

## AN ANALYSIS OF LEGAL AID AND THE ROLE OF JUDICIARY

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### Introduction

‘[H]is own suit upon his own bottom and at his own expense’. Those who are poor - of small means - can bring their cases at the expense of the state. They can have them conducted by lawyers of their own choice without making any contribution out of their own pocket.<sup>1</sup> Law is one of the most accurate reflections of the social, economic and political principles of the particular era. Law is not eternal, because it is undergoing to the profound changes from time to time. State now places a high priority on the rights to equality, liberty, and justice. The basic responsibility of the state, which serves as society's welfare organ, is to create an environment in which every individual has the chance to develop his abilities.<sup>2</sup> It is imperative for the state to show special concern for those persons who are unable to protect their rights and interest. <sup>3</sup> Roosevelt the then President of America also have the same view in different words, the state should try hard to establish a social order which should ensure “freedom from wants” and “freedom from for all”<sup>4</sup>

After independence, India adopted the concept of welfare, as a result it cannot be indifferent towards legal system. The administration of justice system of the present day lacking more defects especially the expense and causing of the delay in delivering of the justice. To uphold the healthy democratic values, the contribution of legal aid is more, which is based on the principles of equality and dignity. Without legal aid, the rule of law is nothing but a fake slogan and myth.

### Legal Aid – Definition & Meaning

While defining the term legal aid it is necessary to understand the benefits of legal aid. It is a kind of assistance extended to those who are unable to afford legal assistance and access to the court. It is regarded as central in providing access to justice by ensuring equality before law, right to fair trial and right to counsel.<sup>5</sup>

The term legal aid is defined as professional legal assistance given for free or for a nominal sum, to the needy person who is need of such help.<sup>6</sup> According to Justice Krishna Iyer “The spiritual essence of Legal Aid movement consists in investing law with a human soul: Its Constitutional core is the provision of equal legal service as much to the weak and in want as to the strong and affluent, and the dispensation of social justice through the legal order.”<sup>7</sup>

Arthur Berney defined the term legal aid in India as Constitutional important & the court must rule that the assistance of well trained personnel be produced to any party who requires such aid”.<sup>8</sup> Lord Denning, believed legal aid is the spirit and foundation of equality, liberty and principle of natural justice. He rightly observed that “Since the second world war, the greatest revolution in the law has been the mechanism and evolution of the system of legal aid and it is a fundamental human right.”<sup>9</sup>

The basic law of the land Constitution, one of the Article<sup>10</sup> define the term legal aid as providing legal services to the poor at free of cost to those who cannot afford services of advocate for his case in court of law. Legal aid guarantees that no one is deprived of advice and help because of lack of fund. The main objective of legal aid is to provide justice to the poor section of the society. Legal aid facility is available to the poor and illiterate person who cannot afford advocate and court.<sup>11</sup>

According to Cambridge Advanced Learners“ Dictionary „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. According to Cambridge Advanced Learners“ Dictionary „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.

<sup>1</sup> Lord Denning, *What Next in the Law*, (London: Butterworths, 1982), p. 92.

<sup>2</sup> S.S Sharma, *Legal Aid to the poor*, (New Delhi: Deep & Deep Publications, 1993), p. 2

<sup>3</sup> A.V. Dicey, *Law and Public Opinion in England*, (London: Macmillan & Co. Ltd., 1962), p. 261.

<sup>4</sup> <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm>.

<sup>5</sup> [https://en.wikipedia.org/wiki/Legal\\_aid](https://en.wikipedia.org/wiki/Legal_aid)

Accessed on 28-07-2023

<sup>6</sup> The New Encyclopaedia Britannica, Vol. 1974 (ed.), P. 122.

<sup>7</sup> Report of the Expert Committee on Legal Aid Professionals Justice to the poor, (New Delhi: Ministry of Law Justice & Company Affairs, Government of India, 1973), p. 240.

<sup>8</sup> Arthur Berney, .L: “*Legal Aid: A Constitutional Imperative*” a paper contributed in the National Conference on Legal Aid (1970) held by the *Institute of Constitutional and Parliamentary Studies*, New Delhi.

<sup>9</sup> Lord Denning, *What Next in the Law*, (London: Butterworths, 1982), p. 94.

<sup>10</sup> Article 39A of the Indian Constitution.

<sup>11</sup> <https://www.freelaw.in/legalarticles/Definition-of-Legal-Aid>

Cambridge Advanced Learners' Dictionary defines 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.<sup>1</sup> Traditionally legal aid is understood as financial help to a person who is in need of legal assistance to defend his rights in a court of law.<sup>2</sup> P.N. Bhagwati, J. observed that legal aid means providing an arrangement in the society so that the machinery of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of rights given to them by law.

### Meaning

The Constitution of India is called as a living and natural document which is based on the principles of sovereign, socialist, secular, democratic, and republic. Constitution guarantees to all its citizen justice: political, social and economical, equality of status & of opportunity and liberty. "Constitution is not to be construed as a mere Law, but as the machinery by which Laws are made. A constitution is a living and organic thing which of all instruments has the greatest claim to be construed broadly and liberally"<sup>3</sup>

To uphold the concept of equality of law and justice, it is justifiably sufficient that the law should not only discriminate between rich and poor but also necessary that the poor and disadvantaged people must get equal opportunity and equal protection of laws by enabling them to easy access to justice and enforce their rights guaranteed by the constitution. Lord Hewart said - "Justice should not only be done but should manifestly and undoubtedly Bo seen to be done". Legal aid is considered as an essential socio economic tool to achieve de facto justice to tall and equality before law, an integral part of rule of law cannot be maintained, sustained without legal aid.

Legal aid is outcome of socio economic philosophy and concept of welfare state. The main aim of legal is distributive justice, proper implementation of benefits of welfare and removal of social and structural discrimination existed in the society against the poor, weak and disadvantaged persons of the society. In a country like India, based on the democratic values, it is the Constitutional obligation of the state to provide free legal aid to the poor and suppressed sections of the society. Part IV of the Constitution deals with the Directive Principles of State Policy set the ideals and objectives of the welfare state. This part aims at social welfare and common good and secure social and economic justice to all its citizens and ensures principle of equality. Article 38 of the Constitution is the key stone of the directive principles, which contains the directions to the State to achieve the objectives of the welfare state.

The State shall, in particular, strive to minimize the inequalities in income, and endeavour 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 differed vocations"<sup>4</sup> Legal aid is called as an instrument of socio-economic-political justice as mentioned in Article 39A<sup>5</sup> of the Constitution to touch and embody the concept of social justice and welfare State. To implement the aims and objectives of Articles 39A, the Government of India has passed several ordinances, legislations, Amendment Acts and also formulated several schemes.<sup>6</sup>

Equal justice requires an approach responsive to injustice and inequality, just allocation of advantages and disadvantages without any discrimination of the basis of status-social and economical, gender, caste, creed, race, birth etc. in the process of judicial justice. We cannot conceive justice which is not fair, and equal, which is given to one and denied to another.<sup>7</sup> Equal justice is the fundamental principle on which the Administration of justice is based on.

"Social justice is a generous concept which assures to every member of the society a fair deal. Any remedial injury, injustice, inadequacy or disability suffered by a member, for which he is not directly responsible, falls within the liberal connotation of social justice"<sup>8</sup> According to P.B. Gajendragadkar, J., "The Concept of Social Justice takes within its sweep, the objective of removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities"<sup>9</sup>

The concept of legal aid is not borrowed from foreign to Indian legal system but it is essential part of our legal system. It is considered as legal commitment towards citizens by the State. Generally, legal aid means helping the person concerned to protect his or her rights under the system of law.<sup>10</sup> It is a phrase which means giving to persons of limited means *gratis*, or for nominal fees, legal advice and legal assistance in court in civil and criminal matters.<sup>11</sup> It is treated as a programme to secure social justice of the poor. It is also vital to streamline and remove the defects of the present legal system.<sup>12</sup> It is observed that in the absence of free legal aid, the fundamental rights and freedoms of the poor and needy guaranteed by the Constitution and international covenants have no value.<sup>13</sup>

<sup>1</sup> <http://dictionary.Cambridge.org/dictionary/british/legal-aid>

<sup>2</sup> Narain, Jagat, Legal Aid-Litigational or Educational: An Indian Experiment, Journal of the Indian Law Institute, Volume 25, 1983.

<sup>3</sup> Goodyear India v. State of Haryana AIR (1990) SC 781 -791 Para 17

<sup>4</sup> Article 38 renumbered as clause (1) thereof by the Constitution (Forty-fourth Amendment) Act, 1978, Sec. 9 (w.e.f. 20-6-1979)

<sup>5</sup> 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

<sup>6</sup> Rewaria, Sakshi, Justice and Legal Aid (February 26, 2021). Available at SSRN: <https://ssrn.com/abstract=3793413> or <http://dx.doi.org/10.2139/ssrn.3793413>

<sup>7</sup> PN Bhagwati "legal Aid in India" in Lav/ and the Common Wealth, ed. L.M. Singhvi, 1971 P.206

<sup>8</sup> Sailja Chander, Justice V.R. Krishna layer on Fundamental Rights and Directive principles, 1992 Page 15,

<sup>9</sup> P.B. Gajendragadkar, Law, liberty and Social justice 1965, Asia Publishing house

<sup>10</sup> Pollock, *The Legal Aid System*, (New Delhi: Orient Longmen Ltd., 1974), p. 1.

<sup>11</sup> N.R. Madhva Menon, *Justice for the Poor*. Rationale, Retrospect and Prospect, in Law and Poverty, Singhvi, D.M., (ed.), (Bombay: N.M. Tripathi Pvt. Ltd. 1973), 281.

<sup>12</sup> L.M. Singhvi, *Law and Poverty*, (Bombay: N.M. Tripathi Pvt. Ltd. 1973), p. 287.

<sup>13</sup> Report of the Committee on Legal Aid and Advice in the State of Bombay, (1950), p. 8.

According to Universal Declaration of Human Rights, 1948, Declared by the General Assembly of the United Nations Organization on December 10, 1948. 'Humanity is the basic foundation of human society upon which human rights are nurtured and asserted.' Article 8 of the UDHR, 1948 provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted to him by the Constitution or by other law". Article 6(3) (c) of the *European Convention on Human Rights* provides for legal aid in criminal cases. It is reported that the provisions in relation to legal aid to poor, needy and indigent persons has been enacted in more than 132 nations across the globe.<sup>1</sup>

## Position of Legal Aid in India

### Indian Constitution

'The concept of seeking justice cannot be equated with value of dollars.'<sup>2</sup> The Constitution of India, in its Preamble promises that it secure Equality of Status and Opportunity and Liberty in social democracy. Dr. B. R. Ambedkar vibrantly explained in his concluding speech in the Constituent Assembly about the concept.<sup>3</sup> The main vision of the Constitution, is to establish the society based on socialistic pattern. The term "SOCIALIST" was inserted in the Preamble to achieve this goal.<sup>4</sup> Unlike the Constitution of United States, the Constitution of India has not explicitly provided, legal aid as a fundamental right.<sup>5</sup> The Indian Constitution contains many provisions dealing with the legal aid. The preamble<sup>6</sup> of the Indian Constitution provides justice: social, economical and political and equality of status and opportunity. In *Keshavananda Bharati v. State of Kerala*,<sup>7</sup> Hon'ble Supreme Court held that, the Preamble is an integral part of the Constitution, and the Constitution should be read and interpreted in the light of grand and noble vision expressed in the Preamble. One of the provisions of the Constitution states that, State shall not deny to any person equality before the law and equal protection of the laws.<sup>8</sup> Legal aid is a right guaranteed the Constitution under Article 21<sup>9</sup> and Article 39-A.<sup>10</sup>

Concept of equality involves that all persons must have an equal opportunity to access to court. Any member of the society who is unable to move court due to financial constraints, he cannot defend his case, in such circumstances justice becomes unequal and the very purpose of the justice is defeated. Providing of legal assistance to the indigent litigant is therefore, not a problem of procedural law but a question of fundamental character.<sup>11</sup> The discrimination in justice delivery on the grounds of poverty and other reason also considered as a violation of Article 14. Equal justice always demands access to law and justice to both rich and poor in a equal manner, unless the concession is provided to poor, results Article 14 will be useless and ridicule.<sup>12</sup> There is a necessary to interpret the Article 14 in a progressive way to convert legal equality into social equality.

Another important provision of the Constitution Article 21 guaranteed the right to life and personal liberty. This right can be taken away only according to procedure established by law. Such procedure should be fair and reasonable. A procedure may be said to be fair and just only when it fulfils the demands of natural justice. Right to hearing is an integral part of natural justice.<sup>13</sup> Further, the Supreme Court in *Sunil Batra v. Delhi Administration*,<sup>14</sup> has laid down the free legal aid services is an essential element of reasonable, fair and just procedure for a accused person and it is a fundamental right according to Article 21. The need of the legal aid is not only needed in judicial proceedings but also administrative proceedings also. This was repeated in *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*<sup>15</sup>, wherein Hon'ble judiciary held that, it is an essential ingredient of a reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him.

Free legal aid is the essential element of reasonable, fair and just procedure to the poor and the needy persons. Supreme Court in the case of *Khatris & Ors. v. State of Bihar*<sup>16</sup> held that it is the obligation of State Government to provide legal aid to the poor and needy persons at free of cost. State Government cannot deny justice to the poor because of financial and other constraints. State is under a Constitutional mandate to provide free legal services to the needy people. Further the Supreme Court opined that, it is a fundamental right of a needy person to get the free legal service at the cost of the State for any such offences which may involve jeopardy to his life.<sup>17</sup> Article 22(1)<sup>1</sup> deals with right of an arrested person to consult the legal practitioner of his

<sup>1</sup> Mamta Rao, *Public Interest Litigation Legal Aid and Lok Adalats*, 3rd edn., (Lucknow: EBC Publishing (p) Ltd., 2010), p. 343.

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

<sup>3</sup> "Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity which are not be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity".

<sup>4</sup> Constitution (42nd Amendment Act) 1976

<sup>5</sup> Report of the Legal Aid Committee of Gujarat (1971), at p.1

<sup>6</sup> "We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the nation."

<sup>7</sup> AIR 1973 SC 1461.

<sup>8</sup> Article 14 of the Constitution of India

<sup>9</sup> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

<sup>10</sup> 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.

<sup>11</sup> Fourteenth Report of Law Commission of India on "Reform of Judicial Administration", Vol.1, (New Delhi: Ministry of Law, Government of India, 1958), p. 587.

<sup>12</sup> Mukherji, Davesh Chardra, "Legal Education and Services to the Poor", AIR (1982) *Journal Section*, p. 650.

<sup>13</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>14</sup> (1978) 4 SCC 494.

<sup>15</sup> (1980) 1 SCC 98.

<sup>16</sup> AIR 1981 SC 928

<sup>17</sup> *Sukdas and others v. Territory of Arunachal Pradesh*, AIR 1986 SC 991.

choice. The three-judge bench of the Supreme Court in the case of *M. H. Hoskot v. State of Maharashtra*<sup>2</sup> applied the rule of *Maneka Gandhi's* reading of Article 21, 39-A, Article 142 and Section 304 of Cr.P.C. together to affirm that State is under duty to provide legal aid to the accused persons.

Part – IV of the Constitution under Article 39-A gives direction to the State to ensure that the aim of the legal system is to promote justice on a basis of equal opportunity, particularly provide legal aid to the poor through suitable law or schemes or in any other way & ensure that the justice should not be denied to any person by reason of economic and other disabilities.<sup>3</sup> The main crux of Article 39A is promoting of justice on equal opportunities and it imposes an necessary duty on the state to provide legal services to the needy and poor. State is under mandatory duty not only under Article 39A but also under Article 14 and 21 of the Constitution to uphold the principle of equality before law and equal protection of law. Legal aid also constitutes as a right to personal liberty under Article 21 and the same can be enforceable by the court.<sup>4</sup>

The Supreme Court has ruled in *Ranjan Dwivedi v. Union of India*<sup>5</sup> that it cannot issue a mandamus writ to enforce Article 39-A. It is clear from Article 39-A that social objective and free legal aid has to be implemented through suitable legislation or schemes. Therefore, the main object behind the insertion of Article 39-A is to lessen the inequalities in the society so that justice reaches to the door of the needy, poor and weaker sections. In order 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.

The Hon'ble Supreme Court repeated the ratio of *M. H. Hoskot* in *Khatri v. State of Bihar*<sup>6</sup> after two years. In *Francis Carolie v. Union Territory of Delhi*<sup>7</sup> has opined that even the foreign national is also entitle for right to legal aid. In this case the petitioner, a British citizen was detained under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The petitioner experienced a difficulty in finding lawyer for her defence and she moved Supreme Court, Bhagawati J., extended the right legal aid to the petitioner and through which it is assumed that even the foreigner too entitle for legal aid in the case of detention.

Another question before the judiciary was whether legal aid is provide only on demand by the accused or a lawyer should be made available without demand? The question was answered in *Khatri (III) v. State of Bihar*.<sup>8</sup> The court has opined that the Magistrate or Judge are under an obligation to inform the accused that if he is unable to engage the lawyer to defend him because of poverty, he is entitled to obtain the free legal services at the cost of State. The same principle was adopted in *Suk Das v. UT of Arunachal Pradesh*<sup>9</sup>. The main question before the Apex Court was what should be qualification of advocate to be appointed for defence to the poor.<sup>10</sup> Hon'ble Supreme Court held that the prisoner should be provide a competent lawyer the expense of the State. Bhagawati J., observed that the legal services to the poor or needy accused that is arrested and put in jeopardy of his life and personal liberty is a constitutional essential mandate not only by Article 39-A but by Article 14 and 21 of the Constitution.<sup>11</sup>

The champion of social justice in India Justice V. R. Krishna Iyer rightly pointed out that, if the accused sentenced to imprisonment, he is unable to exercise his right (Constitutional and Statutory) of appeal even special leave to the Supreme Court for legal assistance there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, the power to assign counsel for such imprisoned individual \_for doing complete justice<sup>12</sup>.

It has been said under Order 33 Rule 9A of Civil Procedure Code, 1908, it is a statutorily recognized public duty of each great branch of government to obey the rule of law and uphold the trust with the constitution by making rules to effectuate legislation meant to help the poor.<sup>13</sup> The purpose of enactment of law is to protect the poor and the needy, authorities of the government are very lazy in implementing the provisions of law. Hon'ble Supreme Court also observe the same in *State of Haryana v. Darshana Devi*.<sup>14</sup>

### Role of Supreme Court and Legal Aid

The basic law of the land is the Constitution. When the law was passed its validity was tested by the judiciary on the touchstone of the Constitution. Supreme Court is neither representative nor reflective of the society, so Supreme Court enjoys the highest judicial power in the country. Supreme Court is not accountable to any. "The Judicial power, so vested cannot be passed over to or shared with the executive and legislative organs under the Constitution"<sup>15</sup> Law also drives its legitimacy from the justice and end point is also the justice. Law does not mean as an instrument of the state, maintain only law and order in a state. Law is considered as an instrument of administration of justice (equal justice) which close with the social justice.

<sup>1</sup> No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

<sup>2</sup> AIR 1978 SC 1548.

<sup>3</sup> Ms. Silky Mukherjee, *CONSTITUTIONAL PROVISIONS FOR LEGAL AID IN INDIA*, Bharati Law Review, Jan.- Mar., 2013, p. 149.

<sup>4</sup> Sugreev vs. Sushila Bai AIR 2003 Raj. 149.

<sup>5</sup> AIR 1983 SC 224 : (1983) 3 SCC 307

<sup>6</sup> AIR 1981 SC 928.

<sup>7</sup> (1981) 1 SCC 608.

<sup>8</sup> (1981) 1 SCC 635.

<sup>9</sup> AIR 1986 SC 991.

<sup>10</sup> *Kadra Pabadiya and others v. State of Bihar* AIR 1981 SCC 939.

<sup>11</sup> *Sheela Barse v. State of Maharashtra* AIR 1983 SC 378.

<sup>12</sup> *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC 81.

<sup>13</sup> Dr. G. Mallikarjun, *LEGAL AID IN INDIA AND THE JUDICIAL CONTRIBUTION*, NALSAR Law Review, Vol.7 : No. 1, 2013, p. 237.

<sup>14</sup> AIR 1972 SC 855.

<sup>15</sup> A.K. Roy Vs. Union of India, 1982 1 SCC 271,295.

The entire system of administration of justice is based on the cardinal principle of concept of equal justice. State is under a Constitutional obligation to provide free legal aid. If the state provide free legal aid to the poor, ignorant and illiterate people including accused by demand, than it is considered as a mockery of legal aid. If legal aid fail to provide its services to poor, it would become merely a paper promise. There was not express provision in the Constitution regarding providing free legal aid to the indigent and disadvantaged at the expense of the State before 1976. However, the equality principle, natural justice and its application have enhanced the civil law. Equity and equality is synonymous. The essential principles of the civil jurisprudence is equality before law and the principle of equal standing, in English law, the legal aid the paupers in the process of litigation was well recognized and accepted in the form of “forma pauperis”.

The procedural codes also contains some of the provisions relating to providing of legal aid to the poor and indigent persons. The Civil Procedure Code, 1908 deals with providing legal aid to the poor on the principle of equal standing under Order XXXII in respect of their civil rights and access to civil justice par with their opponents through an application to file case as a pauper. If the court grant permission, than he shall not liable to pay any fees with respect to petition, appointment of pleader or other proceeding connected with the suit.<sup>1</sup>

Apex Court as the guardian of the Constitution & protector of fundamental rights of its people cannot distance itself from the harsh reality arising out of poverty and its impact upon the right to seek equal justice from the court. The Hon’ble Supreme Court expressed itself in the following observation - “If the citizen whose right has been violated does not file petition before the court by reason of poverty or illiteracy etc., the court will be helpless and cannot punish the persons violating the fundamental rights guaranteed by the Constitution”.<sup>2</sup> After the development of the concept of legal aid through the interpretation of the Constitutional provisions of fundamental rights and Directive Principles of State Policy and the Preamble, it is essential to discuss the interpretation of some of the Fundamental Right Cases of the Supreme Court which accentuated, promoted this aspiration and concept to an active reality.

The question relating to providing of legal aid is not only provide assistance of a lawyer, but competent lawyer against opponent party. If it is not done, it will amount the violation of fundamental right to equality. The three organs of the State i.e., legislature, executive and the judiciary were working for the betterment of the people and their work is complimentary to each other. But the functions of the each organs is different with each other. Legislature enacts the laws, executive to implement the law and judiciary to interpret the law and dispense the justice to all. “When the two organs failed to enact and implement the law and policies of the Part IV, the third organ has to perform its role of implementing them on the way or other. And such an action or the role of the judiciary, we can not call excessive judicial legislation”. The Supreme Court held that “Judicial process is also state action under Article 37 and the judiciary is bound to apply the directive principles in making its judgments”<sup>3</sup>

The amendments to the Constitution made a lot of impact on the concept of legal aid. Before 42<sup>nd</sup> amendment to the Constitution, there was not clear provision (expressive) for legal aid. Supreme Court also show its interest and concern for providing legal aid for fair trial and equal justice in the Criminal Procedure justice system. The concern of Supreme Court got honor when specific provision for giving legal aid was inserted to the new Criminal Procedure Code, 1973.<sup>4</sup> It may be recalled that in the summer of 1975, emergency was clamped on the Nation, suspending Indian democracy and making fundamental rights inoperative. The Supreme Court also received the onslaught of the emergency when the power of Judicial review was attempted to be curtailed by the Constitutional 42<sup>nd</sup> Amendment Act, 1976, (Section 5) by inserting Clause (4), (5) to Article 368.

In the case of *Sunil Batra v. Delhi Administration*<sup>5</sup> the hon’ble Supreme Court brings legal aid society into actions and calls for their active participation in the process and recommended the District bar to keep a calls for prisoner’s relief and observed that - “The prisoner’s rights shall be protected by the Court by its writ jurisdiction plus contempt power. To make this jurisdiction viable, free legal services to the prisoner programme shall be promoted by professional organisations recognised by the Court such as ' e.g. Free legal aid (S.C.) Society. The district bar shall recommend to keep a cell for prisoner’s relief”.

The Supreme Court has to taken up the responsibility to educate the people legally because of the failure of government to bring full literacy, this will fall within the domain of pure social justice in the educational front under Directive Principles of State Policy. It also proves that legal aid is the process of delivery system of social justice. This is the active role played by the Supreme Court in promoting social justice to the poor and indigent persons of the society. Supreme Court in its various decisions highlighted about the importance of legal aid to the poor and the needy and the role of government and judiciary. If the state fails to provide legal aid to the poor, it is against to the aspiration of the Constitutional values. State is duty bound to protect the rights of it citizen at any cost.

A Constitutional bench of five judges of the Supreme Court in *A.R. Antulay v. R.S. Nayak*<sup>6</sup> dealt with very important question of “right to speedy trial” and laid down guidelines.<sup>7</sup>

<sup>1</sup> Rule 8 of order xxxm of c.p.c.

<sup>2</sup> Daryoo v. State of U.P. AIR 1961 SC 1457.

<sup>3</sup> Vasanth Kumar Vs. State of Karnataka AIR 1985 SC 1495 at 1502.

<sup>4</sup> Section 304 of Criminal Procedure Code, 1973.

<sup>5</sup> *Sunil Batra Vs. Delhi Administration* AIR 1980 SC 1579.

<sup>6</sup> AIR 1992 SC 1701

<sup>7</sup> a) Fair, just and reasonable procedure implicit in Article 21 creates a right in the accused to be tried speedily.

b) Right to speedy trial, flowing from Article 21, encompasses all the stages, namely, the stage of investigation, inquiry, appeal, revision and re-trial.

c) The concerns, underlying the right to speedy trial from the point of view of the accused, are :

- the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected do unnecessary or long incarceration prior to the conviction;

The Hon'ble Apex Court played a significant role through its interpretation and give new dimensions in the bail laws bringing it within the sweep of Article 21 of the Constitution and connected with the concept of legal aid. Whatever the development witnessed in this regard, it is because of the active participation of the judges of the Supreme Court. Their active involvement really activated the Constitutional mandate of socio-economic justice and the welfare concepts.

The concept of judicial activism also played a vital role in promoting the concept of legal aid. Judiciary has played a active role in promoting justice to the common people. The champion of PIL Justice V.R. Krishna Iyer and Justice Bhagwati played a very important role in providing equal justice to every citizens irrespective any reason.

According to Dr. Upendra Baxi, "*Public Interest Litigation movement is primarily judge-led and even judge -induced in India*".<sup>1</sup> In India Public Interest Litigation is an active declaration of judicial power to improve the difficulties of the depressed and deprived class of the society. The movement of PIL ushered as a means of legal aid to the all the persons who are illiterate, poor, indigent, unprivileged and underprivileged those who have been denied justice.

In *Bandhu Mukti Morcha v. Union of India*,<sup>2</sup> Supreme Court declared PIL as a co-operative, non-adversarial exercise to correct justice. It was held to be not necessary for the Court to follow fire "adversarial procedure under all circumstances". The epistolary jurisdiction of Supreme Court and High Courts contributed a lot in the development of PIL in India, where even a letter started to be treated as writ petition in the attainment of and to secure justice. Mr., Justice A.M. Ahmadi (Rtd.)<sup>3</sup> also expressed their opinion about the judicial activism.

The Supreme Court is the ultimate repository of all Judicial powers of the Country and is known as the guardian and the protector of the people's Fundamental Rights. The judicial conscience cannot rest reconciled to a situation that may expose citizenry to the substantial risk of grave injustice. Mischief would arise from passivity of the Supreme Court and it would be unwholesome and against the public interest if justice elude the weak and the poor.

### Conclusion

The concept of legal aid is based on the principle of humanity. The various provisions deals with the legal aid and it is made it available to the poor. The main aim of the legal aid is to extend legal services to those who are weaker section of the society both socially and economically. It is well stated that state can ensure political equality subject to the assurance of economical equality. The concept of legal aid helps the people to come out from ignorance and exploitation. In the concept of welfare state legal aid plays as an one of the important instrument.

The principle of natural justice is one of the base for sound legal system of any nation of the world. Our judicial system is also standing on the premises of one single most important canon of natural justice. According natural justice no one punished without giving an opportunity of being heard. The concept of free legal aid provision is contained in Article 39A of the Constitution within the ambit of Part IV and therefore this provision is not enforceable before the court of law. The access to justice poses a challenge to the democratic values. The rights and laws must reflect contemporary realities to remain meaningful. Equitable availability of legal aid as a top national priority should be, therefore, made a Fundamental Right for the larger good of the nation. Legal aid is not only required to be provided for access to the Court of Justice or during the course of Court proceedings but the legal assistance also needs to .be provided to the poor persons when they are detained or arrested by the Police or other authorities.

The concept of legal aid is not a charity, but a constitutional obligation of the State to provide it to the bonafide and eligible persons. Article 39A is a part of "just fair and reasonable procedure" under Article 21 of the Constitution and the due process of law, as affirmed by the Supreme Court. 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.

- the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimum; and
- undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance I or non-availability of witnesses or otherwise.

d) Where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is who is responsible for the delay. Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated and delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay.

e) While determining whether undue delay has occurred, one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the Court concerned, prevailing local conditions and so on - what is called the systemic delays. In such matters, a realistic and practical approach, instead of a pedantic one, should be adopted by the State including judiciary as well.

f) Each and every delay does not necessarily prejudice the accused. However, inordinately long delay may be taken as presumptive proof of prejudice, the prosecution should not be allowed to become a persecution. But, when does the prosecution become persecution, again, depends upon the facts of a given case.

g) Ordinarily speaking, where the Court comes to the conclusion that right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, shall, be quashed. In a given case, however, the Court may make such other appropriate order, if the quashing of proceedings is not in the interest of justice.

h) It is neither advisable nor practicable to fix any time limit for trial of offences. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay.

i) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis.

<sup>1</sup> Upendra Baxi, Taking suffering seriously : Social Action Litigation in the Supreme Court of India, in P.K, Gandhi, Social Action through Law, Concept Publishing Co. N. Delhi, 1985 P.62.

<sup>2</sup> AIR 1984 SC 803

<sup>3</sup> "Judicial Activism" may be defined as the pro-active role played by the judiciary in ensuring that the Rights and liberties of the people are protected. It may be understood as the role of the court in stepping out from its normal interpretative role. When the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the system of country laying down principles and guidelines that the Executive must carry out, that role of the court, may be said to be judicial activism.

