

## **Analysis of Position of Legal Aid to Prisoners in India**

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### **Introduction**

The expression “Legal aid” refers to legal assistance that are provided to those people who are unable to afford it so that they do not suffer injustice. According to Justice P.N. Bhagwati, the legal aid means providing an arrangement in the society so that the mission of administration of justice becomes easily accessible and is not out of reach of those who need to resort to it for enforcement i.e. the poor, illiterate and even prisoners should be able to approach the courts, and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the court. Legal Aid should be available to all those who don't have access to the court.

For providing legal aids, there are Legal Services Authorities who after examining the eligibility criteria of an applicant and the existence of a prima facie case in his favor provide him counsel at State expense, pay the required Court Fee in the matter and incur all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

Although the legal aid is fundamental right given to every citizen but in reality the prisoners are deprived of by it when they are behind the bars because of unavailability of the legal assistance.

As per 2011 report of the National Crime Records Bureau, Ministry of Home Affairs, there are overcrowding in a large majority of jails, some operating at over 200 percent of their available capacity, with undertrials accounting for up to two-thirds of the prison population.

The central jails are overcrowded by 118.6 percent, while the district jails are overcrowded by 126.9 percent. The maximum number of overcrowding is recorded in Chhattisgarh to 256.3 percent, Uttar Pradesh 175.1 percent, Maharashtra and Jharkhand up to 128.1 percent, followed by Assam, West Bengal and Bihar recording 109.6 percent, 94.4 percent and 83 percent respectively (Prison Statics India, 2011, National Crime Record Bureau).

The highest number of undertrials languishing in jails has been recorded in Uttar Pradesh, followed by Bihar, Maharashtra, West Bengal and Jharkhand (Prison Statics India, 2011, National Crime Record Bureau).

Out of the whole prison population only 20% prisoners are convicts, while the rest are under-trials. Thousands of poor persons including dalits, Muslims, women and juveniles languish in the jails and police lockups, without due process of law. Women with children and the mentally ill people are among the worst-affected groups. According to available statistics, 1,400 children younger than five are accompanying their mothers in jails.

The data of around 80% undertrials being in prison shows how bad the implementation of the law is in India with respect to providing of legal aids. Had they been provided proper legal aids some of them would definitely have been acquitted and consequently the percentage of the undertrials would be much lower.

### **Legislation governing Legal Aid to Prisoners in India**

**Article 39A of Constitution of India** imposes a duty on States to secure that operation of legal system promotes justice on a basis of the equal opportunity and it makes it mandatory, in particular, to provide free legal aid by suitable legislation or schemes or in any other way to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The object of this provision is to promote equality in the process of justice. Though Art.39A is a directive principle but it is enforceable under the **Legal Service Authority Act,1987**.

Under this Act, **Sec.12** and **Sec.13** are two important sections that talks about the entitlement of the legal services.

Sec.12 says that the following people shall be entitled to get legal services: -

- a) a member of Scheduled Caste or Scheduled tribe;
- b) a victim of trafficking in human beings or beggar;
- c) a woman or child;
- d) a disabled person;
- e) a person under circumstances of undeserved wants such as being a victim of a mass disaster, ethnic violence, caste, atrocity, flood, drought, earthquake or industrial disaster

- f) an industrial workman;
- g) a person in custody including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956) or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987;
- h) a person in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court;

Sec.13 says that if anyone of the aforesaid criteria under sec.12 is satisfied then the person concerned gets entitled to the legal service provided such person has a prime facie case to prosecute or to defend.

The legal service is provided by the various legal services authority free of cost only when the criteria is satisfied Both of these sections obligate on the legal service authority to provide legal services at any stage of the trial and do not make any distinction between the trial stage and the appellate stage.

The entitlement of the free aid is not dependent on the accused making the application to that effect but the court is obliged to inform the accused of his right to obtain free legal aid.

And even **Sec.303** and **Sec.304** of the **Code of Criminal Procedure,1973** talks about the provision of legal aid to the accused person.

Sec.303 gives right to the accused to be defended by the pleader of his own choice in cases under this Act. Whereas sec.304 says that where in a trial before the court of session, the accused is not represented by the pleader and he does not have sufficient means to engage a pleader, it is the duty of the court to assign the accused a pleader for his defence at the expense of the state.

## Judicial Opinions regarding the Legal Aid to Prisoners

In **D.K. Basu vs. State of West Bengal, AIR 1997 SC 610**, the supreme court had increased the purview of Art.21 of the constitution of India by saying that it includes the right to get free legal aid at the state expenses. And the same was reiterated in **Dipak Shubashchandra Mehta v. Central Bureau of Investigation, 2012 AIR (SC) 949** saying that when the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the constitution is violated.

In **Sheela Barse v. Union of India (1986) 3 SCC 596**, the petitioner was a journalist who interviewed 15 women prisoners wherein they disclosed that they were assaulted in the police custody and they were not even adequately represented by the legal practitioners. On this, the supreme court observed that failure to provide legal assistance to the poor and impoverished persons violates constitutional guarantees. Article 39-A [Directive Principle of State Policy] casts a duty on the State to secure the operation of a legal system that promotes justice on the basis of equal opportunity. The right to legal aid is also a fundamental right under articles 14 and 21. Thus, the supreme court issued the following directions: -

1. Female suspects must be kept in separate lock-ups under the supervision of female constables.
2. Interrogation of females must be carried out in the presence of female police persons.
3. A person arrested without a warrant must be immediately informed about the grounds of arrest and the right to obtain bail.
4. As soon as an arrest is made, the police should obtain from the arrested person, the name of a relative or friend whom she would like to be informed about the arrest. The relative or friend must then be informed by the police.
5. The police must inform the nearest Legal Aid Committee as soon as an arrest is made and the person is taken to the lock-up.
6. The Legal Aid Committee should take immediate steps to provide legal assistance to the arrested person at State cost, provided such person is willing to accept legal assistance.
7. The magistrate before whom an arrested person is produced shall inquire from the arrested person whether she has any complaints against torture and maltreatment in police custody. The magistrate shall also inform such person of her/his right to be medically examined.

In **Hussainara Khatoon v. Home Secretary, State of Bihar** (1980) 1 SCC 98, the petition was filed before the supreme court for claiming relief for a large number of people who had been languishing in jail for years awaiting trial in courts of law. It was brought to the notice of the Supreme court that most of the undertrials even after undergoing the punishment for the offence for which they were charged were kept in jail. Even the people charged with trivial offences were undergoing imprisonment for too long. The supreme court after considering the matter ordered immediate release of the prisoners and observed that the state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the state has no adequate financial resources to bear the expenditure.

In **M. H. Hoskot v. State of Maharashtra** 1978 AIR 1548, 1979 SCR (1) 192, the accused was convicted by the session court and the appeal filed to the high court was also dismissed. He was sent to the jail. Thereafter he filed a Special leave petition along with petition for the condonation of the delay to the supreme court contending that he did not receive the certified copy of the judgement through the jail authorities. The supreme court observed that if a person is imprisoned then because of being a prisoner he is unable to exercise his constitutional and legal right for the want of legal assistance so it is the responsibility of the state to provide legal assistance to the prisoner who is indigent and disabled in securing legal services for doing complete justice.

In **Rajoo @ Ramakant v. State of M.P** (2012) 8 SCC 553, there were seven persons who were all convicted for the offence of the gang rape and when they file an appeal to the court, five of them were acquitted but two of them were not. After taking into cognizance of their case, the supreme court held that all poor must be given free legal aid irrespective of the severity of the offence attributed to them at every stage of the justice delivery system, trial as well as appellate.

In **Kara Aphasia v. State of Bihar**, the petitioners were boys who had been in jail for over 8 years. It is also alleged that they were even forced to work outside the jails. The supreme court held that the accused must be provided legal representation by fairly competent lawyers at the state's cost, as it is the fundamental right of the person involved in criminal cases, as per article 21.

## **Conclusion**

The right to have legal aid is the basic fundamental right to every person. It is the responsibility of state too to ensure the same. But still it lacks implementation in India. This is the main defect in the free legal aid movement. This defect can be cured only when the citizen of our country are well-aware of their basic legal right. So, poor illiterate people must be imparted legal knowledge and the same should be done at the very grass root level both in rural areas and urban areas.

And most importantly, the government should work directly in the jail by spreading the legal awareness there and make sure that the prisoners are imparted legal knowledge either on monthly basis or weekly basis so that they can exercise their right wisely and act against injustice if they face it.

