CHAPTER - 3
FREE LEGAL AID SCHEME
AND
THE RIGHTS OF ACCUSED

(I) PRELUDE

The equal justice and free legal Aid in India is of recent origin. Legal Aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. It is extended to reach justice to the common man. The system of Legal Aid in 1495 which took in the form of statute in the reign of Henry VII came to be known as the procedure "In Forma Pauperis" in England. After the 2nd World War (1939-45), the United Kingdom passed an Act "The Legal Aid and Advice Act, 1949" for the benefit of the poor and needy. The U.K. Parliament set apart a huge amount to be spent for the purpose of Free Legal Aid and Advice to the needy persons. A welfare state ruled by law and not man, has to preserve each citizen's rights from encroachment by the Government or his fellow citizens. Its objective is to deliver equal justice for which it has to enact and enforce laws and procedures to see through the objectives achieved. In a socialistic democracy, the role of the judiciary is vital, it interposes between the state and an individual in relation to socialistic and un-socialistic approach of the state legislative measures and their implementative devised mechanism for securing justice.

In U.S.A., the scheme of legal aid got statutory recognition with the enactment of the Legal Services Corporation Act, 1974 which was amended in 1977 and its head office at Washington has branches in the State capitals and other places to implement the scheme. Apart from Legal services corporation, some of the States in

3. Ibid.
4. Supra note 1.
5. Ibid.
U.S.A. have people’s Court. For the first time the Law Commission of India laid down a system of Legal Aid which read that “unless some provision is made for assisting the poor man for the payment of court fees and lawyer’s fees and other incidental costs of litigation, he/she is denied equality in the opportunity to seek justice.” The equal justice and free Legal Aid to the poor was inserted in Article 39-A of Constitution of India as one of the Directive Principles of State Policy. Our Constitution is wedded to democracy, socialism, secularism, equality of status and equal protection of laws. Legal Aid for weaker sections is a social obligation and Constitutional mandate. To the poor man “legal” has become a synonym simply for technicalities and obstructions, not for that which is to be respected. The poor man looks upon the law as an enemy, not as a friend for him law is always taking something away. Who is too poor to hire a lawyer cannot be assured fair trial unless counsel is provided to him. Lawyers to prosecute are deemed essential to protect the public’s interest in an orderly society. Similarly there are few defendants charged with crime who to hire the best lawyers they can get to prepare and present their defences. Shri K.D. Gangrade has observed, “The necessity of legal aid has arisen because agonising gap between the ideal of equal access availability of legal justice has reached almost break down point in our country. The reality is that law in our country is in the hand of rich people and has gone beyond the reach of poor. It has become discriminatory against them.” The poor too, have civil and political rights and the rule of law is meant for them also although till today it exists only on paper and not in reality. The time has now come when the courts must be the courts of poor and struggling masses of the country. They must shed their character as upholders of status quo. The absence

7. supra note 1.
9. There was no provision of free legal aid in the Constitution of India. Article 39-A was inserted in the Constitution by the Constitution (Forty Second Amendment) Act 1976, Sec. 8 (w.e.f. 3-1-1977).
10. supra note 1. p. 66.
14. Justice P.N. Bhagwati in People’s Union for Democratic Rights v. Union of India, popularly known as Asiad case.
of legal aid means depriving a person of justice. Leeman Abott has rightly observed:

“If the doors of court rooms are open to the rich only who can unlock with a golden key and close to poor who need most ... the fire brand of revolution will be lighted and put into the hands of men who will be justified in the revolution which will follow.”

Justice Bhagwati regretted in Hussainara Khatoon v. State of Bihar, that the introduction of a comprehensive legal service programme failed to invoke any response. Though the legal aid has been considered as an essential ingredient of the fair procedure under Article 21, it has not been properly extended to the poor and needy accused. Thus the courts were, until recently like a five star hotel open to all but accessible only to rich. Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in the criminal courts are necessities, not luxuries. Laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before 'impartial' tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him.

In this Chapter the Constitutional provisions relating to legal aid and the legal aid services which are available to the indigent accused would be analysed threadbare. The position of right to counsel in India will be examined. Hence provisions of Cr. P.C. will also be deeply studied to list out the actual rights available to the accused person in different circumstances and at different stages of the criminal proceedings.

(II) CONSTITUTIONAL PROVISIONS RELATING TO LEGAL AID

An accused has the right to be presumed innocent until proved guilty according to law in a public trial. It is desirable that the prosecution should bear the burden of proving him otherwise. The maxim that it is better that ten guilty men should go free

16. AIR 1979 SC 1360.
17. Ibid p. 1369.
18. Supra note 12.
19. Ibid.
than one innocent man should be convicted insists that the liberty of an innocent person should not be sacrificed in order to increase the efficiency of crime control. More particularly, that a rule of procedure should be opposed if it secures greater crime control by increasing the probability that innocent persons will be convicted (emphasis added). The Preamble of the Constitution of India enshrines the ideals of justice-social, economic and political. Article 22 (1) of the Constitution reads, “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.” The Constitution of India laid down the right to consult and be defended by a lawyer of his choice in absolute terms. Article 22(1) embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in a system governed by rule of law. Justice Hidayatullah, as he then was, observed that the right to counsel cannot be taken away showing any cause. Limiting the right to counsel gravely endangers search for truth. A lawyer for accused cannot be engaged without ascertaining the will of the accused and without giving him opportunity to choose a lawyer. Article 22(1) confers “the right to consult and to be defended by, a legal practitioner of his choice” which in plain terms infers that arrested person is only to be given opportunity to engage a lawyer and it does not require the State to supply lawyer to the accused person. The accused “shall not be denied the right to consult, and to be defended by a legal practitioner of his choice. But attention is drawn that “to consult and to be defended by legal practitioner of his choice” and “court shall assign a pleader for his defence at the expense of State” have different meaning while both are for ensuring and securing justice to an accused, the former is not a guaranteed right but a choice or opportunity of having the services of a lawyer for his defence. Therefore, “the right to be defended by legal practitioner of his choice could only mean a right of the accused to have the

opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the State." The proof of guilt and innocence needs "specialised training in the science of law without which even intelligent and educated persons will not be able to establish their innocence and may be put on trial without proper charge, and convicted without guilt upon incompetent, irrelevant and inadmissible evidence." This may be true to the intelligent and educated persons, think of the ignorant, illiterate and indigent persons. The Constitutional right to assistance of counsel is a very necessary and practical one. The ordinary person accused of crime has little if any knowledge of law or experience in its application. He is ill prepared to combat the arsenal of statutes, decisions, rules of procedures, technicalities of pleading and other legal weapons at the ready disposal of the prosecutor. Without counsel, many of his elementary procedural and substantive rights may be lost irretrievably in the intricate legal maze of a criminal proceeding. Especially this is true of the ignorant, indigent, the illiterate, the immediate defendant. There are some individuals, who by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature.

In Tara Singh v. State, the Supreme Court held that "the person arrested shall be given an opportunity to engage lawyer for his defence and there is no guarantee that the lawyer will be provided at State expenses." The similar expression was observed by the Supreme Court in Janardhan Reddy v. State of Hyderabad that the right to consult and be defended by a lawyer under Article 22(1) of the Constitution and Section 340 (1) of the Code of Criminal Procedure, 1898 does not guarantee any right to any accused to be supplied with a lawyer by the State at the State expenses. The right conferred by the Article 22 (1) of the Constitution and Section 303 of the

27. Supra note 24.
29. Ibid.
32. AIR 1951 SC 441 : 1951 Cr.LJ. 1481.
33. Ibid.
34. AIR 1951 SC 227.
Code 35 of 1973 only ensured a right to counsel to an accused in case he wishes to engage a lawyer.36 The right to be defended by a legal practitioner cannot be excluded by a statute because of the Constitutional mandate under Article 22(1).37 The right to be defended by counsel does not cease even when arrested person is released on bail or personal bond. Hidayatullah, J, (as he then was) speaking for the court that the right is not lost by virtue of release of the arrested person on bail or personal bond, observed:

The rights given by Art. 22(1) and (2) are absolute in themselves and do not depend on other laws. There is no force in the submission that if there is only a punishment of fine and there is no danger to personal liberty the protection of Art 22(1) is not available. Personal liberty is invaded by arrest and continues to be restrained during the period of a person is on bail and it matters not whether there is or is not a possibility of imprisonment. A person arrested and put on his defence against a criminal charge, which may result in penalty, is entitled to the right to defend himself with the aid of counsel and any law that takes away this right offends against the Constitution.38

The International Convention on Civil and Political Rights39 guarantees to everyone, "The right to be tried in his presence and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance of his rights, and to have legal assistance assigned to him in any case when the interests of justice shall require and without payment to him in any such case if he does not have sufficient means to pay for it."40 The European Convention for the protection of human rights and fundamental freedoms provides that everyone charged with a criminal offence has the right, "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice to require. 41

40. Ibid., Article 14 (3).
41. Article 6 (3) (c).
(i) WHEN DOES THE RIGHT TO CONSULT COUNSEL COMMENCES?

No person who is arrested shall be ....... denied the right to consult and to be defended by a legal practitioner of his choice. The right to counsel begins from the moment of arrest of the accused. When the question came before the court as to when the accused person is entitled the services of legal practitioner after his arrest. The Supreme Court quoted the words of Justice Blackmum in Jackson v. Bishop, that "humane considerations and Constitutional requirements are not in this day to be measured by dollar consideration. Moreover this Constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attached when the accused is for the first time produced before the Magistrate." It infers that legal services are entitled to the arrested person when he is produced before the Magistrate. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

In Nandani Satpati v P L Dani, the Supreme Court upheld the right of the accused to secure the services of a lawyer of his choice even at the time of police interrogation. The right to consult a lawyer can be availed at the moment of police questioning. It is prudent on the part of the police to allow a lawyer to the arrested person, if he so wants at the time of questioning. The issue of availing services of

42. Clause (1) of Article 22.
44. 404F Supp. 2d, 571.
46. Clause (2) of Article 22.
47. AIR 1978 SC 1025.
48. Ibid., In USA the right to counsel has been expanded by US Supreme Court in Miranda v. Arizona (384 US 436 (1966), it has been established in this case that the detained accused must be allowed to exercise the right to counsel in process of interrogation because police elicit incriminatory statements from him; "Interrogation" is questioning initiated by a law enforcement officer; see Miranda v. Arizona (1966) 384 US 436, 16L Ed 2d. 694, 86 S Ct 1602, 10 ALR 3d. 974.
counsel during investigation came up in *Gendra Brahma v State of Assam*, 50 Justice Lahiri, as he then was, observed that the accused has a right to counsel in course of a police investigation under Section 161 of the Code Criminal Procedure, 1973. 51 Article 20 (3) and 22 (1) of the Constitution can be telescoped by making it prudent for the people to permit a lawyer to the accused to be present at the time of questioning. The right to counsel not only includes the defence against arrest but also against the charge levelled against him. 52 Herbert Ira Handman opined that the defendant has a right to the assistance of the counsel at every stage of the criminal proceeding where substantial right of the accused may be affected. 53

The Allahabad High Court held in *Raghubir Singh v State* 54 that the Magistrate's refusal to admit the accused's counsel at the time of identification parade test is a negation of his right to counsel. 55 It is impossible to have anything confidential about communication with his lawyers if he is surrounded by police officers or anyone of such officers sitting before the accused within ear shot. Therefore, at the time of consultation the accused should have free and unfettered consultation not only with his lawyer but also with his friends and relations out of the hearing of the police officer. 56 The communication between the accused and his lawyer can be within the presence of police but not with in the hearing of the police. 57 The grant of remand custody of the accused to the police does not take away the right of the accused to be interviewed by his counsel, relatives or friends. 58 The presence of the counsel at

50. 1981 Cr. LJ. 430.
51. Ibid. Police officer investigating the offence can examine the witnesses under Section 161 of Cr.PC 1973.
54. AIR 1952 All 529.
55. Ibid; Identification parade is a process of identifying the alleged criminal among several persons which is held in presence of a magistrate.
the stage of interrogation of the accused does not interfere the investigation and such request for presence of counsel, there being a kind of legal identity between the two.\textsuperscript{59} The Supreme Court in a recent case \textsuperscript{60} has clearly laid down in clear terms that "the arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation."\textsuperscript{61} The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.\textsuperscript{62} The recognition of the right at prior stages is primarily for the purpose of insuring the fairness of the trial. The recognition of the right at subsequent stages is primarily for the effective review of the fairness of the trial. Beyond the general right to present the case for the defence.\textsuperscript{63}

Now the Law Commission of India have also recommended for incorporation of procedure for arrest of a person by police, duties of police officers and rights of the arrested person to have an advocate during interrogation. The violation of these provisions should constitute an offence within the meaning of Section 166 of the Indian Penal Code.\textsuperscript{64} The right to legal aid is one of the fundamental human rights. The history of concerted endeavour on the part of the State to provide legal service to the indigent and needy in countries governed by Anglo-Saxon System of Administration of Justice has roots, since May, 1944.\textsuperscript{65}

\textbf{References:}

61. \textit{Ibid.}
62. \textit{Ibid;} This is a landmark judgement by which Supreme Court have laid down detailed procedure which is to be followed by police from the moment of arrest. In total 12 directions are laid down in the judgment to prevent violation of human rights during police custody.
64. The Law Commission of India in its 177th Report, CrPC have made serveral recommendations about the rights of accused person. The Commission have suggested insertion of Sections 41-A and 41-D in Cr PC to include procedure of arrest and duties of police officer and rights of arrested person to have Advocate during interrogation. The Commission have considered guidelines and safeguards issued by Supreme Court in D.K. Basu v. State of West Bengal, AIR 1997 SC 3017.; See \textit{The Hindu, Chennai}, 1st January, 2003 p. 13 (Col. 1-2).
(ii) EQUAL JUSTICE AND FREE LEGAL AID

The Preamble makes a mention of “equality of status and of opportunity” and justice which is social economic and political but there was no provision in the original Constitution of India providing for equal justice and free legal aid to the accused person.\(^\text{66}\) Our Nation, with all its hopes and all its boasts, can never really be free and just till all the citizens high or low, can claim equal justice through law in action.\(^\text{67}\) Article 39-A was inserted in the Constitution as need was felt to give right of equal justice and free legal aid a Constitutional status, Article 39-A of Constitution of India, reads:

The state shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to secure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.\(^\text{68}\)

It can be said that Article 39-A of the Constitution has fulfilled the objectives of Magna Carta of 1215 after more than seven centuries. Clause 40 of Magna Carta, provides that “To no one will we sell, to no one will we refuse or delay the right to justice ...” Hence, denial of legal aid to indigent amounts to refusal or denial of justice. The Supreme Court established the principle in *M H Hoskot's case\(^\text{69}\)* and there after in *Hussainara's case\(^\text{70}\)* that the procedure which does not make legal services available to the indigent accused and have to got through the trial without legal counseling cannot possibly be regarded as reasonable, fair and just.

The exposition of the principle of reasonable fair and just procedure in *Maneka Gandhi's case\(^\text{71}\)* includes legal assistance. The principle has fertilized Article 39-A of the Constitution. Thus, the indigent accused has not only the right to counsel, but also has right to legal aid. The right to legal aid is implicit in the Article 21 of the Constitution. The right to legal aid is not only an implicit mandate of the Article 21 but also a

\(^{66}\) See Preamble to the Constitution of India, 1950.
\(^{68}\) Inserted in the Constitution of India, by 42nd Constitutional Amendment, 1976, Sec.8 (w.e.f 3.1.1977)
\(^{69}\) *M.H. Hoskot v. State of Maharasthra 1978 Cr.LJ. 1684-85 (SC).*
\(^{71}\) AIR 1978 SC 597.
Constitutional compulsion under Article 39-A of the Constitution. The Supreme Court has rightly observed that Article 22 (1) of the Constitution implies a right to legal aid to an indigent accused and also implies that the State should provide a lawyer to indigent accused. While explaining indigence as “relative concept” the US Supreme Court explained in *Hardy v United States* that “An impoverished accused is not necessarily one totally devoid of means ... An accused must be deemed indigent when “at any stage of the proceedings his lack of means ... substantially inhibits or prevents the proper assertion of a particular right to claim of right.” The court guaranteed the right of the under-trial prisoner to the assistance of lawyer at the State cost. It may thus be noticed that Article 21 imposes a positive obligation on the Magistrate or the committing Judge, to inquire as to whether the accused is not in a position to engage a lawyer on account of his poverty or indigence. If so, then the accused must be provided with a lawyer at the State cost.

In *Sheela Barse v. State of Maharashtra*, Justice Bhagwati observed that if the legal assistance mandated by Articles 14, 21 and 39-A was not given to the indigent accused and put in jeopardy of life and liberty, injustice was likely result and every act of injustice destroys the foundation of democracy and the rule of law. Justice Sen also looked upon free legal aid as an element of equality that secures fair trial to the indigent accused. The right to be heard is inalienable natural right of a human being. It is fundamental to a fair trial that both side should be heard: *audi alteram partem* ‘hear the other side’. It has now been held that legal aid constituted a part of the right to personal liberty guaranteed under Article 21 and was enforceable by the court. The State is held to be under a duty to provide lawyer to a poor man and it must

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75. Ibid.
76. *Supra note* 36 at p. 213
77. (1983) 2 SCC. 96.
78. Ibid.
79. Ibid.
pay to the lawyer as fixed by the Court. Article 21,Legal aid may be treated as a part of the right created article 21. An important impact of Article 39-A read with Article 21 has been to reinforce the right of a person involved in a criminal proceeding to legal aid. The article has been thus to interpret (and even expand) the right conferred by Sec. 304 of the Code of Criminal Procedure, 1973. Article 39-A promotes justice on the basis of equal opportunities. It imposes an imperative duty upon the State to provide free legal aid to the poor. It is with a view to enable the poor litigant to have an easy access to a court of law to invoke legal right and to secure him equal protection of laws against his well to do opponent, that the scheme of affording legal aid and assistance to the poor has been conceived. It has been held to be a mandate not only from Article 39-A but also from Article 14 and 21.

Article 39-A is one of the Directive Principle of State policy. Part-IV of the Constitution of India "contains a list of directives and instructions to be followed by the government of the country irrespective of their political complexion. They reflect the ambitions and aspirations of the framers of the Indian Constitution regarding the welfare State in India based on social, economic and political justice. They contain the aims and objectives which are required to be achieved by the government. Therefore, these Directive Principles deal with positive duties cast upon the States to achieve them because they are fundamental in governance of the country. Thus the directives have been incorporated in the Constitution to supplement Fundamental Rights in achieving a welfare state in India based upon social, political and economic justice." The Directive Principles have been expressly declared non-justiciable. Article-37 does

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88. Kumar, Narender, op.cit., p.300; see also Article 37 of Constitution of India.
not “confer any enforceable rights and their alleged breach does not invalidate a law, nor does it entitle a citizen to complain of its violation by the State so as to seek mandatory relief against the State.” The Court ruled that it cannot issue a writ of mandamus to enforce Article 39-A and the social obligation of equal justice and free legal aid has to be implemented by suitable legislation or by formulating scheme for free legal aid. In pursuance of this suggestions Parliament passed the Legal Services Authorities Act, 1987. In Ranjan Dwivedi v Union of India, the court held that although the mandate in Article 39-A is addressed to the legislature and the Executive yet the courts too are bound by the mandate contained therein.

(III) LEGAL AID SERVICES FOR SOCIAL JUSTICE

An international document speaks of the value of free legal aid, “the right to be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interest of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it.” After independence, the first and most important study was made by “The committee on Legal Aid and Legal Advice in the State of Bombay”. This committee recommended legal aid to poor and backward classes as a governmental responsibility, as under Article 14 of the Constitution of India the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The Constitution of India aims to achieve social justice, equality

90. Kumar, Narender, op. cit., 306.
91. AIR 1983 SC 224.
92. Ibid; see also Central Coal fields v. Jaiswal Coal Ltd. 1980 SC 2125.
94. Khan, K.D., "The Making of Legal Aid Legislation", Nyaya Deep, The Official Newsletter of National Legal Services Authority, Delhi, Oct, Dec 2000, Vol. III, Issue-4, p.19; Hon'ble Mr. Justice N.H. Bhagwati of Bombay High Court was Chairman of this committee. The Committee was constituted in 1949. The Committee recommended four tier system at Taluka, District, Greater Bombay and State levels.
95. Preamble of the Constitution of India.
before law and equal protection of the laws.\(^96\) and provides for accused the right to consult and to be defended by a counsel of his choosing\(^97\) and also equal justice and free legal aid.\(^96\) Justice is the core area in criminal justice system. Medgavkar, J., of Bombay High Court observed that “if the ends of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case, and to lay its evidence fully, freely and fairly before the court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice - advice so valuable that in the gravest of criminal trials when life or death hangs in balance, the very state which undertakes the prosecution of the prisoner also provides him, if poor, with such legal assistance.”

Undoubtedly, the aim of criminal justice administration is to protect the society with concomitantly rules not to violate Human Rights which include the rights of the accused. This fact is supported by Constitution of India read with Sections 303, 304 of Cr.P.C. (Act of 1973). Therefore, where the penalty could be severe, the necessity to obtain legal counsel arises for the accused person is unskilled in its (legal) intricacies thenceforth assistance in preparing defence is needed. If Constitution provides judicial review of the actions of the Legislative and Executive under Article 32 and Article 226 thereby making High Court and Supreme Court as the case may be, the protector of citizen’s liberty. To protect a citizen’s liberty includes that of an accused, thus making the right of an accused person a sacrosanct, for though accused of an offence he/she does not become a non-person. As a matter of fact the law of India-Constitutional, evidentiary and procedural have made elaborate provisions for safeguarding the ‘Basic Right of an Accused’ with a view to protect his dignity as a human being and giving him benefits of a just, fair and impartial trial.\(^100\) The necessity of legal aid has arisen because the agonising gap between the ideal of equal access availability of legal

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96. Article 14.
97. Article 22 (1).
98. Article 39-A.
justice has reached almost breakdown point in our country. The reality is that laws in our country are in the hands of the rich people and has gone beyond the reach of the poor. It has become discriminatory against them.\textsuperscript{101} Our country is poor and all of us are not equal in earning as such High Income Group, Middle Income Group and Lower Income Group or Poor or Weaker Sections and so on are categorised in our society. Some of us are able to afford high demand of lawyer's fee. Therefore, basic objective of the provisions are to be enable the weaker sections of the society to access to justice by just, fair and reasonable means and no one is deprived of his life and limbs without due process of law, and such nature of right is implicit in Article 21 of Constitution of India. Therefore, weaker the person accused of an offence, greater the caution and higher the responsibility of the law enforcement agencies.\textsuperscript{102} The right to free legal services is an essential ingredient of “reasonable, fair and just” procedure and implicit in Article 21 of the Constitution.\textsuperscript{103} This is a Constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course, the accused person does not object to the provision of such lawyer.\textsuperscript{104} The State Government cannot engage a defence lawyer without ascertaining the wishes of the accused and without giving him any choice of selecting his lawyer for the reason that Article 22 (1) of the Constitution guarantees that the choice of a lawyer for defence is only that of the accused himself.\textsuperscript{105}

The court has pointed out in Hussainara Khatoon's case which was decided as for back as 9th March, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a Constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person

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\item \textsuperscript{101} Supra note 13, p. 265.
\item \textsuperscript{102} Kishore Chand v. State of Himachal Pradesh, 1990 (3) crimes, 349.
\item \textsuperscript{103} Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1369/1374.
\item \textsuperscript{104} Ibid.
\item \textsuperscript{105} See Tara Singh v. State, AIR 1951 SC 441.
\end{itemize}
does not object to the provision of such lawyer. The financial and the administrative constraints cannot come in way of Constitutional mandate and State is duty bound to secure free legal aid to the accused person. The apex court had the occasion to direct the State of Bihar in the matter of *Khatri v State of Bihar* by saying that "we may point out to the State of Bihar that it cannot avoid its Constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. 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." Law has gone further with respect to defence of an accused specially in respect of those who could not afford defence lawyer or who is unable to secure legal service on account of indigence or incommunicado situation. It is universally accepted axiom that a person accused of any offence should not be punished unless he has been given a fair trial and opportunity to defend himself. Legal assistance which is nothing else but equal justice in action, to poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a Constitutional imperative mandate not only by Article 39-A but also by Article 14 and 21 of the Constitution. It is a "sine qua non" of justice and where it is not provided, injustice is likely to result. Article 14 of the Constitution guarantees equality before law. Equality requires that both parties should be equally placed. The State has competent legal advice. All accused should also have the same quality of services.

In *Sukh Das v Union Territory of Arunachal Pradesh* a question arose as to whether the magistrate is bound to inform the accused that he is entitled to free legal aid and enquire from him whether he wishes to have lawyer at State expense. The court held that "The question is extremely important because we have almost

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112. AIR 1986 SC 991.
50% population which is living below the poverty line and around 70% is illiterate and large section 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." Justice V. H. Bhairavia while speaking in an international conference expressed the need of economic justice and observed "Poor people do not have individual legal problems they have are common to them all, and that is the problem of poverty only. I believe since human rights are fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible." The State authority should, therefore, be much interested in ensuring basic human rights, Constitutional as well as legal, to those who are in a socially and economically disadvantaged position. The time has come for the poor and struggling masses of the country. They must be sensitised to the need of doing justice to the poor masses of the people to whom justice has been denied by a cruel and heartless society for generations.

The right of free legal service is clearly an essential ingredient of reasonable, fair and just procedure and it is implicit in the guarantee of Article 21. No procedure can be said to be reasonable, fair and just which denies legal service and representation to an indigent at even the initial stage i.e. when the accused is for the first time produced before the magistrate. The magistrate or the session 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 aid at the cost of the State. It is the Constitutional obligation of the State to devise such a procedure as would ensure free legal service to the poor. The necessity of legal aid has been emphasised by Alan Barth that "It is not to be thought in a civilised community for a moment that any citizen put in jeopardy of

113. Ibid., at 992.
115. People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473.
life or liberty, should be debarred of counsel because he was too poor to employ such aid. No court could be respected for respect itself, to sit and hear such a trial. The defence of the poor, in such cases is a duty resting somewhere, which will be at once conceded an essential to the accused to the court and to the public.”

The Gauhati High court emphasised the need for providing legal aid as a necessary constituent of a fair procedure implicit in Article 21 of the Constitution. While the right to counsel is first a right of representation at trial. The legal aid to the indigent accused should be provided from the moment of arrest, and the “undertrial prisoners should be provided legal representation by fairly competent lawyer at the cost of the State”. Hence, the State is under a Constitutional mandate, now, to provide free legal aid to an accused person, who has not sufficient means to engage a pleader, to secure legal service and court is under obligation to inform him (accused) if he (the accused) is unable to engage a lawyer on account of poverty, he is entitled to obtain free legal services at the cost of the State. It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of offence which may involve jeopardy to his life or personal liberty and their fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. Of course, it must be recognised that there may be cases involving offences, such as economic offences or offences against law prohibiting prostitution or child abuse and the like where social justice may require that free legal service may not be provided by the State. 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 offence, and the ends of justice so require, assign competent counsel for the prisoner’s defence provided the party does not object to that lawyer. The philosophy of legal aid is an inalienable

element of fair procedure is evident from Mr. Justice Brennan's well known observation that "Nothing rankles more in the human heart than a brooding sense of injustice, unless we can put with. But injustice makes us want to pull things down when only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."  

It is now well established after decision of Supreme Court in the matter of Hussainara Khatoon that "the right to free legal service is ... clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reason such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer." In a developing country like ours, where problems like literacy, ignorance, poverty and backwardness are existing; providing of legal awareness and giving a legal help is much more important unless the people of this country are made conscious of their rights and duties, the Rule of law may not be effective, as desired.

(i) RIGHT TO COUNSEL AND LEGAL ASSISTANCE UNDER THE CODE OF CRIMINAL PROCEDURE, 1973

Section 303 of CrPC, 1973 reads "Any person accused of an offence before a criminal court, or against whose proceedings are instituted under this Code, may of right be defended by a pleader of his choice." Section 303 (Sec. 340, old) deals with

124. Ibid., at p. 1555.
126. Ibid.
127. Balakrishnan, K.G. (Justice), op. cit., p. 29
the right of any person accused of an offence or against whom proceedings are instituted under the Code to be defended by a pleader. This section makes it quite clear that the right to be defended by pleader extends to all persons against whom proceedings are instituted under this code in criminal court, and thus renders obsolete various rulings on the subject.\(^{128}\) This Section not only contemplates that the accused should be at liberty to be defended by a pleader at the time the proceedings are actually going on, but also implies that he should have a reasonable opportunity, if in custody of the police, of getting into communication with legal adviser for the purpose of his defence.\(^{129}\) The same policy is shown in Sec 40 of the Prisons Act 9 of 1894, which lays down that, subject to proper restriction, an un-convicted prisoner should be allowed to see his legal adviser in jail.\(^{130}\) The addition of the words “of his choice” at the end indicates that no advocate or pleader is to be foisted on the accused and he should be permitted to be defended by a pleader or advocate in whom he has full confidence. The right of an accused to consult a legal practitioner of his choice has been upheld by the Supreme Court.\(^{131}\) The right to consult and be defended by a legal practitioner of his choice is guaranteed with a view to enable the detenue to prepare for his defence. This right belongs to the arrested person not only at the pretrial stage, but also at the trial before a criminal court or before a special tribunal and whether the arrest is made under the general law or under a special statute.\(^{132}\) There should be effective representation of the accused who is undefended by appointing a counsel. Session Judge should not commence trial immediately after appointing a counsel for accused without giving the counsel sufficient time for consulting the accused and generally preparing the case.\(^{133}\)

The right conferred by this Section does not extend to a right in an accused person to be provided with a lawyer by the State or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage for him.


\(^{129}\) *Hirananda Ojha v. Emperor,* 9 CWN 983; see also Princep’s Cr.P.C., p.972.

\(^{130}\) *Llewelyn Evans,* (1926) 28 Bom. LR 1043, 50 Bom, 741; *S Sunder Singh* (1930) 12 Lah, 16.

\(^{131}\) In *re Llewelyn Evans,* ILR 50 Bom. 741, at pp. 745-46; 28 Bom LR 1043 : AIR 1926 Bom. 551.


only duty cast on the Magistrate is to afford him the necessary opportunity.\textsuperscript{134} It was held that a demand to consult a lawyer must be made by the person arrested and that the court was not found to provide to him the help of a lawyer unless a request was made by him.\textsuperscript{135} This Section, however does not prohibit the appointment of a counsel by the court at state expense. No hard and fast rule can be laid down as the time which must elapse between the appointment of the counsel and the beginning of the trial; but on the circumstances of each case, the court of session must ensure that the time guaranteed to the counsel is sufficient to prepare for defence.\textsuperscript{136} As and when in a criminal case, which in case of conviction may carry sentences of imprisonment, an accused is produced or appears before a court, the court should make known to the accused that he has a right to be represented by a lawyer of his choice and in case because of his poverty or other reasons, he cannot engage a lawyer, then the court will provide him a lawyer to defend him. Merely because the accused does not ask for time to engage a lawyer of his choice, it cannot be said that the trial of the accused is in accordance with the law. It will be different if the accused is asked whether he wants to be represented by a counsel and the accused is also not impecunious and in that case, the accused cannot have a right to say that the procedure established by law has not been complied with.\textsuperscript{137}

Section 304 CrPC provides “Where, in a trial before the court of session, the accused is not represented by the pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State.”\textsuperscript{138} The rules for mode of selections of pleaders, facilities allowed to them and fees payable can be framed by High Court with the previous approval of State Govt.\textsuperscript{139} Free legal aid can be extended by the state govt. in relation to any class of trials before other courts as it apply in relation to

\textsuperscript{134} Chellapan, (1971) Cr.LJ. 1021.
\textsuperscript{135} Tara Singh v. State, AIR 1951 SC 441 at p. 443; see also Suresh Narain Roy v. State 1978 Cr.LJ 1514 at pp. 1516-17 (Gau.).
\textsuperscript{136} Ram Sarup v. Union of India, AIR 1965 SC 247.
\textsuperscript{137} Bashira, (1969) 1 S.C.R. 32.
\textsuperscript{138} Jagmalaram v. State of Rajasthan, 1982 Cr.LJ. 2314 at pp. 2317-18, 2319 (Raj.).
\textsuperscript{139} Clause (1) of Sec. 304 Cr.P.C.
trial before the courts of session.\textsuperscript{140} This is a new section which enables the sessions court to assign a pleader for the defence of the accused at the expense of the state provided he is un-represented and the court is satisfied that he has no sufficient means to engage a pleader. The selection of such pleader, the facilities to be given to him by the court and his remuneration are to be governed by the rules that may be framed by the High court in this regard with the previous approval of the State govt.\textsuperscript{141} The careful perusal of Section 304(1) shows that to avail counsel at expense of State the trial of the person should be in the Court of Session.\textsuperscript{142} The trial before Session's Court is for an offence punishable with imprisonment for a term exceeding seven years.\textsuperscript{143} Therefore facility is not as matter of right in the offences which are triable in lower courts other than court of sessions.\textsuperscript{144} Under the new code a provision is made in Section. 304 conferring on the accused the right to legal aid at the expense of the Government in cases triable by a Court of Session. The section also contains a provision enabling the State Government to extend this right by a notification to any class of trials before other courts in the State.\textsuperscript{145} The remedy of free legal aid, if any, lies by way of making an application before the learned additional session judge under Sub-section (i) of Sec. 304 of the Code of Criminal Procedure, 1973 and not by a petition under Article 32 of the Constitution.\textsuperscript{146} It is an essential ingredient of reasonable, fair and just procedure to a procedure to a prisoner who is to seek his liberation through the courts process that he should have legal services available to him.\textsuperscript{147}

A criminal trial is incomplete in absence of Defence Lawyers as such absence deprives the right of the accused's defence. In the United States, a defendant in a criminal case has a Constitutional right to be represented by an attorney. The same

\textsuperscript{140} Clause (2) of Sec 304 Cr.P.C.

\textsuperscript{141} See Clause (3) of Sec 304 Cr.P.C.


\textsuperscript{143} See Sec. 304 (1) Cr.PC.

\textsuperscript{144} See powers of the Court of Sessions &C. J.M. under Section 28 and 29 of Cr.P.C,1973.

\textsuperscript{145} Sec. 304 Cr.PC provides for "Legal aid to accused at state expense in certain cases" The counsel at State expense is to be provided by Court of Sessions where it appears to the court that accused has not sufficient means to engage the pleader (304 (1) Cr.P.C.).


view has been produced in our Constitution under Article 22(1) and Section 303 of Cr.P.C., Section 304 Cr.P.C. further provides Legal Aid to the accused at State expenses in certain cases. In a recent case of trial of several accused for serial blasts in Coimbatore, an accused sought permission of the court to decline permission to another co-accused to have a particular Govt. counsel. The Courts clarified that "Section 303 of CrPC and Article 21 and 22 of the Constitution gave the accused a right to choose counsel of their choice." Hence the plea by the accused seeking court to decline permission to another accused and engaging the same counsel to defend him was not sustainable. Even if the accused had counsel to defend them at their own cost, their plea to curtail the right of another accused was not sustainable. The accused had no locus standi to seek the removal or curtailment of right of another accused, however the dispute can be raised by the accused concerned. Neither Section 340 (1) (Now section 303) of the Criminal Procedure code nor Article 22 (1) in isolation of Article 39-A of the Constitution enjoins a duty on the state to engage a lawyer free of charge for defending the accused at the state expense. Indigence should never be a ground for denying fair or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronizing gesture to raw entrants to the Bar. Sufficient time and complete papers should also be made available, so that the advocate chosen may serve the cause of justice with all the ability at his command.

In Kishore Chand v State of Himachal Pradesh, the Supreme Court observed that "Though Article 39-A of the Constitution provides fundamental right to equal justice and free legal aid and though the state provides amicus curie to defend the indigent

149. A case is pending in the court against several accused in Coimbatore for alleged serial blast; See The Hindu, Chennai, 1st Jan, 2003, p.5 (Col. 1-3).
150. Ibid.
151. Ibid.
152. Ibid.
154. Sadhan Dutta Roy v. State, 1978, Cr.LJ. notes on cases, 131 (Cal.).
accused, he would be meted out with unequal defence, if, as is common knowledge, the youngster from the Bar who was either a little experience or no experience is assigned to defend him. It is high time that the senior counsel practising in the court concerned, volunteer to defend such indigent accused as a part of their professional duty.”

A far difficult situation arises when a murder accused refuses the assistance of a counsel not because of his poverty but for non participation in the proceedings. It is the duty of the court to assign the counsel at the expense of the State at the very outset of the proceedings and the court must take the responsibility of a trial fair to the accused. Bankim Chandra Chattopadhyay, father of modern Bengali literature said that the law is mere farce, only rich people can enjoy the fun by spending money. Article-39-A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

It may, therefore, now be taken as settled law that free legal assistance at State Cost is a fundamental right of a person accused of offence which may involve jeopardy to his life or personal liberty and their fundamental right is implicit in the requirement of reasonable fair and just procedure prescribed by Article 21.

(ii) LEGAL AID SERVICES

Legal Aid means, providing lawyers to those who are unable to pay fees for the Legal Services, Legal Aid means not only legal representation in court cases but also include legal advice, counselling, arbitration and conciliation, creation of legal awareness about their rights, duties and obligations etc., in other words to ensure protection of legal and Constitutional rights of the underprivileged the poor, the neglected

156. 1990.Cr.LJ.2296 (SC).
157. Ibid.
and the indigent, its objects is to make it impossible for any men, women or child to be
denied the equal protection of laws simply because he or she is poor or indigent
person. The equal justice and Free Legal Aid in India is of a recent origin. The
Law Commission of India for the first time felt the need of legal aid and observed that
"unless some provision is made for assisting the poor man for the payment of court
fees and lawyer's fees and other incidental costs of litigation, he/she is denied equality
in the opportunity to seek justice." The recommendation of Law Commission was
implemented to some extent when Article 39-A was inserted in Chapter-IV of the
Constitution of India. Article 39(A) shows that it was enacted for providing free legal
aid to litigants who have already found themselves involved in legal battle before courts,
in other words, in courts proceeding when one of the parties is not in a position to fight
his legal battle on an equal footing because of poverty. In such cases, direction of the
Article is to provide free legal aid by legal aid schemes based on executive orders or
legislative enactments, unequals in legal battles are tried to be made more equal by
providing them free legal aid. The Supreme Court in Hoskot's case laid bare the
true meaning of the term "procedure" in Article 21, it has opened a new vista in
criminal jurisdiction. A long line of decisions have followed since then. The High Courts
have been emphasising the need for providing to accused persons legal services
and legal representation, so that their task in the dispensation of criminal justice is
facilitated. It is the duty of the courts to see that law is administered fairly and in a
manner which clearly shows that the judicial institutions act responsibly as upholders
of the norms and standards of a civilised social order. In Kedra Pahadiya v State of

161. Rule 2 of Legal literacy Camp Scheme, 1999 enacted by M.P. State Legal Services Authority; Sec. 2 (c) of the Legal Services Authorities Act, 1987 defines the term Legal Service, which reads, "Legal Service" includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter."; Term "Legal Aid" is not defined in this Act.
162. AIR 1986 SC 991 at 993.
163. Supra note 1.
166. Article 39-A was inserted in the Constitution by Constitution (Forty Second) Amendment Act, 1976,Sec. 8. (Wef 3-1-1977).
The Supreme Court directed the sessions judge, Dumka that four persons who were languishing in jail as undertrial prisoners for a period of over eight years, be provided legal representation by fairly competent lawyers at the cost of the state. Legal aid in criminal case has thus been held to be a fundamental right which is implicit in Article 21 of the Constitution. In Zorralima v Govt. of Mizoram, the Gauhati High Court emphasised the need for providing legal aid being necessary constituent of fair procedure implicit in Article 21 of the Constitution. It is now established law that “free aid to indigent and poor accused springs from Article 21 of the Constitution.”

The Supreme Court in Sheela Barse v State of Maharastra observed that “whenever a prisoner is arrested by the police and taken to the police lockup, the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal aid/assistance to the arrested person at state cost provided he is willing to accept such legal assistance. The State government will provide necessary funds to the concerned Legal Aid Committee for carrying out this direction.” The Supreme Court also held that immediately on arrest of a person the police have a duty to inform the nearest legal aid clinic if the accused is unable to appoint a lawyer and also give information to his friend or a relation. State is under a Constitutional obligation to provide free legal service to an indigent accused not only at a stage of trial but also at the stage when he (the accused) is first produced before a Magistrate.

In pursuance of Constitutional mandate, the Legal Services Authorities Act, 1987 was drafted with a view to constitute legal services authorities at national, State and district level to provide free and competent legal service to the weaker sections of the society. Further to ensure that opportunities for securing social justice are not denied to any citizen by reason of economic or other disabilities and to

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171. Ibid. “Free aid” means “free legal aid”.
174. Ibid.
175. Sheela Barse, 1983 Cr.LJ. 642 (SC).
organise Lok Adalats to secure that the operation of the Legal System promotes justice on the basis of equal opportunities.\textsuperscript{177} The bill of above said Act was first passed by Rajya Sabha on 11th January, 1991 and it was pending in Lok Sabha which was dissolved in March 1991. The Act was amended after a nation wide debate and brought into effect in November, 1995.\textsuperscript{178} A committee under Chairmanship of Mr. Justice P.N. Bhagwati was constituted in 1980 to monitor and implement legal aid programme on a uniform basis in all the state and union territories.\textsuperscript{179} The said “committee for Implementing Legal Aid Scheme” (CILAS) evolved a mode scheme for legal aid programme which includes:

1. The promotion of legal literacy and creation of legal awareness among the weaker sections of the community.

2. Organisation of Legal Aid Camps.

3. Training of para-legals for the purpose of providing support to the legal aid programme.

4. Setting up Legal Aid Clinics in Universities and Law Colleges.

5. The Public interest litigation.

6. The holding of Lok Adalat.

7. The encouragement and support of voluntary organisations and social action groups by the State in operating the Legal Aid Programmes.\textsuperscript{180}

The Supreme Court in a case strongly recommended to the Government of India and the State Governments that it is high time a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicated in Art. 14 and right to life and liberty conferred by Art. 21, but also the compulsion of the constitutional directive embodied in Article 39-A.\textsuperscript{181} In Sheela Barse v State of Maharashtra,\textsuperscript{182} the Supreme Court issued following directions for ensuring

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{177} Act No 39 of 1987.
\item \textsuperscript{178} Bathula, Venkateshwar Rao, \textit{op. cit.}, p 66.
\item \textsuperscript{179} Ibid; See also Verma, S.K., Right to Bail, 2000 ILJ, \textit{Publication} p. 185-86.
\item \textsuperscript{180} The Govt of India set up the committee by a Resolution dated 26th September, 1980 which was first committee of its kind.
\item \textsuperscript{181} Ibid; see also Bathula, V.R., \textit{op. cit.}, p. 66.
\item \textsuperscript{182} AIR 1979 SC 1369 at 1376.
\end{itemize}
\end{footnotesize}
legal aid to the undertrial prisoners:

1. A list of all undertrial prisoners separately of males and females be sent to legal aid committee of the district concerned mentioning the date of entry and offence charged with.

2. A list of persons arrested on suspicion under Section 41 CrPC who have been in jail for more than 15 days be sent to Distt. Legal Aid Committee.

3. To provide facilities to the lawyers of the District Legal Aid Committee to interviews the prisoner who desire to have their assistance.

4. To furnish requisite information to such lawyers in regard to prisoners in jail.

5. To put up notices at prominent places in the jail about the visit of those lawyers, so that prisoners may avail of their counselling services.

6. To allow any prisoner to meet and interview such a lawyer out of hearing of jail official.

7. The District Legal Aid Committee should nominate a couple of Lawyers who should visit jail atleast once in a fortnight.

8. State Board or Legal Aid and Advice should call periodic reports from district committees to ensure compliance with these directions.\textsuperscript{183}

There can be no doubt that if legal aid programme is to succeed it must involve public participation. The State Government undoubtedly has an obligation under Article 39-A of the Constitution which embodies a directive principle 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.\textsuperscript{184} Justice Bhagwati while emphasising need of voluntary organisations and social action groups in legal aid programmes observed that "we are therefore, definitely of the view that voluntary organisations and social action groups must be encouraged and supported by the state in operating the legal aid programme. It is now acknowledged throughout the country that the legal aid programme which is needed for the purpose of reaching

\textsuperscript{183} AIR 1983 SC 378 at 381.

\textsuperscript{184} Ibid.
social justice to the people cannot afford to remain confined to the traditional or litigational 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 we may call strategic legal aid programme consisting of promotions of legal literacy, organisation of legal aid camps, encouragement of public interest litigation and holding of lok adalats or Niti Melas for bringing about settlements of disputes whether pending in courts or outside. The assistance of voluntary agencies and social actions groups must, therefore, be taken by the state for the purpose of operating the legal aid programme in its widest and most comprehensive sense and this is an obligation which flows directly from Article 39-A of the Constitution. Now the Legal Services Authorities Act, 1987 has been enacted and three tier system of legal services at central, state and district level have been introduced with the objective to provide legal services, education and legal aid to the needy people. The functions of Central Authority are:

The Central Authority shall, subject to the general directions of the Central Government, perform all or any of the following functions, namely

a) Lay down policies and principles for making legal services available under the provisions of this Act;

b) Frame the most effective and economic schemes for the purpose of making legal services available under the provisions of this Act;

c) Utilise the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities;

d) Take necessary steps by way of social justice litigation with regard to consumer protection, environment protection or any other matter of special concern to the weaker sections of the society and for this purpose give training to social workers in legal skills;

e) Organise legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through lok Adalats;

186. Ibid., p. 2195.
f) Encourage the settlement of disputes by way of negotiations, arbitration and conciliations;

g) Undertake and promote research in the field of legal services with special reference to the need for such services among the poor;

h) To do all things necessary for the purpose of ensuring commitment to the fundamental duties of citizens under Part-IV-A of the Constitution;

i) Monitor and evaluate implementation of the legal aid programme at periodic intervals and provide for independent evaluations of programmes and schemes implemented in whole or in part by funds provided under this Act;

j) Recommend to the central government grant-in-aid for specific schemes to various voluntary social welfare institutions and the state and District Authorities from out of the amounts placed at its disposal for the implementations of the legal services schemes under the provisions of this Act;

k) Develop, in consultation with the Bar Council of India, programmes for clinical legal education and promote guidance and supervise the establishment and working of legal service clinics in Universities Law Colleges and other institutions;

l) Take appropriate measures for spreading legal literacy and legal awareness amongst the people and in particular to educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures;

m) Make special efforts to enlist the support of voluntary social welfare institutions working at the grass root level, particular among the Scheduled Castes and the Scheduled Tribes, women and rural and urban labour; and

n) Coordinate and monitor the functioning of State and District Authorities and other voluntary social welfare institutions and other legal services
organisations and give general directions for the proper implementation of the legal services programmes.\textsuperscript{187}

The criteria for giving legal services is provided in Section 12.\textsuperscript{188} Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is -

a) a member of a Scheduled Caste or Scheduled Tribe;

b) a victim of trafficking in human beings or begar as referred to in Art. 23 of the Constitution;

c) a woman or a child;

d) a mentally ill or otherwise disabled person.

e) a person under circumstances of undeserved want such as being a victim of mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

f) an industrial workman;

g) in custody, including custody in a protective home within the meaning of cl. (g) of Section 2 of the Immoral Traffic (Prevention) Act, 1956, (104 of 1956) or in a juvenile home within the meaning of cl. (i) of Sec. 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of cl. (g) of Sec. 2 of the Mental Health Act, 1987, (14 of 1987); or

h) in receipt of income less than nine thousand rupees if the case is before a court other than the Supreme Court, and less than twelve thousand rupees, or such other amount as may be prescribed by the Central Government if the case is before the Supreme Court.\textsuperscript{189}

Persons who satisfy all or any of the criteria specified in Sec. 12 shall be entitled to receive legal services provided that the concerned authority is satisfied that such person has a \textit{prima facie} case to prosecute or to defend.\textsuperscript{190} An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the

\begin{itemize}
\item[187.] Sec.4 of Legal Services Authorities Act, 1987.
\item[188.] \textit{Ibid.}, Clause (a) to (n) of Section 4.
\item[189.] The Legal Services Authorities Act, 1987.
\item[190.] \textit{Ibid.}, Clause (a) to (h) of Sec. 12.
\end{itemize}
entitlement of legal services under this Act (L.S.A. Act. 1987) unless the concerned Authority has reason to disbelieve such affidavit. 191

The Supreme Court in a recent case 192 have issued following directions to Union of India and various States for implementation of provisions of Legal Services Authorities Act, 1987.

i) "that they will, by issuing administrative orders/instructions ensure that every prisoner/convict is provided with free copy of the judgment of the Sessions Court or the High Court in her/his case or matter within 30 days of the pronouncement of such judgment and that the Registry of the Court concerned will personally endorse such copy to the Superintendent of the Jail for forwarding the same to the petitioner;

ii) the Superintendent of the Jail concerned to ensure that the judgment of the Sessions Court or the High Court, as the case may by, is read out to the prisoner and explained to him in the language as understood by him;

iii) that the prisoner will be informed by the Superintendent of every Jail about the availability of legal aid in the High Courts and the Supreme Court and be asked whether he is desirous of exercising his Constitutional right to avail of legal aid;

iv) that every Jail will have to provide at the cost of the State exchequer copy of Vakalatnama, proforma Affidavit in the form as required by the respective High Courts and the Supreme Court for being signed by the prisoner immediately upon expressing his intention to avail of legal aid;

v) that the Superintendent of the Jail will ensure that complete papers/records of the case are sent to the Supreme Court Legal Aid Committee or the High Court Legal Aid Committee along with the signed Vakalatanama and Affidavit of the prisoner forthwith by registered post at the cost of State exchequer and that if there is any delay in forwarding

191. Supra note 173; see also Sec. 13 (1).
192. Supreme Court Legal Services Committee v. Union of India and others, WP(c) No. 637/97 and contempt P.(Crl.) Nos. 1-31 in writ petition (Crl.) No. 312/94.
the papers, the reasons for forwarding the papers belatedly will accompany such papers;

vi) that where the judgment of the Sessions Court and the High Court is in a language other than English, the Superintendent of the Jail will at State's cost arrange to have the same translated before sending the papers to the Supreme Court Legal aid Committee or the High Court aid Committee, as case may be."

There can be no doubt that if the legal aid programme is to succeed, it must involve public participation. The State Government undoubtedly has an obligation under Article 39-A of the Constitution which embodies a directive principle 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.\(^\text{193}\) It is absolutely essential that people should be involved in the legal aid programme because the legal aid programme is not charity or bounty but it is a social entitlement of the people and those in need of legal assistance cannot be looked upon as mere beneficiaries of the legal aid programme but they should be regarded as participants in it. If we want to secure people's participation and involvement in the legal aid programme, we think the best way of securing it is to operate through voluntary organisation and social action groups. These organisations are working amongst the deprived and vulnerable sections of the community at the grass root level and they know what are the problems and difficulties encountered by these neglected sections of Indian humanity.\(^\text{194}\) Any legal aid programme needs awareness and assertiveness to be successful and both the things are absent in our country. In this situations, the primary functions of the legal service programme should be to make the poor and the unprivileged aware of their rights and privileges conferred on them by law, and the legal aid committee must help spread literacy apart from providing legal aid service.\(^\text{195}\) The Supreme Court has rightly observed in *Centre for Legal Research v State of Kerala*,\(^\text{196}\) that "voluntary organisations and social action groups must be encouraged

\(^{193}\) Ibid., Sec. 13 (2)
\(^{194}\) *Centre for Legal Research and Others v State of Kerala*, AIR 1986 SC 1322 at 1322-23.
\(^{195}\) Ibid., p. 1323.
\(^{196}\) Gupta, Uma, Supreme Court and Civil Liberties (Delhi), 1988, p. 142-43.
and supported by the State in operating the legal aid programme. It is now
acknowledged throughout the country that the legal aid programme which is needed
for the purpose of reaching social justice to the people cannot afford to remain confined
to the traditional or litigation oriented legal aid programme but it must, taking into
account the socio-economic conditions prevailing in the country adopts a more
dynamic posture and take within its sweep what we may call aid schemes or the State
Legal Aid and Advice Board, but we may make it clear that such voluntary organisation
or social action group shall not be under the control or directions or supervision or the
State Government or the State Legal Aid and Advice Board because we take the
view that voluntary organisations and social action groups operating these
programmes should be totally free from any Government control.\(^{197}\) The State alone
cannot perform free legal aid and advice to the poor and needy but all the more it is
absolutely necessary for the voluntary organisations to give them necessary legal
support in seeking redressal of grievances through the instrumentalities of law and
the free legal aid centres would make the legal aid and advice accessible to the vast
masses of illiterate and the suffering poor.\(^{198}\) In many countries in the world, law schools
have played an important role in rendering legal services to the poor.\(^{199}\) The biggest
problem in India is lack of awareness and illiteracy. Poor and illiterates needs to be
made aware through print and electronic media. Non governemental organisations and
social action groups can play a pivotal role in this direction.

\[(\text{IV}) \text{ SUM UP}\]

The above study of right to counsel and free legal aid under the Constitution of
India reveals that as per Article 22 (1) accused person has a fundamental right “to
consult and to be defended by a legal practitioner of his choice.”\(^{200}\) The accused person
is not to “be denied the right to consult and to be defended by a legal practitioner of
his choice.”\(^{201}\) The right to engage the lawyer and to be defended by him is now

\(^{197}\) Air 1986 SC 1322.

\(^{198}\) Ibid., at 1323.

\(^{199}\) Bathula, Venkatesware Rao, op.cit.,at p. 68.

\(^{200}\) Ibid., p.69 ;In countries like USA,UK,Canada, Zambia, Chile, Indonesia and Ceylon, law
students are providing legal assistance for preparing briefs and appearing in petty cases
therby helping poor clients.

available from the moment of his arrest, when the accused is produced before the magistrate for the first time, during interrogation and during questioning by the police. The right to counsel is also available to the accused when police is investigating under Section 161 of Cr.P.C., 1973 and Magistrate’s refusal to admit accused’s counsel at the time of identification parade test is a negation of his right to counsel. The right to be assisted by a counsel throughout the trial of criminal case is provided under the Constitution as well as under the provisions of the Code of Criminal Procedure, 1973 in the interest of fairness of trial. Article 39-A of Constitution of India, has been discussed through which the Constitutional mandate has been expressed that legal system should promote justice, on the basis of equality of opportunity and to provide for free legal aid through suitable legislation or schemes. The right to counsel at the expense of state court can also been examined under Section 304 Cr.P.C. The legal assistance to indigent has also been held implicit in Article 21 as criminal trial without assistance of counsel may jeopardise life and personal liberty of the accused. The dream of social justice can come true only when the equal justice and free legal aid is ensured for poor and indigent.

If the ends of justice is justice and spirit of justice is fairness then each party should have equality of opportunity to defend his case and if indigent is punished for want of counsel this would be no equality in action. The object of criminal justice administration is to protect the society and not to violate human rights including rights of accused.

It has been held in number of cases that right to free legal aid is essential for reasonable, fair and just procedure. The accused person has right to engage

212. See in re Llewelyn Evans, AIR 1926 Bom 551.
counsel of his choice and in case he is unable to afford the engagement of counsel due to indigence the counsel has to be provided at the State expense. Provided accused does not object to the appointment of counsel.\textsuperscript{213} The Magistrate is under obligation to inform the accused person that if he is unable to engage services of a counsel due to indigence or poverty, he can be provided counsel at State's expense.\textsuperscript{214}

Section 303 Cr.P.C., 1973 also provides for a right to counsel to the accused person as a matter of right which corresponds to Article 22 (1) of the Constitution of India. Section 40 of Prisons Act, 1894 also reiterates the same right for undertrial prisoners. The accused should also be made aware of this right to counsel.\textsuperscript{215} It has been discussed under section 304 of Cr.P.C. that accused has right to counsel in trial before sessions court and accused is to be provided counsel at State's expense if accused has not sufficient means to engage the pleader to present his case.\textsuperscript{216} The Govt. is also empowered to extend this right (Right to Counsel at State's expense).\textsuperscript{217} The Govt. have made efforts to identify the needs of free legal aid and modalities for extending this facility for the poor and ultimately enacted Legal Services Authorities Act, 1987 under which a scheme has been enacted to extend legal aid services for SCs, STs and other weaker sections of the society.

Our nation, with all its hopes and all its boasts, can never really be free and just till all the citizens high or low, can claim equal justice through law in action.\textsuperscript{219} In recent judgement,\textsuperscript{220} the Supreme Court of India held that in the event of arrest of a person the time, place of arrest and venue of custody of an arrestee must be

\begin{enumerate}
\item \textsuperscript{214} See Hussainara Khatoon, op.cit., See also Verma R.S.pp.cit., pp.91-92.
\item \textsuperscript{215} See Khatri and others v.Stateof Bihar, AIR 1981 SC 928.
\item \textsuperscript{216} See Jagmalaram v. State of Rajasthan, 1982 Cr.LJ. 2314 at pp. 2317-18 2319 (Raj.).
\item \textsuperscript{217} Clause (1) of Section 304 Cr.PC 1973.
\item \textsuperscript{218} Clause (3) of Section 304, Cr.PC, 1973.
\item \textsuperscript{219} A committee under the Chairmanship of Justice P.N Bhagwati was conunstituted in 1980 to monitor and implement legal aid programme on uniform basis all over India which was first committee of its kind.
\item \textsuperscript{220} Chitkara M.G.and Mehta,P.L.,op.cit., p.103; see also,Report of the Expert Committee on Legal Aid,Processual Justice to the People,(1973),p.9
\end{enumerate}
notified by the police where the next friend or relative of the arrestee live outside
the district or town through the legal aid organisation in the District"\(^{221}\) and it was
also reiterated that "the arrestee may be permitted to meet his lawyer during
interrogation though not throughout the interrogation."\(^{222}\) It can, thus be concluded
that the accused person has right to counsel from the time of his arrest till his
conviction and appeal against conviction. Where accused is unable to engage the
lawyer he is to be provided legal aid at the expense of the State.

\(^{222}\) Ibid.