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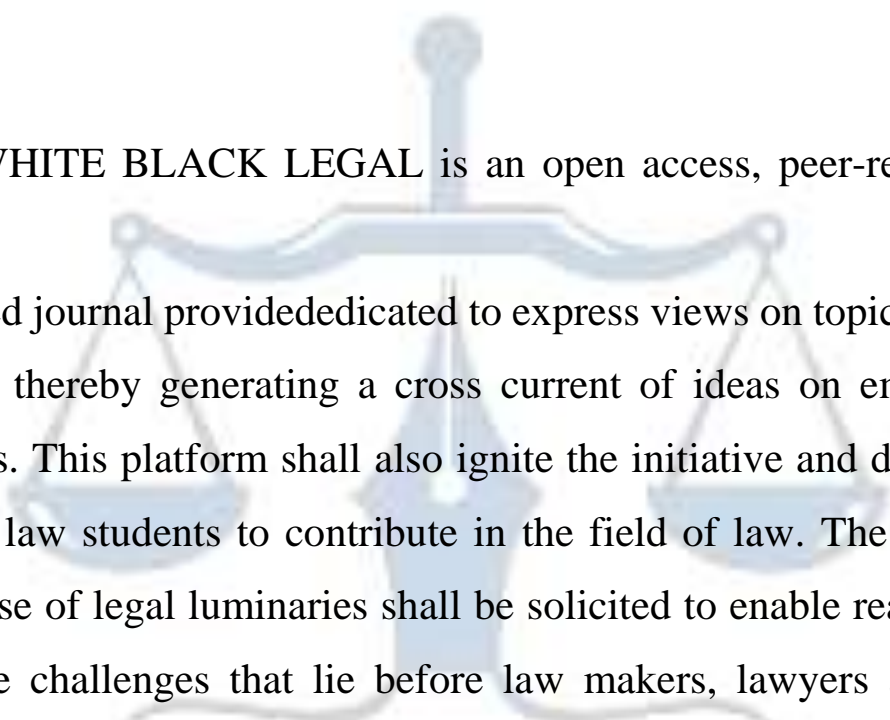


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LEGAL AID: NATIONAL AND INTERNATIONAL PERSPECTIVE WITH SPECIAL REFERENCE TO ROLE OF INDIAN JUDICIARY

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1. Introduction

The ultimate objective of all the legal systems across the world is to impart justice to the people by enforcing their rights and redressing their grievances. However, one of the most crucial issues facing the legal community is access to justice. A big chunk of the population around the globe is deprived of its inherent right of access to justice owing to its poverty, illiteracy, ignorance, lack of awareness, exploitation and certain other disabilities of similar kind. The poor and the downtrodden is not in a position to hire the expensive services of a private lawyer to plead his case in the court. In the absence of qualified advocate, the high sounding universal principle of audi alteram partem ensuring opportunity of being heard to all the parties involved in a litigation and assuring that no one should be condemned unheard is no more than a mere pious hope. Rule of law ensuring equality before law and equal protection of law is meaningless if one party to a litigation is supported by a competent lawyer to argue his case where as his adversary party has no legal expert to plead for him. In such a pitiable situation, the principles of natural justice would remain confined to the mere lip service and would never be realized in true letter and spirit on the ground. Administration of justice postulates the administration of equal justice which is a dream that would never be realized among unequals. Even the pious principles of equity demands equality among equals and inequality among the unequals. How can the same treatment be given to the people under different circumstances and of different accomplishments? Unequals cannot be treated alike. The concept of a welfare state and an egalitarian society pre-supposes social justice. The ideal of social justice can be achieved only by providing equal access to justice for all the people transcending the barriers of poverty, backwardness and ignorance.

If legal aid would be provided to the economically backward class, then only the inherent right of equal access to justice for all could be realized. The untiring efforts of United Nations are

indicative of the international concern towards the realization of the noble ideal of providing equal access to justice for all particularly the poor and the needy by assuring the provision of legal aid in their countries by the member states by enacting the various international documents like the Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966. In order to fulfil its international commitment and observing its socialistic mission for setting up a welfare state, India has incorporated the provision of legal aid to the poor and the needy in its Constitution in the form of an ideal enshrined in the Preamble, as a fundamental right under Articles 14, 19, 21 and 22 and as a directive principle of state policy under Article 39-A. The Indian Parliament has enacted a specific legislation called The Legal Services Authorities Act 1987 for assuring the provision of legal aid in India. Other statutes like Advocates Act 1961, Civil Procedure Code 1908, Criminal Procedure Code 1973 contain provisions relating to legal aid in India. Various authorities like National Legal Services Authority¹, State Legal Services Authority² and District Legal Services Authority³ have been established at the national, state and district levels in India to implement the provision of legal aid in the country. Apart from these, Supreme Court Legal Services Committee⁴, High Court Legal Services Committee⁵ and Taluk Legal Services Committee⁶ have been set up at the various level respectively to assist in the task of providing legal aid in India. The Indian judiciary particularly the Supreme Court and the High Courts is in the forefront to play a pivotal role in issuing guidelines from time to time to the Indian governments to ensure the smooth provision and working of legal aid mechanism in the country.

Undoubtedly, the various governments in India have from time to time made untiring efforts to accomplish the international commitment and the constitutional pledge to ensure equal justice for all the people in the country and to assure that no person in India is deprived of approaching the court of justice for the enforcement of his rights and the redressal of his grievances. However, the largest democracy in the world where majority of the population is suffering from want and distress is still far behind from achieving the universal goals qua the provision of effective legal aid in the country. Unfortunately, there is a gap between the

¹ The Legal Services Authorities Act, 1987 (Act 39 of 1987), s. 3.

² *Ibid.*, s. 6.

³ *Ibid.*, s.9.

⁴ *Ibid.*, s.3A.

⁵ *Ibid.*, s.8A.

⁶ *Ibid.*, s.11A.

legislative commitment and the institutional response regarding the provision of legal aid in India.

As such the present research has been undertaken to make a comparative study of policies and practices pertaining to legal aid followed in some of the selected countries of Europe so as to find out their levels of endeavor and accomplishment and to propose a working model and an ideal course of action qua the provision of legal aid in India by adopting the better policies and practices followed in Europe and thereby attempting to bridge the gap between the legislative perspective and the institutional responsiveness in India and to make the provision of legal aid more meaningful.

In the present paper policies and practices pertaining to legal aid followed at international levels has been undertaken to propose a working model and an ideal course of action qua the provision of legal aid in India by adopting the better policies and practices followed internationally and thereby attempting to bridge the gap between the legislative perspective and the institutional responsiveness in India and to make the provision of legal aid more meaningful.

2. MEANING OF LEGAL AID

Legal aid means providing financial help by the state to the poor so that he can avail legal services⁷. Legal aid means the legal assistance provided to the poor whether free of cost or for nominal charges⁸. According to Justice PN Bhagwati, Legal aid contemplates an arrangement in the society to make equal justice readily available to all the people particularly the poor and the illiterate for the enforcement of their legal rights and the various hindrances like poverty and ignorance should not cast any obstacle in the smooth administration of justice⁹. According to Justice VR Krishna Iyer, Legal aid postulates a humane approach to law and the legal order assuring equal access to justice for both the strong and the weak, the rich and the poor thereby ensuring social justice in the true sense. In simple words, the concept of legal aid means and includes three perspectives. The first perspective of providing legal aid is to provide free legal representation in the court to those people who cannot manage to pay the fee of the advocate due to their poverty and financial restraints. The second aspect of legal aid is to offer legal help to the individuals who cannot reach the court of law due to exploitation, backwardness and the

⁷ *Oxford Dictionary*, 513 (Oxford University Press, UK)

⁸ *The New Encyclopaedia Britannica*, 122, Vol VI (1974).

⁹ Government of Gujarat, Report of Legal Aid Committee (1970).

other like deprivations. The third angle of the legal aid is the creation of legal awareness and assertiveness about their legal rights and the legal remedies available to them among the masses who are unable to take legal recourse due to their illiteracy, ignorance and lack of awareness.

3. LEGAL AID IN INDIA

The basic document, the Constitution of India provides ample provisions relating to legal aid in India. The Preamble¹⁰ resolves to secure social, economic and political justice to all the citizens of India. The Preamble¹¹ further resolves to provide equality of status and opportunity to the Indian citizens. There are many fundamental rights which ensures the provision of legal aid to the poor and the needy in India. Article 14¹² provides equality before law and equal protection of laws in India. Article 21¹³ ensures the fundamental right of life and personal liberty to all the people in India. Article 32¹⁴ provides the fundamental right to all the people in India to approach the Hon'ble Supreme Court by instituting appropriate proceedings for the enforcement of their fundamental rights by way of writ jurisdiction. Further, the Constitution of India has issued a mandate to the government of India by way of directive principle of state policy to ensure equal access to justice for all. Article 38(1) provides that the state shall promote the public welfare by effectively providing social, economic and political justice. Article 39-A provides equal justice and free legal aid. Besides the Constitution of India, a special law has been enacted by the Parliament of India called the Legal Services Authorities Act 1987 to make the provision of legal aid for the poor and the needy people in India. The Legal Services Authorities Act 1987 provides for the establishment of various authorities like National Legal Services Authority, State Legal Services Authority and District Legal Services Authority at the national, state and district levels in India to implement the provision of legal aid in the country. Apart from these, Supreme Court Legal Services Committee, High Court Legal Services Committee and Taluk Legal Services Committee have been set up at the various level respectively to assist in the task of providing legal aid in India. Apart from the special law, various provisions have also been made in the various Acts like Advocates Act 1961, Civil Procedure Code 1908 and criminal Procedure Code 1973 dealing with the provision of legal aid to the poor and the downtrodden in India so as to ensure the constitutional mandate of providing equal access to justice for all.

¹⁰ The Constitution of India

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

4. INTERNATIONAL CONCERN ON LEGAL AID

Justice can be accessed by the poor and the vulnerable sections of the society through the legal aid mechanism. For the fair, humane and efficient justice system, legal aid is very important. If the people do not have any access to the legal aid, their rights would get infringed when they come in contact with the criminal judicial system. For civil and administrative matters also, access to the legal aid is necessary for the empowerment of the poor and unprivileged public. People may have access to knowledge about their rights and obligations if legal aid is provided to them. Legal aid is very important, it is also reflected through the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System issued in 2012¹⁵. It is the very first step taken at the international level regarding the provision of legal aid in criminal cases with the motive of establishment of criminal legal aid systems. In the declaration of 2012 regarding the rule of law at national and international levels, the emphasis has been laid upon the protection of right to equal access to justice for all and all necessary steps to be taken in this regard which includes the provision of legal aid¹⁶. The resolution adopted by the Commission on Crime Prevention and Criminal Justice encourages the UN member states to make the effective legal aid provisions at domestic level. This resolution also asked to work with other UN agencies so that in the field of legal aid, the assistance can be provided to the member states. Legal aid is to provide equal access to justice for all especially the women and other special categories such as disabled, denominational etc. Along with this, Legal aid also protect the rights of victims and witnesses¹⁷. Through legal aid, the legal advice and assistance regarding the property, inheritance and family matters is given to the survivors of gender based violence and therefore, legal aid contributes towards treating the gender equally and empowering the woman. Right to fair trial and equal protection of law was at very first granted by The Universal Declaration of Human Rights 1948¹⁸. So, for accomplishment of the goal legal aid is necessary. By this declaration UNO asked member states to strengthen their justice systems so that everyone can be given equal protection of law. Article 14 (3)(d) of The International Covenant on Civil and Political Rights says that legal assistance must be provided to the persons facing criminal charges and in the interest of justice the legal assistance can be provided free of cost if the person is not capable to pay for it¹⁹. In the General Recommendation #32 Human Rights Committee laid stress on the right to legal assistance. According to the

¹⁵ UN General Assembly, G A Res 67/187.

¹⁶ UN General Assembly, G A Res 67/1.

¹⁷ *Ibid.*

¹⁸ UN General Assembly, GA Res 217 A (III) (December 10, 1948).

¹⁹ The International Covenant on Civil and Political Rights, 1966, Art. (2)(3)(a) and Art. 14 (3)(d).

recommendation, whether a person can access relevant proceedings or not, it is determined on the basis of availability of legal assistance. International Covenant on Economic Social and Cultural Rights, 1976 does not specifically speak about the right to legal assistance but it asserts that everyone should be entitled to equal rights without any discrimination²⁰. The Convention on the Elimination of all forms of Discrimination Against Women 1979 aims at equality which also includes equality of legal protection of rights without any gender discrimination. The General Recommendation #33 published by the Convention on the Elimination of all forms of Discrimination Against Women gives the guidelines regarding how the legal aid services can be assessed by the woman including legal awareness.

European convention for the Protection of Human Rights and Fundamental Freedoms 1950²¹ also speaks about the legal assistance. Article 6 of the convention says that the person has right to defend himself personally or through the legal assistance of his own choice. In the interest of justice legal assistance free of cost to be provided to the person if he does not have sufficient means to pay for it²². In Eastern Europe and Central Asia, in the 20th century for the poor people legal services were provided by the ex officio appointment approved in which the services were provided by the lawyers either Pro Bono or they were given compensation for their discrete actions. At the end of 20th century various laws have been made specifically upon Legal Aid with the target to improve Legal Aid. Legal Aid Reformation includes reconfiguration of payment parameters, priority to be given by the lawyer to the society above his client, Legal services to be reorganized, legal aid in criminal cases can be provided even by unlicensed lawyers. Pilot public defender's office were established in several countries such as in Georgia, Ukraine and Moldova²³. Some of the Eastern European countries provides Legal Aid only in criminal cases, some allows in both criminal and civil case, some have limited the legal aid facility keeping in view the term of imprisonment while other provides legal aid in all criminal matters. In Western Europe, through Bar Association and churches it became common in 18th and 19th century to provide legal aid in Austria, France and Germany. Nowadays legal aid provided in the Europe has its foundation upon the European Convention on Human Rights. By the European Court of human rights, the regional people are provided the guidance about the state-funded Legal Aid.

²⁰ International Covenant on Economic Social and Cultural Rights, 1976, Art. 2(2).

²¹ Council of Europe, ETS 5 (November 4, 1950).

²² *Ibid.*, Art. 6(3)(c).

²³ Ministry of Justice of Ukraine and UNDP, "International Study of Primary Legal Aid Systems with The Focus on the Countries of Central and Eastern Europe and CIS", Legal Empowerment of the Poor project (Kyiv: 2012).

5. JUDICIAL APPROACH ON LEGAL AID IN INDIA

The Hon'ble Supreme Court and the various High Courts in India have delivered various landmark judgements in an attempt to assure that equal access to justice is ensured to all the people in the country transcending the obstacles and hindrances of poverty, illiteracy, ignorance, exploitation, backwardness, lack of awareness and the others. Justice PN Bhagwati has, while pronouncing the judgement, very emphatically remarked that it is the constitutional right of every person to have equal access to justice in India and it is the constitutional duty of the state to provide it²⁴. The landmark judgements of the Apex Court would help in understanding the concept and working of legal aid mechanism in India-

In **Hussainara Khatoon vs Home Secretary State of Bihar**²⁵, the Hon'ble Supreme Court of India learnt about the plight of under-trial prisoners who have remained in the prison for periods longer than the maximum term for which they could have been sentenced if convicted due to their poverty and ignorance. Therefore, the Supreme Court emphasized on the provision of adequate and comprehensive legal aid in India. In **Khatri vs State of Bihar**²⁶, it was observed that the state is bound to provide legal aid to the poor and the needy not only during the trial but also when the accused is first produced before the Magistrate after arrest or thereafter remanded into custody from time to time. It was further observed that right to legal aid cannot be refused on the grounds of financial constraints or administrative inability. In **Kishore Chand vs State of Himachal Pradesh**²⁷, it has been observed that it is high time that the senior advocates themselves volunteer to defend the poor to ensure equal access to justice. In **Sheela Barse vs State of Maharashtra**²⁸, it was held that the Indian Constitution through Articles 14, 21 and 39-A provides mandatory legal assistance to the people who are not represented by a counsel due to their economic and other disabilities. In **Sukdas vs Union Territory of Arunachal Pradesh**²⁹, it has been observed that the provision of free legal aid to the Indian person is compulsory to realize the fundamental rights of equality and life and liberty under Articles 14 and 21 respectively. In **Gopalanachari vs State of Kerala**³⁰, the Hon'ble of Supreme Court of India has cast upon the state the duty under Articles 21 and 22 of the constitution to follow the just, fair and reasonable procedure of providing legal assistance to

²⁴ Hussainara Khatoon vs Home Secretary State of Bihar (1979) 3 SCR 532.

²⁵ (1979) 3 SCR 532.

²⁶ (1981) 2 SCR 408.

²⁷ (1990) 1 Supl 105.

²⁸ AIR 1983 SC 378.

²⁹ AIR 1986 SC 991

³⁰ 1981 Cri. L.J. 337

the accused person to defend his case. In **Moti Bai vs State**³¹, it was observed that it is a constitutional mandate under Article 22 to provide free legal assistance to the poor and the needy accused at the state expense. In **State of Madhya Pradesh vs Shobha Ram**³², it has been observed that the Constitution of India clearly provides an absolute right to the accused to be represented by a lawyer which cannot be curtailed or taken away in any manner. In **MH Hoskot vs State of Maharashtra**³³, the Hon'ble Supreme Court of India referred to Article 8(2)(e) of the International Covenant on civil and political rights 1966 which guarantees the absolute right to the accused of the provision of legal assistance by the state in case the accused does not engage a lawyer to defend himself. The Apex Court further referred to Article 14(3) of the International Covenant on civil and political rights 1966 which guarantees the right to legal representation to all the accused persons at the state expense. In **Air India Statutory Corporation vs United Labour Union**³⁴, it was observed that it was the bounden duty of the state to set up a comprehensive and an effective legal aid programme under Article 39-A to ensure that the legal system promotes justice on the basis of equality. In **Rajoo @ Ramakant vs State of Maharashtra**³⁵, it has been observed that Article 39-A added by 42nd amendment 1976 in the directive principles of state policy has contributed in bringing about a historic change in the legal aid movement in India. In **Peoples Union for Democratic Rights vs Union of India**³⁶, the Apex Court of India has interpreted the noble principle of Rule of Law to mean that justice must be equally available to the destitute and the under privileged sections of the society. It was further observed that if the meek and leverage sections of the society are deprived of enforcing their legal rights due to unavailability of the resources, the provision of legal rights to them is of no use. In **Kadra Pabadiya vs State of Bihar**³⁷, it was observed that it is the duty of court to appoint a competent counsel for the litigant who has no lawyer to represent him.

6. CONCLUSION AND SUGGESTIONS

Conclusion

According to the doctrine of Audi Alteram Partem, Opportunity of being heard shall be provided to all the parties involved in a hearing. This is an age old ritual. In the primitive

³¹ 1954 Cri. L.J. 1951

³² AIR 1966 SC 1910.

³³ AIR 1978 SC 1548.

³⁴ AIR 1997 SC 645

³⁵ AIR 2012 SC 3034

³⁶ AIR 1982 SC 1473

³⁷ AIR 1981 SC 939.

societies also, no one was condemned unheard though hearing in those times was personal only and not through a counsel. However with the advancement of civilization, a plethora of complex and complicated laws have come into existence. The authority of judicial precedent cannot be undermined today. This has made it difficult for a litigant to present his case in person in the court without a lawyer. Litigation without an advocate has become impossible. But a major chunk of the population around the globe is suffering from want and distress. As such, the weaker sections of the society who are not even in a position to make their both ends meet cannot afford the hefty fees of the lawyers. Litigation through a private lawyer is like a mirage for them. It is like a dream which would fail miserably. Therefore in a welfare state, the provision for legal aid to the poor is an essential requirement for the true and constructive realization of their democratic ideals. An egalitarian society is possible only where social justice is in full swing. The cause of social justice can only be realized when all the people have equal access to justice. Otherwise, justice would serve only the rich and resourceful. Those suffering from want and distress would silently become the prey of their disabilities like poverty, ignorance and backwardness.

Before the advent of Legal Services Authority act 1995, The criminal procedure code as well as Civil Procedure code played a vital role in the application of the legal aid practically. The state is duty bound to provide the legal aid to its citizens and it's not a kind of charity or bounty rather it's the right of the citizens. The right to legal aid complies with the constitutional provisions regarding equal justice for all as legal aid is the facility for the downtrodden and weaker sections of the society so that they can have equal access to justice like the economically sound citizens of India. But the Legal Aid movement has not achieved the goal as was required. Lack of legal awareness among Indians is the basic reason behind it and because of this poor class of society is being exploited and deprived of its rights.

Suggestions

To overcome the situation, it is suggested that legal education must be imparted among the poor illiterate citizens at the very grassroot level and they must be made aware about their basic rights. The more focus of judiciary is required to give the momentum to the legal aid movement. As much as possible free legal aid must be provided so that structural and social discrimination against the downtrodden could be eliminated. Instead of passing new laws, the effective and proper implementation of existing laws regarding Legal Aid must be focused.