolution and establishing of a welfare state. So they can be interpreted and applied together. The court now considers that the fundamental rights and directive principles are complimentary and supplementary to each other. This shows the equality of significance of both, fundamental and directive principles of state policy in fulfilling the constitutional mandate of equality and social justice.

Mr. M.C. Setalvad who was the first Chairman of Law Commission of India observed: “Article 14 of the constitution provides that the state shall not deny to any person equality before the law or the equal protection of the laws. Equality in the administration of justice can thus be said to form the basis of our constitution. The essential need for legal aid can be based on yet another imperative consideration. No true democracy can endure without the system of administration of justice of which the poorest are able to take advantage. It would not be an exaggeration to ask that the very existence of free government depends upon making the machinery of justice available to the humblest of its citizens.”¹⁶

LEGAL AID AND RIGHT TO PERSONAL LIBERTY

The right to life and personal liberty is enshrined in Article 21, of the constitution of India. Article 21 of the constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

The Supreme court in Menaka Gandhi vs. Union of India¹⁷ held that under Article 21 life and liberty of a person can be taken away only by the procedure established by law. The procedure which can take away

¹⁴ Sundari Rama. Ivaturi., Ph. D Thesis entitled - “Evaluation of legal aid and legal literacy – Tools of Social Justice”, Department of Shri Padmavati Mahila Visvavidhyalam, Chapter 3, Legal Aid a Constitutional Mandate.

¹⁵ AIR 1973 SC 1461.

¹⁶ Encyclopedia of Social Work in India, India Ministry of Welfare Director, Publications Division, Ministry of Information and Broadcasting, Govt. of India, (1968), p. 470.

¹⁷ AIR 1978 SC 597.



life and liberty of a person should be just, fair and reasonable. Any procedure established by law which does not provide for free legal aid for poor and illiterate people to ensure fair representation before court cannot be treated as just, fair and reasonable. So the hon'ble Supreme Court widened the scope of Article 21 to include provisions of free legal aid in it.

In a leading case,¹⁸ Supreme Court has laid down that right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person, accused of an offence and it is implicit in the guarantee of Article 21 of the constitution of India. The state government cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative abilities. The state is under the constitutional mandate to provide free legal aid to accused that is unable to secure legal service on account of indigence and whatever is necessary for this purpose has to be done by the state.

Similarly, In *Sukh Das vs. Union Territory of Arunachal Pradesh*,¹⁹ It was held that free legal aid at the state cost is a fundamental right of a person accused of an offence. This right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.

In *Superintendent of Legal Affairs vs. Home Secretary State of Bihar*,²⁰ the Supreme Court discussed the concept of legal aid and fair procedure. The Supreme Court laid down that the right to 'free legal services' is an essential ingredient of fair and reasonable procedure as implicit in the right of personal liberty contained in Article 21 of the Indian constitution.

LEGAL AID UNDER DIRECTIVE PRINCIPLE OF STATE POLICY

The relevance of equal to justice is not only supported by fundamental rights but also by directive principles enshrined in part 4 of the constitution. They are not enforceable like fundamental rights but they are the guiding principles for governance of welfare state. Article 38, 39-A, 41 and 46 though not enforceable but has aptly guided the promotion of equal access to justice in India.

The state is under an obligation to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice-social, economic and political shall inform all the

institutions of the national life.²¹ Under Article 38, state is directed to strive to minimize the inequalities in income, to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Legal Aid comes within the ambit of Article 38 as it diminishes the inequality due to economic factor and tries to bring equal opportunity of availing legal services irrespective of its affordability.

Article 38 needs to be read along with Article 41. This directive reaffirms what has been declared in the Preamble of the constitution, viz., the function of the Republic state is to secure, inter alia, social, economic and political justice.²²

Article 39-A promotes justice on the basis of equal opportunities. It imposes an imperative duty upon the state to provide free legal aid to the poor. The parliament of India in discharge of its obligation under Article this Article enacted The Legal Services Authorities Act, 1987 which provided for free legal aid.

The state is required under Article 41 of the constitution of India to provide for the public assistance in cases of undeserved want within the limits of its economic capacity and development. So state is under an obligation subject to its economic capacity to provide free legal aid to poor, illiterate or ignorant people.

Legal Aid under Article 39-A:

Parliament became too aware about the need and utility of legal aid after submission of various reports by Central Committees and the Central Govt. So under the vibrant leaderships of Mrs. Indira Gandhi in the year 1976, Parliament of India by the 42nd amendment inserted Article 39-A in order to ensure equal justice.

Thus, Article 39-A obligates the state to 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 and other disabilities".²³

Thus, the central theme of this provision of Article 39-A is that no one should be denied

¹⁸ *Khatri and ors vs. State of Bihar and ors.* AIR 1981 SC 928.

¹⁹ AIR 1986 SC 99.

²⁰ 1979 AIR 1369, 1979 SCR (3) 532.

²¹ Article 38, constitution of India.

²² *AIR India Statutory Corporation vs. United Labour Union And Others*, AIR 1997 SC 645; (1997) 9 SCC 377.

²³ Prof. Narender kumar ; *Constitutional Law of India*, chapter 16., p.486.



opportunity to equal justice by reason of economic or other disabilities.

Right to hearing is also an integral part of natural justice. In this regard it can be said that right to counsel is essential to fair trial. Fair trial on the other hand is an important pillar of justice delivery system.²⁴

Article 39-A ordains the state to secure a legal system which promotes justice on the basis of equal opportunity. The language of Article 39-A is couched in mandatory terms as is clear by the use of the word 'shall' twice therein.

In *Ranjan Dwivedi vs. Union of India*,²⁵ Supreme Court has ruled that it cannot issue a writ of mandamus to enforce Article 39-A. Article 39-A makes it clear that the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid.

Article 39-A promotes justice on the basis of equal opportunities imposing an imperative duty upon the state to provide free legal aid to the poor. "It has been held to be a mandate not only from Article 39-A but also from Article 14 and²⁶ 21" to uphold the principles of "Equality before the law or equal protection of the laws". "The legal aid constitutes a part of the right to personal liberty guaranteed under Article 21 and is enforceable by the court".²⁷

In the words of Delhi High Court, "It is emphasized that the legal system should be able to deliver justice expeditiously on the basis of equal opportunity and should provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reasons of economic or other disabilities."

Therefore, the main object behind the insertion of Article 39-A is to mitigate inequalities so that justice reaches to the door of the poor and weaker sections of the society. In other words, a person should not be denied justice merely on the grounds of poverty or on the ground he is not in a position to engage a lawyer to conduct his case.

CONCLUSION

The provision of legal aid to the poor is based on the humanitarian considerations. The main aim of this provision is to help the poverty stricken people who are socially and economically backward. It is

necessary to have the peaceful transformation to avoid through revolutionary process. Political equality can only be assured if there is economic equality. The concept of free legal aid will break the shackles of ignorance and exploitation. It is an innovative which needs to be adopted and executed if we want the concept of welfare state to be a reality.

²⁴ *Hussainara Khatoon vs. Home secretary, State of Bihar* AIR 1981 SC 1360.

²⁵ AIR 1983 SC 224 : (1983) 3 SCC 307 .

²⁶ *Sheela Barse vs. State of Maharashtra* AIR 1983 SC 378.

²⁷ *Sugreev vs. Sushila Bai* AIR 2003 Raj. 149.