

BRIEFING PAPER:

‘EARLY’ ACCESS TO LEGAL AID: STAGES OF PRE-ARREST AND ARREST

Prepared By: Jaishree Suryanarayanan

Edited By: Maja Daruwala and Sana Das

**Reviewed by: Dr. Mrinal Satish, NLU Delhi and
Ms. Navaz Kotwal, Project Coordinator GOI, UNDP A2J Project, Delhi**



COMMONWEALTH HUMAN RIGHTS INITIATIVE
55 A, Third Floor, Siddhartha Chambers-1, Kalu Sarai
New Delhi - 110016

T +91 11 43180200, F + 91 11 43180217
info@humanrightsinitiative.org
www.humanrightsinitiative.org

1. RIGHT TO LEGAL AID : A CONSTITUTIONAL MANDATE

Anyone who is arrested has the right to a lawyer. This is a constitutional guarantee and a fundamental right.¹ A reading of the Constituent Assembly debates on the inclusion of Article 22 (1) shows the importance that was attached to this provision. The debates reveal that this provision was meant to compensate for the omission of the 'due process' clause in Article 21 (the right to life). In Dr B.R. Ambedkar's words, the Article

*".....merely lifts from the provisions of the CrPC two of the most fundamental principles which every civilized country follows as principles of international justice.... Making a fundamental change because what we are doing.....is to put a limitation upon the authority both of Parliament as well as of the Provincial Legislatures not to abrogate the two provisions because they are now introduced in our Constitution itself."*²

The moment of arrest pits the individual against the might of the police and puts her/him in jeopardy in relation to the custodian. S/He is extremely vulnerable to custodial violence and is not in a position to assert her/his rights. In reality, many of those who are arrested are from the lower income groups, who do not have legal representation, and are too poor to furnish bail bonds. As a result they suffer prolonged periods of pre-trial detention.

The Constitution was amended in 1976 in recognition of the prevailing socio-economic conditions in the country and the consequent violation of the right to equality and the right to equal access to justice. This constitutional amendment³ stated that the State should provide free legal aid by appropriate laws or schemes to secure equal justice to all.

Our judiciary too has responded to the needs of the poor through creative interpretation of the right to equality and the right to life (Articles 14 and 21) and made the right to legal aid a fundamental right by reading it into the right to life.⁴ The jurisprudence that has developed through instances of prolonged incarceration and custodial violence, at times resulting in death, has recognised the importance of the right to legal aid in preventing such violations.⁵

These developments imply that the State must provide a person with a lawyer if s/he is too poor to hire one her/himself. Otherwise the right to equal treatment before the law is breached. That is the essence of our constitutional and legal arrangements as is summed up in the Supreme Court's statement:

¹ Article 22 (1) of the Constitution of India.

² parliamentofindia.nic.in.

³ Article 39A of the Constitution.

⁴ *M.H. Hoskot v State of Maharashtra* AIR 1978 SC 1548.

⁵ The Supreme Court recognised the role of legal aid in preventing custodial violence and prolonged pre-trial detention resulting in human rights violations in a series of PILs, such as, *Hussainara Khatoon (IV) v State of Bihar* 1979 AIR 1369; *Khatri (II) v State of Bihar* 1981 CrLJ 470 and *Sheela Barse v State of Maharashtra* AIR 1983 SC 378.

“The right to free legal services is therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21.”⁶

2. WHEN DOES THE RIGHT TO LEGAL AID BEGIN

Expert committees⁷ appointed by the central and some state governments in the 1970s have deliberated upon the nature and scope of the right to legal aid. Provision of legal aid was conceptualised as a mechanism to reduce the discrimination within the criminal justice system and to ensure that all have equal access to justice through early and effective legal representation.

It was recognised by all the committees that **legal aid should be made available at all stages in the criminal justice system as required by the fair trial standard - on arrest, during investigation, at trial and post trial.**

However, the Code of Criminal Procedure (hereinafter referred to as the Code) was amended in 2008,⁸ whereby, a **pre-arrest** stage has been added to the stages identified by the committees. Early access to legal aid, therefore, needs to be seen in the context of these amendments.

The Legal Services Authority Act (LSAA), 1987, (which came into operation in 1996) provides that any person in 'custody' is entitled to legal aid,⁹ which will begin the very moment a person comes in to contact with the police - the first point of contact within the criminal justice system - as a suspect or an accused or a witness.¹⁰ This Act provides the enabling legal framework through the constitution of legal services authorities¹¹ to provide free legal services to the weaker sections.

⁶ *Hussainara Khatoon (IV) v State of Bihar* 1979 AIR 1369.

⁷ Committee appointed by the government of Gujarat in 1971 under the chairmanship of Justice P.N. Bhagwati; Expert Committee on Legal Aid appointed in 1973 (This committee was appointed by the Ministry of Law and Justice, Government of India under the chairmanship of Justice V.R. Krishna Iyer and submitted the report, *Processual Justice to the People*); Juridicare Committee appointed in 1977 (This committee was appointed by the Government of India and consisted of Justices P.N. Bhagwati and V.R. Krishna Iyer and submitted the *Report on National Juridicare: Equal Justice - Social Justice*).

⁸ In 2008, for the first time, significant amendments were made to the 1973 Code. The 2008 Act met with severe criticism from some sections and was notified and enforced only on December 31, 2009 (Sections 54, 55, 60A). Provisions dealing with arrest powers were again sent to the Law Commission and on its recommendations, provisions were further amended by the 2010 Act. The arrest provisions in the 2008 Act were notified and enforced from October 30, 2010 and the 2010 Act was notified on November 1, 2010 (Sections 41B, 41C, 41D).

⁹ Section 12, The Legal Services Authorities Act, 1987.

¹⁰ It has been held by the Supreme Court that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. *Directorate of Enforcement v Deepak Mahajan* (1994) 3 SCC 440. Also see *State of UP v Deoman Upadhyaya* AIR 1960 SC 1125; *Aghnoo Nagesia v State of Bihar* AIR 1966 SC 119; *Mukesh v State* CrI Appeal No.615/2008 judgement dated May 4, 2010 (Del HC).

¹¹ The Legal Services Authority Act (LSAA), 1987 provides for a hierarchical structure for the delivery of legal services. Legal services authorities at national, state, district and *taluk* levels have been constituted under the Act. The Supreme Court and High Courts have their own legal aid committees. While the National Legal Services Authority (NLSA) can formulate legal aid schemes for the entire country, the State Legal Services

The amendment to the Code was necessitated by the need to provide safeguards to check the abuse of the power to arrest by the police and to make the process transparent to curb custodial violence. Across the country, courts have consistently and repeatedly deplored unnecessary detentions without arrest, unnecessary arrests, custodial torture and abuse of power and addressed the importance of having safeguards on the ground to prevent torture and use of third degree methods by the police during interrogation.

The Supreme Court prescribed directions in *Joginder Kumar*¹² and *D.K. Basu*,¹³ to put in place safeguards to curb abuse by the police of the power to arrest without a warrant and custodial violence while the accused is in police custody. Further, the Law Commission's recommendations in its 177th Report,¹⁴ paved the way for the Code to be amended to include the directions prescribed in these two decisions.

The provisions relating to arrest were amended to make the process transparent and to make the police more accountable by requiring them to give reasons for carrying out a particular arrest in offences punishable with imprisonment up to 7 years. Section 41(1)(b) provides specific conditions that need to be fulfilled before carrying out an arrest in such cases.¹⁵ The police now have to give specific reasons, in writing, for carrying out an arrest or for not doing so in cases not falling within these specified situations, and a magistrate at first production has to independently assess the validity of these reasons.

In all cases where the arrest of a person is not required under Section 41(1) the police officer is required to issue a 'notice of appearance' directing the person to appear before her/him at a specified place and time under Section 41A. If such a person appears before the police officer, then s/he cannot be arrested, unless the police officer is of the opinion that the arrest is necessary for the conditions prescribed in Section 41. Reasons have to be recorded before any such arrest, which will be subject to scrutiny by a magistrate at first production under Section 167 of the Code.

Authorities (SLSA) frame model schemes for their respective state. The SLSA and the District Legal Services Authorities also conduct legal aid clinics in prisons.

¹² *Joginder Kumar v State of UP* 1994 SCC (4) 260.

¹³ *D.K. Basu v State of West Bengal* AIR 1997 SC 610.

¹⁴ 177th report of Law Commission of India available at <http://lawcommissionofindia.nic.in/reports/177rpt1.pdf>.

¹⁵ Section 41(1)(b) (i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence; (ii) the police officer is satisfied that such arrest is necessary - (a) to prevent such person from committing any further offence; or (b) for proper investigation of the offence; or (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured.

While the Supreme Court has time and again emphasised that there is no scope for any further debate about the existence of the right to legal aid at the time of first production¹⁶, there appears to be some ambiguity about the existence of this right at the two stages of pre-arrest and arrest.

The right to legal aid at the pre-arrest stage has not yet gained recognition. Even though some States have recognised the right to legal aid at the time of arrest and devised schemes for enforcing the right, recognition of this right at this stage is half-hearted, which is reflected in the absence of any institutional mechanism for realising this right in many States.

This paper seeks to argue for the need to recognise and enforce the right to legal aid from the earliest stage when an accused is arrested or a suspect is issued a notice of appearance and called for questioning under Section 41A, CrPC. The preventive role of legal aid needs to be acknowledged especially in the context of the amendments made to the Code.

3. WHY 'EARLY' ACCESS TO LEGAL AID IS AN IMPERATIVE

Constitutional and Statutory Rights of an Arrested Person

- The right to a lawyer on being arrested (Article 22 (1))
- The right to have the arrest memo prepared as per Section 41B and scrutinised by the Magistrate
- The right to be informed of the grounds of arrest and of the right to bail (Section 50)
- The right of information to any friend, relative or any other person nominated by the arrested person about the arrest and the place of detention (Section 50 A)
- The right to medical examination by a medical officer/registered medical practitioner soon after arrest – female medical practitioner in the case of a female accused (Section 54)
- The right to meet an advocate of her/his choice during interrogation (Section 41 D)
- The right against self incrimination (Article 20 (3))
- The right to be produced before a competent Magistrate within 24 hours, excluding the time taken for the journey to the Magistrate (Section 56 read with Section 57)

Five years after the amendments to the Code, the non-implementation of the provisions pertaining to arrest and the continuing tendency of the police to 'arrest first and then question' came up before the Supreme Court in *Arnesh Kumar*.¹⁷ Expressing concern, the court again called for a change in police attitudes and directed the force to abide by the amended arrest provisions, and not arrest any person unless there are supportable reasons.

¹⁶ *Khatri (II) v State of Bihar* 1981 CrLJ 470. This was reaffirmed more recently in *Md. Ajmal Md. Amir Kasab @Abu Mujahid v State Of Maharashtra* AIR 2012 SC 3565.

¹⁷ *Arnesh Kumar v State of Bihar* 2014 (8) SCALE 250.

The court reminded the police that Section 41 of the Code expressly precluded a police officer from arresting a person accused of an offence punishable with up to seven years imprisonment only on her/his satisfaction that such person has committed the offence. Instead, the police officer has to be satisfied that the arrest is mandated by the provisions of the section, and should be able to justify it in the facts of the case and not just mechanically reproduce the reasons contained in Section 41.¹⁸

The court also pointed out the importance of judicial scrutiny and the duty of a magistrate in a remand proceeding to check unnecessary and baseless arrests. It was critical of the “*routine, casual, and cavalier manner*” in which detention is authorised by magistrates and directed them to independently peruse the police report and record their satisfaction.¹⁹

Thus it is seen that legal and judicial processes that ought to ensure that accused persons, especially the poor, who do not have the resources to engage expensive lawyers, do not suffer unnecessary arrests and lengthy pre-trial detention, have failed them. The right to a fair trial is, therefore, violated as the basic principle of 'presumption of innocence until found guilty by a court after a trial' is breached with impunity as poor undertrials languish in jails, at times for periods which exceed the sentence that could have been given if convicted.

One of the basic features of a fair trial is that an accused is able to avail of all her/his rights and put up an effective defence through competent legal representation. A person with resources would do exactly that and will not have to undergo prolonged pre-trial detention.

The right to legal aid, therefore, has been recognised as an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. This right is a foundation for the enjoyment of other rights, including the right to a fair trial, and is an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.²⁰

While upholding the right against self incrimination in a custodial or near custodial setting, Krishna Iyer, J drew upon the importance of the right to legal representation and said

*"It may not be sufficient merely to state the rules of jurisprudence in a branch like this. The man who has to work it is the average police head constable in the Indian countryside. The man who has to defend himself with the constitutional shield is the little individual, by and large. The place where these principles have to have play is the unpleasant police station, unused to constitutional nuances and habituated to other strategies."..... Right at the beginning we must notice Art. 22(1) of the Constitution....."*²¹

¹⁸ *id.*

¹⁹ *Arnesh Kumar v State of Bihar* (2014) 8 SCC 273.

²⁰ Principle 1, Clause 14, Resolution No. 67/187, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2012) available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf.

²¹ *Nandini Sathpaty v P.L.Dani* AIR 1978 SC 1025 followed in *State (N.C.T. Of Delhi) v Navjot Sandhu@ Afsan Guru* (2003) 6 SCC 641 .

The pre-trial stages where effective legal representation, which includes representation by a legal aid lawyer in the case of an indigent person, can prevent unnecessary/illegal arrests and custodial violence, and ensure respect for the rights of a suspect/accused, such as the right against self incrimination²² and the right to bail, are pre-arrest and arrest. These safeguards were designed to mitigate the disadvantages faced by an accused in a custodial environment.

Pre-arrest Stage

The inclusion of Section 41A to the CrPC has created a pre-arrest stage, thereby, necessitating the enforcement of the right to legal aid even prior to arrest when a suspect can be issued a notice of appearance to appear before the police for questioning within 2 weeks of the institution of a case.²³

The entitlement to legal aid of a suspect prior to questioning finds recognition in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. This UN standard provides for the right to legal aid of any person who is "**detained, arrested, suspected of**, or charged with a criminal offence punishable by a term of imprisonment or the death penalty" at all stages of the criminal justice process.²⁴ It states that "States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights."²⁵ It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid.²⁶

The implementation of Section 41A can give rise to the following situations in case of offences punishable with imprisonment up to 7 years:

- I. a suspect can be called to appear at the police station for interrogation without being arrested and be in police custody for that duration
- II. a suspect can be wrongly arrested without sufficient reasons, instead of being issued a notice of appearance

I. Questioning of a suspect pursuant to a notice of appearance

²² This right is a fundamental right under article 20 (3) and it has been held by courts that it will be available only to an accused against whom a criminal case to be investigated by the police under the Code is instituted. This right will not be available to a person against whom only an inquiry is to be conducted by customs and other revenue officials on the basis of which an offence triable by a magistrate may be made out. *Romesh Chandra Mehta v State of West Bengal* (1969) 2 SCR 461 followed in *Poolpandi v Superintendent, Central Excise* 1992 SCR (3) 247 and *Senior Intelligence Officer v Jugal Kishore Samra* (2011) 12 SCC 362. Also see *Balkishan A. Devidayal v State of Maharashtra* (1980) 4 SCC 600.

²³ *Arnesh Kumar v State of Bihar* (2014) 8 SCC 273.

²⁴ Principle 3, Clause 20, Resolution No. 67/187, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2012) available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf.

²⁵ *ibid* Principle 8, Clause 29.

²⁶ *ibid* Principle 3, Clause 23.

A person can be in police custody for questioning without being arrested. The terms 'custody' and 'arrest' have not been defined in the Code. However, it has been held by the Supreme Court that "in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms."²⁷ In the context of admissibility of confession of an accused while in police custody,²⁸ it has been held that "police custody" does not commence only when the accused is formally arrested but "would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance."²⁹

This would squarely cover an accused who is called for questioning pursuant to a notice of appearance. Therefore, it can be argued that the right to a lawyer/legal aid lawyer of suspects arises before questioning, when they become aware that they are the subject of investigation, and when they are under threat of abuse and intimidation, such as, in custodial settings. Further, Section 41A is silent on the duration for which a suspect can be detained in a police station for questioning, which can become a source of harassment and can be mitigated by the presence of a lawyer.

It has been held conclusively by the courts that the right against self-incrimination extends to the stage of investigation.³⁰ While there is a requirement of formal accusation for a person to invoke Article 20(3), the protection contemplated by Section 161(2) of the Code is wider. This section protects 'any person supposed to be acquainted with the facts and circumstances of the case' in the course of examination by the police.³¹ Therefore the right against self-incrimination protects persons who have been formally accused as well as those who are examined as suspects in criminal cases.

The importance of legal representation as a mechanism for the practical realisation of this right against self incrimination has been recognised by the Supreme Court in *Nandini Satpathy*. The court, even while cautioning about the possibility of a potential police-lawyer nexus, held:

"The spirit and sense of Art. 22 (1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial

²⁷ *Directorate of Enforcement v Deepak Mahajan* (1994) 3 SCC 440. Also see *State of UP v Deoman Upadhyaya* AIR 1960 SC 1125; *Aghnoo Nagesia v State of Bihar* AIR 1966 SC 119; *Mukesh v State* CrI Appeal No.615/2008 judgement dated May 4, 2010 (Del HC).

²⁸ Section 26, Indian Evidence Act, 1872.

²⁹ *Paramhansa Jadab v State* AIR 1964 Ori 144.

³⁰ *M.P. Sharma v Satish Chandra* (1954) SCR 1077;

³¹ *Selvi v State of Karnataka* 2010(7) SCC 263. However, in *Romesh Chandra Mehta v State of West Bengal* (1969) 2 SCR 461, this very logic was used by the Supreme Court to deny the right against self incrimination to persons who are examined during proceedings that are not governed by the Code by drawing a distinction between proceedings of a purely criminal nature and those proceedings which can culminate in punitive remedies and yet cannot be characterised as criminal proceedings. A customs officer is not a police officer as he cannot file a chargesheet, can only conduct an inquiry based on which he can ask the magistrate to initiate a case. The protection of Article 20(3) becomes available only after a person has been formally accused of committing an offence. This position still holds good as the *Selvi* court did not go into it and Article 20 (3) remains unavailable to persons who are subjected to examination by customs and other revenue officials.

interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice."³²

Section 41D of the Code which confers on an arrested person the right to a lawyer during interrogation, does not expressly cover instances where a person is called to the police station for questioning under Section 41A without being arrested. But, the spirit and rationale behind provision of this right to an arrested person requires that the role of a lawyer, or a legal aid lawyer in the case of an indigent person, at this pre-arrest stage too, needs to be recognised and provided for in the Code.

II. Enforcement of Section 41A

The police continue to show a tendency to arrest without sufficient reasons and this very significant section, which can prevent unnecessary detention, is followed more in the breach. The Supreme Court has expressed concern over the continuing abuse by the police of the power to arrest and the non-implementation of the amended provisions pertaining to arrest. Calling for a change in the attitude on the part of the police, the court directed the police to exercise caution before arresting any person and to exercise the power to arrest only if reasons exist for doing so.³³

Given the powerlessness of an accused, one can hardly expect him to assert his rights on being arrested or when he is in police custody for questioning, and, that too, with an awareness of the new legal provisions. The police are expected to furnish reasons to the court within two weeks if they decide not to arrest.³⁴ This means that the police cannot continue to interrogate or investigate under notice of appearance for more than two weeks without arresting. While it is the duty of the magistrate to oversee both the use and misuse of police obligations and action, the presence of a lawyer can ensure proper enforcement of the amended Code, especially given the unequal power equation between the suspect/accused and the police.

The new provisions make it obligatory on the courts to check whether police has complied with Section 41A before conducting an arrest in pertinent cases and whether the suspect/accused was provided with a lawyer at this stage, and if followed by arrest, at that stage as well. In case of offences punishable with imprisonment up to 7 years a lawyer can ensure that the police send a notice of appearance instead of arresting, or if the arrest was premature, take up the matter in court accordingly at the time of first production.

Arrest Stage

Section 41D gives an arrested person the right to meet an advocate of her/his choice during interrogation, in part if not for its entire period. This statutory recognition can be traced to the

³² *Nandini Sathpaty v P.L.Dani* AIR 1978 SC 1025.

³³ *Arnesh Kumar v State of Bihar* 2014 (8) SCALE 250.

³⁴ *id.*

Supreme Court's decisions in *Nandini Satpathy*³⁵ and *D.K.Basu*³⁶ which held that an arrested person has the right to have his lawyer present during interrogation, though, not throughout.

D.K.Basu judgment recognised the role that a lawyer can play and said that the presence of a lawyer for the arrestee at some point of time during interrogation will help in curbing third degree practices. This judgment covers interrogation by the police and other government agencies.³⁷

The statutory right under Section 41D will prevail despite the *Kasab*³⁸ court taking the view that an accused does not have the right to a lawyer during interrogation as *Kasab* does not consider Section 41D. The *Kasab* judgement, therefore, is *per in curium*³⁹ on this point and cannot be said to be a binding precedent with regard to the right of an arrested person to a lawyer during interrogation.

The *Kasab* Court has relied on the legal position, that confessions made by an accused while in the custody of a police officer are not admissible,⁴⁰ to deny the right to a lawyer during interrogation.

The Court, however, has not considered the possibility of misuse of the legal provision that permits admissibility of information given by an accused while in police custody to the extent that it leads to discovery of some facts or recovery of objects.⁴¹ This provision can breed interrogation related malpractices like use of torture, even though the Supreme Court in *Kathi Kalu Oghad*⁴² has said that use of compulsion, if proved, will render any confession resulting in discovery of a fact or recovery of a object inadmissible.

The *Kasab* court fails to consider that, in recognition of the importance of legal representation in ensuring the rights of an accused during interrogation, the amended Code itself provides the added safeguard of the right to a lawyer during interrogation, though not throughout.

The fundamental right to equality demands that the right under Section 41D should logically include the right to a legal aid lawyer when an indigent suspect cannot engage a lawyer. Denial of legal aid will amount to the denial of the right to equality and result in the rights of

³⁵ *Nandini Satpathy v P.L.Dani* AIR 1978 SC 1025.

³⁶ *D.K.Basu v State of West Bengal* AIR 1997 SC 610.

³⁷ In *Senior Intelligence Officer v Jugal Kishore Samra* (2011) 12 SCC 362, the court even while relying on *Romesh Chandra Mehta v State of West Bengal* (1969) 2 SCR 461 and *Poolpandi v Superintendent, Central Excise* 1992 SCR (3) 247 to hold that *Nandini Satpathy* will not apply as the person was not at that stage accused of an offence and a customs officer did not have the same powers as a police officer, allowed the presence of a lawyer during interrogation based on *D.K.Basu v State of West Bengal* AIR 1997.

³⁸ *Md. Ajmal Md. Amir Kasab @Abu Mujahid v State Of Maharashtra* AIR 2012 SC 3565.

³⁹ '*Incuria*' literally means 'carelessness' and the phrase '*per incurium*' is used to describe judgments that are delivered with ignorance of some statute or rule.

⁴⁰ Section 26, The Indian Evidence Act, 1872.

⁴¹ Section 27, The Indian Evidence Act, 1872.

⁴² *State of Bombay v Kathi Kalu Oghad* (1962) 3 SCR 10.

an indigent accused being violated. Further, the expression "a legal practitioner of his choice" in Article 22 (1) should extend to availing of a legal aid lawyer at the State's expense, in the case of an indigent accused.

The presence of a lawyer at the stage of arrest can make a huge difference to how the accused is treated in police custody. A lawyer at this stage can ensure that the police perform their duties and respect the rights of the accused, including his right to be silent, and prevents harm to the accused. It reduces the possibility of beating, torture, coercion to gain 'confessions', wrongful detention, fabrication, false implication and much more.

Further, in bailable cases, a lawyer can apply for bail at the police station itself so that pre-trial detention is kept to the minimum extent possible, which is what an accused with the necessary resources will do.

Recognising the need for legal representation at the state's expense of an indigent accused at the time of arrest, the Supreme Court, in *Sheela Barse*,⁴³ directed:

"..... whenever a person is arrested by the police and taken to the police lock up, the police will immediately give an intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance."

This PIL involved women in police lock ups in the State of Maharashtra being subjected to custodial violence and was the first instance when an institutional mechanism was created for providing legal assistance at the state's expense to an accused at the time of his arrest.

For realising this right at the time of arrest, some state legal aid bodies⁴⁴ have framed 'duty counsel schemes' for institutionalising early access to legal aid to ensure that lawyers appointed by the concerned Legal Services Authority (LSA) have access to an indigent accused at the police station itself.

Additionally, some states have a 'Paralegal Volunteer Scheme'⁴⁵ under which trained paralegal volunteers are appointed by the concerned legal services authority to provide paralegal advice to an indigent person on his arrest and while s/he is in police custody. It is submitted that this cannot be a substitute for a legal aid lawyer guiding an indigent accused through the maze of the criminal justice system, arguing for her/his bail and resisting remand, thereby ensuring that her/his indigent client does not have to suffer unnecessary pre-trial detention.

⁴³ *Sheela Barse v State of Maharashtra* AIR 1983 SC 378.

⁴⁴ These states are Assam, Gujarat, Haryana, Punjab and Kerala. This is based on information received by CHRI in response to RTI applications filed in 2013 in all states as part of a study on early access to counsel.

⁴⁵ Under the 'Scheme for Para-legal Volunteers' framed by the National Legal Services Authority available at <http://www.bing.com/search?q=paralegal+volunteers+scheme&form=PRHPCS&pc=HPDITDFJS&refig=2956468d6f2e47f18dcd918785bc30bb&pq=pralegal+volunteer&sc=5-18&sp=2&qs=SC&sk=SC1>.

5. CONCLUSION

On the absolute necessity of ensuring legal assistance to an indigent accused, P.N.Bhagwati, J observed in *Sheela Barse*:

"It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and rule of law are merely slogans or myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests."

While the Code casts duties on the police and magistrates to make available all safeguards to an accused, the organic link between early and effective legal representation and the observance of these duties by the functionaries in the criminal justice system cannot be denied. Hence, the early access to legal aid at the state's expense has been conceived as essential to the realisation of the right to access to justice by all, irrespective of their socio-economic status.

The presence of a legal aid lawyer representing an indigent accused at a police station can help to clear misconceptions, if any, on the part of the police and prevent unnecessary arrest. He can apply for bail at the police station itself in bailable cases and prevent any hardship that may be caused to the accused and his family due to unnecessary detention, such as, loss of earnings and/or livelihood. A functioning legal aid system will reduce the length of time suspects are held in police stations and detention centres.

During questioning, before or after arrest, a lawyer can *"intercept where intimidatory tactics are tried, caution his client where incrimination is attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated."* "..... he may help his client and complain on his behalf, although **his very presence will ordinarily remove the implicit menace of a police station**"⁴⁶ (emphasis added).

The Legal Services Authorities have to work towards making the right to equal access to justice meaningful, by not only providing legal aid mechanisms at all levels, but by also implementing a system of vigilance and monitoring. It is also important to create mechanisms to "ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs".⁴⁷

⁴⁶ The Supreme Court's observation in *Nandini Sathpaty v P.L.Dani* AIR 1978 SC 1025, even while acknowledging that a lawyer's presence is not a panacea for all problems of involuntary self-crimination.

⁴⁷ Principle 13, Clause 37, Resolution No. 67/187, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2012) available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf.

They have to formulate schemes and mechanisms, being mindful of the amendments to the CrPC, which were legislated expressly to curb malpractices by the police by casting obligations on the police and by providing certain safeguards for a person in custody. While Duty Counsel Schemes for police stations exist in some states and are a step towards ensuring early access to legal aid at the time of arrest, they need to be extended to cover the pre-arrest stage too. Further, universalisation of such schemes all over the country, their effective implementation, and rigorous monitoring is what is required.

ABOUT CHRI

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. CHRI's objectives are to promote awareness of and adherence to the Harare Commonwealth Declaration, the Universal Declaration of Human Rights, and other internationally recognized human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

The Prison Reforms Programme of CHRI is more than a decade old. The programme focuses on improving prison monitoring through the strengthening of undertrial review mechanisms and prison visiting system nationally, and ensuring early safeguards against unnecessary pre-trial detentions, specifically in Rajasthan and West Bengal. The programme also concentrates on the release, repatriation and asylum of foreign national prisoners. Evidence-based research, advocacy, capacity-building of actors of the criminal justice system including prison officials, welfare and probation officers, criminal defense lawyers, magistrates, legal aid functionaries, and civil society actors are the regular activities of the programme.