

A STUDY ON LEGAL AID AND THE CODE OF CRIMINAL PROCEDURE

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“Legal aid is an instrument by which poor can get justice and can enforce their rights.”

- Pollock²

introduction:

Wikipedia says “Justice is the legal and/or philosophical theory by which fairness is administered.”³ Again it says “*Criminal justice* is the system of practices and institutions of governments which is directed to uphold social control, deter and mitigate crime, or sanction *criminal* penalties and/or provide rehabilitation facilities to them who violate laws”⁴. For attaining such Justice there is a proper procedure and the *Code of Criminal Procedure* is the main legislation on *procedure* for administration of substantive *criminal* law in India⁵. We all know that Criminal Law is the punitive arm of the legal order and it affects the life and liberty of human being, thus, a very special attention is required at the time of its administration.⁶

On the other hand, *Wikipedia* says “*Legal Aid* is the provision of assistance to people who otherwise are unable to avail legal representation for themselves and unable to access to the court system”.⁷ Therefore, Legal aid may be defined as “the free and/or inexpensive legal advice or assistance or representation provided to the poor, needy and indigent persons, who, because of their financial condition, otherwise would not be able to get”⁸. The

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² Retrieved on 07-07-2016 from <https://books.google.co.in/books?id=al6y7aEgqzsc&pg=PA61&dq=the+english+legal+aid+system+pollock&hl=en&sa=X&ved=0ahUKEwjv4-dnOHNAhXFM48KHZUYCKkQ6AEIHDAA#v=onepage&q&f=false>

³ Retrieved from <https://en.wikipedia.org/wiki/Justice>

⁴ Retrieved from https://en.wikipedia.org/wiki/Criminal_justice

⁵ Retrieved from https://en.wikipedia.org/wiki/Code_of_Criminal_Procedure,_1973

⁶ Retrieved from <http://legalaidinindia.weebly.com/chapter-ii.html>.

⁷ Retrieved from https://en.wikipedia.org/wiki/Legal_aid

⁸ Retrieved from <http://www.businessdictionary.com/definition/legal-aid.html>.

Supreme Court of India has categorically stated in its various decisions that providing Legal Aid is not a charity but it is a duty of a welfare state.⁹

As per the new dynamic dimension¹⁰ of Article 21 of the Constitution of India it may be noticed that Article 21 imposes a positive obligation on the Magistrate or the committing Judge, to inquire as to whether the accused is not in a position to engage a lawyer on account of his poverty or indigence. If so, then the accused must be provided with a lawyer at the State cost.¹¹ Thus, according to the Constitution of India, every accused has a constitutional right of being represented by a Counsel of his choice. In case of trial of a criminal case, when the accused is produced or brought before a Magistrate, the Magistrate should convey to the accused that he has a constitutional right of being represented by a Counsel of his choice. When it is seen that he has no means to engage a lawyer, then arrangement may be made for his defence.¹²

For the poor, needy and indigent accused there is a need to provide Legal Aid so that they can be represented by a Counsel of their choice. Under the Code of Criminal Procedure, 1973, which is an Act to consolidate and amend the law relating to Criminal Procedure there is a provision which deals with legal aid to accused. This article entitled as “*A Study on Legal Aid and the Code of Criminal Procedure*” focuses on the link between Legal Aid and the Code of Criminal Procedure, 1973 i.e., the article tries to provide an idea of the connection between free Legal Aid and the Code of Criminal Procedure, 1973. Besides, the article also provides, in short, the historical background of Legal Aid Service in India and Code of Criminal Procedure, 1973.

⁹ Vyas , Brij Bhushan. Legal Service-Meaning, Nature and Scope. (15 June 2008).

¹⁰ In *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, the Supreme Court gave a new dynamic dimension to Article 21 of the Constitution of India. *Maneka Gandhi* has a profound but beneficial impact on the administration of criminal justice in India. The Court has now been seeking to humanize and liberalize the administration of criminal justice.

¹¹ Kumar, Narendra. *Constitutional Law of India*. 7th Ed. (Reprint) 2010. Allahabad Law Agency. p.329.

¹² Refer to case *Jagmalram & others v. State of Rajasthan*, 1982 CrLJ, 2314.

Historical Background Of Legal Aid Service In India:¹³

The idea of Legal Aid for the first time evolved in the year 1851 in France when the Government of France introduced an Act for providing legal help to the poor, indigent and needy persons. In India, the concept of Legal Aid evolved for the first time in the year 1952 when the Government of India asked for providing legal help to the poor, indigent and needy persons in various Law Conferences. In 1980, under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati, a Committee was formed which supervised Legal Aid Programmes throughout India. In *Centre for Legal Research v. State of Kerala*,¹⁴ it was suggested that in order to achieve the objective of Article 39A¹⁵ of the Constitution of India, the State must encourage and support the participation of voluntary organisations and social action groups in operating the legal aid programme. The Government should set up a “suitor fund” to meet the cost of defending a poor or indigent.¹⁶ The Court held that although the mandate in *Article 39A* of the Constitution of India is addressed to the Legislature and the Executive, yet the Courts too are bound by the mandate contained therein.¹⁷

The Court ruled that it cannot issue a *writ of mandamus* to enforce Article 39A of the Constitution of India and the social obligation of *equal justice and free legal aid* has to be implemented by suitable legislation or by formulating scheme for *free legal aid*. In pursuance of this suggestion, Parliament passed the Legal Services Authority Act, 1987. Thus, in 1987, the

¹³Bansal Yashu. Legal Aid and Law Schools in India. Retrieved From https://www.academia.edu/8191942/LEGAL_AID_AND_LAW_SCHOOLS_IN_INDIA

¹⁴ AIR 1986 SC 1322.

¹⁵ Article 39A of the Constitution of India states the following:

“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.”

¹⁶ *State Bank v. N.S. Money*, AIR 1976 SC 1111.

¹⁷ *Rajan Dwivedi v. Union of India*, AIR 1983 SC 624. See also *Central Coal Fields Limited v. Jaiswal Coal Company*, AIR 1980 SC 2125.

Legal Services Authority Act, 1987 was enacted so that the concept of Legal Aid cells gain a statutory base and uniformity. But due to some imperfection it was not enforced at that time. In 1995 by Hon. Mr. Justice R.N. Mishra mainly the Act of 1987 was enforced and came into use since then.

The setting up of Lok Adalats was another great achievement in the field of Legal Aid because these courts helped to speed up the trial process, which thus helped in providing justice at a faster rate.

The Madhya Pradesh High Court in *P.N.B. v. Laxmichand Rai*¹⁸, has held that the award passed by Lok Adalat constituted under the Legal Services Authority Act, 1987, was final and said that no appeal would lie against it in any court.¹⁹

In the year 1995, the National Legal Services Authority was constituted and it promoted that every individual should get equal justice as per the Constitution of India. It is important to mention here that our Constitution is the ultimate rule book in our country and it has Articles and clauses for every activity. In one hand, as per *Article 39A* of the Constitution of India, the State is obliged to secure that the legal system should promotes justice on a basis of equal opportunity, and it shall provide free legal aid, in any way, to ensure that opportunities for securing justice is provided to every citizen irrespective of their economic or social or other disabilities, which falls under the Directive Principles of State Policy. On the other hand, *Article 14* of the Constitution of India makes it obligatory for the State to ensure equality before law, which is a Fundamental Right enshrined under Part III of the Constitution of India. Besides, in *M.H. Hoskot v. State of Maharashtra*²⁰, the Supreme Court laid down that *right to free legal aid* at the cost of the State to an accused, who could not afford legal services for reason of poverty, indigence or in non communication situation, was part of fair, just and reasonable procedure implicit in Article 21 of the Constitution of India. *Free Legal Aid* to the indigent has been declared to be “*a State’s duty and not government charity.*”²¹ Legal aid ensures that the constitutional pledge is

¹⁸ AIR 2000 MP 301.

¹⁹ Kumar, Narendra. Constitutional Law of India. 7th Ed. (Reprint) 2010. Allahabad Law Agency. P.468.

²⁰ AIR 1978 SC 1548. Also see *Hussainara Khatoon v. Home Secretary, Bihar*, AIR 1979 SC 1369; *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378. It was held that free legal aid assistance to the poor or indigent accused was a *sine qua non* of justice.

²¹ Kumar, Narendra. Constitutional Law of India. 7th Ed. (Reprint) 2010. Allahabad Law Agency. P.328.

fulfilled properly and equal justice is made available to every poor, indigent, needy and weaker sections of the society.²²

historical background of code of criminal procedure, 1973:

The Code of Criminal Procedure is the main legislation on procedure for administration of criminal law in India.²³ There was at first no uniform law of criminal procedure for the whole of India. In medieval India, subsequent to the conquest by the Muslims, the Mohammedan Criminal Law came into prevalence. In the year 1773, the Regulating Act of 1773 was passed under which a Supreme Court was established in Calcutta at first and then two more Supreme Courts were established at Madras and Bombay respectively. The Supreme Court was to apply the British Criminal Procedural Law while deciding the criminal cases in India. Post 1857, the crown took over the administration in India and the Criminal Procedure Code, 1882 was passed by the British parliament.²⁴ It was the Criminal Procedure Code of 1882 which gave for the first time such a uniform law of procedure; it was supplanted by the Code of 1898. The Code of 1898 remained unchanged for a very long period of time; though it was amended in 1923 and 1955. The law Commission studied the old Code and made various recommendations/suggestions in its detailed report (41st) submitted in September 1969. These suggestions were incorporated in the Code of 1973. The Code of Criminal Procedure was enacted in 1973 and came into force on 1 April 1974.²⁵

Legal Aid And Code Of Criminal Procedure:

We all know that Criminal Law is the punitive arm of the legal order and it affects the life and liberty of human being, thus, a very special attention is required at the time of its administration. In this regard, the legal process without Legal Aid to the poor, needy and indigent persons may be a guarantee

²² Introduction and history of NALSA, available at <http://nalsa.gov.in/12/10/2013/12:12 IST>.

²³ Bharti, Dalbir (2005). *The Constitution and criminal justice administration*. APH Publishing. p. 320.

²⁴ Retrieved on 11-07-2016 from https://en.wikipedia.org/wiki/Code_of_Criminal_Procedure,_1973

²⁵ Code of Criminal Procedure, 1973, p1.

of anarchy and not of order.²⁶ Thus for a better form of justice legal aid is highly essential.

In India there was no specific provision in the Criminal Procedure Code, 1898 for the appointment of a Pleader for the poor accused. Although, Section 340 of that Code provided that the accused may be represented by a Pleader but it did not give him any right to Legal Aid at the expense of the State. In order to provide Legal Aid to poor accused as a matter of right, statutory provision was required. Thus the Law Commission came up with three important recommendations as regard to Legal Aid in Criminal Cases. They were as follows:

Firstly, for the accused representation by a Lawyer should be made available at Government expenses.

Secondly, in case of appeal, representation by a Lawyer should be made available at Government expenses for the poor, needy appellant.

Thirdly, for an accused person, representation by a Lawyer should be made available at Government expenses before the final hearing of Jail appeal.²⁷

The Law Commission of India strongly recommended that the accused have a right to be represented by a lawyer at the Government expense and the above mentioned recommendations should be made legal in relation to trials for serious offences, or other offences and as a first step in this direction, the Commission suggested that such right should be made available in all trials before the Court of Session. Section 304²⁸ of the Code of Criminal

²⁶ Retrieved from <http://> Retrieved from <http://legalaidinindia.weebly.com/chapter-ii.html>.

²⁷ *Ibid.*

²⁸ Section 304 of the Code of Criminal procedure code, 1973 states the following:

“304. *Legal aid to accused at State expense in certain cases.*

(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 rules providing for-

(a) The mode of selecting pleaders for defence under sub- section (1);

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

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

Procedure, 1973 gave effect to the recommendation of the Law Commission and the accused were provided with the right of Legal Aid at the expenses of Government²⁹.

Section 304, added by the 1973 Code, enables the Court of Sessions to assign a pleader for the defence of the accused at the State expense, provided the accused is unrepresented and the Court is satisfied that the accused has no sufficient means to engage by himself, a pleader for his defence. The selection of such pleader, the facilities to be given to him by the Court and his remuneration are all to be governed by the High Court Rules (as approved by State Government). The State Government is empowered to extend the application of the above provisions to any class of trials before other Courts in the State.³⁰

The 'right to counsel' (Section 303 of the Code of Criminal Procedure, 1973) would remain vacant if the accused due to his poverty or indigence condition has no means to engage a counsel for his defence. Article 39-A, one of the Directive Principles of State Policy, lays down that it is the duty of the state to provide free legal aid in order to ensure that equal opportunities for securing justice are not denied to any citizen by reason of economic and other disabilities.³¹

Justice Krishna Iyer in *R.M. Wasawa v State of Gujarat*³² observed:

“Indigence should never be ground for denying fair trial or equal justice.... Particular attention should be paid to appoint *competent* advocates, equal to handling complex cases, not patronizing gestures to raw entrants at the Bar. Sufficient time and complete papers should also be made available so that the advocate chosen may serve the cause of justice.” The right to legal aid is implicit in the guarantee of Article 21 of the Constitution of India.³³

(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 Courts of Session.”

²⁹ Retrieved from <http://Retrieved from http://legalaidinindia.weebly.com/chapter-ii.html>.

³⁰ Code of Criminal Procedure, 1973, pp 226-227.

³¹ Ibid.

³² AIR 1974 SC 1143

³³ Refer to case *Hussainara Khatoon v Home Sec., State of Bihar*, (1980) 1 SCC 98.

The right to free legal aid service does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate³⁴. This constitutional right cannot be denied even if the accused failed to apply for it. Unless refused, failure to provide legal aid to an indigent accused would vitiate the trial³⁵. Further the accused persons who, because of peculiar circumstances and security restraints, cannot have access to the outside world, can avail of the legal aid e.g. in the *Indira Gandhi Assassination case*, the assassins were provided with all legal aid and the lawyer of their choice. In *Rajiv Gandhi Murder Case [T. Suthenraja v State]*³⁶, it was held that the criteria in the appointment of prosecution lawyers is different from those of the defence as free legal aid to indigent persons.³⁷

Where the accused had pleaded guilty and he was convicted without appointing a counsel for the accused under the Legal Aid Scheme, it was held that the trial was not vitiated when the trial Judge was satisfied about the plea being voluntary, genuine and true.³⁸

conclusion:

It is to be noted that for the poor, indigent and needy persons free Legal Aid acts like a crucial legal help or legal support system. Those who are not able to get legal advice, assistance, etc. anyhow due to their poor financial condition or indigent condition, legal aid free of cost comes to rescue for them. In criminal matters many poor accused could not make themselves that efficient due to their poor financial condition to get a pleader for their defence. In this regard, Section 304 of the Code of Criminal Procedure, 1973 plays a very important role because it deals with “*Legal aid to accused at State expense in certain cases*”.

Thus, it can be concluded that Section 304 of the Code of Criminal Procedure, 1973 is an important link between Legal aid and Code of Criminal Procedure, 1973 and it plays a vital role to help the poor, needy, indigent accused persons.

³⁴ Refer to case *Khatri (II) v State of Bihar*, (1981) 1 SCC 627.

³⁵ Refer to case *Suk Das v U.T. of Ar. Pradesh*, AIR 1986 SC 911.

³⁶ 1995 CrLJ 1496 (Mad).

³⁷ Code of Criminal Procedure, 1973, pp 226-227.

³⁸ Refer to case *Tyron Nazarath v State*, 1989 CrLJ 123 (Bom).

