

## **Legal Aid movement in Bangladesh and India: A Comparative Study**

Nadia Shabnam<sup>1</sup>

**Abstract :** *Bangladesh is a country currently undergoing a transition socially, economically and politically. In an effort to achieve the United Nations Millennium Development Goals, and to further implement international instruments prescribing good governance based on the rule of law and respect for human rights; access to justice by its citizens remains one of the biggest challenges. This article discusses the notion and significance of access to justice, vis-à-vis, the right to legal aid in Bangladesh, and hence a comparison is made to that of India legal aid system. The reform of Bangladesh's National Legal Aid Program is still in its initial phase and therefore, this article is intended to make an in-depth analysis with the legal aid system of India and with countries' jurisdictions to increase knowledge of best practices to be suggested and to be recommended for initiating further reforms in the Bangladesh legal aid system.*

**Key-Word:** *Access to Justice, Legal Aid, Legal Representation, Scheme, Analysis, Comparison.*

### **Introduction**

The practice of Legal Aid movement was started in 14th century in Europe when Henry VII relinquished court fees for poor and introduced legal representation by appointing lawyers in the court [1]. In 1960, The United States of America invented a new concept of legal aid which includes legal advice, legal representation and legal information and education.[2] In this respect, Reginald Herber Smith spelled out the mission of the legal Aid, " we can end the existing denial of justice to the poor if we can secure an administration of justice which shall be accessible to every person." [3]

The movement of legal aid started from this basic realisation that every people must have equal opportunity of access to the legal remedies provided by the courts. So the philosophy of legal aid is dependent on the principle of equality and rule of law. Therefore, legal aid is one of the components of access to justice

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1 Assistant Professor Department of Law University of Information technology & Sciences (UITS). Email: [nadiasub@gmail.com](mailto:nadiasub@gmail.com)

without which the principle of equality before the law cannot be achieved. In most instances, Incoherent legal procedure, excessive costs of litigation and excessive delay are earmarked as prohibitive obstacles for the vulnerable to access the formal justice system. The essence of legal aid remains in its aim that is to make the legal system more accessible for the marginalised sections of the society.

### **Objective of the Paper**

The specific objective of this paper is to include some policy recommendations to advance the access to and quality of legal aid services in Bangladesh.

### **Research Methodology**

The present article has been written by using qualitative method. All the data and information used here are from secondary sources such as journal articles, national and international documents, case laws, local newspapers, focus group discussion and legislation.

### **Rational for Legal Aid**

Over seven centuries ago, the inceptions of equal justice under the law were marked by the inscription in the 40th paragraph of the Magna Carta:

*“To no one will we sell,  
to no one will we deny  
or delay right or justice.”*

The fundamental purposes of providing access to justice is to ensure right to legal remedy and right to fair trial. To attain these purposes legal aid has been marked as an effective weapon for socio economic disparities. Therefore, there should be equal law for all sections of people so that both can utilise the benefits of such law.

Several international and Regional instruments prescribe free legal assistance as a matter of right. The philosophy of legal aid is contended in Art 7 of Universal Declaration of Human Rights and also under Art 14 of the International Covenant on Civil and Political Rights. The obligation of a state to provide legal aid and other legal services to the poor and disadvantaged sections of a society is also stated in s. 2 of the United Nations Basic Principles on the role of Lawyers. [4] Under these documents it is obligatory on the part of the state to provide legal aid to its unequal segments, which really need assistance from the court but for their financial constraints they are unable to do so.[5]

**Understanding Legal Aid:** Legal aid means the way of assistance provided to weaker sections of the society and the protection of their rights and entitlements under the law and the constitution. The New Encyclopaedia Britannica defines legal aid as the professional legal assistance given, either free or for a nominal

### *Legal Aid movement in Bangladesh and India: A Comparative Study*

sum, to indigent persons in need of such. The Black Law Dictionary elaborates legal aid as free or inexpensive legal services provided to those who cannot afford to pay full price.[6]

Galanter categorizes legal aid into two distinct types- service oriented legal aid and strategic legal aid .The service oriented approach focuses on representation of the clients in the court by their lawyers .On the other hand, strategic approach focuses on groups rather than individuals .In first category, legal aid is provided through advice, counselling and assistance where as in second category ,legal aid ensures the accountability of political institutions and guarantees to achieve social changes. [7]

#### **The Prevailing Models of Legal Aid in Different Countries**

Many countries have adopted different models of providing legal aid service mechanisms for criminal and civil matters but no such system is ideal. Each country's experience, however, can help inform the decisions of those seeking to reform legal aid. There exist three main types of legal aid model systems which are cost effective and can be put into practice. These include the Ex officio assignment counsel, the contracting and the public defender systems which will be discussed below:

##### **The Ex officio assigned counsel**

The ex officio model is one of the earliest models designed to assign lawyers to represent legal aid clients in court. This model relies on random assignment of lawyers to cases as a method of fairness. However, it does not take into account the effect of assigning competent lawyers to legal aid clients. It is for this reason that various nations which have adopted this method of legal aid, have inevitably evolved and developed it to avoid this outcome, and therefore provide a more fair system of lawyer selection. Many countries have adopted more refined ex officio models, under which attorneys are assigned on a rotational basis in accordance with their experience, their expertise, and the complexity of the case.

##### **The Contracting system**

The contracting system is one method of legal aid that has worked effectively in the United Kingdom and serves as a method of assigning lawyers to legal aid cases but without running the risk of selecting barely competent lawyers. This model is focused around a contract that is entered into by a law firm and the Legal Services Commission. This contract guarantees quality of service by way of fee and caseload analysis of the firm in question.

##### **Public Defender System**

The Public Defender System, similarly with the Contracting system, aims to ensure legal aid clients with the best possible service upon appointment of a lawyer. However, this system is based upon the employment of full-time lawyers



working for a governmental agency where their sole commitments are to handle the caseloads of legal aid clients.

The method aims to reduce costs and regulate the caseload of each lawyer so as to avoid reducing the quality of the service provided. One inherent difficulty in doing so is that it may not be possible for all cases to be taken on by lawyers due to sheer numbers

This method also assure quality in the following way: "Regardless of the organizational structure or oversight mechanism, ethical rules and the codes of ethics applied to private attorneys usually are binding on the staff of public defender offices as well". This system is used around the world but can be difficult to minimize costs depending on the potential case load. [8]

In light of this, it is clear that a greater obstacle lies in the way of providing best legal services to legal aid clients. To eliminate both hurdles would call for even greater reform, therefore putting pressure on available resources both financial and non-financial. Although many inadequacies can be found in the methods of legal aid, it is very important not to lose sight of the ultimate goal, which is to enable one's case to be heard in the general interest of justice.

#### **An Analysis of Legal Aid in Bangladesh and India**

If we go through the present picture of legal aid in Bangladesh and in India it will be found that in both the instances the state is directly ensuring legal aid but there are significant differences regarding the scope of delivery system.

#### **Legal Aid in Bangladesh**

The constitution of Bangladesh indirectly recognizes right to legal aid under article 27 and 31. Both this article deal with equal protection of law. Albeit, there is no direct provision mentioned in constitution in respect of legal aid, the above provisions proclaim the perception of legal aid. Article 27 proclaims that "Everyone is equal before law and is entitled to get equal protection of law" In this context, article 31 guarantees the life and personal liberty of all individuals and provides that every person arrested or detained in custody shall have the right to be defended by a legal practitioner of his choice.[9] Apart from these constitutional provisions, the statutory provision regarding legal aid is stated in CPC and Cr.P.C. The rules of CPC allow a person to institute a suit without court fee. As regards criminal matters, Cr.P.C allows an accused to be defended by a lawyer and he must pay the fees.[10]

Earlier 2000, there was no formal system of providing legal aid. After the enactment of The *Legal Aid Services Act 2000* (Act VI of 2000), a formal legal framework was formulated. To this end, The National Legal Aid Organization (NLAO) was empowered to regulate legal aid function to different districts in Bangladesh with the assistance of 61 District Legal Aid Committees (DLAC)s. After one year in 2001, the NLAO adopted the legal aid rules to indicate who are entitled to legal aid along with submitting of legal aid applications and appointment and remuneration of panel lawyers..

## *Legal Aid movement in Bangladesh and India: A Comparative Study*

### **Salient features of The Legal Aid Act, 2000**

Section 2 (a) of the Act broadly defines 'Legal Aid' so as to include counselling, payment of lawyers fees and other incidental cost for expenses of litigation. Pursuant to the 2000 Act, a National Legal Aid Services Board has been established which is chaired by the ministry for Law, Justice and Parliamentary affairs. All powers and authority in the regulation of legal aid vest in the National Legal Aid Services Board. The National Legal Aid Services Board shall determine the criteria of the applicants for legal aid and enact the rules of business in this regard. The act envisages initiatives to raising legal aid awareness among the people through publication, seminars and the media. Different legal aid scheme shall also be developed, complemented by education and research. The board is also responsible for monitoring the status on the ground. The district legal aid committees are chaired by the district and session judge and assisted by District magistrates, police and jail superintendents in respective districts and civil society representatives including lawyers from the district courts. The district legal aid committees are responsible for entertaining applications for legal aid from people who fulfil the eligibility criteria and providing legal aid services according to specific needs of the applicant. The state will bear all the miscellaneous expenses except the court fee. Panel lawyers with requisite skills and experience are selected from both the higher and the subordinate courts to handle cases. Appeals against decisions of the district legal aid committees declining to grant may be made by the aggrieved to the national legal aid board within 60 days of the district committee's decision. The decision of the board shall be final and binding. [11]

### **Loopholes in the Legal Aid Act 2001**

After analyzing Secondary data regarding availability of government legal aid, it is found that insufficient provision of government legal aid affects legal aid delivery mechanism. Major drawback relates to substantial provisions of this act which itself is not sufficient in nature. The act does not explain the particular ground for which civil and criminal legal aid will be provided. Merit test provision is not available to determine a prima facie case to give legal aid. There are no criteria for selecting or rejecting a case. The state will bear only the incidental expenses relating to the case excluding the court fees. The panel lawyers are reluctant to deal with cases due to insufficient payment. Due to lack of remuneration and proper publicity, the members are not accountable and people are not informed about government initiative respectively. People are unaware about government initiative due to lack of proper publicity. Above all, absence of monitoring mechanism is a prime reason for not measuring the quality of legal aid services.

An attempt is made to underscore the procedural barriers of this act that prevent the poor from accessing justice. According to statistics published in 2006 by the national legal aid organization legal aid has been given in total of 68 cases whereas the number of cases filed was 2632. The number of cases filed and the number of cases receive legal aid indicates the committees ineffective



functioning. Another statistics published in 2003 by the national legal aid organization shows that total fund granted for legal aid is 1, 87, 23012 out of which tk.40, 88,723 has been expended and the balance is tk.1, 79, 15,076.[12].Both of these statistics show the disinterest and ineffective functioning of legal aid committees. The constitution of these committees is defective. Therefore, it is difficult for the district judge to cope with the bar and other officials. Moreover, there is no coordination among service providers which is a pre-requisite for effective service delivery mechanism. The main problem remains in its limited accessibility to the poor. The complicated process of application to the district judge and the subsequent steps to receive legal aid takes a long time .As a consequence, a poor litigant cannot bear the travelling cost or related expenses to pursue the matter again and again. As observed by Khair“The poor and the marginalized are not aware of the existence of legal aid programmes and even where they are aware of it; they are not likely to be persuaded to avail of it for a number of reasons.”[13]

#### **Legal aid in India**

Article 39A of the constitution of India directly recognizes free legal aid for all on the basis of equality.CPC and CrPC ensure legal assistance through its provision by indicating that when an indigent person is deprived of legal counseling from a lawyer in civil and criminal matters the court will exempt the fee and must engage a lawyer at the expense of the state.

#### **Salient features of The Legal Services Authorities Act, 1987**

The grant of legal Aid in both civil and criminal matters is now governed by The Legal Services Authorities Act, 1987. This act deals with a national scheme under which legal aid and advice to person within the means and limits is provided. According to section 2(1)(a) of the act legal aid can be provided to a person for a case or other legal proceeding before any court ,authority or tribunal and the giving of advice on any legal matter.

The Legal Services Authority Act empowered National Legal service authority which is also a central authority to lay down policies and principles for making legal services available to the needy and to frame most effective and economical schemes for legal services It is responsible for disbursing funds and grants to state legal services authorities and NGOs for implementing legal aid schemes and programmes.

Every state, district and taluk has a separate legal aid committee to regulate legal aid function properly. The committees are headed by presiding judge or magistrate as an ex-officio chairman and assisted by Government officials, senior lawyers practising in the bar, the president of bar association, law teachers from colleges and universities and social activists. There is a provision to review the payment of panel lawyers through negotiation.[14]

Section 12 of the legal services authorities act prescribes the criteria under which an individual has to undergo three fold tests namely Merit test, Means test and

### *Legal Aid movement in Bangladesh and India: A Comparative Study*

Reasonableness test. Both these tests apply to determine balance of probabilities in their cases, eligibility and right to defence. Section 13 of this act stipulates that after examining these entire tests an individual is able to receive legal aid from the state. There is a list of civil and criminal cases as well as the way to select or reject a case for which legal aid can be provided. The monitoring committee will scrutinise the progress and end result of legal aid cases under the supervision of chairman in every month. The quality of legal aid will be ensured through the reports which are given by the panel lawyers.

#### **Legal aid schemes introduced by National Legal Aid Service Authority**

National Legal Aid Service Authority (NALSA) has introduced some schemes for proper implementation of legal aid programmes. Under these schemes, any civil and criminal issue except non-compoundable cases can be settled through negotiation. An indigent accused can defend them through legal aid counsel scheme. Counselling and conciliation centers are established in all the districts to bring about negotiated settlement of disputes between the parties by assisting the legal service authorities to find out the eligible person for grant of legal aid which is a pre-requisite for legal aid.

Permanent Lok Adalat is established in all the districts and specially in family court to resolve the dispute without delay at pre-litigation stage and thus reduce the overburdened of courts. The decision of Lok Adalat shall be binding and no appeal can lie against the decision of Lok Adalat. Legal aid counsel scheme has been provided in magistrates courts for those prisoners who are financially incapable to defend themselves. NALSA has introduced legal literacy and legal awareness campaign along with NGOs to promote legal aid awareness programme among vulnerable section which help them to raise their voice against injustice and make them understand the importance of legal aid. Accreditation of voluntary social service institutions are established to spread legal aid knowledge among people and take an initiative to make people aware of their legal rights and publicity for legal service throughout the nook and corner of the country. Nalsa has set up a legal aid cells in jails so that the prisoners are provided prompt and efficient legal aid. A newspaper is published relating to legal aid schemes and programmes so that service providers can share the ideas and useful information for promoting a healthy working relationship. Paralegal scheme is provided to encourage the poor to use the law as an instrument of redress. Paralegal may interview clients and witnesses, prepare case histories, do legal research and assist lawyers in every other works for effective legal assistance. Legal aid clinics or law centers are regulated by non-lawyers, lay advocates and law students to identify the problems which require legal aid. [15]

One significant aspect of legal services movement in India is the public interest law movement, conducted by judicial members, lawyers and social activists aims at creating a legal environment with developed laws for the benefit of the poor.



### Recommendations

After observing the instances of most advanced legal aid movement in India, the abject state of legal aid in Bangladesh can be well understood. It is found that legal aid movement in Bangladesh is supervised by the state itself which confirms it by enacting and implementing statutes. On the other hand, in the case of India the state assures legal aid with the collaboration of the activities of NGOs and forums.

1. The government should incorporate right to legal aid in constitution as fundamental right with judicial enforcement like article 44 and 102.
2. To examine the eligibility of an applicant merit test should be introduced like balance of probabilities (whether there is a prima facie case to provide legal aid). This can be done by constitution a committee of judge, government officials and magistrates. Moreover, a monitoring committee should be constituted employed by senior judicial members, senior lawyers for observing day to day reports of panel lawyers, the advancement and end result (success and failure) of legal aid cases.
3. Paralegals are lay person who may be NGO workers or community based volunteers or a fresh crop of law students having specialised training in formal legal education that assist the poor to use the law .Paralegals can perform their function through law clinic or law centers which can be established in rural areas to make people aware of their rights.
4. Counselling and conciliation centers are totally opposite concept from the conventional adversarial mode of dispute resolution and accordingly facilitate parties to arrive at a solution in mutually acceptable ways. Simultaneously legal aid counsel scheme is remarkable under which a financially incapable accused can defend himself in front of magistrate. Other notable advantages of these schemes are to explore the eligible candidate for grant of legal aid.
5. There is a saying that justice delayed is justice denied. In our country justice is delayed due to procedural drawbacks such as delay in investigation, lengthy process of recording of evidence and last but not the least long awaited trial. In order to eliminate the delay in dispensing justice lok adalat will definitely be a welcome inclusion. So, a permanent lok adalat should be established in all districts and especially in family court to resolve the dispute at pre-litigation stage and thus relieve courts of congestion, undue costs and delays. The decision of Lok Adalat shall be binding and no appeal can lie against the decision of Lok Adalat.
6. There is a general reluctance amongst senior lawyers to represent legal aid cases. To this end, the service organisation can revise the payment for panel lawyers to ensure effective legal assistance to aided persons. Nonetheless, the prominent features of lawyers in Bangladesh are their orientation to litigation rather than advising, negotiating and planning, their individualism



### *Legal Aid movement in Bangladesh and India: A Comparative Study*

and their lack of specialisation. This kind of legal service discourages the disadvantaged in using the legal system. So, Lawyers are said to have taken a moralistic and individualistic view of the problems should engage themselves in pro-bono (done without compensation for public good) service culture.

7. Legal literacy and legal awareness programme, seminars and campaign employed by NGO sensitises the poor and marginalized about the legal aid scheme and their rights and thus help to get assistance .In this context government and NGOs may work together for ensuring a better implementation of legal aid scheme. This may be done through assisting government by providing an expert.

#### **Conclusion**

Through the course of this paper, the conclusions which I have come to at the end of this analysis are as follows.

Firstly, insufficient provisions of legal aid act in Bangladesh have become formidable stumbling blocks in the efforts to establish required legal aid facilities. Legal policy of India like merit test, selecting or rejecting criteria of cases, application procedure , monitoring authority and selection process for lawyers will ensure the availability of legal aid.

Secondly, as we know, lack of legal knowledge and information is one of the greatest hurdles in the way of legal aid so we can introduce legal aid scheme in Bangladesh like in India as we have already discussed earlier. All these schemes will ensure effective delivery of legal aid.

Thirdly, Disinterest of senior lawyers to take legal aid cases for low salary, lack of coordination between lawyers and clients and the failure of bar association to give leadership are the reasons of lack of legal representation in Bangladesh. To ensure legal representation, selection and remuneration process in India should be followed to encourage the legal aid lawyers to take cases in Bangladesh.

Finally, James Fallers, a former president of American Bar Association opines that The Bar Association can assure legal assistance for the poor on a voluntary basis in a preventive way –to seek legal advice before they get into trouble.[16]

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