

**LEGAL AID MOVEMENT IN THE U.K., U.S.A AND
BANGLADESH; A COMPARATIVE STUDY**

by

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One of the fundamental bases of the concept of modern state is the assurance of personal protection in respect of life and property. In this case all people living within a state and being a citizen of a state have to surrender their personal sovereignty to the state authority. Now if a man is to forfeit his right to protect his life and property by force of arms and to take revenge for any harm caused to him he needs assurance that he would have an equal opportunity to prevail in the substitute arena for deciding these disputes, the courts. So a society that requires its citizens to live within the law must ensure that they have access to the institution and remedies of the legal system regardless of their economic Condition. The movement of legal aid started from this basic realization that every people must have equal opportunity of access to the legal remedies provided by the courts.

Justification of legal aid:

If we look upon history, it is found that the percentage of poor people was never less, but law and the legal system had not pervaded their lives to the extent it is needed. Inability to utilize the legal system can be and often is disastrous for the poor in ways that are almost unimaginable for others. Lack of education and the thin economic margins of which the poor live make law a crucial instrument of survival. Yet for so many that instrument is beyond reach. English Philosophers, Jurists and Intellectuals, therefore uphold the view that the principle of equality of justice, which every civilised nation admit with due respect, can be observed by making the legal system accessible to every man. 'From the pledge

1. MAGNA CARTA, Cap. 40.

of the Magna Carta" To no one will we sell, to no one will we refuse or delay, right or justice," early English justice evolved a principle that free counsel should be provided to litigants too poor to employ their own.² This common law development culminated in the inclusion of a written guarantee in the statute of Henry VII enacted in 1495;

"..... The justices..... shall assign to the same poor person of persons counsel learned, by their discretions, which shall give their counsel, nothing taking for the same;..... and likewise the justices shall appoint attorney and attornies for the same poor person or persons"...³

The motivating philosophy of the legal aid movement was clearly explained by Reginald Heber Smith, pioneer leader of the American legal aid movement. In his book 'justice and the poor', he said;

Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes and when the law recognizes and enforces a distinction between classes, democracy is at an end.... the historic need of civilization is frustrated.⁴

After marshaling the case histories and statistics which revealed the injustices of the American legal system, as it existed in 1916, Reginald Heber Smith spelled out the mission of the legal aid movement;

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 no matter how humble.....⁵

Smith's statement was echoed many times by subsequent leaders of the Bench and Bar. In 1926 Chief justice Taft wrote :

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2. The Right to counsel in civil litigation, 66 Columbia L. Rev. 1322-1324 (1966).
 3. Statute of Henry VII, 1495, 11 Hen. VII, C. 12
 4. Smith, Justice and the poor (New York : (Carnegie Foundation) p. 6
 5. Smith. Op. Cit. Supra n. 4. at pp. 257, 261

..... If the individuals in seeking to protect himself is without money to avail himself of such procedure, the constitution and the procedure made inviolable by it do not Practically work for the equal benefit of all. Something must be devised by which every one, however lowly and however poor, however unable by his means to employ a lawyer and to pay court costs shall be furnished the opportunity to set fixed machinery of justice going.⁶

Fifteen years later, justice wiley Rutledge Spoke to the same goal.

"Equality before the law in a true democracy isa matter of right. It can not be a matter of charity or of favour or of grace of discretion."⁷

Academic supporters of legal aid sounded the same theme. In 1926 professor william Vance summarized :

"The process of setting the machnery of the law in motion involves effort and expense. Those very weak economically . . . can not bear this expense. What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons, when he has not the wherewithal to pay the adjmission fee?⁸

Actually the period of 1920-40 was an era promising growth for legal aid in U.K. U.S.A and many developed Western countries. Many types of legal aid movement viz legal clinic for middle-income, prepaid legal insurance, public interest law movement, legal services scheme etc, conducted by the jurists, lawyers, social activist organised a strong public consciousness about it's necessity. When second world war(1939-43) ends with it's inevitable result of death, despite, destruction, famine and dispotism by the stronger section of the society, the unavoidableeness of the recognition of

6. Smith and BRADAWY, *Legal Aid work in U. S* (1926) p. 17

7. Spech to the fifth open meeting on legal aid work, Annual convention. American Bar Association (September 29, 1941).

8. Vance, *the Historical Background of the legal Aid movement*, THE ANNALS (March, 1926). p. 39

legal aid by the international community was felt. consequently the concept of legal aid finds its due manifestation in Art 7 of U.N. Universal Declaration of Human Rights, also under Art 14 of the International Covenant on Civil and Political Rights, which are precisely an international statement adopted by the United Nations to set up principles and standards for legal aid.

The basic principle was laid down in this way "..... all are equal before the law and are entitled without any discrimination to equal protection of the law."⁹ Undoubtedly, the delivery of legal services to paupers and deserving litigants is covered by this declaration. For, through legal aid, the poor or the oppressed must be given competent legal representation to make them equal before the law and to respect their inherent dignity despite the circumstance of their poverty and deprivation.

Art. 14 of the International covenant on civil and political Rights¹⁰ states in detail the right of free legal assistance to those who cannot afford it. Para 2(d) of this article states the right, "To be tried in his absence, 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 this rights; and to have legal assistance assigned to him, in any case where the interests of justice require, and without payment by him in any such case if he does not have sufficient means to pay for it". Art 2(f) states the right "To have the free assistance of an interpreter if he cannot understand or speak the language used in the court.

Therefore, the right of the disadvantaged section of the population to have free legal aid has got it's necessary international recognition.

Modern legal aid movement : Realistic Approach

During the 1950's and 1960's western world has witnessed a significant expansion of legal aid programs sponsored by govern-

9. Article 7, Universal Declaration of Human Rights.

10. Article 14, International Covenant on civil and political Rights.

ment, professional or social work agencies.¹¹ Legal aid in these countries has had its roots in the tradition that it is the responsibility of the legal profession to provide legal service to the poor. Jurisprudential concepts of "equality before law", "equal protection of law", "rule of law" have provided in the past, the rationale for legal aid movement.

Traditionally the function of legal aid is viewed as providing legal solution to legal problems of the poor by indicating their legal rights. Unfortunately legal aid limited to this traditional function contributes little, if any thing to development. The reason is that traditional legal aid accepts uncritically the basic rightness of the legal order and of the social system and institutions within which it operates. Its thrust is to uphold the law, not to transform society. Critics of traditional legal aid viewed that it is in fact, the lawyer's way of giving alms to the poor. Traditional legal aid redresses particular instances of injustice but does not fundamentally change the structures that generate and sustain injustice. Therefore the need of structural legal aid rather than individualistic legal aid was felt severely. It was observed that since the main emphasis of individualistic legal aid is on the law itself and since the law is always regarded as neutral or egalitarian, Justice is caught in its own orbit and becomes static. Political and socio-economic realities therefore paved the way of the popularity of structural legal aid. As Mulya Lubis (T Mulya Lubis, "Legal Aid: Some Reflections" Zed Books, London, 1985) puts it:

"Law, in and of itself, can not address the question of injustice. Indeed it often strengthens the status quo because it is obliged to be neutral. Once one accepts that society is neither just nor egalitarian, then one must reject neutrality in favour of supporting the weak in their confrontation with the strong. Structural Legal aid, therefore placed itself on the side of the weak who form the majority of the population. The concept of it is tied to the destruction of injustices in the social system. It is directed not merely toward aiding indivi-

11. Finman, 'Legal Service programs and the Pursuit of social change' Wisconsin Law Review, p. 1001.

duals in specific cases, but towards an emphasis on cases which have a structural impact."

This structural approach is mainly adopted by the lawyers who describes themselves as legal services lawyers, rather than legal aid lawyer. Supporters and critics of this legal services programs agree that lawyers in legal services programs are different from those in earlier legal Aid offices.¹² Legal aid lawyers are said to have taken a moralistic and individualistic view of the problems of the poor, accepted only certain types of cases, and adopted a passive approach.¹³ Legal services lawyers are more aggressive in meeting the legal needs of the poor. They have tended to assume the validity of client's claims, to broaden the range of cases handled and to persue client's interests actively.

Most fundamentally, legal Aid lawyers rarely engaged in the kind of law reform litigation that has formed a significant part of the efforts of legal services lawyers. There is difference in work method also. By and large legal aid programs recruited lawyers who were marginal to the legal profession in both background and training. By contrast legal services lawyers, especially those who joined in the 1960's, have been characterized as "new professionals" the best and the brightest young lawyers, who would traditionally have been expected to join major firms but were politically motivated to serve unrepresented interests.¹⁴

One of the significant achievements of the legal services lawyers is to concern the state itself with the movement. If we go through the present picture of legal aid movement in the U.K. and U.S.A. it will be found that in the first instance the state is directly ensuring legal aid and in the second instance the state is petronizing private efforts in every possible way to ensure everyone access to legal system.

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12. Howard S. ERLANGER, Lawyers and neighborhood legal services. Social background and the impetus for reform. *Law and Society Review* 1978
 13. Carlin, Jerome E. Civil Justice and the poor." 1 *Law and society Review*.9
 14. Moonan, wendy and Tom Goldstrin (1972) "The New Lawyer." in Ronald Gross and paul ostrman (eds.) *The New Professoinals*. New York. Simon and Schuster.

Legal aid and advice in the U. K.

Prior to 1949, poor litigants had the scope of legal aid under various provisions with the financial assistance of various societies and authorities. These provisions have later been replaced by statutes. The grant of legal aid in both civil and criminal matter is now governed by the Legal Aid Acts of 1974 and 1982. These acts deal with a National Scheme under which legal aid and advice to person within the means and limits is provided. The necessary expenses are provisioned to be met out of a public fund known as the Legal Aid Fund financed by the state.

Under these Acts Legal aid in civil matters and legal advice is to be governed by the Law Society which acts in consultation with the Bar Council and under the general guidance of the Lord Chancellor.¹⁵ For the purposes of the scheme England and Wales are divided into 15 areas. Each area has an area secretary who may grant (but not refuse) legal aid and three Committees; first, the General Committee which deals with applications for legal aid and the control of certificates and green forms; secondly, the Area Committee which deals with appeals against refusal of legal aid and financial matters such as the assessment of bills; finally, the Criminal Legal Aid Committee deals with reviews of magistrates' court decisions to refuse legal aid together with some aspects of the conduct of criminal proceedings. Area Committees also deal with complaints against solicitors and barristers on these panels which may result in their names being removed.¹⁶

a) Legal Advice and Assistance

The legal Advice and Assistance Act, 1972 introduced a completely new scheme for the giving of legal advice and assistance in relation to both civil and criminal matters. The aim of the scheme was to introduce a simple and effective method of providing legal advice and assistance so as to make these services

15. Legal Aid Act 1974, S. 15

16. Legal Aid Act 1974, s. 12(4) substituted by Administration of Justice Act, 1977, S. 1; Sch.1)

more readily accessible to the public. The scheme, which is generally known as the "green form scheme", is now contained in sections 1 to 5 of the Act' (as amended by section 1 to 3 of the 1979 Act) and in regulations.¹⁷ Under the scheme a solicitor, and so far as may be necessary, counsel, may give oral or written advice on any question of English law and as to any steps which the applicant might appropriately take (whether by way of settling any claim, bringing or defending any proceedings, making an agreement, will or other instrument or transaction, obtaining further legal or other advice or otherwise) having regard to the application of English law to his problem. The scheme does not apply to advice or assistance given in connection with any proceedings in which there is already in existence a legal aid certificate or (in criminal proceedings) a legal aid order.¹⁸ The normal services which are provided under the scheme comprise such matters as general advice, writing letters, negotiating settlements and the like. It does not save in those cases to which "assistance by way of representation" applies, extend to taking any step in proceedings, (other than negotiating settlement) since this is a matter for legal aid proper rather than for legal advice or assistance. Legal advice and assistance under the scheme is available to applicants whose "disposable income" does not exceed 108 pounds per week. The applicant must complete a form (the "green form") which contains requirements as to details of his income and capital so that the solicitor can decide his eligibility for legal advice and assistance.

b) Legal Aid in Civil Proceedings

Legal aid is now available in connection with proceedings in almost every types of courts. Any person, not being a body corporate or unincorporated, may apply for legal aid irrespective of nationality or residence, He must, however, be within the grant of legal aid. His "disposable income" must not exceed 5, 155 pounds a year and, if required the applicant must show that his "disposable capital" does not exceed 4, 710 pounds, or if it does, that he could

17. Currently the legal Advice and Assistance (No. 2) Regulations 1980 (as amended).

18. Legal Aid Act, 1974, s. 2(1), (2).

not afford to proceed without legal aid. Disposable income and disposable capital are assessed by the assessment officer of the Department of Health and Social Security in accordance with section 11 of the Act and the legal Aid (Assessment of Resources) Regulations 1980 as amended.

c) Legal Aid in Criminal Proceedings

Criminal proceedings, formerly outside the scope of the legal aid scheme, are now provided for in part 11 of the legal Aid Act 1974.

However, in contrast to civil proceedings, the order is made by the court.

There are two basic differences between legal aid in criminal proceedings and legal aid in civil proceedings. The first is that, due to the importance of expedition in criminal proceedings, there is no time for the elaborate formalities relating to applications for certificates and assessment of resources which take place in civil cases. The second essential difference between civil and criminal legal aid is that while in civil proceedings, there is a wide discretion in the matter of granting certificates, legal aid must be granted where it is desirable in the interests of justice" and accused will rarely be refused legal aid, on grounds other than financial one, where he is charged with a serious crime, even if he intends to plead guilty.

Legal Services Movement in the U. S. A

In U.S.A. the picture of legal aid movement is somewhat different from that of U.K. In U.S.A. until 1920 legal aid was provided by a loose, unorganized collection of independent organizations located in a few of the countries larger cities. At the 1920 American Bar Associat's (A.B.A) meeting a Special Committee on the legal aid was created. In 1923 a national organization of agencies and presons interested in legal aid called National Association of Legal Aid Organizations was established. Later, this organization was converted to the National Legal Aid and Defender Association. With the expansion of the works of ABA

and NIADA, the debate about government financing of legal Assistance to the poor started. American Lawyers, community and legal aid covement leaders were firmly committed to the advantages of privately financed and controlled legal aid. Various ABA resolution even condemned Government influence on legal aid movement on the ground that it brings unexpected govermental control and hampers the smooth functioning of the movement. After the debating decade of 1960, the legal aid movement is settled to be controlled by lawyer's forums, though the government provided finance and supporting laws. The government provides a large portion of finance to the lawywers scheme of various types of legal aid movemet for the implementation of the States' policy of Justice for all and equality before law. But the supervising and controlling authority is making the lawyers.

In U.S. A. legal aid and advice is basically conducted by the legal services corporaton, which is a private, non-profit organization established by Congress in 1974 to provide financial support for legal assistance to the poor. The federally funded legal services program was removed from the executive branch after it become apparent in the late sixties and early seventies that a structural change was necessary to insulate legal assistance for the poor from partisan political pressures.

The corporation is responsible for ensuring that its guarantees provided services efficiently and effectively and that they comply with the legal services corporation Act and rules and regulations issued by the corporation.

The role of the corporation also is field evaluation and manitoring visits and to support-through training, research, clearing house activities and technical assistance the lawyers. Paralegals and other staff who work for local legal services programs so that they can provide the highest quality of legal services to the poor. Actually legal activities in the U. S. A. have moved from a concept of legal aid to a concept of legal services, the concept which emphasizes law and lawyers as needing to be in the service of the poor. The legal services approach highlights the following

interrelated emphasis essential to an effective program of legal assistance;

- a) emphasis on collective and not purely individual rights.
- b) emphasis on goals of participation and self reliance in the delivery of legal assistance. This self-reliance is to be achieved both through programs seeking to educate specific poverty communities about their rights and the laws and procedure relevant to their day-to day activities so as to enable them to decide for themselves when and how to recourse to law and when not to.
- c) emphasis on seeking to redress both injustices and inequalities and more importantly the structures which produce and reproduce such injustices.
- d) emphasis on helping develop organizations of victim groups and victim people
- e) emphasis on helping secure public accountability of bureaucrats and governmental officials.

Besides the wide scale legal service movement conducted by legal service corporation there are various types of low cost legal services schemes some of which are discussed below:

Pre-raid legal insurance: Under such plans individuals or someone acting on their behalf contribute regularly to a fund for legal services that the individual may need or use in the future. By spreading the cost of services over a large number of people over a period of time, the expense to the individual client is kept relatively low. James Fallers, a former president of the American Bar Association Opines that 'pre-paid plans are probably the best way for the majority of Americans to be able to assure themselves of legal assistance when they need it. In addition to providing reasonably priced legal services, pre-paid plans encourage members to practice "Preventive law"—to seek legal advice before they get into trouble.

Legal clinic : Another alternative to traditional methods of providing legal services is the legal clinic. These clinics provide basic legal services for substantially lower prices than those charged by most lawyers. Most clinics also let clients pay in installments or with credit cards. Legal clinics are able to keep prices down by handling a high volume of cases and by making use of paralegals, standardized forms and procedures and other money-saving efficiencies.

Paralegal Scheme: Some legal aid forums have turned to non-lawyers-paralegals- to help them with their work. Paralegals perform a wide variety of tasks. They may interview clients and witnesses, prepare case histories and do legal research, assist the lawyers in almost every other works.

One significant aspect of legal services movement in U. S. A is the public interest law movement, conducted by lawyers and social activities, this movement aims at creating a legal environment with developed laws for the benefit of the poor.

Legal Aid Facilities in Bangladesh

After observing the instances of most advanced legal aid movement in the U. K. and U. S. A., the abject state of this movement in Bangladesh can be well understood. It is found that legal aid or more correctly legal services movement in the U. K. is mostly supervised and controlled by the state itself which confirms it by enacting and implementing statutes. On the other hand in the case of the U. S. A. though statute and regulations assure legal aid, the activities in this respect are mainly conducted and controlled by non-governmental institutions and forums. In the case of Bangladesh, legal aid movement is not so organised either in the statutory law or in the activities of non-governmental organizations. In Bangladesh, law itself is not sufficient enough to protect the rights of the poors. Rather the opportunity of the powerful section of the society to berave the weaker section of their rights exist in the loopholes of legal system. Various complications of trial system and incompleteness in the application of law discourages the poors to go to the court and try for having justice. Besides this the socio-economic condition obtaining in this country also underlines the inevitability of the wider scale legal aid facilities.

State's role:- Frankly speaking, there is no state fund or state patronised fund for legal aid. Though Art. 27 of the Bangladesh Constitution states that "All Citizens are equal before law and are entitled to equal protection of law" there is no supporting arrangement to ensure it. The only statutory provision providing legal aid facility is order xxxiii of C. P. C. rules of which order states that any suit may be instituted by a pauper.

This order explains that a person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the entitled to property worth one hundred taka other than his necessary wearing apparel and the subject matter of the suit.

Scope and object of the Order:- A plaintiff suing in a civil Court must pay the Court-fee prescribed by law for the plaint and subsequent proceedings in the suit. These fees are prescribed by the Court Fees Act VII of 1870. But a person may be too poor to pay the Court-fee, and the object of this order is to enable such person to bring and prosecute suits without payment of Court-fees. There are however, certain fees from which even a pauper is not exempted, namely, fees for service of process, and such fees must be paid by him (r,8).¹⁹ If the pauper succeeds in the suit, the Government have a first charge on the subject-matter of the suit for the amount of the Court-fee which would have been paid by him if he had not been permitted to sue as a pauper (r.10).²⁰ If the pauper fails in the suit, the Court should order him to pay the Court-fees due by him (r.11).²¹ Where two persons apply jointly to sue as paupers and one is held to be a pauper and the other not, the latter is not entitled to prosecute the suit in forma pauperis as the execution is personal to the former. He must either pay full court fees on the plaint or withdraw from the suit.

Besides the statutory provisions, poor people have another scope of having legal aid which is offered by some non-governmental organizations. But considering the percentage of poor people of Bangladesh, the activities of these N.G.O.s are very limited. In response to a variety of conflicts, legal disputes and

19. Or. 33, r. 8, The code of Civil procedure-1908

20. Or. 33, r. 10, The code of civil procedure-1908

21. Or. 33, r. 11, The code of civil procedure-1908

human rights violations, some N. G. Os have undertaken some programmes which are basically 'legal literacy training' based. These training programmes are in most cases limited to the staff and target groups of NGOs and government organization or to any particular section of society. A few NGOs which provide legal aid, prefers mediation to the court system. Again a very few number of people who directly communicate with the NGOs get the mediation facility. In many cases the mediation can not resolve the disputes of the clients. As a whole the NGO activities to provide legal aid is very insufficient in comparison of it's demand. The number of cases confronting legal aid societies so outstripped legal aid facilities that clients are often tired of waiting and tired of inadequate services. Unfounded fear of competition, inherent lethargy, lack of interest, the failure of local bar associations to give leadership and in many cases the hostility of lawyers to the idea, have become formidable stumbling blocks in the efforts to establish required legal aid facilities.

The legal aid lawyers of Bangladesh rarely engage them in the kind of law reform litigation that has formed a major part of the activities of legal services lawyers of the U. K and U. S.A.

Conclusion:

Bangladesh is one of the poorest countries of the world. Maximum people of this country are not in a state to afford the expenditures of litigation. Again Government is not in a position to start the full working of any countrywide comprehensive legal aid scheme. What the government can do is to accept it's obligation of providing legal aid to poor and unable persons. Then it can lay down priorities and proceed by gradual stages. Legal aid will have to be extended firstly to the poor persons accused of crime, particularly crimes of a serious nature.

In a poor country like Bangladesh private efforts to the meting of legal aid is very important. The legal professionals should shoulder their responsibilities for assuring legal aid to the needy people. This responsibility should be discharged by the professionals by organising and by serving the bodies which will render legal aid. They can also represent the poor persons in the court without fees or with maximum possible fees. The Bar Association can play a significant role here. They can take immediate measure to render legal aid on a voluntary basis in an organized way.