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AN ANALITICAL STUDY ON RIGHT TO COUNSEL IN INDIA AND USA

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INTRODUCTION

The role of an advocate may include with delineating the issues, contend the matter, cross examine the witnesses, and safeguard the interest of the party. The right to get represented by a lawyer in a matter is a part of Principles of Natural Justice. The right to representation is different from the right of fair hearing yet the right of fair hearing cannot be held good if it does not fulfill the right of representation. The right to representation is in mostly every country and in such scope of the right is wide in range.

RIGHT TO COUNSEL IN INDIA

The supreme court of India, the apex court held that the Legal assistance from a lawyer is an essential requisite that is established by law in the process of rendering justice. When a party is not being given the right to get access to the legal aid in the country then the right to liberty is been deprived. But in the case of quasi-judicial bodies the need of lawyers is not necessary which can be the reason for the establishment of the administrative tribunals to have easy and de-professionalized mechanism to work and there are provisions that has exclusion of need of lawyers². The bud of the right to counsel is in the article 22 of the Indian constitution where it provides the arrested person cannot be detained without informing and as soon as he/she is being arrested the grounds for such act must be informed and cannot deny the right to counsel and their choice to appoint the advocate.

The reason of being in poverty cannot be a pillar to get access to the right of being represented because the state must make sure the right to counsel is given to all the indigent accused. If such right is not accessible, then it shall amount to the deprivation of liberty of the accused. Therefore, it is to be known that the right to counsel is an important element and essential requirement in the

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² Mayukha Parcha & Anicham Tamilmani, *Access to Justice in India*, (Volume 2, Issue 1) IJLMH (2018) Pg.no 3 <https://www.ijlmh.com/wp-content/uploads/2019/03/Access-to-Justice-in-India.pdf>

process of justice rendering including the criminal cases. The right to counsel as it's a basic ingredient the law should reach high to make sure the ingredient is not absent.

In the case of R.M Wasawa³ which is case of 1994 where the supreme court of India made it affirm that the indigence cannot be a ground to deny a fair trial and to get justice. This principle has also been affirmed by the Indian Supreme Court in the 1974 case of R.M. Wasawa. the advocate who takes up the case must give a particular pay and such advocate should be competent, equal in handling the cases. The advocate must be given with the time and papers sufficiently and completely respectively.

Along with the constitution, the Code of Criminal Procedure also stands for the right to counsel under section 303 where it states that the accuse person is provided with the right to choose his own attorney of choice. Whereas under the section 304 of the code. It is provided that at the stage of trial of the accused, the accused shall be represented, if not the court has to observe that accused has the sufficient means to appoint a counsel for his defense. If the court finds that the accused cannot afford to get a pleader, then the court shall appoint a pleader for the defense of the accused. This is made available to the criminal cases as well, where the pleader is appointed by the state at its own expense for the defense of the accused. However, the actions be, the court shall presume the accused as innocent unless he/she is proven guilty. Only then the court will be able to provide fair and just trial. On the breach of this section of 304 of the code shall amount to violation of the fundamental principles of the judicial procedure and may be the cases of absence of fair and proper trial. The selection of the pleader to act in defense to an accused who is not in the means to afford a pleader, their remuneration, facilities offered to the pleader of this such is governed by the rules that are framed by the High court of the state in accordance with the previous approval of the State government. On interpreting the section 304 of the CrPC, the court examined in the case Ranjan Dwivedi v. Union of India⁴ that there is no doubt the accused in criminal cases are entitled to get financial assistance for the pleader to be appointed. The court also implicated that the government should make legislations that are schemes for legal aid. However, the CrPC was silent on the right to counsel during the period of interrogation until the case of D K Basu v. State of West Bengal⁵.

³ R.M Wasawa v. State of Gujarat 1974 SCC (3) 581

⁴ Ranjan Dwivedi v. Union of India 1983 SCC (3) 307

⁵ D K Basu v. State of West Bengal AIR 1997 C 610

With this, there was a section inserted in the CrPC Section 41-D that provides when police make arrest of a person and in interrogation, then such person is entitled to seek advise from the counsel which is a right to meet an advocate of his own choice⁶. This right is provided during the interrogation but not to stay throughout the complete interrogation. In the case of Quasi- Judicial body, the right to counsel is denied. This is done because the lawyers tend to prolong the matter with many complications and may also tend to destroy information. Therefore, the right to counsel is an essential need in the criminal matters where if this right is denied, then the balance in the natural justice is under fall.

THE INDIAN CIVIL RIGHTS ACT OF 1968 AND THE RIGHT TO COUNSEL DEBATE

The right of appointing a defense counsel was not given to the Native American Indians who were charged in criminal proceedings at the tribal court. According to the tribal sovereignty, the Indian Tribes in America were not entitled to be benefited from the Fifth amendment guarantees and sixth amendment's right to counsel however they are bound by the act established by the Congress named, Indian Civil Rights Act of 1968. Under this act, it is said that the Indian tribes were given the right to counsel only at their own expense⁷. It is to be noted that the right to counsel is given in the federal criminal courts but not in the tribal courts. This is a discrimination to the American Indians and amounts to difference in the accessing justice.

It is in the Civil Rights era that the Congress made an investigation for the Native American Indian, and where in 1961, Senate Subcommittee that was headed by Senator Sam Ervin of North Carolina on the Constitutional Rights conducted a series of hearings. They also made field investigations which resulted in an independent report and such report consisted of problem faced by the American Indians with respect to their rights. The sole objective of the investigation by the committee was to identify the civil rights gap that were caused due to the non-applicability of the bill of rights. The congress enacted the Indian Civil Rights of 1968 with the view to make

⁶ *Id.* at 4

⁷ Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, (Volume 8) MICHIGAN JOURNAL OF RACE AND LAW, (2013) pg.no 345 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1012&context=mjrl>

affordable to the independent protection of rights as a citizen. The established act contained 10 rights which is to be “constitutional rights” and is made on mimicking Bill of right but having some exceptions.

LEGAL AID IN INDIA AND ITS SIGNIFICANCE

India is a developing country still having illiterate people and where the people of India are not aware of the laws and the constitutional rights. Even though they know, some people lack to get justice on the ground of being poor and not being able to afford a counsel. they are helpless in such situation as the legal counsel is a costly in services⁸. To help the people who are not in the position to afford legal counsel, the solution is legal aid. To provide legal aid, by the 42nd amendment of the Indian Constitution, the parliament inserted the Article 39-A. the article derives the support from Article 21 which guarantee the right to life and liberty of a person.

The tremendous contribution for the development of legal aid and its incorporation goes to the Justice V. R. Krishna Iyer. The report “Processionals Justice to Poor” of him made a step ahead to the recognition of the people with poverty to get access to the legal aid. In 1971 report on Legal aid, even Justice Bhagwati observed, even though the adversary system is still in place, some modifications might be made that would give the judge greater influence in the proceedings and put the underprivileged on an even footing with the wealthy in the administration of justice.

Again in the judgement of M. H Hoskot v. State of Maharashtra⁹ the supreme court upheld te constitutional mandate for the legal aid to the people of poor. In the case of Hussainara Khatoon v. State of Bihar¹⁰ as well as in the case Khatri (II) v. State of Bihar¹¹ there is a notable increase in the strength provided to the mandatory of legal aid function. Further in the case State of Maharashtra v. M.P. Vashi¹², there was interpretation of Article 39-A the supreme court had a

⁸ Ms. Silky Mukherjee, *Constitutional provisions for legal aid in India*, BHARATI LAW REVIEW, Mar, 2013 pg no. 153
https://www.probono-india.in/Indian-Society/Paper/35_CONSTITUTIONAL%20PROVISIONS%20FOR%20LEGAL%20AID%20-%20Silky%20Mukherjee.pdf

⁹ M H Hoskot v. State of Maharashtra 1978 SCC (3) 544

¹⁰ Hussainara Khatoob v. State of Bihar 1979 SCR (3) 532

¹¹ Khatri v. State of Bihar 1981 SCC (1) 627

¹² State of Maharashtra v. M P Vashi 1995 SCC (5) 730

different perspective of clubbing the need of legal aid implementation as well as legal education and the court directed states to modulate the structure of legal education.

The Supreme Court, in this case¹³, have also made another impact whereby it directed the providing of grant-in-aid to the law colleges recognized well by the states. By this way, the budding future of law graduates will help in functioning of the judiciary effectively and efficiently in a proper manner. By this way the judiciary will have well equipped law graduates studied from the grant-in-aid knowing the purpose of article 39 and Article 21 to be correlated and to have better system of judiciary in the country.

RIGHT TO COUNSEL IN USA

The American Constitution's right to counsel is a straightforward idea. The person have a fundamental right to representation from a lawyer if such person is accused of a crime in which he/she might serve time in jail. And the government is required to supply with a competent attorney at no cost to if such person is unable to afford the attorney on his/her own¹⁴. The Sixth Amendment guarantees criminal defendants the right to legal representation. The Sixth Amendment's scope and times of application have been determined by the Supreme Court's interpretation of it over the years.

The Powell v. Alabama¹⁵ case marked the start of the trend when the Court overturned eight black boys' death sentences in a trial that was rushed through and conducted without the assistance of lawyers. According to Justice Sutherland speaking for the Court, due process always necessitates the observance of a few basic individual rights connected to a hearing, one of which is the right to legal representation. This observation featured an excellent statement about the importance of counsel as well as the freedom to choose and pay for one's own legal representation. If one's right to be heard did not include the right to be represented by counsel, it would often be of little use. Even the most intellectual and educated layperson has little to no aptitude for the study of law. He is typically unable to decide on his own whether the accusation is favourable or unfavourable if he

¹³ Id. at 8

¹⁴ Edward T. Haggins, *Right to Counsel in Criminal Cases*, (Volume 71, Issue 2)THE CLEVELAND STATE LAW REVIEW, (2023) Pg.no 155
<https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=3016&context=clevstlrev>

¹⁵ Powell v. Alabama 287 U.S 45 (1932)

is charged with a crime. He doesn't know the laws of evidence. Without legal representation, he may be tried without a valid accusation, found guilty based on unreliable evidence, irrelevant evidence, or evidence that is otherwise inadmissible. Despite having a flawless defence, he lacks the knowledge and skills necessary to properly prepare it. At each stage of the proceedings against him, he needs legal assistance to lead the way. Without it, even though he is innocent, he runs the risk of being found guilty because he has no idea how to prove his innocence.

The Court proclaimed an unwavering rule requiring the appointing of attorney for federal accused of crimes who were unable to afford to hire counsel in *Johnson v. Zerbst*¹⁶, which marked the next stage in the expansion. According to Justice Black's opinion for the Court, the right to legal representation is important to protect the fundamental human rights to life and liberty¹⁷. Without pausing to make a distinction between the right to get counsel if the accused cannot afford to pay one and the right to get counsel, the Justice quoted Justice Sutherland's invocation of the necessity of legal counsel for even the intelligent and educated layman and said:

"The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."

Over time, the *Powell v. Alabama*¹⁸ special circumstances phrase was dropped by the Court. When capital cases were involved, subsequently in *Hamilton v. Alabama*¹⁹, decided that a defendant in a capital case need not demonstrate a particularised need or harm caused by the absence of counsel; going forward, the presence of counsel was required under the constitution in capital trials.

The 'special circumstance' doctrine remains intact in form in non-capital trials, but its content has been slowly and significantly undermined, which is according to Justice Harlan. The rule was

¹⁶ *Johnson vs Zerbst* 304 U.S 458 (1938)

¹⁷ Jennifer Williams, *Criminal Law—The Sixth Amendment Right to Counsel—The Supreme Court Minimizes the Right to Effective Assistance of e Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys*. (Volume 28, Issue 1) UALR, (2005) pg 158
<https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1218&context=lawreview>

¹⁸ *supra* note 14, at 8

¹⁹ *Hamilton v. Alabama* 368 U.S. 52 (1961)

created to provide some degree of certainty in determining whether the absence of counsel would render a trial fundamentally unfair.

In general, even if a forfeiture serves to deprive a defendant of the resources to hire counsel, the right to hire counsel of one's choosing does not prevent the execution of forfeiture provisions. In *Caplin & Drysdale v. United States*²⁰, the Supreme Court upheld a federal law requiring the forfeiture to the federal government of property and proceeds obtained from drug-related crimes that constitute an ongoing a criminal company, even though part of the forfeited property had been used to hire defence attorneys. The court ruled that while a defendant may use his own money to hire counsel, he or she has no right under the Sixth Amendment to use another person's money to pay for legal services, even if it's the only option to hire the lawyer of their choice. Even if the intention is to conduct a constitutionally guaranteed right, the defendant is not permitted to transfer the forfeitable assets to a third party because the Act vests title in the United States at the period of the illegal act.

OTHER SIDE OF SIXTH AMENDMENT

"Reason and reflection, require us to recognise that, in our adversary's system of criminal law, any person brought into court, who is sufficiently poor to afford a lawyer, will not be guaranteed a fair trial until counsel is provided for him," the Supreme Court stated in *Gideon v. Wainwright*. It is to believe that this is an evident fact. The promise of *Gideon* has been consistently extended by the Supreme Court in the more than 50 years since then to any criminal proceeding in which a defendant may be subject to losing their freedom, including direct hearings, juvenile delinquency proceedings, misdemeanours, misdemeanours with suspended sentences, and appeals contesting a sentence resulting from a guilty plea.

But what is "obvious" to judges in the respected chambers of the Supreme Court may not be so obvious to others, and some jurisdictions across the country have erroneously believed that the Sixth Amendment right to representation is satisfied as long as every defendant is given a professional with a bar the card to stand next to them. The Court has ruled through a protracted list of cases that the right of representation includes the right to an efficient lawyer. Without working

²⁰ *Caplin & Drysdale v. United States* 491 U.S 617 (1989)

under indigent defence systems that guarantee their independence, impart training, and impart monitoring, among other systematic safeguards, lawyers cannot be effective.

A COMPARISON OF THE RIGHT TO COUNSEL DURING INTERROGATION UNDER SIXTH AMENDMENT AND MIRANDA

The right to counsel under the Sixth Amendment and the Fifth Amendment Miranda²¹ decision differ in the following ways:

Timing: The Fifth Amendment's right applies after the defendant is placed in custody; the sixth amendment right only applies after adversary judiciary criminal procedures have been launched against the accused.

Unless the offender is in jail, the freedom guaranteed by the Fifth Amendment does not apply; however, the sixth amendment is not subject to this restriction and is applicable in cases when the defendant has been freed from custody on bond or his own recognizance.

The Fifth Amendment right to counsel extends to all offences once custodial interrogation begins, whereas the Sixth Amendment right is offense specific.

Focus of the investigation: The Sixth Amendment forbids "deliberate elicitation," and it focuses on the intents of the police. The Fifth Amendment right to counsel is applicable when the suspect in custody is "interrogated," and it focuses on the suspect's perceptions (if he believes he is in custody).

Questioning by an undercover police officer or informant – When the accused person is questioned by an undercover cop or informant, the Fifth Amendment right to be consulted cannot be invoked; instead, the Sixth Amendment's protection applies to purposeful elicitation by both undercover and overt government agents.

Fruit-of-the-poisonous-tree doctrine - The theory only applies to violations of the Fifth Amendment's right to counsel; it does not apply to violations of the Sixth Amendment.

²¹ Miranda v. Arizona 384 U.S. 436 (1966)

Impeachment - Statements obtained in infractions of the rights guaranteed by the Fifth Amendment and the Sixth Amendment regulation may be utilised in an impeachment proceeding, respectively.

INTERNATIONAL CONVENTIONS

To get an idea about the fair trial and to have the right, it can be expected to look upon some of the international conventions at global level. Such international conventions may have the inclusion of Universal Declaration on Human Right, United Nations Convention on Civil and Political Right, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950²².

Universal Declaration of Human Rights, 1948

Article 11(1): any person being charged with a penal offence gets the right to have themselves presumed to be an innocent until such person is proved to be guilty which is done in accordance to the public trial law that is provided with all necessary guarantees for the defence.

International Covenant on Civil and Political Rights, 1966

Article 14(2): under the law any person being charged with offence that is considered as a criminal offence has the right to be presumed as innocent until the person is proved to be guilty.

Article 14(3): with the determination of having a criminal charge against the person he/she shall be provided with the minimum necessary guarantees with complete equality without any discrimination.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

Article 6: Right to Fair Trial.

It reads:

(1) to determine the civil rights or to render obligation under the criminal charge, the person is provided with the right to have a fair and public hearing within a reasonable period of time done by an independent and impartial body that is established by or under the law.

²² *supra* note 1, at 2

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has to be entitled with minimum rights

CONCLUSION

Legal counsel is not permitted in quasi-judicial processes on the grounds that they tend to become more complicated, drag on longer than necessary, and lose their inherent informality. It is further supported by the argument that hiring a lawyer of one's choosing will favor the wealthy over those who are unable to afford a skilled attorney. The countries' law differs in accordance with their development though America is a developed country it still stands in position having high rate of crimes and India being a developing country has the same. The laws in both the countries are dynamic in nature and are developing with the advancement in both the countries, respectively.