

## RIGHT TO LEGAL AID

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### INTRODUCTION

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*“Rights and Justice ought to be obtained freely without being obliged to purchase it”*

-Massachusetts Constitution, 1780

The quality of a legal system is judged by the fairness of its procedural norms. Justice is the Legitimate end of Law. The highness of the legal system vests in the Access to justice, which is a basic Human Right. In India Right to Legal aid is not only a Human right but also a Fundamental right guaranteed under the Constitution. Legal aid means extending legal assistance free of cost to the poor and needy, to those who do not have the resources to engage a lawyer to represent him in legal proceedings in a court ,tribunal or before any other authority. Legal aid to the poor and weak is necessary for the preservation of rule of law which is necessary for the existence of the orderly society. Until and unless poor illiterate man is not legally assisted, he is denied equality in the opportunity to seek justice. Therefore, as a step towards making the legal service serve the poor and the deprived; the judiciary has taken active interest in providing legal aid to the needy in the recent past. The Author will be discussing the right to legal aid in various national and international instruments.

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### INTERNATIONAL HUMAN RIGHTS LAW

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#### League of Nations

The international community for the first time considered the importance of legal aid. It was also realised that universal peace could be established only by imparting social justice to all<sup>1</sup>. There was a necessity of legal aid, because without legal aid social justice to all was not possible. Thereafter the members of the League of nation in the conference held at Geneva on 1924 appointed International committee for legal aid to study about right to

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<sup>1</sup> United Nations Publication, The United Nations and Human Rights ( New York, 1984) 1

legal aid in various nations .The committee submitted the report on 1927 comprising the survey of legal aid in various nations<sup>2</sup>.

### **Universal Declaration of Human Rights**

Articles 7,8and 10 of UDHR provides right to legal aid as a human right. Article 7 provides that *“All are equal before the law and are entitled without any discrimination to equal protection of the law.”* Article 8 provides that *“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”*. Article 10 provides that *“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”* By reading these articles it is clear that equality and justice are given paramount status. The equality and justice are reciprocal ie, without equality there is no justice and without justice there can be no equality. It was earlier adopted as a declaration on 1948 but now it plays an important role of standard setting in international law.

### **International Covenant on Civil and Political Rights**

Article 14(1) provides that all persons are equal before the courts and tribunals. Article 14(3)(d) reads as *“Every person shall be entitled to be tried in his presence and to defend himself in person or through legal assistance of this own choosing, to be informed, if he does not have legal assistance of this right and to have a legal assistance assigned to him in any case where the interests of justice so require and without payment by him in any such case of he does not have sufficient means to pay for it”*.

### **Convention on the Elimination of all Forms of Discrimination against Women**

Ratified by 186 states and came to force 1981. Article 2 of CEDAW provides legal protection of women on equal basis and the state must provide civil legal aid necessary to the fulfilling of that obligation.

### **International Convention on the Elimination of all forms of Racial Discrimination**

Ratified by 173 states – came to force 1969. Imposes a duty to provide legal aid when it is necessary to do so to ensure the enjoyment by all of protected rights

### **Tehran Conference**

The International Conference on Human Rights at Tehran was the first conference ever organized on worldwide basis to consider the question of human rights in all its aspects.

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<sup>2</sup>Dr. Sharma S.S, Legal Services, Public Interest Litigations and Para Legal Services (Central Law Agency, 1st Ed. 2003) 42

The Conference adopted the resolution on legal aid which declares that

- a. The governments should encourage the development of comprehensive legal aid system for the protection of human rights and fundamental freedoms.
- b. Standards to be devised for granting financial, professional and other legal assistance in appropriate cases to those whose fundamental rights appeared to have been violated.
- c. The Governments should consider ways and means of defraying the expenses involved in providing such comprehensive legal aid system.
- d. The Governments should take all possible steps to simplify laws and procedures so as to reduce the burdens on the financial and other resources of individuals who seek legal redress.
- e. The Governments should co-operate in extending the availability of competent legal assistance to aggrieved individuals who need it.

### **Convention on International Access to Justice ,1980**

According to Article 1, it is important to note that irrespective of nationality of the persons who habitually resident of contracting state is entitled to legal aid for the court proceedings in civil and commercial matters as if they were nationals of that state.

### **Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment**

Adopted by General Assembly Resolution 42/173 of 9 December 1988. Under principle 17(2) if a detained person unable to appoint a legal counsel of his own, he is entitled to have a legal counsel assigned to him by a judicial or other authority and without payment by him.

### **International Court of Justice Trust Fund**

Legal Aid not only individual cases but also extends to individual states when the matters are pending before international court of justice. The trust fund was introduced as a device to overcome financial impediments to the judicial settlement of disputes between states by offering them financial assistance in bringing their disputes before the ICJ. The Secretary-General is the manager of the trust fund and is assisted in its implementation by the UN Secretariat through the Office of Legal Affairs. The trust fund is financed by voluntary contributions from states, intergovernmental organizations, as well as individuals and corporations.

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## **INDIAN LAWS**

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### **Constitution of India**

Law Commission of India in its 14<sup>th</sup> report under the chairmanship of M.C .Setalvad observed that “*Equality is the basis of all modern system of jurisprudence and administration of justice.....unless some provision is made for assisting the poor man for the payment of court fees and lawyer’s fees and other incidental cost of litigation,he is denied equality in the oppurtunity to seek justice.*” V.R.Krishna Iyer in the report on processual justice submitted on 173 stated that “a proposition to which we are Constitutionally dedicated – is possible only through an activist scheme of legal aid.....law and justice can no longer be distant neighbours....so right to legal aid is need for an hour”

Article 39A was inserted into the constitution by 42<sup>nd</sup> amendment act,1976. Article 39A reads as “*Equal justice and free legal aid- The State shall secure that the operation of the legal system promotes justice, on the 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.*”

Article 39A is added by the Constitution (42<sup>nd</sup> Amendment) Act, 1976 to ensure equal justice which has been promised to all citizens by the Preamble and to further guarantee equality before law (Article 14) , which would have no meaning to the poor so long as they are unable to pay for their legal admission<sup>3</sup>.It essentially imposes a duty on the state to ensure that the legal system functions in a manner that furthers justice, provides equal opportunity and more importantly, devises, appropriate mechanisms or legislations so that it can extend legal aid free of cost. The purpose of this is to promote equality so that any citizen is not denied the right to seek justice because of economic incapacity to bear the cost of legal aid<sup>4</sup>. The right to legal aid was inserted as a Directive Principle of State policy but later it was made as a fundamental right by the judiciary.

In **Hussainara Khatoon v. State of Bihar**<sup>5</sup>- In this case the court pointed out that Article 39-A emphasized that free legal service was an inalienable element of reasonable, fair and just procedure and that the right to free legal services was implicit in the guarantee of Article 21.

In **Khatri v. State of Bihar**<sup>6</sup>- The right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of

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<sup>3</sup> Basu,D.D, Constitution of India ( Prentice of India Pvt.Ltd.,New Delhi, 1981) 231

<sup>4</sup> M.P. Jain, INDIAN CONSTITUTIONAL LAW, vol. 2, 1616, 5th edn. (2003)

<sup>5</sup> (1980) 1 SCC 98

<sup>6</sup> AIR 1981 SC 262.

justice so require...The State cannot avoid this obligation by pleading financial or administrative inability or that none of the aggrieved prisoners asked for any legal aid.

In **Suk Das v. Union Territory of Arunachal Pradesh**<sup>7</sup>- It was held that it is the responsibility of the presiding judge to make the accused aware of his right to demand free legal assistance from the State if he cannot afford to engage a lawyer himself and if the accused is convicted without being informed of his right to legal aid and subsequently not having a lawyer to represent him at the trial, the conviction would be declared invalid.

### **The Civil Procedure Code,1908**

Order 33 of the Civil Procedure Code provides for filing of suits by indigent persons. It enables persons who are too poor to pay court fees to institute suits without payment of requisite court fees.

### **Criminal Procedure Code**

Section 304(1) 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”.

### **Legal Services Authorities Act, 1987**

Legal Services Authorities Act, 1987 was passed exclusively for providing legal aid . The Act prescribes the criteria for giving legal services to the eligible persons.

It makes a person eligible for assistance under the act if he is

- (a) a member of a Scheduled Caste or Tribe;
- (b) a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
- (c) a woman or a child;
- (d) a mentally ill or otherwise disabled person;
- (e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- (f) an industrial workman; or
- (g) in custody, including custody in a protective home or in a juvenile home
- (h) of in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987; or

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<sup>7</sup> AIR 1986 SC 991

- (i) A person whose annual income less than rupees fifty thousand or such other higher amount as may be prescribed by the State Government<sup>8</sup>.

This limit on income can be increased by the state governments. Limitation as to the income does not apply in the case of persons belonging to the scheduled castes, scheduled tribes, women, children, handicapped, etc. Thus by this the Indian Parliament took a step forward in making the legal aid possible in the country. Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prima facie case in his favour provide him counsel at State expense, pay the required Court Fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

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## REGIONAL LAWS

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### Inter-American Human Rights System

**Charter of Organization of American States (OAS)** - Article 45, member states agree to dedicate every effort to the adequate provision for all persons to have due legal aid in order to secure their rights.

**American Declaration on the Rights and Duties of Man** - It provides for right to fair trial in Article XVIII, XXVI, II which also provides for right to legal aid.

**American Convention on Human Rights ,1978** - Articles 8,24 and 25 provides for right to legal aid.

### Commonwealth | Article VII.4 of Latimer House Guidelines

The **European Convention for the Protection of Human Rights and Fundamental Freedoms** and the **African Charter on Human and People's Rights** contain provisions guaranteeing rights to equality before the law, effective remedies for human rights violations and to fair trials in the determination of rights

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## RIGHT TO LEGAL AID IN U.S

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The U.S. Supreme Court has recognized a right to counsel in criminal cases. No such right, however, is recognized in the civil context. Later, The Legal Services Corporation (LSC) was created to promote equal access to justice and provide grants for civil legal assistance to low income Americans.**RIGHT TO LEGAL AID IN TRIBUNALS**

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<sup>8</sup> Section 12 of the Legal Services Authorities Act, 1987.

In *A.K. Kraipak v. Union of India*<sup>9</sup>, *Ridge v. Baldwin*<sup>10</sup> & *Maneka Gandhi v. Union of India*<sup>11</sup>. The principles of natural justice are treated as a part of the Constitutional guarantee contained in Art. 14 and the violation of these principles by the administrative authorities is taken as violation of Art 14. Actually the concept of quasi-judicial, natural justice and fairness all have been developed to control the administrative action. The object has been to secure justice and prevent miscarriage of justice. The concept of rule of law would have its importance if the administrative authorities are not charged with the duty of discharging their functions in fair and just manner. Art 14 & 21 have strengthened the concept of natural justice. Art. 14 applies not only to discriminatory class legislation but also to discriminatory or arbitrary state action. Violation of the principle of natural justice results in arbitrariness and, therefore, its results in the violation of Art. 14. Art. 21 requires substantive and procedural due process and it provides that no person shall be deprived of his life or person liberty except according to the procedure established by law. The procedure prescribed for deprivation of person liberty must be reasonable, fair, just and a procedure to be reasonable, fair and just must embody the principle of natural justice. A procedure which does not embody the principles of natural justice cannot be treated as reasonable, just and fair as in case of *Vionet v. Barret*<sup>12</sup>. In *A.K. Kripak v. Union of India*<sup>13</sup> the Supreme Court has observed “What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice has been contravened, the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.” In *State of Orrisa v. Birapani Dei*<sup>14</sup> the Supreme Court has specifically held that even an administrative order which involve civil consequences must be made consistently with the rules of natural justice. In *Raj Kumar v. State of Haryana*<sup>15</sup>, The Appellant was appointed as J.B.T. Teacher in the year 2000 and promoted as Hindi Teacher on the basis of seniority –cum–merit in 2007. On 30.05.2008 order of revision passed without giving any opportunity, Single Judge set aside the order of reversion on the ground of violation of principles of natural justice. State was given liberty to proceed afresh in accordance with law, without taking the appellant back on promoted post. However, it was made clear that appellant would be entitled to benefit of the order which may finally be passed. The Course adopted by Single Judge held, is proper. No prejudice would be caused to the appellant if

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<sup>9</sup> A.I.R. (1970) S.C. 150

<sup>10</sup> (1964) A.C. 49

<sup>11</sup> A.I.R. 1978 S.C. 579

<sup>12</sup> (1885) 55 LJ RB, 29

<sup>13</sup> A.I.R. (1970) S.C. 150

<sup>14</sup> A.I.R. (1967) S.C. 1269

<sup>15</sup> 2011(2) SCT 62(P&H)(D.B)

liberty to proceed afresh in accordance with law is given and right of the appellant to benefit accruing from final order is left undisturbed. In view of judgment of Apex Court in B.Karunakar, appellant not entitled to be restored to the promoted post, merely on setting aside order of reversion for violation of principles of natural justice. since the right to legal representation is a part of principle of natural justice, it plays a major role in attaining justice.

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## CONCLUSION

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The hallmark of welfare state vests in the access to justice. Legal aid is not a charity or bounty, but is an obligation of the state and right of the citizens. The prime object of the state should be equal justice for all. Thus, legal aid strives to ensure that the constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the downtrodden and weaker sections of the society. Legal help initiatives must also make use of alternative dispute resolution mechanisms such as conciliation, client counselling, mediation. Etc. also, the benefits of legal services should not only be directed to the poor sections of society but also to those suffering from disability and discrimination such as prostitutes, the mentally challenged, etc. the role of law schools in promoting legal aid should also be emphasised, more legal aid centres should be set up and clinical education and pro bono work by students and also by law firms should be encouraged.