



Access to Legal Services in India: The Concept of Empowering People and Strengthening System

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Abstract

Mauro Cappelletti has asserted that legal aid is a prerequisite in providing individuals with access to justice, by allowing the individual legal enforcement of social, economic, and cultural rights. He developed his views in the second half of the 20th Century when democracies with capitalist economies established liberal welfare states which primarily focused on the individual. States established themselves as service providers and contractors within a market-based philosophy that gave prominence to the citizens as consumers. The administration of justice is one of the important functions of the State. For maintaining the rule of law, both the rich and the poor must be provided equal access to justice and it should not be available only to the affluent segments of society. The poor should also have civil and political rights so that they could enjoy the fruits of the rule of law. The judicial system should be such that it becomes a source of strength and comfort to the deprived and vulnerable sections of society. The Supreme Court has maintained that for treating a right as a Fundamental Right, it is not imperative that it should be expressly stated as a Fundamental Right in the Constitution. The recognition of these rights depends on the political, social and economic changes persisting in the country. The law in its eternal youth grows to cater to the demands of society. The right to life enshrined in Article 21 has been liberally interpreted as something more than merely a survival or mere an existence like animals and includes all those aspects of life which make a man's life meaningful, complete, and worth living. Article 21 has been fundamentally metamorphosed from non-deprivation of life to its preservation, from negative to positive content, as a result of judicial creativity. Article 21 has experienced a notable journey during the last fifty years.

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Introduction

Administration of justice is one amongst the essential functions of the State.⁴ Equal access to justice for the rich and also the poor must be seen as a vital part for preserving the rule of law. The rule of law doesn't mean that the protection of law must be made available only to the affluent segments of the society. The poor should have political and civil rights, so that they could be the beneficiary of the rule of law.⁵ Judicature must become a source of solace and strength to the vulnerable and deprived

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⁴ H. R. Khanna, *Judiciary in India and Judicial Process*, pp.3 (1985).

⁵ *People Union for Democratic Rights v. Union of India* AIR 1982 SC 1473.

sections of the society. The justice system has, therefore to reorient itself to make confidence within the poor and poverty-stricken section of the society.⁶

Historical Background

History of administration of justice in India isn't found on a bit of paper at one place. "It forms the web and woof of all the metaphysical texts and has become part of the whole thinking process of our people."⁷ Jurists like Mauro Cappelletti maintain that legal aid is important in providing individuals with access to justice, by allowing the individual legal enforcement of social, cultural and economic rights. His views developed in the second half of the 20th Century, when democracies with capitalist economies built liberal welfare states that focused on the individual's demand. States established themselves as contractors and service providers within a market-based philosophy which emphasized the citizens as consumers. This led to an emphasis on individual enforcement to attain the conclusion of rights for all.⁸

Right to Legal Aid

It is the foremost duty of the State to work out that the legal system is giving justice on the basis of equal opportunity for all the citizens. Therefore it must provide free legal aid to those who cannot access justice due to economic and other disabilities.⁹ If the accused does not have sufficient means to engage a lawyer, the court must provide one, for the defense of the accused at the expense of the state.¹⁰ The Constitutional duty to provide legal aid arises from the time when the accused is produced before the Magistrate for the first time and should be continued till he is produced for the remand.¹¹ A person who is entitled to appeal against his/her sentence has the right to ask for a counsel, to prepare and to argue the appeal.¹²

Duties of the Police and the Courts

The police must inform the closest Legal Aid Committee about the arrest of someone immediately after such arrest.¹³ The Magistrates and session judges must inform every accused, who appears before them and who is not represented by a lawyer on account of his poverty or destitution that he is entitled to obtain free legal services at the cost of the State. Any failure in providing legal aid to an indigent accused, unless it absolutely was refused, would vitiate the trial. It might even lead to setting aside a conviction and a sentence.¹⁴

⁶G. M. Lodha, *Judiciary- Fumes and Fire*, pp.7, (1983).

⁷S. D. Sharma, *Administration of Justice in Ancient India*, pp.7, (1988).

⁸Francis Regan, *The transformation of legal aid: comparative and historical studies*, pp.89-90, (1999).

⁹INDIA CONST. art. 39A.

¹⁰Section 304 of the Code of Criminal Procedure, 1973.

¹¹*Khatri II v. State of Bihar*, 1981 Cri. L J 470.

¹²*MadavHayavadanraoHoskot v. State of Maharashtra* 1978)3 SCC 544.

¹³*SheelaBarse V. State of Maharashtra*(1983), AIR 378

¹⁴*Suk Das v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

Provisions under the Constitution of India, 1950

The Constitution in its Preamble proclaims the principles of justice, liberty, equality and fraternity. The term justice includes- social, economic and political justice as well as equality of status and opportunity.

Article 21 Right to Life and Personal Liberty

The Supreme Court has declared that in order to treat a right as a Fundamental Right, it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social and economic changes within the country entail the acknowledgement of the new rights. The law in its eternal youth, grows to fulfil the demands of the society. The Right to Life enshrined in Article 21 has been liberally interpreted as something more than mere a survival or existence because it includes all those aspects of life which are instrumental in making life of an individual meaningful, complete and worth living. During the last fifty years, Article 21 has had an eventful journey as it has been fundamentally transformed as a result of judicial creativity. The foremost feature of expansion of Article 21 has been that many of the non-justiciable Directive Principles have been converted into enforceable Fundamental Rights by the magical wand of judicial creativity. In the process of expanding the scope of Article 21, the result of this judicial activism has been that not only many Directive Principles have been activated but also many new Fundamental Rights have been implied by the Supreme Court from Article 21. Through the interpretation of this Article 21 in various cases, the Supreme Court has come to impose positive obligations upon the state, to take steps for ensuring to the individuals a more robust enjoyment of their life and dignity, e. g., (1) maintenance and improvement of public health; (2) providing humane conditions in prisons and protective homes; (3) improvement of the environment, etc.¹⁵

Remedies for Enforcement of Rights Conferred by Article 32

It is guaranteed that one has the right to move to the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Article 32. The Supreme Court shall have power to issue directions or orders or writs, within the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the fulfilment of any of the rights according to this Part. Parliament may by law empower any other court to exercise within the local limits of its jurisdiction or any of the powers exercisable by the Supreme Court under Clause (2) without prejudice to the powers bestowed to the Supreme Court by clauses (1) and (2). The rights according to this Article shall not be suspended except as otherwise provided by the Constitution.

Directive Principles of State Policy

The formulation of social and economic objectives in National Constitutions owe its origin essentially to the realization that the content of political freedom is impaired by the absence of social justice and that without adequate protection of social and economic rights, the Constitution guarantees what are known as "Classical

¹⁵ M P Jain, *Indian Constitutional Law*, pp.1120-1121, (2006).

Individual Liberties” such as the Right to Equality, Liberty of Person. Since the end of the First World War, it has become increasingly recognized that peace in the World can be established only if it is based on the social justice. The policies of the State will be consistently directed towards the attainment of certain ends and that legislation will be based on certain guiding principles. The concept of a declaration of policy in regard to social and economic obligations of the State cannot be said to be foreign to the genius of India.¹⁶

There was a time, known as the *laissez faire era*, when the State was mainly concerned with the maintenance of law and order and defense of the Country against external aggression. Accordingly, they embodied some provisions in the Constitution so as to achieve enrichment of the socio- economic condition of people. As per Article 39A¹⁷ the State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid. Such principles are there for the state to take action for the welfare of the people and accomplish economic democracy. These principles give directions to the legislatures and the executive in India in regard to the manner in which they should exercise their power.¹⁸

RIGHT TO LEGAL AID

In 1987, the Indian Parliament enacted the Legal Services Authorities Act (LSAA) which gave an expansive meaning to ‘legal services’ to include legal advice apart from legal representation in cases. Section 12 of the LSAA lists out the categories of persons, who automatically entitled to legal aid without having to satisfy a means test. This includes a member of the historically and socially disadvantaged groups (Scheduled Caste or Scheduled Tribe); a victim of trafficking in human being or forced labour; a person with disabilities and ‘a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster’. The LSAA set up a network of legal aid institutions at the village⁴², district⁴³, and state levels and the National Legal Services Authority (NALSA). The functions of NALSA under Section 4 of the LSAA include organizing ‘legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through lok adalats’ and ‘taking necessary steps by the way of social justice litigation. Although the LSAA envisages a proactive role for judges, its core area of activity has centered around the organizing of lok adalats as it is seen as a useful case management device. Pending claims in courts for land acquisition compensation, motor accident compensation, insurance claims and also claims by banks against defaulters are the most common categories of cases sent to the Lok adalats. There are no appeals in the decisions of the lok adalat that record a compromise. Encouraged by the ‘settlement’ of a large number of cases, the LSAA was amended in 2002 to enable the setting up of ‘permanent’ lok adalats which can dispose of disputes involving certain public utilities even if no settlement is reached. The organization of lok adalats and legal aid camps has not necessarily been a success. Also, they bring out the failures of the formal legal system. The reasons offered the persuading the litigant to participate in the lok adalat are usually that the pending dispute in court would entail unforeseeable delays, prohibitive costs and uncertain results.

Also, in the context of economic and social rights legal aid is still seen as a welfare measure to which the recipient has no 'right'. It therefore, does not come as a surprise that the legal services that are presently available are poorly utilized. These factors explain in large measure why civil society groups continue to approach the High Courts and the Supreme Court in PIL cases for the redress of many of the grievances. As the ensuing discussion on the specific areas of these rights show, the remedies under the statutes concerning them are hardly enforced.

Conclusion

The provisions of the Legal Services Authorities Act seek to scale back justice dispensation to an off-the-cuff and casual process. Such measures will serve no purpose to save the foundation of the legal system from total chaos and disarray. Let the Executive and the Legislature realize that the reason for the pathetic state of our litigation disposal rate is next to non-existent infrastructure, enormous delays in filling up vacancies, low entry level barriers into the legal profession and appallingly low judge-to-population ratio in India. The objection of the lawyers to the provisions of the Act has relevancy and most definitely merits a review.

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¹⁶ B. Shiva Rao, *The Framing of India's Constitution: A Study*, pp.319-320, (1968).

¹⁷ INDIA CONST. art. 39A.

¹⁸ M. P. Jain, *Indian Constitutional Law*, 1595 (2003)