CHAPTER III

LEGAL AID
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3.1 INTRODUCTION

The constitution of India has defined and declared the common goal for its citizens as “to secure to all the citizens of India, justice – Social, Economic and Political”. The eternal value of the constitutionalism is the rule of law which has three facets i.e. rule by law, role under law and rule according to law. Under our constitution, it is the primary responsibility of the state to maintain law and order so that the citizens can enjoy peace and security. The preamble speaks of justice, social economic and political and of equality of status and opportunity. It points out that protecting the interest of the poorer section of the society is the constitutional goal. So this very idea of protecting poor people cannot be promoted without the effective, efficient functions of the legal aid programmes and legal literacy programme. The study relates to the Legal Aid provisions in Constitution and in the code of civil and criminal procedures.

3.1.1 Legal Aid Relevant Constitutional Provisions : Preambular Aspirations and Legal Aid

The preamble\(^7\) to the Constitution summarises the aims and objectives of the Constitution. It is a legitimate aid in the interpretation of the constitution. It put

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\(^7\) The Preamble of the Constitution of India declares, 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 IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION. Section-2 deals with Amendment of the preamble. In the preamble to the constitution: for the words “SOVEREIGN” DEMOCRATIC, REPUBLIC, the words “SOVEREIGN” SOCIALIST SECULAR DEMOCRATIC, REPUBLIC shall be substituted1. Be it
socialism in the Constitution as its guiding principle and Master Slogan. The Constitution of India, undoubtedly, is goal-oriented, policy-oriented, and welfare state-oriented and permeates all laws of the land and its Preamble sets the human tone and temper of the Constitution which envisages, among other things, justice, equally and dignity of individuals. The Constitution of course is that light-house for all the navigators and its interpretation must conform to its aims and objects. Law no doubt is for the man, for the society for advance towards those fundamental goals in vocatively expressed in the Preamble by the “we the people of India”, and the Preamble contains “ideals and aspirations of the people of India” Law of course, is not static, backward looking or a tradition bound. The preamble of the Constitution of India speaks of justice, social economic and political and of equality of status and opportunity. The duty of legal aid is to find out the area of disturbance and to plug out the cause by forefront of the advocating legal literacy as well as legal aid.

3.1.1.1 Concept of justice

The Constitution inscribes Justice as the first promise of the republic which means that state power will execute the pledge of justice in favour of the millions who are the republic. Justice is genus of which social justice is one of its species; Social Justice is people’s justice where the tyranny of power is transformed into the democracy of social good.


80 Chitkar M.G and Mehatha P.L: Lok Adalat and the poor, p104
81 The term ‘justice’ is originated and derived from Latin jus, law. This again cognate with jussen, meaning what is ordered. A just man means who obeys orders-moral-orders of just laws. Just law has the quality of fairness or impartiality.. Justice, therefore, the criterion of adjudging a law as good or just law. Jethrow brown opines that justice as a concept of jurisprudence is mere conformity to law. Stammler also maintain that all positive law is an attempt to be just law.
‘Justic’ said Daniel Webster, "is the greatest interest of man on earth". ‘Justic’\textsuperscript{82}, as Aristotle said, “is the bond of men in society." and "States without justice" are as "robber-bands." St. Augustine said. The power of justice is so great that it strengthens and excites a person fighting for a justice cause. Justice is both an objective reality as well as an abstract quality outside and within the realm of law involving values and reality, ethics and mortality, equality, and liberty and social control, and individual freedom conditioned by need of individual good and conscience.

Collier’s encyclopedia, 1962 viewed justice ‘firstly, as the logical, almost mechanical assessment of act or acts according to the criteria of an accepted and mandatory value structure represented by the law; secondary, justice involves reference to sum to criterion or set of values which is reassumed to be higher than and superior to that which is embodied in the law.

The international webster new encyclopedic dictionary of the English language says ‘justice’ as equitableness, unprejudiced adjudication of conflicting interests on the basis of legal or moral principals; lawfulness; what is rightly due. The new oxford illustrated dictionary defines justice as just conduct fairness, exercise of authority in an maintenance of right, judicial proceedings, to treat fairly etc., as for the shorter oxford dictionary, justice, the quality of being(morally) just or righteous; the principle of justice dealing just conduct, integrity, rectitude.

Justice, in a generic sense, involves man fold ideals and principals, it forms are also chaotic, such as legal justice, social justice, natural justice, democratic justice, totalitarian justice, political justice etc. These divisions are viewed for

\textsuperscript{82} Suresh Kumar Sharma: Distributive justice under Indian Constitution with reference to right to equality and property, deep & deep publications Quoted in philosophy of justice and distributive justice p - 17
understanding the very nature and content of justice. Similarly various theories have been propounded to explain the genes or nature of justice. For instance-David miller propounds; indeed the most valuable general definition of justice is that which brings out its distributive character, most plainly ‘justice is sum evique to each his due’-the just state of affairs are that in which each individual has exactly enjoyed these benefits and burdens which are due to him by virtue of his personal characteristics and circumstances.

J.S. Mill remarks: justice implies something which is not holy right to do, and wrong not to do, but which some individual person can claim from us is moral right. Rawls proposes the following general conception of justice\(^83\) a). each person is to have an equal right to the most comprehensive basic liberty compatible with a similar liberty for others, b) social and economic inequalities are to be arranged so that they are both To the greatest benefit of the least advantages; and Attached to offices and positions open to all the conclusions of fair equality of opportunity.

In short the dimensions and scales of justice are not blind or merely abstract. The concept of justice as such is though provoking and it made the making to develop themselves in an environment conducive to freedom, human dignity and socio economic justice. The philosophy embodied in the U.S. Declaration of Independence, 1776, the Universal Declaration of Human rights, 1948 and the various other modern constitutions, particularly so, the Constitution of India is its very preamble enshrine the concept justice.

Justice is considered to be the primary goal of a welfare state whose very existence in turn rests on the parameters of justice, the greatest contrast, however, between ancient and modern thinking about the social harmony of justice is in the

changed conception of individual personality in relation of law. The term justice has two aspects, namely, abstract justice and concrete justice. In the Abstract sense 'justice' means a course of conduct both legal and moral, which tends to argument human 'welfare'. The concept of 'Justice' is not easy to define in absolute terms. It is a term which has to be changing socio-economic contours of a given society. According to Aristotle justice is of two types. They are (1) Distributives justice and (2) corrective or remedial justice. Aristotle said that justice implies a certain degree of equality; this equality might, however, be either arithmetical or geometrical, the first based on identity and then second on proportionality and equivalence. Arithmetical equality leads to commutative justice, geometrical equality to distributive justice, (to each according to his deserts). The second is the business of the legislator, while the first is the business of the judge. Political rights and goods should be apportioned according to distributive justice, punishments should be imposed and damages paid according to commutative justice. The theory of justice thus involves an examination of the body of rights and duties accepted in the society in the light of the formal principles of equality, the aim being to rid it of arbitrary elements; that is discrimination not grounded on relevant differences.

According to St. Thomas Aquinas; "Justice is habit (habitus), whereby a man renders to each one his due with constant and perpetual will." According to Kelsen: Justice is social happiness. It is happiness guaranteed by a social order." He further writes: "The happiness that a social order is able to assure cannot be happiness in a subjective individual sense; it must be happiness in an objective-collective sense, that is to say, by happiness we must understand the satisfaction of certain needs, recognized by the social authority, the law giver, as needs worthy of being satisfied, such as the need to be fed, clothed, housed, and the like."

84 In the words of Aristotle, "Injustice arises when equals are treated unequally and unequal's are treated equally. Justice arises when equals are treated alike."
Austin viewed the concept of 'justice' was more concerned with legal justice as a standard, measured in terms of positive law in contrast to 'moral justice' or 'individual justice'; the concepts which were widely prevalent in the earlier stages of the development of the society. Dean Roscoe Pound, new vistas in the sphere of justice. According to Pound's 'theory of justice', the law is a means to balance the competing interests of an individual along with the social interests of the society. Laski, thinker of twentieth century regard law as a means of realizing 'social justice' the striking of balance between the competing interests and values.

3.1.1.2 Distributive Justice: The expression ‘social and economic justice’ involves the concept of ‘distributive justice’, which connotes the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between the unequal in society. Social justice, therefore, comprehends more than lessening of inequalities by the differential taxation, giving debt relief or regulation of contractual relations; it also means the restoration of properties to those who have been deprived of them by unconscionable bargains; it may also take form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of the society. The ideal of economic justice is to make equality of status meaningful and life worth living at its best removing inequality of opportunity and of status – social, economic and political.

P.N. Bhagawathi succinctly explains distributive justice as under “when I talk of justice, I mean not commutative justice but distributive justice, justice in depth, justice which penetrates and destroys inequalities of race, sex and wealth, justice which is not confined to a fortunate a few, but takes within its sweep the entire people of the country, justice which ensures equitable distribution of the social, material and political resources of the community.” This is the kind of justice which
we in India are trying to realize through the process of law and our substantive law is being geared to this task.

Justice V.R. Krishna Iyer visualizes justice as a "Special concern for the backward human sector of the lowliest and the lost, and activist, affirmative state action for their advancement as a democratic imperative, plus the organization of a sensitive and creative milieu which offers, as of right, social, economic and cultural opportunities, dignity of personhood and individuality to every human, regardless of seeming or real disparities to unfold his full mental, moral and physical potential. 85

Distributive justice means justice to all and not to a few or a favoured class. It does not introduce class conflicts, but seeks to improve and harmonize the society with a view to avoid the socio-economic imbalances. Distributive justice demands preferential treatment of the weaker sections of the society, but that is only to correct the imbalances existing in the society and not to cause unnecessary harassment or injustice to the advanced sections thereof. Thus, it seeks to remove the imbalances in the social, economic and political life to the people. There cannot be distributive justice unless the society progresses in all the directions. According Plato “Justice is a board which holds a society together, a harmonious union of individuals each of whom has found his life work in accordance with his natural fitness and training. Democracy is the product of liberty, equality and fraternity and these three make for rationality. “A democratic state is prone to schemes for supporting the idle and indigent citizens (plato.).

3.1.1.3 THE CONCEPT OF SOCIAL JUSTICE

The term social justice was first used in 1840 by a Sicilian priest, Luigi Taparelli d'Azeglio, and given prominence by Antonio Rosmini Serbati in La Costituzione Civile Secondo la Giustizia Sociale in 1848.\(^86\) A Theory of Justice has used it as a pseudonym of distributive justice. The concept of social justice is a revolutionary concept which provides meaning and significance to life and makes the rule of law dynamic. When Indian society seeks to meet the challenge of socio-economic inequality by its legislation and with the assistance of the rule of law, it seeks to achieve economic justice without any violent conflict. The ideal of a welfare state postulates unceasing pursuit of the doctrine of social justice. That is the significance and importance of the concept of social justice in the Indian context of today. ‘justice’\(^4\) was used as equivalent to ‘Righteousness’, since the beginning of recorded ethical and legal history In 1918, Karl Kautsky wrote in the Dictatorship of proletariat: “Socialism as a means to the emancipation of the proletariat without democracy is unthinkable……socialism is for us inseparably connected with democracy … No socialism without democracy.” The concept of socialism is not of new origin, Swami Vivekananda, all India congress committee had adopted the socialism approach since long; J. Nehru as president declared at the labour session of the congress (1929) that the philosophy of socialism had gradually developed in the whole structure of society through the world. The Avadi resolution on socialistic pattern of society, the Nagapur resolution on the Agrarian co-operatives and Jaipur statement on democracy and socialism lead one to the invisible conclusion that India is wedded to the establishment of Democratic socialism.

To the mahatma independence did not mean more freedom from British rule by breaking the bonds of slavery but it meant more than that, It means justice to all citizen of India, irrespective of religion race, caste, sex creed or language; each getting his legitimate due. Jawaharlal Nehru, the light of Asia to implements the goal

\(^86\) http://L.S.com /article/sojt./html site visited on 3.5.2010.
of social justice declared. “I am convinced that the only key to the solution of the
world’s problem and of India’s problem lies in socialism. In short, it means a new
civilization, radically different from the present capitalist order. It was in this
background the Constitution of India came to an inducted on 26day of Nov, 1949.
The heart of social justice is have with a heart a humanistic jurisprudence sensitive to
the disabled sector, a versatile legal technology, rich with substantive rules,
operational process and executive read to give relief in the spirit of love and armed
with law.

The concept of social justice consists of diverse principles essential for the
orderly growth and development of personality of every citizen. Social Justice is
thus an integral part of justice in the generic sense. Social Justice is dynamic devise
to mitigate the sufferings of the poor, weak, tribals’ and deprived sections of the
society and to elevate them to the level of equality to live a life with dignity of
persons. Social Justice is not a simple or single idea of a society but is an essential
part of complex social change to relieve the poor etc., from handicaps, penury to
ward of distress and to make their life livable for greater good of the society at large.
In other words, the aim of Social Justice is to attain substantial degree of social,
economic and political equality, which is the legitimate expectation and
constitutional goal. In a developing society like hours, stepped with unbridgeable
and ever widening caps of inequality in status and of opportunity, law is a catalyst,
rub icon to poor etc to reach the ladder of Social Justice. The Constitutional law
concern of social justice as an elastic contentious process is to accord justice to all
sections of the society by providing facilities and opportunities to remove the
handicaps and disabilities with which the poor are languishing and to secure dignity
of the persons. The Constitution, therefore, mandates the state to accord Justice to all
members of the society in all facets of human activity. The concept of Social Justice
embeds equality to flavor and enliven the practical content of life. Social Justice and
equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of Social Justice to bring about equality.

‘Social justice’ in its broader sense, is used to include economic justice, political and social justice. Provision of equal opportunities to all citizens and removed of social and economic disparities fall within the purview of social justice. Not only this, it also includes political justice. The basic norm which governs the concept of social justice is that of not discrimination or that of equality among human beings regardless of race, religion, caste, color, sex etc., thus, there has to be no discrimination among the citizens On social grounds and every body should have sufficient opportunities of developing his or her potentialities to the maximum extent in the absence of exploitation and disrespect. The society having commitment for social justice has to ensure to all its citizens a life of decent quality and culture. India is committed to economic growth, planning, direction and control of social change so as to secure social justice to the people.  

The idea of welfare state is that the claims of social justice must be treated as cardinal and paramount. Social justice is not a blind concept or a preposterous dogma. It seeks to do justice to all the citizen of the state. Constant endeavour has to be made to sustain individual freedom and liberty and subject them to reasonable regulation and control as to achieve socio-economic justice. Social justice must be achieved by adopting necessary and reasonable measures. That, shortly stated, is the concept of social justice and its implications. Citizens zealous of their individual freedom and liberty must co-operate with democracy which seeks to regulate freedom and liberty in the interest of social good, but they must be able to resist the imposition of any restraints on individual liberty and freedom which are not rationally and reasonably required in the interests of public good, in a democratic

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way. It is in the light of these difficult times that the rule of law comes into operation and the judges have to play their role without fear or favour, uninfluenced by any considerations of dogma or isms.

Social justice in the wider sense involves political justice and in the restricted sense it involves economic and distributive justice. In reality, social justice is standing for behind the grasp of the common man.

Social justice remains an obscure expression, incapable of any precise definition. In Muir mills co ltd V Suit mills mazdoor J. Bhagawati comments ‘social justice is a very vague and indeterminate expression and that no clear cut definition can be laid down which will cover all the situations. The concept of social justice thus takes within its scope the objective of removing all inequalities and affording equal opportunity to all citizens in social affairs as well as economic activities. The policies of the government should be to protect the weak against the strong and poor against exploitation by rich group and to formulate laws to provide equal opportunity and social order. To express it in the words of President Roosevelt, the state should strive to establish a social order which would ensure “freedom from wants’ and ‘freedom from fear for all. Our social system is multilingual, multi religious and multicultural as well, and in this complex society we are facing several problems. The legal literacy became a very important facet of life, in the light of the ignorance or money, especially the schedule castes, S.T & B.C and the other downtrodden sections of the society.

Social justice is the key note of the constitution, where the bulk of the people are of backward social and economic status but the national goal is social and

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88 Muir mills co ltd V suti mills mazdoor union(A. IR -1955-SC 170)  
89 N.R.MadhavMenon, Legal Aid And Legal Education A Challenge and and opportunity,StudentLegalService Clinic p2
economic justice, the rule of law, notwithstanding its majestic equality, will fail in its mission in the absence of a scheme to bring the system of justice nearer the down-trodden. Therefore, it becomes a democratic obligation to make the legal process a surer means to social justice. The major strategy to end the estrangement between the law and lowly is legal aid in its comprehensive coverage which is what we mean by the expressive, though newly minted word ‘juridicare’.

Justice Krishna Iyer says, “Social justice is people’s justice where the tyranny of power is transformed into the democracy of social good.” The observations of Blaise Pascal dealing with inter-relationship between the state power and rendition of justice are apposite: “Justice without power is inefficient; Power without justice is tyranny. Justice without power is opposed, because there are always wicked men. Power without justice is soon questioned. Justice and power must therefore be brought together, so that whatever is just may be powerful, and whatever is powerful may be just.”

Social justice would also include legal justice, which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all sections of the people irrespective of their social or economic position or their financial resources.

The universal declaration of Human Rights, the great covenants, the many conventions and other United Nations resolutions have woven a garment of human rights, social justice defense of dignity and cultural development, not merely for individuals, but also for homogeneous group, communities and minorities. Each particularly belonging to weaker category has to evolve new principles of jurisprudence, new rule, regulations and laws and cannons of justice and new instrumentalities to protect the weaker individuals and groups so that freedom may
not be the monopoly of some and a suppressive order be the lot of the many. The rule of law geared to the rules of justice whereby each individual and community may have the opportunity to unfold its personality in the political, social and economic, must become a reality.

Law should accord with justice;\textsuperscript{90} and the disharmony between the two should be removed. The result otherwise would be that the protections and the benefits promised by the law would become teasing illusions. Our Constitution, wedded to democracy, socialism and secularism, guarantees equality of status and equal protection of law; and the goal set by the Directive Principles is to secure and protect a social order in which justice shall inform all the institutions of the national life.

The same was true of our founding fathers. In their arduous quest for justice during our National Freedom Struggle they felt the prime importance of framing a Constitution for a free nation where justice for its citizen becomes easily accessible. The idea of legal aid in the industrial adjudication is to serve the purpose of social justice. It endeavors (1) to analyse social justice (2) to incorporate social justice in the industrial relations and to declare legal aid in the industrial relations as an instrument of social change. J. Krishna Iyer\textsuperscript{2} observed that social justice is the tune of Constitution of India and this note is nowhere more vibrant in industrial jurisprudence. Efforts have been made to define the concept of social justice in the background of the labor relations. Mrs. Indira Gandhi Former Prime Minister of India observed that: “Law should be an instrument of social justice and the System must shake off the inhibiting legacy of its colonial Past and assure a dynamic role in the process of transmission. It should assist in the liberation of human Spirit and human institutions from the strait-jacket of out dated custom”.

\textsuperscript{90} k. Bhaskaran: Legal Aid to the poor Chief Justice, High court of Andhra Pradesh C.U.L.R (1986) p1
Indian concept of social justice, Justice Subba Rao, a former Chief Justice of India identified a two-fold meaning to it. He said: The expression Social Justice has a limited as well as a wider meaning. In its limited sense it means the rectification of injustice in the personal relations of the people. In its larger sense it seeks to remove the imbalances in the political, social and economic life of the people. Social justice is to be understood in the latter sense. As the three activities are interconnected, there cannot be social justice even in its limited sense, unless the society progresses in all directions. In short, social justice helps to bring about a just society. The means adopted in the task of achieving social justice and as important as the end objectives. As Subba Rao J, observes it (social justice) seeks to meet out justice through just means Unjust means may satisfy some, but cause injustice to others and bring in its trial a chain reaction of unjust consequences. Justice is to all and not to a favoured class, it does not introduce class conflicts but seeks to improve the society, with a view to avoid the imbalances.

In (1995)\(^ {91}\) it was held that "Social justice is a device to ensure life to be meaningful and livable with human dignity. State has to provide facilities to reach minimum standard of health, economic security and civilized living to the workmen. Social justice is a means to ensure life to be meaningful and livable. "So we can see that the Supreme Court has always stepped in to protect the interest of the Indian citizens, whether it has been has the case of consumer protection or claiming insurance or be it representation of suppressed classes, it has used the medium of social justice as an umbrella term to deliver justice.

Legal Aid in India has comprehensive constitutional status and ambit, its inspiration, individuality and operation being found in the group of articles referred

\(^ {91}\) Consumer Education & Research Centre v Union of India,1995 SCC p.42.
to further down. Its jurisprudential roots, socio-legal character and perspective amplitude are evident from the circumstances that “We, the people of India” who are, by and large, poor and backward, are at once the architects and beneficiaries of the New Order. Consistent with this slant and stance, the highlight of the constitutional system is social and economic justice as a rule of life and of law, since the evocative words of the preamble and Article 38 have to have the ring of sincerities. Although, under the Indian Constitution there is no express statement of legal aid as a fundamental right there are many provisions in our Constitution providing legal It is not only the constitutional duty of the legislature and the executive but also of those who operate the levels of judicial power to join the struggle for achieving these targets. The nature of judicial functions is such that it can also play and should play an important role as a catalytic agent and an accelerator in the process of achieving socio-economic justice to masses”92

3.2 FUNDAMENTALRIGHTS PROVISIONS FACILITATING LEGAL AID:
Part III of the Constitution deals with Fundamentals Rights which are judicially enforceable. Indian Constitution not only proclaims in the preamble but also guarantee equal justice to all Under Art 14. Article 14, 21&22, incorporates the idea of Legal Aid and equal justice. Art.14 deals with Equality before Law and Equal Protection of Laws. The very nature of the article makes it clear that the Legal aid to the indigent person is directly derived out of this article and made positive to implement the legal aid scheme a very feasible scheme within the territory of India. Equal justice demands access to law and justice to both the poor and the rich. Equal justice further require equal opportunity and human dignity which necessitates

considerable reorientation of the attitudes of legislators and the public at large so that no discrimination is made either substantially or procedurally against persons. Justice Chandrashekar highlighted as to how economic inequality hampers equality in the administration of justice, in his following words. “…..Theoretically all are equal in the eyes of law and justice. But in reality economic inequality has made justice beyond the reach of the weaker section of the people. As the law has become so complicated and the procedure in courts is so technical that very really a litigant will not be able to put forth his case before the Court, without the aid of an advocate. How many people in our country can afford to pay fee for engaging the services of advocates? A litigant has also to incur expenses for the travel, between his place of residence and the place where the Courts situated and for bringing his witness to the Court…” Therefore, our concept of legal aid is expected to take note to such economic needs of litigation.

The heart of the Constitution is the fundamental rights given to every citizen and the Directive principles of the Executive and legislative for governance of the country.93 The object behind them is to ensure certain basic rights to the citizen, so that they are not at the mercy of the shifting opinions of legislators, Dr. Ambedkar is of opinions that the inclusion of Fundamental Rights in Constitution is to ensure firstly that every citizen must be in a position to claim those rights, secondly they must be binding on every authority. These Fundamental Rights are not absolute riddle the in position of reasonable restrictive so many exceptions have eaten up the rights alternative .Acc to A.M Rasesthaa Fundamental Rights was intended to provide not only senility for and quality of citizen but also certain standards of conduct, citizen justice of fair play. Constitutional provisions aimed at preventing discrimination and promotion of social justice are under Fundamental Rights articles 14, 15& 23. Thus it is clear that this provisions made a concerted effort to abolish

93 Supra note 11 at p.10
social inequity, social stigma and social disabilities in our society. That is why a biding concern for justice is the first premise in the Preamble, and the cornerstone of our Fundamental Rights is equality which is rightly called the ‘mother of justice’. If equality disappears from the precincts of court, justice is orphaned. Therefore ‘access to justice’ in our Constitution is placed on the high pedestal of fundamental right. Access to justice is an inbuilt content of Article 14. If in accessing justice, the common man has to encounter barriers and impediments, the equality clause becomes a mere promise on paper. If access is gagged in a judiciary and the judges do nothing to remove the obstacles, such a system ceases to be an independent judicial system.

The Principle of legal aid is based on the social, economic and political considerations. It being a constitutional imperative, the citizens and the governments are to strive for the establishment of an egalitarian society in which full and equal justice is guaranteed to all irrespective of position at which one is stationed in life.

RIGHT TO EQUALITY:

Indian Constitution not only proclaims in the preamble but also guaranties equal justice to all under article 14. Every human being is therefore, is a divine being and has title to dignity, liberty, equality and other basic rights. Articles 21 and 22 of the Constitution deals provisions relative to Social and equal justice. Besides there are a number of entries in the legislative Lists which amply provide for legal aid to the poor and needy ones. These entries are in the union list, state list and concurrent

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94 Article 14 provides that State shall not deny to any person equality before the law or the equal protection of law. Article 21 declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22(1) provides that person who is arrested shall be denied the right to consult and be defended by a legal practitioner of his choice

12 Entry 3: Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of matters in this list.

Entry 11A: Administration of justice; Constitution and organization of all courts, except the Supreme Court and the High courts.
The need for providing legal aid to poor and the needy is to be recognized within the framework of Entry 3 of the state list lays down the primary responsibility of the state to provide legal assistance to those who cannot afford to go to the court of law on their own because of financial limitations. These entries obligates the central and state government to enact legislations regarding legal aid.

The Scheme of legal aid may also be framed as a part of economic and social planning under entry 20 of the concurrent list. Some jurists also stressed that legal aid is not a State subject under the concurrent list. Indeed, there should be a partnership between the Union Government and the State Government, for social action. The Expert Committee supported this view. The Doctrine of equality enshrined in Article 14 is a dynamic and evolving concept, which has many facets. It is embodied not only in Article 14 but also in Art. 15-18 of part III as well as in Article 38, 39-A, 41 & 46 part IV of the constitution. The objective of all these provisions is to attain - Justice social, economic, and political which is indicated in the preamble and which is the sum total of the aspirations incorporated in part IV. In a society where glaring inequalities of income social injustice and exploitation, inequality of status and opportunity exist, there is no room for equality before law. The spiritual essence of legal aid moment is to provide equality.

Right of equality under Art14 is also extended to the aliens and foreigners and also for the artificial personalities like companies in certain circumstances. The legal

\textit{Entry 20: Economic and social planning}

\textit{96} Report of the Preparatory Committee for Legal Aid Scheme, Government of Madhya Pradesh. Published by M.P. State Legal Aid and Advice Board, Bhopal (ed. 1982)

\textit{97} The Doctrine of equality embodied in Article 14-18 have to understood in the light of social justice. Article 14 to 18 of the Constitutionguarantee the right to equality to every citizen of India. The succeeding Articles 15 and 16 speaks about the prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth. Article 16 guarantees equality of opportunity in matters of public employment. Untouchability is prohibited under Article 17 and Article 18 abolishes all Royal Titles which were in practice during British regime
aid is an instrument to achieve equality before law. It is a concept of administration of justice. Equality is the bedrock of any democracy. Democracy provides equality before law and equal protection of law.\(^9^8\) Equality before the law is the fundamental principle of the English Constitution. Regarding the principle of equality before the law learned English Scholar A.V. Dicey writes: With us no man is above the law but that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England, the idea of legal equality or of the universal subjection of all classes to one law administered by the ordinary courts has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

Equality in administration of justice thus forms the basis of all modern systems of Jurisprudence. Justice W.B. Rutledge rightly mentioned that equality before law in a true democracy is a matter of right. It cannot be a matter of charity or of favour or of grace or direction. The legal aid is only the practical method to guarantee that no person shall be denied the equal protection of the law because he is poor.

Equality before law necessarily involves the concept that all the parties to a proceeding in which justice is sought must have an equal opportunity of access to the court and of presenting their cases to the Court. But the access to the courts depends upon the payment of court fees, and the fee of skilled lawyer. In so far as a person is unable to obtain access to a court of law due to poverty for having his wrongs redressed or for defending himself against a criminal charge, justice become unequal and laws which are meant for his protection have no meaning and to that extent fail

in their purpose. Unless some provision is made for assisting the poor man for the payment of lawyer’s fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice. The rendering of legal aid to the poor litigant is, therefore, not a minor problem of procedural law but a question of a fundamental character Article 14 sets out an attitude of mind, a way of life, rather than a precise rule of law.

The law is a bewildering jungle of rules, and a procedure which confounds both judges and lawyers alike. How can we expect from poor present to conduct his case successfully in such complicated legal system without any help? The interpretation of our Constitution must be progressive. Now a line has been drawn between the rich and the poor, hence the justification that “like should be treated alike” seems to be irrelevant. The Court should interpret Article 14 in such a way as to invoke its aid to the poor and direct the State not to deny equality to those who have not ample means of representing themselves in the courts of law. Equal justice demands access to law and justice to both the poor and the rich and unless concession is provided to poor persons the Article 14 regarding equality will be futile and a mockery. The legal aid is really a fact of the right to equality before the law. The assurance of equal justice under law is an essential requisite of true democracy, and the such principle requires that competent and conscientious legal assistance be available to all persons in need thereof even though they are unable to secure it through their own financial resources. 99 If equality before the law is not functional that is readily available and viable in remedies for a poor men’s complaint or assertion of his right, then it is fiction even for those who have the privilege to be represented before the law. It will be idle to speak of the blessing of liberty unless the poor enjoy the equal protection of law.

99 Ibid at P 65
The reason is obvious, that the equal access to court depend upon the money in pocket required to pay court fee, lawyer’s fee etc. Although, the ideal of modern law is fairness to rich and poor alike, the latter are often at practical disadvantage and need special help. The legal right to poor is a fallacy because without money one cannot exercise it and this is the phenomenon which cause suffering and hardship to the poor. The concept of equal justice requires that the legal rights of the poor and his ability to enforce those rights should be same as those of his richer neighbours. Equal justice further requires equal opportunity and human dignity which necessitates considerable re-orientation of the attitudes of legislators, lawyers and the public at large so that no discrimination is made either substantially or procedurally against the poor.

There is no justice unless there is a sure uniformity about it. In a country like ours, where the poor are neither aware of their rights nor have money to engage lawyers, justice ends up becoming a rich man indulgence. The object behind free legal service for poor is to ensure equal and uniform justice. The ideals of equal justice, legal services and legal aid are a mechanism to realize equality before the law and equal protection of laws as these are basic aspects of administration of justice.

3.2.1. Scope of Art 21 – Protection of Personal Life and Liberty –

The object of Art 21 is to protect the life or personal liberty of every person. It guarantees against deprivation of personal liberty. The State cannot deprive a person of his life or liberty except in accordance with procedure established by law. Procedure established by law are words of deep meaning for all lovers of liberty and judicial sentinels. Amplified, activist fashion, procedure means fair and reasonable procedure. One component of fair procedure is natural justice. Article 21 intends to

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100 Art. 21 of the Constitution of India "No Person shall be deprived of his life or liberty except according to the procedure established by law".
prevent encroachment upon personal liberty by Executive save in accordance with law and inconformity with the provisions thereof. Prior to the decision in 1978 in Maneka's case\textsuperscript{101} Article 21 was construed narrowly only as a guarantee against executive action unsupported by law but in Maneka's case\textsuperscript{102} a limitation was imposed upon legislations while depriving a person of his life or liberty it must prescribe procedure which is reasonable, fair and just. Justice Bhagwati, (as he then was) pronounced that the procedure by which a person is deprived of his life or personal liberty must be reasonable, fair and just. This view of justice Bhagwati became harbinger of the most revolutionary development in the field of Human Rights. The Maneka ratio was fruitfully utilized by Justice Bhagwati to extend legal services to the accused. 

The Supreme Court of India has laid down that right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21. The Learned Judge had a wider vision of the right to get legal aid in his opinion is was nothing but equal justice in action and the delivery system of social justice. The State Government cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative liabilities. The State is under a constitutional mandate to provide free legal aid to an accused that is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State.\textsuperscript{103} The Court extended the scope of right to counsel in legal aid and held that detenu right to consult a legal advisor of his choice for any purpose. It was treated as a part of the right to live to human dignity. The Court held that the

\textsuperscript{101} Gopalan v State of Madras 1950 S.C.R 88
\textsuperscript{102} Maneka Gandhi v Union of India A.I.R. 1978 SC.597,
\textsuperscript{103} Francis Coralie v Union Territory A.I.R. 1981 SC. 746,
prison regulations must provide for an interview with a counsel for a consultation failing which is violative of Art. 21.\textsuperscript{104}

The Supreme Court set aside the conviction and the sentence passed by the trial court because free legal aid was not provided to the accused during the trial as it is violative Article 21.\textsuperscript{105} Suk Das v. Union Territory of Arunachal Pradesh, The facts of this case are the appellants and four other accused were charged in the Court of the Additional Deputy Commissioner, Dibang Valley, Anini, Arunachal Pradesh for an offence under Section 506 read with Section 34 of the Indian Penal Code on the allegation that the appellants and the other four accused threatened Shri H.S. Kohli, Assistant Engineer, Central Public Works Department, Anini with a view to compelling him to cancel the transfer orders of the appellants which had been passed by him. The case was tried as a warrant case and at the trial 8 witnesses, on behalf of the prosecution, were examined. The appellants were not represented by any lawyer since they were admittedly unable to afford legal representation on account of their poverty and the result was that they could not cross examine the witnesses of the prosecution. The appellant examined witnesses without any legal assistance. The result was that at the end of the trial the other 4 accused were acquitted but the appellants were convicted of the offence under Section 506 of the Indian Penal Code and they were sentenced to undergo simple imprisonment for a period of two years. The appellants preferred an appeal before the Gauhati High Court. The contention is that the appellants were not provided free legal aid for their defense and the trial was therefore vitiated. The High Court in the circumstances confirmed the conviction of the appellants but reduced the period of sentence as they already undergone by them. The appellants were accordingly ordered to be set at liberty forthwith but since the order of conviction passed against them was sustained by the High Court, they preferred the present appeal with special leave obtained from this Court.

\textsuperscript{104} Khatri and Ors. v. State of Bihar, A.I.R. 1981 SC.928
\textsuperscript{105} Sukdas and others v. Territory of Arunachal Pradesh, A.I.R. 1986 S.C 991
This appeal by special leave raises a question of considerable importance relating to the administration of criminal justice in the country. The question is whether an accused who on account of his poverty is unable to afford legal representation for himself in a trial possibility of imprisonment imperiling his personal liberty, is entitled to free legal aid at State cost and whether it is obligatory on him to make an application for free legal assistance or the Magistrate or the Sessions Judge trying him is bound to inform him that he is entitled to free legal aid and inquire from him whether he wishes to have a lawyer provided to him at State cost: if he is not so informed and in consequence he does not apply for free legal assistance and as a result he is not represented by any lawyer in the trial and is convicted, is the conviction vitiated and liable to be set aside. This question is extremely important because we have almost 50% population which is living below the poverty line and around 70% is illiterate and large sections of people just do not know that if they are unable to afford legal representation in a criminal trial, they are entitled to free legal assistance provided to them at State cost.

Free legal assistance at State Cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty. This fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. The exercise of this fundamental right is not conditional upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him. On the other hand the Magistrate or the Sessions Judge before whom the accused appears is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. The conviction reached without informing the accused that they were entitled to free legal
assistance and inquiring from them whether they wanted a lawyer to be provided to them at State cost which resulted in the accused remaining unrepresented by a lawyer in the trial is clearly a violation of the fundamental right of the accused under Art. 21 and the trial must be held to be vitiated on account of a fatal constitutional infirmity.

In subsequent years the Apex Court incorporated access to justice in Article 21 by various judicial interpretations. Articles 22(1) and 22 (2) specifically ensure the ‘access to justice’ of persons who are arrested and detained in custody. The right to move the Apex Court for enforcement of Part III rights by appropriate proceedings is a guaranteed fundamental right under Article 32. While exercising power under this Article in the words of Chief Justice Gajendragadkar, the Court has to play the role of a ‘sentinel on the qui or a right without a remedy is legal conundrum of the most grotesque kind. The Supreme Court’s right to do ‘complete justice’, cutting across all procedural wrangles, has been recognized in Article 142. At times the Supreme Court exercises its jurisdiction under Article 32 in conjunction with its power under Article 142. It is well established that State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and needs of justice to requires, provided of course, the accused person does not object to the provision of such a lawyer.

3.2.2 Article 22 (1)

Right of Arrested Person: Article 22 (1)\textsuperscript{106} of our Constitution provides that no person shall be denied the right to consult, and to be defended by a legal practitioner of his choice. The right of the accused to have a counsel of his choice is fundamental

\textsuperscript{106} Gopalachari V. State of Kerala, A.I.R. 1981 S.C.67424 \textit{In dubio Pro reo – An uncared right. Hate the Sin, love the sinner} – Mahatma Gandhi \textit{Hate no one, but they vices not themselves. Hate the crime and not the criminal} - J.G.C.Brain hard” The two allusions express that even the sinner needs human treatment. It indicates the right of the accused will be protected. The legal terms \textit{In dubio pro reo} is equivalent to “Innocent Until Proven Guilty” the cardinal rule in criminal jurisprudence is that every person is innocent until proven guilty
and essential to fair trial. The right is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend himself before a court of law wherein the prosecution is conducted by a competent and experienced prosecutor. This has been eloquently expressed by the Supreme Court of American in Powell v. Alabama. The Court observed that right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

The Supreme Court held in Janardhan Reddy v State Hyderabad, the right guaranteed to an accused person under Art 22(1) is not absolute right to be supplied with a lawyer by the state the only right is to have an opportunity to engage a lawyer. Later in subsequent cases the supreme court held that it is a constitutional duty on the part of the state to assign a lawyer the Supreme Court observed in khatoon case that it is the constitutional right of every accused person who is unable to engage a lawyer and secure a legal service on the ground of his poverty, to have free legal service

107 287 US 45 (1932).
108 A.I.R. 1951SC 217
provided to him by the state and the state his under a constitutional mandate to provide a lawyer to such accused person.

When a person is arrested ever since the moment of his arrest he has a right to consult a legal advice of his own choice and also to have effective interview with the lawyer out of the hearing of the police, though it may be within their presence. The right extends to any person who is arrested, whether under the general law or under the special statute. The right to consult and to be defended by a lawyer of his choice belongs to the person arrested not only at pre-trial stage but also at the trial of any offence whether the offence is punishable with death, imprisonment or otherwise.109

The right to be defended includes not only the defense against arrest but also against charge. If an arrested person is released on bail it does not mean that he has ceased his right under this Article. The Right to consult Legal adviser also extends to preventive detention cases. The old view of the Supreme Court that this Article does not guarantee any absolute right to be supplied with a lawyer is vitiating.

3.3 Directive principles and Legal Aid

Part IV deals with Directive Principles of State Policy which are fundamental in the Governance of State. The Directive Principles, contained in part 1V of the Constitution, definitely have their feet deep in the struggle for independence and were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India and the rights and principles that connect India’s

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*Per Justice Vivan Bose in Bidi Supply co. v Union of India (AIR 1956 SC 479 at p- 487
future, present and the past, adding of greatly to the significance of their inclusion in the Constitution.

The Supreme Court liberalized ‘access to justice’ in view of the clear mandate under Article 38 of the Constitution. Article 38\textsuperscript{110} imposes a duty on the State, which obviously includes the judiciary, to usher in a social order in which justice-social, economic and political, must inform all institutions of national life. So by widening the ‘access to justice’, the Court is discharging its Constitutional duty to promote a just social order.

The All India Congress Committee under the Chairmanship of Mrs. Swaran Singh in its report recommended the constitutionalization of legal aid in the directive principles of state policy. The Recommendation of the Swaran Singh Committee is embodied in the Constitution (forty second Amendment) Act 1976. By virtue of the amendment Act the legal aid has become a constitutional direct as enshrined in Article 39-A\textsuperscript{111} to ensure equal justice which has been promised to all citizens by the preamble and to further guarantee equality before law (Article 14), which had no meaning to poor so long he was unable to pay for his legal adviser. Article 39-A puts stress upon legal justice the directive obliges the state to provide free legal aid to deserving people so that justice is not denied to any one merely because of economic disability.

Right to Access To Justice is a Fundamental Right under Art 21 and it has been reinforced by 39-A which provides that State should promote justice and provide free

\textsuperscript{110} Article 38 provides that the State shall strive to promote the welfare of the people by securing and Protecting as effectively as it may be a social order in which justice, social economic and political shall inform all the institutions of the National life.

\textsuperscript{111} Article 39A, lays down that the State shall secure that the operation of the legal system promote 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, ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
legal aid by suitable legislation (Legal Services Authorities Act,1987) or schemes ensures that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Therefore the state in criminal cases must give facility to be defended by a counsel to the accused. The main object behind insertion of article 39-A is to mitigate inequalities so that justice reaches to the door of the poor and weaker section of the society. In other words, a person should not be denied justice merely on the grounds of poverty to engage a lawyer.

Article 39A is one of the Directive Principles of the State Policy which promotes justice on the basis of equal opportunity. It is the duty of the legal aid functionaries in the State to provide free legal aid by suitable legislation or schemes to give assistance to the citizens who are unable to engage a counsel on account of poverty.

Directive Principles articulate the goals and ideals to be realized by India as a welfare state, such as free and compulsory education, the right to work and to better one’s standard of living. Although these rights are not judicially enforceable they “are”, nevertheless, fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. Thus, in India the State by constitutional mandate is required to provide the good life for its people. The apex court undoubtedly is aware of the fact that the courts must become the courts of the poor to whom the justice has been denied for generations. Thus the philosophy of the Constitution contained in its preamble adequately and reasonably interpreted by the Courts, that in order to ensure equality of justice, it is not only sufficient that law treats rich and poor equally, but it is also necessary that poor must be in a position to get their rights enforced.
This newly introduced Directive Principle (Article 39A) obligating the State to provide legal services, impelled the court to further specify the way in which prisoner’s rights in this regard were to be protected.\textsuperscript{112} The Supreme Court explained the objectives of Article 39A as. “It is clear from the terms of Article 39A, the objectives of the Constitution is to ensure social and equal justice so that legal and has to be implemented by comprehensive schemes. Directive principles and fundamental right have no disharmony as both are aiming at the same goal of bringing about a social revolution and the establishment of a welfare state, which is envisaged in the Preamble. Primarily Article.39A is addressed to the Legislature and Executive, but so far as the court of justice can indulge in judicial Law making within interstice of the Constitution, the court too are bounded by this mandate”. Article 39A is an interpretative tool for Article 21. But no writ can be granted to enforce Article 39A. The Supreme Court of India in Rajan Dwivedi V. Union of India\textsuperscript{113} case clearly laid down that petitioner is not entitled to the grant of writ of mandamus for the enforcement of Article 39A. by ordaining the Union of India to give financial assistance to him to engage a counsel of his choice on a scale equivalent to or commensurate with the fees that are being paid to the counsel appears for the state. As is clear from the terms of 39A, the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating scheme for legal aid. The remedy of the petitioner, if any, lies by way of making an application before the learned Assistant session judge under sub-section of Sec 304 and not by a petition under Article 39A.

Legal aid cannot be denied by the government on the ground of paucity of funds. State of Maharashtra V. Manubhai Pragaji Vashi and others\textsuperscript{114} State preferred

\textsuperscript{112} Supra note 6 at P 67
\textsuperscript{113} Rajan Dwivedi v. Union of India A.I.R. 1983 SC 624
\textsuperscript{114} State of Maharashtra v. Manubhai Pragaji Vashi and others, AIR 1996 SC 1
an appeal against High Court Judgment and order of the Court directing the Government of the Maharashtra to extend the grant-in-aid scheme to non-Government law colleges in the State. The Supreme Court of India held that non-extending the grant-in-aid by State to non-Government law colleges and at the same time extending such benefit to non-Government colleges with faculties, viz., Arts, Science, Commerce, Engineering and Medicine (other professional non-Government colleges) is patently discriminatory. The State has not discharged the burden of proof cast on it to sustain the differential treatment meted out to one of the Government recognized professional colleges (private law colleges). It is patent that like have been treated unlike, without proper justification or reason and the private law colleges have been singled out for hostile discriminatory treatment. The disparity in the service conditions in not affording the benefits of pension-cum-gratuity scheme to the non-teaching staff in non-Government law colleges and at the same time affording the same benefit to the non-teaching staff of the colleges Arts, Science, Commerce, Engineering, Medicine is a discriminatory Article 21 is a fundamental right conferred under Part III of the Constitution, whereas Article 39A is one of the directive principles of the State Policy under.

Chandra Bhawan Boarding and Lodging, Bangalore v. State of Mysore, while rights are conferred under Part IV of the Constitution. As held by the Constitution Bench of the Supreme court in Part III are fundamental, the directives given under part IV are fundamental in the governance of the countryIn Unnikrishnan J.P.V. State of A.P., (which again is a ConstitutionBench decision) B.P. Jeevan Reddy, J. stated the law thus: “It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve the goal indicated in Part IV. It is also held that the fundamental rights must be construed in the light of the directive principles.”
The learned Judge has further declared thus: “The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be constructed in the light of the directive principles in Part IV of the Constitution.”

Article 21 the Constitution dealing with personal liberty has many dimensions as held by the series of decisions of this Court. A few of them have been catalogued in the judgment of Mohan J. in Unnikrishnan’s case. It is now fairly settled that the right to legal aid and speedy trial are part of the guarantee of human rights envisaged by Article 21 of the Constitution of India.

In the light of the above, the court has considered the combined effect of Article 21 and Article 39A of the Constitution of India. The rights to free legal aid and speedy trial are guaranteed fundamental rights under Article 21 of the Constitution. The preamble to the Constitution of India assures justice, social, economic and political. Article 39A of the Constitution provides equal justice and free legal aid. The State shall secure that the operation of the legal system promotes justice. It means justice according to law. In a democratic polity, governed by rule of law, it should be the main concern of the State, to have a proper legal system. Article 39A mandate that the State shall provide free legal aid by suitable legislation or schemes or in any other way to ensure the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The crucial words are the obligation of the State to provide free legal aid by suitable legislation or by schemes or in any other way, so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. (Emphasis supplied). The above words occurring in Article 39A are of very wide import. In order to enable the State to afford free legal aid and guarantee speedy trial, a vast number of persons trained in law are essential. Legal aid is
required in many forms and at various stages, for obtaining guidance, for resolving disputes in Courts, tribunals or other authorities.

It has manifold facets. The explosion in population, the vast changes brought about by scientific, technological and other developments, and the all round enlarged field of human activity reflected in modern society, and the consequent increase in litigation in Courts and other forums demand that the service of competent persons with expertise in law is required in many stages and at different forums or levels and should be made available. The need for a continuing and well-organised legal education is absolutely essential reckoning the new trends in the world order, to meet the ever-growing challenges.

The legal education should be able to meet the ever-growing demands of the society and should be thoroughly equipped to cater to the complexities of the different situations:. The court further held that specialisation in different branches of the law is necessary. The requirement is of such a great dimension that sizeable or vast number of dedicated persons should be properly trained in different ranches of law, every year by providing or rendering competent and proper legal education. This is possible only if adequate number of law colleges with proper infrastructure including expertise law teachers and staff are established to deal with the situation in an appropriate manner. It cannot admit of doubt that, of late there is a fall in the standard of legal education. Lack of sufficient colleges called for the establishment of private law colleges. If the State is unable to start colleges of its own, it is only appropriate that private law colleges, which are duly recognized by the concerned University and / or the Bar Council of India and / or other appropriate authorities, as the case may be, should be afforded reasonable facilities to function effectively and in a meaningful manner. State requires substantial funds. Under the label of self-financing institutions, the colleges should not be permitted to hike the fees to any
extent in order to meet the expenses to provide the infrastructure and for appointing competent teachers and staff.

The private law colleges may not afford to incur the huge cost required in that behalf. The standard of legal education and discipline is bound to suffer. It should not so happen for want of funds. The quality should on no account suffer in providing free legal aid and if it is not so, the free legal aid will only be a farce or make believe or illusory or a meaningless ritual. It is in that direction the grant-in-aid by the State will facilitate and ensures the recognized private law colleges to function effectively and in a meaningful manner and turn out sufficient number of well-trained or properly equipped law graduates in all branches year after year. That will in turn enable the State and other authorities to provide free legal aid and ensure that opportunities for securing justice are not denied to any citizen on account of any disability. These aspects necessarily flowing from Articles 21 and 39A of the Constitution were totally lost sight of by the Government when it denied the grant-in-aid to the recognized private law colleges as was afforded to other faculties.

The court directed the State of Maharashtra Government to extend the grant-in-aid scheme to all Government recognized private law colleges, on the same criteria as such grants are given to other faculties, viz. Arts, Science, Commerce, Engineering and Medicine from the academic year 1995. The scheme shall be implemented within three months from today.

3.4 ROLE OF JUDICIARY

Judiciary plays a key role in protecting the rights of the people in plethora of cases.

The objectives and functions of the judiciary are:¹¹⁵

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¹¹⁵ Beijing Statement
(a) To ensure that all persons are able to live securely under the Rule of Law:
(b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
(c) To administer the law impartially among persons and between persons and the State.

In Janardhan V State of Hyderabad,\textsuperscript{116} the court held that the right to be defended includes not only the defence against the arrest but also against the charge. In Motilal V State of Rajastan \textsuperscript{117} the right extends to any person who is arrested, whether under the general law or under a special statute. The supreme court observed in R.M. Wasava V state of Gujarat,\textsuperscript{118} that “Indigence should never be a ground for denying fair trial or equal Justice The right to free legal aid received mandate of the Constitution in the year 1977, under Article 39-A as part of the Directive principles of state policy, which are not justifiable. The importance of part-IV was explained by the Supreme Court in Maneka Gandhi V Union of India\textsuperscript{119} and held that although the Directive principles are not enforceable by any court but the principles therein laid down are never the less fundamental in the governance of the country and they obligate the state to secure a social order.

A Significant Watershed in the history of the Legal Aid Movement in India was the judgment delivered by Justice P.N.Bhagwati in Hussainara Khatoon V. Home Secretary, State of Bihar.\textsuperscript{120} A petition for a writ of habeas corpus was field by the number of under-trial prisoners who were is jails in the state of Bihar for years awaiting their trial, more than their convictions. The supreme court recognized that

\textsuperscript{116} In Janardhan V State of Hyderabad, 1951 S.C.R. 344
\textsuperscript{117} In Motilal V State of Rajastan 1954 AIR Raj 241
\textsuperscript{118} R.M.Wasava V state of Gujarat A.I.R.1974 S.C 1143
\textsuperscript{119} Menaka Gandhi V Union of India A.I.R.1978 S.C 597
\textsuperscript{120} Hussainara Khatoon V. Home Secretary, State of Bihar, A.I.R. 1979 SC 1360
“Right to a speedy trial” a fundamental right is implicit in the guarantee of life and personnel liberty enshrined in Article 21 of the Constitution. Free legal aid to indigent and poor accused is implicit under Article 21. If under trial put in prison more than the period if the imprisonment is imposed for the said offence, it is violation of the test of reasonableness in Article 19 and of fairness in Article 21.

Justice Bhagawathi further held that “it is constitutional right of every accused person who is unable to engage lawyer and secure legal services an account of reasons such as poverty, indigence it is constitutional mandate to provide a free lawyer such accused person if the needs of justice so required. A procedure which does not make available legal services to an accused who is too poor to afford a lawyer and who would, therefore, go through the trial without legal assistance, can not possible be regarded as “Reasonable fair and just”. It is an essential ingredient of Reasonable fair and just procedure to prisoner that the legal services should have been made available who is to seek is liberation through the court’s process. If free legal services are not provided to such an accused, that trial it self may run the risk of being vitiolated as contravening article 21. Legal Aid must be rendered to prisoners as it is guaranteed by article 39A. The court ordered Bihar Government to release forthwith under-trial prisoners on their personal bonds.

The Supreme Court dealt with rights of under trial Prisoners, observed that the right to a reasonably speedy trial was part of the Fundamental rights conferred by Art. 21. Referring to Art.39-A inter - alia to free legal Advice. Bhagwati. J. observed that Art.22 (1) furnishes a surer foundation for the proposition as laid down in that Article that an arrested person shall not be denied “the choice”. The italicized words presumable inserted to prevent the accused being denied the choice of counsel. The right to consult as conferred in Art. 22(1) coupled with the reasonable procedure required by Art.21, would put the state under an Obligation to make legal assistance
available to a needy accused person detained in custody. If free legal Services not provided the trial itself may be vitiated as contravening Art.21.

The Supreme court further recommended the central as well as state Governments to introduce a comprehensive legal service programme in the country on the premise that it is not only a mandate of equal justice implicit in the Article 14 and right to life and opportunity conferred by Article 21 but also the compulsion of the constitutional directives embodied in Article 39-A. The concern of this lordship was that such programme of legal are intended to reach the justice to common man. The Supreme Court in this case further stated that the state will take prompt steps to carry of the constitutional obligation to provide free legal service to every accused who is unable to defend himself through a lawyer, lest the trial itself world run the risk of being vitiated as contravening the provisions of Article 21.

In Madhav Hayawadanro Hoskot V State of Maharashtra the S.C applying the rule of Manaka Gandhi's case has laid down that personal liberty cannot be cut out or cut down without fair legal procedure a prisoner, deprived of his freedom by court sentence but entitled to appeal against such verdict, can claim, as part of his protection under Art. 21 and as implied in his statutory right to appeal, the necessary concomitant of right to counsel to prepare and argue his appeal.

In this case petitioner who was a Reader holding M.Sc. and Ph.D. Degrees was convicted for the offence of attempting to issue counterfeit university degree. The scheme was, however, foiled. He was tried by the Sessions Court which found him guilty of grave offences but took a very lenient view and sentenced him to simple imprisonment till the rising of the court. The High Court allowed the State appeal and enhanced punishment to three years. The High Court Judgment was
pronounced in November, 1973, but the special leave petition was filed in the Supreme Court by the petitioner after 4 years. The petitioner had undergone his full term of punishment. The explanation given by him for the condonation of delay was that he was given the copy of the judgment of 1973 only in 1978. It was disclosed that although a free copy of the order had been sent promptly by the High Court meant for the applicant, to the Superintendent of the Jail but he claimed that he never received it. The Supreme Court, dismissed the special leave application and held that a single right of appeal on facts, where the conviction is fraught with long loss of liberty, is basic to civilised jurisprudence, "One component of fair procedure is natural justice". Every step that make the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and therefore offends Article 21 State responsibilities under 21 is to provide a right of appeal consisting of (1) service of a copy of a judgment to the prisoner in time to enable him to file an appeal, and (2) provision of free legal service to a prisoner who is indigent or otherwise disabled from securing legal assistance. The Supreme Court further observed if a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Art. 142 read with Art. 21 and 39-A of the constitution, power to assign counsel for such imprisoned individual for doing complete justice. This is a necessary incident of the right of appeal conferred by the Code and allowed by art. 136 of the Constitution. The inference is inevitable that this is a State's duty and not Government's charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise, that discretion resides in the court.
While dismissing the special leave petition Hon'ble Supreme Court laid down the following guidelines:

1. Courts shall forthwith furnish a free transcript of the judgment when sentencing a person to prison term;

2. In the event of any such copy being sent to the jail authorities for delivery to the prisoner, by the appellate, revisional or other court, the official concerned shall, with quick dispatch, get it delivered to the sentence and obtain written acknowledgment thereof from him;

3. Where the prisoner seeks to file an appeal or revision, ever facility for exercise of that right shall be made available by the Jail Administration;

4. Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence.

5. The State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix;

6. These begin prescriptions operate by force of Article 21 strengthened by Article 19(1)(d) read with sub-article (5) from the lowest to the highest court where deprivation of life and personal liberty is in substantial peril.

Again two Years later in Sunil Katri V State of Bihar. The Supreme Court held that 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 is implicit in the guarantee of Article 21.

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122 Sunil Katri V State of Bihar AIR 1981 SC 928
The state is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the state. The Magistrate or the session’s judge before whom the accused appears, is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of state.

The Supreme Court observed that free legal aid under 39-A starts as soon as the person is arrested and is produced before magistrate. This is the stage at which accused person needs competent legal advice and representation. No procedure can be said to be just fair and reasonable which denies legal representation to accused at this stage, that the accused gets the first opportunity to apply for bail remanded from time to time and this is stage which accused person. In this case the accused was poor to afford for bail he is unaware of legal services or provisions under 39-A or under 304 of Cr.P.C. The court observed that the state is under constitutional obligation to provide free legal aid services not only at the time of arrest, bail, until the judgment is pronounced it further extends to appeal to High court.

In Kadra Pabadiya and others v. State of Bihar,\(^{123}\) the Supreme Court held that an under-trial prisoner should be provided with a fairly competent Lawyer at state Expense. The state should provide legal assistance to the poor and indigent accused (male and female) whether they are under-trial or convicts. In Sheela Barse V State of Maharashtra\(^{124}\) a journalist complained of custodial violence to women prisoners whilst confined in the police lock-up in the city of Bombay through a letter addressed to the Supreme Court. The Court treated the letter as a writ petition.

\(^{123}\) Kadra Pabadiya and others v. State of Bihar AIR 1981 SCC 939  
\(^{124}\) Sheela Barse V State of Maharashtra AIR 1983 SC 378
The Supreme Court held that legal aid should be provided to a poor or indigent accused whose life and personal liberty is in peril. It is the duty of the State to provide legal assistance to the poor and indigent accused (male and female) whether they are under-trial or convicted persons.

Delivering the judgment of the Court Bhagwati, J, observed, Legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Article 39-A but also by Articles 14 and 21 of the Constitution. It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and rule of law are merely slogans or myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests. It is therefore absolutely essential that legal assistance must be made available to prisoners in jails whether, they be under-trial or convicted prisoners.

Thus there should be no doubt that legal aid is now available as matter of right immediately on arrest land whether the accused is in police lock-up or in jail either as a under – trial or as a convicted prisoner. In Central coal Fields case the effective access to justice provided for by Article 39-A was considered to be basic human right. Thus legal aid has now been transformed in to a human right. In Gopalachari V State of Kerala the right to legal aid was extended even to proceeding under section 110-crp c, the U.S Supreme Court in Johnson V Zerbes, for the first time

125 AIR 1980 SC 2125
126 Gopalachari V State of Kerala AIR 1981 SC 674
127 Johnson V Zerbes 304 US 458 (1938)
had interpreted the fight to counsel to an indigent person in federal criminal proceedings. In Zea Powell V state of Alabama\textsuperscript{128} it was held that failure of according benefit of counsel would amount to denying the “due process law”. The same view was stated in Belts V Brandy\textsuperscript{129}, Robert Galloway white V State of Mary Lord.\textsuperscript{130}

The court in Nandini Satpathys V State of Bihar\textsuperscript{131} case reiterated the same rule in Katri case. The apex court in D.K.Basu V State of West Bengal\textsuperscript{132} held that indigent litigant may be permitted to meet his lawyer during interrogation though not throughout the interrogation.

The Supreme Court had widened the ambit of legal aid free or otherwise, right up to the stage of custodial or near Custodial interrogation by the Police and nor made it contingent on the production of the accused before the magistrate. In Nandini Satpathys case the court held that it would be the prudent for the police to permit the Advocate of the accused, if there be one to be present at the time he is examined. In Kuthu Goala V State of Assam and Gendra Braham V State of Assam\textsuperscript{134} K. Lahiri has very aptly observed, that if free legal aid enshrined in the Constitution and also in the code of criminal procedure means anything to a needy person it should begin form the moment when a poor and needy person is apprehended by the police. It is useless to roots to dry and thereafter to water the plant legal aid at a later stage when the fate of the accused had been sealed is an empty for malty. (Right to get legal aid while in police custody) The court further stated “whenever a person is arrested by the police and taken to the lock-up, the police will immediately give intimation of the

\textsuperscript{128} Zeva Powell V state of Alabama 287 US (1932)
\textsuperscript{129} Belts V Brandy 316 U.S 455 (1942)
\textsuperscript{130} 373 U.S 59 (1963)
\textsuperscript{131} Nandini Satpathys V State of Bihar AIR 1978 SC 1025 Para 58 & 59 of the Report
\textsuperscript{132} D.K.Basu V State of West Bengal 1997 Cr. L.J. 743 SC para 38 (10) of the Report
\textsuperscript{133} Kuthu Goala V State of Assam 1981 Cr. L.J. 424
\textsuperscript{134} Gendra Braham V State of Assam 1981 Cr. L.J. 430
fact of such arrest to the nearest legal Aid Committee and such legal Aid Committee
will take immediate steps or the providing legal assistance. Ashok Kumar V State of
Rajasthan the Supreme Court held that the right of free legal aid shall be rendered
to the indigent persons and it shall not be extended to the rich persons, who can
employ advocates with their own expenses. In this case, the petitioner was a rich
man, but contended that free legal aid should be provided to him. The Supreme Court
dismissed his petition.

T. Suthenraja V State of Tamil Nadu In the famous case of Late Rajiv Gandhi’s murder case. The State Government provided free legal aid to some of
them, entitled for the free legal aid. The State Government fixed a sum of Rs.50/- to
every advocate for everyday attended for the case under Rule 9 of legal Aid to poor
Accused Rules, 1976. The petitioner was one of the advocates appointed for the said
purpose. He contended that the sum paid Rs.50/- was not appropriate. The Madras
High Court held that equal pay for equal work’ rule was not attracted as the criteria in
the appointment of prosecution lawyers was different from those of the defense as
free legal aid to indigent persons. It held that remuneration fixed was reasonable, fair
and just in the circumstances.

Sugreev alias Jagadish and others V Smt. Sushila Bai and others. The
Supreme Court held that where an application filed by litigant of poor economically
weaker section of society to sue as indigent person, it is the duty of the Court either
to send the matter to the concerned authority under Act of 1987 or the concerned
authority under R.18 of o.33 of C. P.C to grant free legal Services, where despite
having been made known of her or his this legal right under the Act of 1987, the
litigant of the category enumerated under sec 12 of the Act, 1987 does not desire to

135 Ashok kumar V.s State of Rajasthan 1995 Cr.L.J. 1231 Raj.19
137 Sugreev alias Jagadish and others V Smt. Sushila Bai and others AIR 2003(5)Raj.149
get the free legal services the Advocate concerned should mention and bring it to the notice of the court concerned in the form of formal declaration of his own or of the litigant concerned to be enclosed to the petition, suit, application, revision and appeal etc as the case may be. Which is presented in the Court. If the litigant desires, the court direct the party to approach authorities, if the litigant is not desirous to avail of his/her right, the court may have to record this fact in the proceedings.

Centre for Legal Research and another V State of Kerala\(^{138}\). The petitioner is Voluntary Social Organization. Its main function are to spread legal awareness among the people, and to render legal services to the poor and needy people, The court held that the state government undoubtedly has an obligation under Article 39-A of the Constitution which embodies Directive principles of state policy to set up a comprehensive and effective legal aid programme in order to ensure that the operation of the legal system promotes justice on the basis of equality. Bhagawati C.J observed “The Voluntary organization and social action groups must be encouraged and supported by the state in operating the legal aid programmes. It is acknowledge that the legal aid programme which is needed for the purpose of reaching social justice to the people cannot afford to remain confirmed to the traditional or litigation oriented legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep what may be called legal aid schemes or the State Legal Aid and Advice Board, , but such Voluntary organization or Social action group must not be under to control of direction or Supervision of the State Government or the State Legal Aid and Advice Board because Voluntary Organizations and social action groups operating these programmes should be totally free from any Governmental control”.

\(^{138}\)Centre for Legal Research and another V State of Kerala AIR 1986 SCC 1
In Kishorechand V State of Himachal Pradesh the apex Court has observed: “Though Art 39-A of the Constitution provides fundamental right to equal justice and free legal aid and though the state provide amicus curiae to defend the indigent accused, he would be meted out with unequal defense if, as is common Knowledge, the youngster from the bar, who has either a little experience or no experience or is assigned to defend him. It is high time that senior counsel practicing in the court concerned, volunteer to defend such indigent accused as a part of their professional duty. The right of defense includes the right to effective and meaningful defense at the trial and nor a more show of it which undoubtedly occurs when an inexperienced lawyer is engaged by the state to defend an indigent against an experienced and able public prosecutor or counsel for the state obviously, it is an unequal battle in which the poor accused cannot defend himself effectively and adequately the greater the need for caution and higher the responsibility for the law enforcement agencies of the state to provide experienced counsel.

The Supreme Court legal Aid Committee V Union of India and others. The petitioner filed a writ petition contending that several state Governments and the Central Government did not constitute legal services Authorities under the L.S.A Act, 1987. The petitioner named that legal services Authorities have not been constituted for Arunachal Pradesh, Kerala, Maharashtra, Nagaland, Tripura, Pondicherry, Union Territories In Chandigarh, Daman & Diu, Dadra & Nagar Haveli, and Lakshadweep. The Supreme Court directed that Central Government and that State Government to constitute the Legal Service Authorities within two months.

3.6 LEGAL AID IN CRIMINAL PROCEDURE CODE

139 Kishore chand V State of Himachal Pradesh 1990 Cr.L.J. 2289 (SC) Para 12&13

140 The Supreme Court legal Aid Committee V Union of India and others 1998(5) SCC 762
Section 304 of the Criminal Procedure Code, 1974 confers the accused the right of legal aid at the expense of the State in cases triable by court of sessions and appeals. Prior to the amendment of Cr.P.C./ section340 of the Cr.P.C. provided that a pleader may represent the accused. It did not give him any right to legal aid at the expense of the state. Assistance of counsel at the expenses of the state was provided under section 304 Cr.P.C. Legal aid in criminal cases applies at trial and appeal, Special leave to appeal, to Prisoners in jail whether under -trial or convicted prisoners ,representation by a counsel of his choice Produced before Magistrate and in period of remand.

Right of Accused to be defended by a lawyer.

Aristotle Observed "Injustices arises when equal are treated unequally and unequals are treated equally. Justice arises when equals are treated alike". From ancient India we get message “YUKTIHINE VICHARE TU DHARMAHANI PRAJAYANTE” which means every accused should heard before delivering the judgment .If someone is not properly defended by himself or by others and punished then that is not justice. Here we get glimpse of the need for legal aid by which legal assistance is provided in court. It has been universally accepted as a human value that a person accused any offense should not be punished unless he has been given a fair trial and his guilt has been proved in such trial. Our courts have recognised that the primary object of criminal procedure is to ensure a fair trial of accused persons.

The system of criminal trial envisaged by the code is the adversary system based on the accusatorial method.\textsuperscript{141} The system of criminal trial assumes that the state using its investigative resources and employing competent counsel will prosecute the accused who, in turn, will employ equally competent legal services to challenge the evidence of the prosecution. The above assumption has been found to

be incorrect in one respect, particularly under the existing conditions in India. Most of the accused persons in India are educated and poor. They do not afford to engage lawyers for their defense neither have they any legal knowledge and professional skill to safeguard their interest themselves. Therefore though the adversary system envisages equal legal rights and opportunities to the parties to present their respective cases before the court, such legal rights and opportunities would in practice operate unequally and harshly affecting adversely the poor indigent accused persons who are unable to engage competent lawyers for their defense. The system therefore depart from its strict theoretical passive stance and confers on the accused not only a right to be defend by a lawyers of his choice, but also confers on the indigent accused person as right to get legal aid for his defence at state cost. The code altered the notions of the judge umpire. The judge is not to remain passive as an umpire; but he has to play a more positive and active role for protecting the public interest has well has the individual interest of the accused person.

The Law Commission\textsuperscript{142} made three recommendations as regards legal aid in criminal cases. Initially, representation by a lawyer should be made available at Government expenses to accused persons without means in all cases tried by a Court of Session. Secondly, representation by a lawyer should be made available at Government expense to appellant without means under the Code. Thirdly, representation by a lawyer should be made available at Government expenses to an accused person without means at the time of the final hearing of a appeal that has been admitted. The Law Commission of India strongly recommended that the right of the accused to representation at the Government expense should be placed on statutory footing in relation to trials for serious offences and as a first step in this

\textsuperscript{142} Report of the Expert committee on Legal Aid P. 70
direction, the commission proposed that such a right should be available in all trials before the court of session.\textsuperscript{143}

The echo of the provisions contained in section 304, Cr.P.C. now finds place in Art 39-A of the Constitution which forms a part of Directive Principles of State policy. Court should administer the provisions of Sec 304, Cr.P.C. with zeal and interpret the same liberally in favour of the citizen seeking legal aid. Sec 304 Cr.P.C. is a right step in the right directions of providing free and competent legal aid to the accused who are unrepresented. The ambit of providing legal aid to an accused at the state expense has been enlarged by the provisions of Sec 304.\textsuperscript{144}

This Section, embraces not only a case which the accused is tried be for an offence punishable with death but also other kinds of cases which are tried before a court of sessions.

Section 340(1) of the old Cr.P.C. provided that an accused has a right to be defended by a pleader. But while interpreting the said section the Supreme Court never cast positive duty on the State to provide counsel at its expenses.\textsuperscript{145} The Rule laid down in Tara Singh case, Janardhan Reddy case etc, has been rendered nugatory.

\textsuperscript{143} See generally Dr. S.S. Sharma :Legal service public interest litigations and para-legal services p.74
\textsuperscript{144} Sohonis: The code of Criminal procedure 1973, 18th edition, The Law Book Company Pvt Lt(2)
Sec. 304 of Criminal procedure code: 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 appear 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-sec (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-sec.(3)The State Government may, by notification, direct that, as from such date as may be specified in the notification.the provisions of subsecs. (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.
\textsuperscript{145} State v. Tikaram Haneri 1970 Cr.L.J. 780
by section 304 of new Code of Criminal Procedure. Therefore, now when an accused is produced or appears before a court, the court should inform the accused that he has a right to be represented by a lawyer. If the accused cannot afford a counsel for him then the court will have to provide him a lawyer for his defence.

**Counsel of accused choice at state expense:** There was no provision in Sec 303, of Cr.P.C. Art 22(1) of Constitution of India and Sec 304 of Cr.P.C. that accused to be represented by a counsel at his choice. The Supreme Court has held that the declaration in Art 39-A of the Constitution as regard legal aid cannot be enforced by the issue of a writ of mandamus to the State. The Court observed that when an accused is unable to engage a counsel owing to poverty, he has to make an application under Sec 304(1) of Cr.P.C. for the grant of legal aid and it is for the Sessions or Assistant Session Judge to make necessary directions if he is satisfied that the requirements of Sec 304(1) satisfied, when it appears to the court of sessions that the accused has no sufficient means to engage a pleader and is unrepresented by a pleader, the court should assign a pleader for his defence at the expense of the State. If an Advocate accepts an assignment made by the Court of Session to defend an accused under section 304 Cr.P.C. is it mandatory that such pleader should file Vakalatnama, even though he is assigned by the Court of Session.

**COUNSEL FOR ACCUSED IN CAPITAL CASES:** whenever an accused is tried for an offence punishable with capital sentence, he must not remain undefended. No person shall be allowed to lose life in an established court of law under any civilized system without affording an opportunity of defence. Provision is invariably made under the rules applicable for his defence at State expense. In such a case it is the duty of the session Judge to see that a lawyer is so appointed. Failure to appoint lawyer would result in vitiating the trial. n different states for a lawyer being engaged in undefended cases for the accused at the state expense. The accused may
not know such rules and may not ask for a lawyer being appointed. Legal Aid to the indigent accused will be of little use if competent lawyers are not selected to defend accused. Session Judges should see that raw and inexperienced juniors are not appointed to defend an accused in capital case. The Court held advocates to be represented by accused must be experienced and skilled. A duty is cast upon the session Judge while selecting and appointing legal practitioners as standing counsel (duty counsel), to appoint legal practitioners of real and marked ability and of sufficient experience to defend an accused in a trial before the court of sessions. This is not mere formality for the sake of complying with provisions of Sec 304 of the Code but one of the real substance and genuine assistance for an accused who is not in a position to defend himself by engaging a suitable lawyer of his choice in serious offences tribal by the session court An Application for legal aid in such a case cannot be rejected on the ground that the accused initially had managed to engage a counsel. Reasonable opportunity has to be given to the accused to get the benefit defending himself by a counsel.

The accused was convicted for various offences and was in custody for entire period of one and half years and no counsel was provided to him at the expense of the state. Supreme Court held to be a case of grave illegality and therefore while considering the recession application seeking modification of sentence period already undergone the court preferred to the grant the relief prayed for instead of ordering fresh trial. Where in a criminal appeal to State of Haryana v. Ram Divya the counsel appointed by the court for the accused was not present at the time of hearing and the appeal was disposed of without hearing it was held that the case must be remanded for fresh hearing. The accused pleaded guilty for charge of possessing brown sugar and he was convicted without appointing a counsel for him under the

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146 Annu Pujary v State of Karnataka 1984, Cr.L.J. 294
147 Mool Chand v State 1990 Cr.L.J. 682
148 State of Haryana v Ram Divya 1990 Cr.L.J. 327
legal aid scheme. It was held that the trial not vitiated as the trial judge was satisfied about the plea of the accused being voluntary, genuine and true.¹⁴⁹

**LEGAL AID IN APPEAL CASES:**

There was no any specific provision in the code for giving legal aid to indigent accused person in appeal proceedings. The Supreme Court expanded the provision of appointment of counsel in appeal cases as it is essential component of reasonable, fair and Indigent accused person, be he the respondent or the appellant, if he is unable to engage one due to his poverty or indigent. First it is not easy for just procedure in appellate proceedings it is mandatory on state to provide a lawyer to an a layman to understand all the legal implications of the judgment of the trial court in the context of the appellate proceedings Secondly, in such proceedings, quite often, intricate questions of law and fact are involved. They would require the skilful and careful handing by a competent lawyer. Thirdly, the State is represented in appeals by well qualified and experienced Public Prosecutors. Therefore, for the proper and just working of the adversary system at the appellate stage, it is necessary that the indigent accused person is represented by a competent lawyer.

The code has made provision to provide a lawyer at State expense to an indigent accused person in a trial before a court of session; the Code also enables a State Government to extend this right to any class of trials before other courts in the State. If in any such trial the accused is acquitted and the State prefers an appeal against the order of acquittal, even in such a situation, the Code surprisingly fails to make any specific provision for providing a lawyer to the indigent accused person to defend himself. The Supreme Court in M.H. Hoskot v. State of Maharashtra¹⁵⁰ Held that the right of appeal is implicit in Article 21 of the Constitution and in the Code. Therefore, the accused is entitled to free legal aid and advice for filling and arguing

¹⁴⁹ Tyron Nazardth v State of Maharashtra 1989 Cr.L.J. 123
appeals including special leave to appeal. Legal aid must be made available to prisoners in jail whether they are under-trial or convicted prisoner. The Supreme Court, Bhuwaneshwar Singh V Union of India,\textsuperscript{151} have had an opportunity to express is difficulty in processing an appeal when the petitioner in person appeared and argued his case. The court suggested that such persons should be provided legal aid and it indicated various agencies offering legal aid to poor. In the implementation of this section several problems are bound to arise. It is not easy to determine whether the accused is not having sufficient means to engage a pleader. The High Court is to frame rules in respect of matters referred to in sub-sec (2) above. Selection of pleaders will indicate the high importance that should be attached to selecting the right type of lawyers to handle such cases.\textsuperscript{152} Legal aid to the indigent accused will be of little use if competent lawyers are not selected for the work. The observations of the Supreme Court in this context Court should appoint amicus curiae, where the accused was not represented by counsel.\textsuperscript{153}

The Apex Court \textsuperscript{154} held that Right to be defended is essentially connected with Right to Life. There was a refusal to pay fees of advocates appearing for accused as quantified by court by Accounts Department of Governmental on pretext that the High Court did not have power to quantify fees. It has resulted in denying opportunity to accused to get himself defended by adequately competent Advocate. It had resulted in violation of Article 21. Government was required to take steps in that regard to do the needful without requiring any mandate from court.

### 3.7 Legal Aid and the Code of Civil Procedure

\textsuperscript{151} Bhuwaneshwar Singh V Union of India 1993 4 SCC 327
\textsuperscript{153} Dilwar Singh V. State of Delhi AIR 2007 SC 3234
\textsuperscript{154} .Sanjay Khan Derao Dore v. State of Maharashtra 2007 criminal Law journal 545 Bombay
The Indian Legislature first dealt with the subject of Legal Aid (Act 9 of 1839) in 1839 and the provisions have, with necessary additions and modifications found a place in successive Codes of Civil Procedure.\textsuperscript{155} The Law Commission in its 14\textsuperscript{th} report recommended to replace the word “pauper” by the word “poor person” or “assisted persons.” Since the expression “pauper” is used in English Statutes also and the expression had come to acquire special meaning in legal parlance and had become familiar, the Law Commission in its 27\textsuperscript{th} report did not suggest for the change and considered it as unnecessary to disturb existing term. But the Law Commission in its 54\textsuperscript{th} Report recommended that the present expression “indigent person” should be used throughout the Code in place of the expression “pauper” which is not in harmony with modern attitudes. The original marginal note "Suits may be instituted in forma Pauperis" is however not changed. Generally, a plaintiff suing in a court of law is bound to pay court fees prescribed under the Court Fee Act. But in view of the fact that there may be persons who by reason of their poverty are unable to pay the fee. Provisions have been enacted in civil procedure code exempting such persons from paying in the first instance the court prescribed and allowing them to prosecute their suits in forma Pauper is provided he satisfied certain conditions laid down in the orders. By virtue of civil procedure code (Amendment) Act XXXIII deals with suits by indigent persons. Rules 1 to 18 of this order contain the various provisions regarding the object, procedure, examination of the applicant and rejection of the applicant to suit as an indigent person. The object of Order XXXIII is to enable persons who are too poor to pay court fee to institute a suit without payment of it. Neither party evades the payment of court fee nor no genuine cause of litigant should fail for want of funds. This order has been enacted to save triple purposes: To protect the bona-fide claims of indigent persons, To safeguard the

\textsuperscript{155} Sanjiva Row The Code of Civil Procedure P 2152

\textsuperscript{156} Law Commission’s 54\textsuperscript{th} Report, 237
interest of revenue, and To protect the defendant’s right not to be harassed. The defendant has also right to contest application to sue as indigent. Ultimately by the Civil Procedure (Amendment Act), 1976 the word “pauper” was substituted by the term “Indigent”. Basing on the recommendation of 14th, 27th and 57 Law Commission Report to enhance the financial limit for indigency from Rs 100 to Rs1000 the Civil Procedure (Amendment Act) 1976, Rule 1 Order XXXIII was amended and eligibility limit for indigence has been raised to Rs.1000. The order deals with 18 rules.

Suit may be instituted in FORMA PAUPERIS: Subject to the following provisions, any suit may be instituted by indigent person\textsuperscript{157}. Under Explanation 1: a person is indigent if he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit.\textsuperscript{158} The word used in Explanation 1 (a) R. 1, O XXXIII is "means" and not "property. What is contemplated in the expression is not the possession of property but sufficient means i.e. capacity to raise money to pay the court fee. Mere possession of some property is not sufficient. If the property in the possession of the plaintiff is not sufficient enough to raise the money to pay the requisite court fee, he should be deemed to have not been possessed of sufficient means to pay the court fee and the court can take him as an indigent person. If on the other hand, he is in possession of property sufficient enough to enable him to raise cash for payment of court-fee he can be deemed to have sufficient means to pay the court-fee and he cannot be considered an indigent person. Means

\textsuperscript{157} an indigent person] subs by C.P.C. (Amendment ) Act, 104 of 197" Rule 1,88Nanglu Chhater v. Maheswar Bhai rAIR 1981 Ori.152
\textsuperscript{158} Explanation 1 of Rule 1 Defines an Indigent Persons as follows. (a) if he is not possessed of sufficient means (other than properly exempt from attachment in execution of a decree and the subject-matter of the suit)to enable him to pay the free prescribed by law for the plaint in such suit, or(b)where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.
covers all realizable assets within a man's reach. Means does not refer to the capacity of a man to raise money on credit. The necessary wearing apparel are to be excluded while calculating the means of a plaintiff desirous of suing as an indigent person. The subject-matter of the suit the weaver’s tools of artisan, weaving materials and daily wages are to be excluded from such consideration.

The defendant can plead counter-claim and also pray for permission to do so as indigent under order XXXIII of the Code of Civil Procedure. The provisions of O.33 will apply to the claim petition under sec 110 A of the Motor vehicle Act, 1939. While hearing an appeal against an award of the Motor Accidents Claim Tribunal, the High court exercises its ordinary appellate power and may permit the appellant to prefer the appeal as an indigent person by invoking provision of O.44 read with O.33. The court-fees are not exempted for all times. In case of an indigent person the payment of court-fee is deferred till the decision of the suit where in it is determined as to which of the two parties would pay the court.

It is not exhaustive for the entire situation which may arise in respect of an application to sue as an indigent person. The provisions of do not apply to the proceedings under Art, 226 of the constitution. The means must exist at the time of suit. The fact that a married woman possessed jewels several years before suit does not necessarily lead to the inference that she possessed it at the time of suit. Explanation II (1976) provides that any property acquired by the person after the presentation of the application and before the decision of the application shall be taken into consideration in determining the question whether or not the applicant is indigent person. The word ‘person’ in O.33 has reference to all those who have a right to institute under the code. O.33 applies to all prospective plaintiff or persons in

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81 Prof. S. Venkata Raman, *The code of civil procedure*:1995, P 307
whom any right to relief exists within the meaning of O.Rule 1 of the code. The word "person" includes juristic persons.

The object of the order XXXIII is to help bona-fide litigants who stricken by poverty are unable to pay the requisite court fee. When a plaintiff was not in a possession of properties allotted to her in partition, which at any rate were worthless and she herself was eking out her livelihood by working as a coolie, held she was an indigent person not having sufficient means. The application for permission to sue as an indigent person cannot be rejected merely on the ground that the appellant was held not to be an indigent person in another case. The fact that the applicant's husband has sufficient property to pay the court fee due on her plaint is not for refusing the application of a married woman for permission to sue indigent person.

DAY COST:- Under the code, an indigent person plaintiff is not excused from payment of the fees payable for service of process nor is there anything in the language the rule to warrant the idea that the pauper plaintiff is exempted from liability for the day costs if and when the court directs that the same should be paid. Legal representative of an indigent person plaintiff cannot continue suit after plaintiff's death unless such Legal representative cannot take advantage of the indigence of their predecessor in interest who died applying for permission or continued the suit after being permitted.

Content of application. Every application for permission to sue as a indigent person shall contain the following particulars:

1. All particulars which are required in a plaint.
2. Schedule of any movable or immovable property.
3. Estimated value thereof.
4. Signature and verification as required in plaint.

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160 Rule 2 Order XXXIII of the C.P.C. Rule 3 Order XXXIII of the C.P.C. Explanation III. Provides that where a plaintiff sue in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity.
The use of the word ‘it’ in the last para of the rule clearly indicates that one of the two documents and not both are required to be signed and verified. Under the rule it is further clear that the pronoun ‘it’ can stand only for the application for permission to sue and not for the schedule of movable property it does not appeal to reason, that the schedule is required to be signed and verified. A person who seeks indigence of the Court to sue as an indigent person must be absolutely frank with the court in the matter of disclosure of his assets, for it is only where there is a genuine case of an indigent person as defined in order 33, Rule 1 CPC, that the court can dispense the court fee which every citizen is expected to pay. And where the petitioner have not been fair and frank in this respect and no cogent explanation has been given at the bar as to full disclosure of his assets, his petition is liable to be disallowed at most good faith, is required of the petitioner in the matter if disclosure of his assets. Any intentional departure from good faith result in the dismissal of his application. A petition is liable to be dismissed if the indigent person does not disclose his assets in the affidavit supporting the application.

**PRESENTATION OF APPLICATION:** The application has to be presented to the court by the applicant in person, unless he is exempted from appearing in court, in which case the application may be presented by authorized agent who can answer all material question relating to the application. The applicant may be examined by Commission also. The new proviso \(^{161}\) seeks to provide that where there are more applicants than one, presentation by one shall be deemed to be sufficient compliance with provision of this Rule. The object is to enable the court to examine the petitioner apparently with a view to satisfy itself Prima facie that the applicant is

\(^{161}\) The proviso to Rule 3 is added by CPC amendment 1976
a real indigent person and that the application is not liable to rejection on any of the grounds mentioned in O. XXXIII.

Rule 5 An application to sue as an indigent person is composit document consisting of an unstamped plaint and an application for permission to sue informa pauperies. If the application is rejected the plaint still remains, and the court may in its discretion while rejecting the application allow the petitioner to pay the requisite court fee and in such case the suit by an indigent person must be regarded as a suit instituted on the date of presentation of application to sue as indigent person. On dismissal of indigent application, court can grant time to pay court fees but the date of institution of suit should be considered from the date of presentation of indigent application.

Where there is more plaintiff than one it shall be sufficient if the applicant is presented by one of the parties. The Court is entitled to examine the applicant when the application is duly presented, not only with reference to question of his pauperism but also with reference to the merits of the claim. Before granting the permission to sue as an indigent person it is imperative to court to give notice to the opposite party and to the Government Pleader.

Where is application to sue as an indigent person is granted an indigent person is exempted not only from payment court fee but also from payment of process-fee. If the application is admitted, it may be numbered and registered and will be deemed has plaint.

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162 Rule 4 of Order XXXIII CPC
163 Rule 7 of Order XXXIII CPC and *Rule 8 of Order XXXIII CPC
Rule 6: On Granting the permission to sue as an indigent person the court has to assign a pleader to unrepresented indigent person (9A) where an application is field by litigant of poor, Economically weaker sections of society to sue as an indigent person, it is the duty of the court to grant free legal services by assigning an advocate, and exempting to pay advocate fee. The opposite party has the right to participate in the enquiry into pauperism, and to adduce evidence to establish that plaintiff is not an indigent person, the defendant is thus clearly an interested party and can resort to the procedure for discovery in such on enquiry withdraw of permission to sue as an indigent person. There is no power vested in the court under order 33, R 9, CPC to dispauper a plaintiff suo motu without there being an application of the defendant are the government. For securing a order under this provision, however it is necessary that they must establish as a matter of fact, that the respondent had suppressed is properties has required under the provisions of order 33 and secondly that his means, are such that he ought not to continue to sue as an indigent person.

The word “Means” in clause (b) is to interpreted with the help of the definition of indigent person. “Means” in order 33 Rule 9 (b) must be interpreted as something acquired by or which has come to the possession of the indigent person, plaintiff after the granting of his petition of leave to sue in forma pauparies, and not what was already existing before the application was granted. Two distinct and separate rights are vested to the State. One is right in rem against the property and the other right in personam, against the indigent person. Where an indigent person succeeds in litigation, the court as to pass an order for the payment of court

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164 Sugrev V Sushila Bai, AIR 2003, Raj 149
165 Rule 9: of Order XXXIII CPC
166 Rule 10: of Order XXXIII CPC
fee, this amount shall be recoverable by the State Government and shall be a first _ charge on the subject matter of the suit. Government is entitled to proceed against the subject matter of the suit irrespective of whether it is in possession of the plaintiff or not. It is not necessary that the court fee should be recovered only from the plaintiff personally.

Where a pauper plaintiff partly succeeded and partly failed in the suit and no direction as to the payment of court fee was given in the decree, held, the court having discretion in such a case to allow or disallow the costs it should be deemed to have disallowed the same and the state Government cannot recover the court fee in such a case.

The Cost of an application for permission to sue as an indigent person shall be costs in the suit. Even if an application is registered, the applicant may be declared dispauper on application of the Government pleader or by the dependent by giving after 7 days clear notice to the plaintiff on following grounds: If he is guilty of vexatious or improper conduct in the course of the suit if it appear that his means are such that he need not appear to continue to sue as pauper, and other person has obtained interest in the subject-matter or the suit.

The Court shall reject an application for permission to sue as an indigent persons in the following cases. 1. If the application is not written and presented in the manner prescribed in Rules 2 & 3 2. When applicant is not indigent. 3. If the application has disposed of any property fraudulently two months before of filing application if the value of disposed property is not exceeding the limit of indigency

167 Rule 16: of Order XXXIII CPC
168 Rule 8: of Order XXXIII CPC Rule 11: of Order XXXIII CPC
169 Rule 5: of Order XXXIII CPC
then the application may not be rejected. 4. When there is no cause of action. 5. When other person gets interest in subject-matter of suit. 6. When suit is time barred. 7. When other person is sound in financial matter. Where the court rejects an application for permission to sue as an indigent persons bars a subsequent application for the same purpose but a second suit is not barred if the plaintiff pays the cost of suit at the time of the institution of the suit or within such a time court allows. Where the plaintiff files in the suit or the permission granted to him to sue as an indigent person is withdrawn the court make an order for the payment of court fee in any of the following four contingencies. First, where the plaintiff fails in the suit, secondly where the plaintiff is not an indigent person. Thirdly, where the suit is withdrawn. Fourthly where the suit is dismissed for certain specified reasons.

An order against rejection to sue an indigence person, is appealable. The Court can assign pleader to an unrepresented indigent person if he cannot afford him. The High Court with previous approval of the State Government can make rules regarding mode of selecting pleaders, facilities to such pleaders etc., The central and state government may make supplementary provisions for free Legal services to indigent person\textsuperscript{170}. Almost all the states have framed Legal Aid rules for rendering Legal Services to the poor.

3.8 Conclusion

To execute the pledge of justice as in the Preamble i.e., socio-economic to provide equal opportunities and to avoid socio-economic imbalances, the Constitution mandates the state to accord justice to all citizens. Social justice is the key note of the constitution, democratic obligation of the state to make the legal process a surer means to social justice. It includes legal justice which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all section of the people irrespective of their social or economic position. Legal Aid in India has comprehensive constitutional

\textsuperscript{170} Rule 18: of order XXXIII CPC inserted by (a) Act 1976.
status and being found in the group of articles. The three Golden Articles of the Constitution incorporates the principle of legal aid i.e. article 14, 21 and 22.

The principle of equality in article 14 assures equal justice. It guarantees that no person shall be denied equal protection of laws because he is poor, provides accessible to court at free of cost. States he is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services. Justice Bhagavathi extended legal services to the accused by laying down that right to free legal services is an essential ingredient of reasonable fair and justice and it is implicit in guarantee of Art. 2. State cannot avoid it, by pleading financial or administrative liability. Judiciary recognized fair trial including constitutional right of every accused person right to consult and be defended by a legal practitioner of his choice under Art.22. Right to access to justice is a fundamental right and it has been reinforced by 39-A with object to mitigate inequalities so that justice reaches to door steps of the poor and weaker sections of the society. As a part of fair trial procedure, legal aid provisions are dealt under Sec-304 of criminal procedure code. The code cast an obligation on the court to inform the accused about his right to be represented by a lawyer in cases triable by court of sessions and also in appeal cases. The code of civil procedure enables an indigent person to institute a suit exempting from payment of court fee and process fee and to assign a pleader to an unrepresented indigent person.