ROLE OF JUDICIARY IN PROVIDING LEGAL AID TO THE ACCUSED

By

—**Dr. T. VIJAYA BHASKARA REDDY**, Principal
Aurora's Legal Sciences Academy,
Hyderabad

Introduction:

Human Rights are rights inherent in all human beings. Human rights are universal and indivisible. Accept to Justice by all is an important human right recognized nationally and internationally. In the Constitution of India, the concept of access to justice is acknowledged under the Directive Principles of State Policy by including Article 39A in the year 1976. The Supreme Court of India in a series of cases held that right to free legal assistance is an element of fair and reasonable procedure of an accused and it is an implicit in Constitutional guarantee of Article 21.

Indian legal system is based on the adversarial system and has many advantages than disadvantages. One particular feature of this system is that it insists upon the services of an efficient lawyer to defend oneself against the adversary, the Court also insists upon furnishing adequate security when a person has to be release on bail. The system is that the poor cannot engage the services of a lawyer by paying huge amounts of fee; they cannot furnish cash security or security of immovable property when ordered by the Court to do so for their being released on bail; they are denied the wages of prison labour. The Legislature has of course taken note of the financial difficulties of the poor and adopted certain measures but they have proved to be inadequate. Therefore, the Courts have taken the step of providing some more relief to them by affording necessary protection to their interests.

Legal Aid in Criminal Cases before Independence:

The progressive displacement of the indigenous modes of settlement by the British administration of justice based on adversary procedure gave rise to the notable problem relating to access to Courts. In the indigenous modes of dispute-settlement whatever might be the quality of justice, the access was easy, the proceedings were informal and non-technical, and were conducted in the language of the parties. The proceedings in the non-indigenous system, in contrast, were formal, technical and generally in a language not known to the litigants. Above all poverty disabled the parties, however strong their case might be from seeking legal remedies. There is the problem of Court fees that is required to be paid for seeking a remedy from the Courts. Even if that could be overcome, the technical nature of the law and pleading necessitated the engagement of a counsel, which was beyond the reach of the poor. Further, there is rampant bribery among the ministerial staff of the subordinate Courts. No doubt there are some provisions in the code of criminal procedure then prevail to aid the indigent accused in criminal cases.

Formerly, under the Code of Criminal Procedure, 1898 when a man was charged with an offence punishable with death, the Court could provide him a Counsel at his request.[1]

The Supreme Court in *Tara Singh v. State*, AIR 1951 SC 441, gave restricted

1. Sec. 340(1) of the Code of Criminal Procedure, 1898.

interpretation to the provision; that it conferred on the accused only a privilege to be provided with a lawyer if he asked for it; that it did not cast a duty on a Magistrate or State or provide a lawyer to an accused, the ambit of Article 14 of the Constitution as conferring *such a right was not argued, and it had no occasion to pronounce any view on the matter*.

Legal aid to accused under the Code of Criminal Procedure, 1973:

The scope of legal aid to an accused has been enlarged under the Code of Criminal Procedure, 1973. Section 304 sub-section (1) of the Code provides that in a trial before the Session Judge, if the accused has not sufficient means to engage a pleader, the Court should assign a pleader for his defense at the expense of the State. Sub-section (1) to any clause of trials before other Courts. However, detailed studies are as to the operation of these provisions.

These provisions relating to legal aid in criminal cases have been found to be inadequate. Some cases that came up before the Supreme Court in the 1978-79 have shown that the legal system in its actual operation discriminates against the indigent undertrials in matters relating to bail, police interrogation and detention. Some public-spirited lawyers drew the attention of the Supreme Court to the existence of thousands of under-trials rotting in the jails in Bihar and elsewhere. Dealing with these cases in *Hussainara Khatoon (I) v. State of Bihar*, (1980) 1 SCC 81, the Supreme Court observed:

> "An alarmingly large number of men and women, children including are behind prison bars for years awaiting trial in Courts of law. The offences with which some of them are charged are trial, which even if proved, would not warrant punishment for more than a few months, perhaps for a year or two, and yet these unfortunate forgotten specimens of humanity are in jail, deprived of their freedom, for periods ranging from three to ten years without even their trial having commenced."

Similarly, *Mamtoo Mazumdar v. State*, (1980) 2 SCC 406, illustrates how the rights of an individual are trampled under the power of the State and even the indifference to the directions of the highest Court. Two persons were detained in 1972 in Bihar Section 167, sub-section (2) of the Criminal Procedure Code empowers a Magistrate to authorize the detention of an accused for a period of 15 days. A proviso to the section enables a magistrate to authorise the detention of a person, who is not in the custody of the police, for a total period not exceeding 90 days where the' person whose detention is sought is accused of an offence punishable with death or imprisonment for ten years. After the expiry of the period, under the provision the accused should be released on bail. Even though the provision authorized the detention for a period of 90 days, the two prisoners were found detained for a period of seven years. The Magistrates mechanically extended their detention. The helpless prisoners wrote letters to the Chief Justice of India which resulted in the *habeas corpus* proceedings. As pointed out by the Supreme Court, despite several adjournments the State did not even furnish the basic facts about the imprisonment of the prisoners, like the offences for which they were kept in judicial custody, for how long and at what stage the proceedings were, the patience of the Court came to an end and it had to issue notices to the Superintendent of the Jail to show-cause why action should not be taken against them for the violation of the Court's order, and to be present in the Court on the date given by it. This order of the Court had the desired effect. The information

furnished by the jail superintendent enabled the Court "to discover the incontestable illegality of the detention." The Supreme Court ordered the release of the detenus on bail.

The right to legal aid under the Indian Constitution: The right to legal aid steps when a person is deprived of his personal liberty, *i.e.*, when free movement is restrained and circumscribed. The justification for deprivation of liberty is to be ascertained through legal standards which call for the role of legal aid to the arrested person.

In the Indian Constitution, there is no specific enumeration of the right to legal aid for an accused person. What all Article 22(1) of the Constitution provides is that no person who is arrested shall be denied the right consult and to be defended by a legal practitioner of his choice. But according to a ruling of the Supreme Court this provision does not carry with it the right to be provided the service of legal practitioner at State expense. (*Janardhan Reddy v. State of Hyderabad*, AIR 1951 SC 1548).

The Constitution (Forty Second Amendment) Act, 1976 however, included the concept of free legal aid in one of the Directive Principle of State Policy by enacting a new provision (Art. 39-A) which reads as follow:

> "The State shall strive to secure that the operation of legal system promotes justice, on a basis of equal opportunity and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

The interpretation of the Constitutional provisions came up before the Courts in few cases the Constitution (Forty Second Amendment) Act, 1976 was enacted, and the judicial decisions set the trend of providing free legal aid to the accused persons. This was not so much based on the Article 39-A as such but on the basis of the theory of implied rights according to which free legal aid was an essential requisite of the right to personal liberty.

In *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548 the Supreme Court held that the right to free legal aid service is an essential ingredient "of the reasonable, fair and just procedure" for a person accused of an offence and is also implicit in Article 21 of the Constitution. The majority of the Judges observed that free legal aid is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services due to the reasons, such as, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to the accused if the circumstances of the case needs of justice so required, provided the accused does not object to the provision of such lawyer. *Krishna Iyer*, J., observed:

> "If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal… for want of legal assistance there is implicit under Article 14 read with Article 21 and Article 39-A of the Constitution, power to assign Counsel for such imprisoned individual for doing complete justice,"

In *Hussainara Khatoon (I) v. State of Bihar (No.2)*, (1980) 1 SCC 81, the Supreme Court held that the procedure for depriving a person of life or personal liberty must be 'reasonable, fair and just', "a procedural which did not make available legal services to an accused person who was too poor to engage a lawyer and who would have to go through a trial without the assistance of a lawyer, cannot be described as 'reasonable,

fair and just'. It was the duty of the State to provide legal assistance to accused person who is too poor to engage a lawyer. The right to consult and to defend by a lawyer of his choice conferred by Article 22(1) coupled with the reasonable procedure required by Article 21, would put the State under an obligation to Make legal assistance under Article 39-A to a needy accused person detained in custody. This innovative method of protecting the accused is one of the greatest contributions made by the Judiciary to the system of penal justice in India. In *Khatri v. State of Bihar*, AIR 1981 SC 928, it was held that the State cannot escape from its constitutional obligation to provide free legal aid to poor person who cannot afford legal service on the ground of financial or administrative inability.

In other words of *Bhagwati*, J.

> "The State is under a constitutional mandate to provide free legal aid to an accused person who is secure legal service on account of indigence, and whatever is necessarily has to be done by the State. The State may have its financial constraints and its priorities in expenditure but the law does not permit any Government to deprive its citizens of Constitutional rights on the plea of poverty."

In *Sheela Barse v. Union Territory*, (1993) 4 SCC 2004, custodial violence to women prisoners confined in police lock-up was complained of. The Supreme Court held in this case that Constitutional obligation to provide to the indigent persons free legal aid emanates from Articles 14, 21 and 39-A. The Supreme Court ordered that the Maharashtra Free legal aid Board should affix a pamphlet in triplicate-language (Hindi, English and Marathi) about free legal aid in each cell for the knowledge of the arrested persons.

The State should provide free legal aid to the poor even if the poor accused had not demanded it, since failure to provide free legal aid to an accused vitiates the trial [*Sukh Das v. Arunachal Pradesh*, (1986) 2 SCC 401]. If the trial takes place without affording a counsel to the State expense, the same amounts to violation of the Fundamental Right of the accused under Art.21 of the Constitution and the trial would be considered vitiated [*Moolchand v. The State*, 1990 Cri.LJ 682]. The accused should get a fair trial and while taking recourse to the provision of the Criminal Procedure Code for engaging a State Defense Lawyer where the accused is unable to engage one sufficient care should be taken by the Court to give it to an able hand.

The Parliament enacted the Legal Services Authorities Act with a view to provide free legal aid to the poor. Under Section 12 of the Legal Services Authorities Act, 1987 legal aid is available to indigents person below certain income (the financial ceiling of legal aid varies from State to State) and to women, children, members of the Scheduled Castes and the Scheduled Tribes irrespective of any income. Though the statutes contain provisions relating to legal aid to indigent accused, the extent of quality service available to the poor innocent accused in criminal cases is a question for consideration. The Legal Service Authorities must work out a plan with enough financial support for encouraging legal aid schemes. Free legal aid to accused must not be inferior legal services.