

Historical Development of Legal Aid in India: An Analysis

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Abstract:

‘Legal Aid’ includes legal advice, assistance, representation, legal education, information, awareness, and other services through ADR, LokAdalats in compoundable cases, etc. The main objectives of this paper are understanding the concept of legal aid as an essential element of “fair and reasonable” proceedings. In this paper, the main focus is on the historical perspective of free legal concept through which the present legal aid movement gets the momentum. In historical perspective, many stages have been discussed from the ancient period to till now. Legal aid is a socio-economic tool to achieve equal justice.

Key words: Legal Aid, Justice, Awareness, Historical, etc.

INTRODUCTION:

"Without equal access to the law, the system not only robs the poor of their only protection, but it places it in the hands of their oppressors the most powerful and ruthless weapon ever created."

- Reginald Heber Smith,

Justice and the Poor, 1919

The expression “Free Legal aid” refers to legal assistance that are provided to those people who are unable to afford it so that they do not suffer injustice. According to Justice P.N. Bhagwati, the legal aid means providing an arrangement in the society so that the mission of administration of justice becomes easily accessible and is not out of reach of those who need to resort to it for enforcement i.e. the poor, illiterate and even prisoners 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 court. Legal Aid should be available to all those who don’t have access to the court.

Legal aid is the indispensable socio-economic tool to achieve and dispense de facto equal justice to all and without legal aid equality before the law, an integral part of the rule of law, cannot be maintained, ensured and sustained. Legal aid is an outcome of the emergence of the socio-economic philosophy and welfare state. The focus of legal aid is on distributive justice, effective implementation of welfare benefits and elimination of social and structural discriminations against the poor, weak, disadvantaged people of the society. In a developing and poor democratic country like India, it is the constitutional obligation of the state to provide legal aid to such poor and disadvantaged people.

Meaning of Legal Aid:

The Encyclopedia Britannica defines legal aid as a 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.¹ Legal Aid is free legal help for people with low incomes. Legal Aid Services include legal information, legal advice, and legal representation.² Legal Aid means a system of providing free advice about the law and practical help with legal matters for people who are too poor to pay for it.³

The definition of legal services has been given under Section 2(1) (c) of the Legal Services Act, 1987⁴, which is as under: "legal service" includes the rendering of any service in the conduct of any case or other legal proceedings before any court or other authority or tribunal and the giving of advice on any legal matter.

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.⁵

Concept of Legal Services:

¹AlkaShrivastav, Legal Aid Programme in India-A Constitutional Guarantee; Part 13 at p. 871

²http://www.familylaw.iss.bc.ca/help/who_LegalAid.ABP(Accessed on 25 October 2019)

³<https://dictionary.cambridge.org/dictionary/english/legal-aid>(Accessed on 25 October 2019)

⁴It was enforced on November 9, 1996 with some amendments made by the Legal Services Authorities (Amendment) Act, 1994

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

Legal service in its literal sense means help, assistance, or free service in the field of law. Previously the word legal- aid was used in place of legal- service but the Apex Court of India has time and again asserted that legal aid is not a charity but a paramount duty of a welfare State. Now 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: It is rightly said that prevention is better than cure. These days, the number of litigation is increasing day by day, which is very dangerous for the smooth administration of justice. So far, the emphasis was given only on post-litigation assistance or help but now it is being realised that pre-litigation legal services are more useful than post-litigation legal services. Pre-litigation legal services include: i) Legal education ii) Legal advice iii) Legal Awareness iv) Pre-litigation settlement etc. In order to provide pre-litigation services, the voluntary organisations have been encouraged and boosted by financial support from the State. In law colleges and law faculties in the Universities, Legal aid clinics have to be established. These clinics would be of immense help in promoting legal awareness as most of the litigation is often due to ignorance of the people about their legal rights and duties.⁶

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.⁷

Historical Perspective of Legal Aid in India

Legal Aid Development before Independence in India

In ancient times, serving the poor and needy people was considered as service to God. In fact, the concept of Dharma calls for the protection of the poor and weaker section of society and

⁶Dr. S. S. Sharma, Legal Services, Public Interest Litigation and Para Legal Services, 3rd Edition, Central Law Agency; Page No. 3

⁷Ibid, page no. 4

to help them in every possible manner. One can find the traces of Legal Aid in India from the Vedic Period itself. The 36th and 42nd slokas under Chapter I discusses the need to save innocent people from violent people. Also, sloka 103 of Chapter III talks about a King who gives money to such needy people becomes the winner of the opponent's wealth and the Devtas always protect him.

After the Vedic period, the traces of free legal aid can be found in the Muslim period where Chief Qazi appointed full-time lawyers who were known as Vakil-e-sarkar or Vakil-e-sharai who were responsible to provide free legal advice to the poor masses.

During the British Period the Code of Criminal Procedure, 1898 was passed which contained a provision wherein the accused when on trial for a capital offence before the session court, had the opportunity to be represented by a lawyer at the expenses of the State. In the year 1924, the Bombay Legal Aid Society was formed with the main objective to make justice accessible to the poor section of the society and to reduce the cost of litigation and legal processes.

Legal Aid in India has been influenced by contemporary legal developments in foreign countries, especially in England. After the publication of the Rushcliffe Committee Report (England) in 1946, the legal aid movement in India gathered momentum and it was considered by various expert committees and in numerous conferences on legal aid. Influence by contemporary development in England and the demand of the Bombay Legal Aid society in 1946, the Government of India inquired from the state governments that they would be able to provide greater facilities for legal aid to poor persons in both civil and criminal cases or not.

Legal Aid Development after Independence in India

A Committee on Legal Aid and Advice was constituted in the state of Bombay under the chairmanship of Mr. Justice P.N. Bhagwati in 1949 the object of the Committee was to inquire into the legal aid facilities to the backward classes. Similarly, in 1949, the Government of West Bengal also appointed a committee under the Chairmanship of Mr. Arthur Trevor Harris (the then Chief Justice of Calcutta High Court). The Committee

recommended⁸, free legal aid in civil and criminal cases. In 1952, the Government of India directed the State Governments to extend legal aid in criminal cases in respect of offences punishable with not less than 5-year rigorous imprisonment and appeals arising out of them.⁹ Then in January 1956, the Government of India for the third time sought from the state government their tentative views for increasing the scope of legal aid to the poor.¹⁰

The Law Commission in its Fourteenth Report devoted a complete chapter on legal aid. Shri M.C. Setalvad as a Chairman of the First Law Commission endeavored the cause of poor in India and made an elaborate report on legal aid.¹¹

In 1960 the Government of India prepared an outline scheme of Legal Aid and sent it to all states and various legal aid institutions for implementation but the States expressed their inability to do so due to lack of funds. This basic National Scheme was very elaborate and involved all the aspects of legal aid¹². In 1970, a National Conference was held at New Delhi to consider the problem of legal aid. The conference insisted on appropriate legislation to implement the legal aid programme. It was realized in the Conference that there is¹³ a vast gap between the constitutional guarantee under Article 22 (1) and real difficulty faced by the poor person. The poor person is not getting the facility of counsel at the State's expenses unless his crime is punishable with death sentence and it is not very easy to get it. The conference stressed the necessity for statutory legal aid programme and financial assistance from the Union Government and State Governments. The co-operation of Bar Association and law schools for effective implementation of legal aid programme was also considered indispensable¹⁴. In 1970, Gujarat Government appointed a committee to consider the legal aid to poor persons and the backward classes under the chairmanship of Mr. Justice P.N. Bhagwati, the then Chief Justice of Gujarat High Court. The Bhagwati Committee gave its report in 1971 and studied the legal aid problem from constitutional, philosophical, and

⁸Recommendations of the Harris Committee(1949)

⁹H.C.Dholakia, "Legal Aid Development in India", 10KVLJ72(1984)at page 10

¹⁰Ibid

¹¹XIVth Report of the First Law Commission, Vol.1,589(1958)

¹²Supra note 6 at 62

¹³Id at 63

¹⁴Id at 64

organizational points of view. The Gujarat Committee recommended that legal aid should be available in all courts. In the report of the Committee Hon'ble Justice P.N.Bhagwati said:

“that an effective legal assistance programme is not only essential to the maintenance of the democratic way of life and the rule of law but also in a poor country like ours a socio-economic necessity.”¹⁵

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 and making recommendations on the issues relating to legal aid. The expert committee submitted its report in May 1973, titled "Processual Justice to the People" underlining the principles that legal aid as a means of justice was a social necessity.

The Government framed a new Code of Criminal Procedure, in the year 1973 which provided for legal aid in respect of criminal matters. Section 303 provides that any person who is accused under any offense before a criminal court or against whom any criminal proceeding is instituted under Cr.P.C may of right be defended by a pleader of his choice. This section empowers the accused to be defended by a pleader of his own choice. Further, Section 304 of the said Code provides that if the Court thinks that the accused does not have sufficient means to engage a pleader, then the Court shall appoint a pleader for his defense and that the expense of the pleader shall be borne by the State. This provision ensures that notwithstanding the number of means a person has, he/she shall be defended by a pleader.¹⁶

In 1976 the Central Government appointed another committee, consisting of Justice P.N.Bhagwati, as Chairman and Justice V.R.KrishnaIyer 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 Committee made various recommendations to formulate various comprehensive programme and submitted valuable report on a radical, humanist, people oriented legal aid scheme entitled “National Judicare: Equal justice Social Justice” in August 1977. Apart from the report, the committee submitted to the Government a draft of the

¹⁵ Ibid

¹⁶ <https://blog.ipleaders.in/procedure-for-legal-aid-in-criminal-matters/> (Accessed on 26 Oct.2019)

National Legal Services Bill setting out the infrastructure of the organization and the nature, direction of the legal service programme to be implemented.

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. Thus to bring about Constitutional amendments, the then central Government appointed a committee, headed by former Minister, Mr. Swaran Singh. The Swaran Singh Committee, amongst other, recommended for insertion of legal aid provision expressly 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 under¹⁷:

*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"*¹⁸.

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

¹⁷http://shodhganga.inflibnet.ac.in/jspui/bitstream/10603/156247/7/07_chapter%203.pdf, Accessed on 15 October 2019

¹⁸Pandey Dr. J.N., The Constitutional Law of India; 47th Edition, Central Law Agency Page No. 410

defendants also by inserting Rule 17 which provides that any defendant, who desires to plead a set-off or counterclaim may be allowed to set up such claim as an indigent person. 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. But the Union Government found the steps taken by states too inadequate to meet what was recommended by the National Juridicare report and, therefore, set up in October 1980 a Committee for implementing Legal Aid Schemes (CELAS), appointing Mr. Justice P.N. Bhagwati as its Chairman.

The concept of legal aid adopted by CELAS for implementation throughout the country was the dynamic, social justice-oriented schemes as recommended by the Expert Committee (1973) and the Juridicare Committee (1978). The equal justice for the poor was taken to comprehend social justice and the object was to inject equal justice into legality through a dynamic scheme of legal aid. The legal aid programme being implemented by the committee included two major approaches : 1) Litigative legal aid 2) Preventive or strategic legal aid. Since legal equality presupposes social and economic equality, the focus was given on reduction or elimination of poverty itself by altering the conditions, which created, or perpetuated poverty rather than just enabling the poor to have the services of a lawyer in Court.

In order to provide for the composition of statutory legal authorities and to provide statutory backing to Lok Adalats and its awards, and also to provide for effective monitoring of legal aid programmes, the Legal Services Authorities Bill, 1987 was introduced in the Lok Sabha on 24th August 1987. The Bill provides for the composition of such authorities and for the funding of these authorities by means of grants from the Central and the State Governments. Power has been given to the National and the State Committees to supervise the effective implementation of legal aid schemes. The bill was passed by both the houses of Parliament and received the assent of the President on 11.10.1987 to become an Act of Parliament under the title "THE LEGAL SERVICES AUTHORITIES ACT, 1987" (39 of 1987).

However, although the Act came on the statute book on 11.10.1987, it remained in abeyance till it was amended by The Legal Services Authorities (Amendment) Act, 1994 (Act 59 of 1994) to make it operational.¹⁹

Conclusion:

The concept of legal aid was evolved from the humanitarian, social consciousness and the commitment to dispense de facto, equal justice to all. The study of historical perspective has traced how the concepts of legal aid germinated, developed from time to time and demonstrated how the fundamental notion of it, laying at the base of the legal system, has evolved. The development throws light on the fact that 'legal aid and assistance is an indispensable part of the administration of justice and it is not a charity but an obligation of the state. It has let us understand the need of legal aid, not for dispensing equal justice only but for protecting and promoting the democratic values in a society. Apart from the formal, technical legal contents of it, the social contents of the concept of legal aid and assistance have emerged as new social revolution. Legal aid is now considered as an important arm of social justice. The societal institutions, in which law exhibits, are given prime importance. Legal aid is now a movement of the people, prevailing and pervading in all the institutions of the democratic society.

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¹⁹http://shodhganga.inflibnet.ac.in/jspui/bitstream/10603/156247/7/07_chapter%203.pdf, Accessed on 15 October 2019