

Access To Justice In Constitution Of India: Materialisation And Mechanisms

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Abstract

The Right of Access to Justice has been considered to be a part and parcel of Article 14 and Article 21 by various judicial pronouncements. The institutionalisation of this right seemed to have been materialised with the creation of NALSA which was established with an aim of providing free legal aid to the poor and marginalized (Section 12, NALSA). Although moving beyond the black letter law, the news reports, committee reports, increasing number of backlog cases and increasing number of under-trials prisoners narrate a contrasting story. The pressing need of integrating various mechanisms to materialize rule of law and to fulfil the promise of access to justice has time and again been highlighted by various eminent scholars, lawyers and judges. Amidst this, with an aim of transparency, and delivery of services, the state recently launched three technology induced mechanisms as part of 'Digital India' to provide access to justice to poor and marginalized – Pro bono lawyering, Tele Law Services, and Nyaya Mitra. The transformation from 'institutionalization' to 'mechanisms of digital implementation' of the fundamental rights is altogether a new dimension in the legal domain. My paper, thus, is an attempt to analyse the underlying objectives, challenges and soundness of these mechanisms. Additionally, identifying such mechanisms which would actively involve 'active agents of legal process' i.e. law students and legal education, in bridging the gap between theory and practice.

Introduction

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“Justice” which is not distinct from the law, but an inherent part of it, promises rule of law that recognizes and protects the rights of individuals and for its materialization ensures Access to Justice to all.² Any failure to fulfill the promise of equality of opportunity and of status, embedded in the Constitution of India, shall not only be a hindrance to justice but will also result in unfulfilled constitutional goals. Despite various institutions, committees and legislations efforts to ensure the materialization of Access to Justice, the constitutional guarantee remains a luxury for many due to economic deprivation, poverty, and lack of education and awareness. The increasing number of unrepresented prisoners, the backlog of cases, overburdened courts are few of the constant reminders that much still needs to be done to deliver the constitutional promise. The declining quality of legal aid awareness camps and legal representation by the SLSA and DLSA without any grievance redressal or feedback mechanism highlights the infrastructural and institutional failure of the justice system. Amidst this, the recently launched e-services for the poor and the marginalized not only widens the gap between the black letter law and beyond but it also increases the burdens of already crippling³ bureaucratic institutions responsible for materialization of right to legal aid.

Research Methodology

The methodology of the research is desk based research. Various articles, judicial pronouncements, legislations, newspaper articles have been critically analysed to understand the ongoing project of materialization of the underlying promise of justice to all irrespective of economic statuses, caste, colour, religion, sex and creed.

Objective

The objective of the paper is to examine, and analyse the trajectory of the right to legal aid and access to justice in India. Further, to study the objectives, challenges and shortcomings of the institutions established with an aim of materialization of this right.

Description Of The Research Issues Including Socio Legal Analysis Of The Problem

²ELLIE PALMER ET AL, ACCESS TO JUSTICE: BEYOND THE POLICIES AND POLITICS OF AUSTERITY 27-40 (2016).

³ Upendra Baxi, *The Pathology of the Indian Legal Profession*, GUJARAT HIGH COURT ADVOCATES ASSOCIATION (Sep. 14, 2018, 09:22 PM) <http://ghaa.in/wp-content/uploads/the-pathology-of-the-indian-legal-profession-by-prof-upendra-baxi.pdf>.

The analysis of any efficient judiciary lies not in examining the number of cases that have been disposed at the last stage but in determining whether it has been within the reach of the poor, marginalized and vulnerable people. Any inability to ‘access’ the justice system threatens the very foundations and functionality of a free democracy which is safeguarded by the Constitution.⁴ The Constitution of India guarantees its citizens equality of opportunity and status, justice – social, economic, and political, and fraternity, which assures the dignity of an individual. By adding sovereignty to its citizens, the Constitution accentuated on its impartiality towards the ends of the legal system. Additionally, the preamble of the Constitution read with the DPSP aimed at enhancing the independence of individuals, organizations and the government to regulate their legal obligations and duties within the basic structure and the bounds of the Constitution.⁵

Though the right to equality, a fundamental right, enshrined in Article 14 was promised to all the citizens of India, in reality the rights hardly materialized⁶. The evident demarcation between the rich, able to defend themselves financially and through resources, and the poor who are mostly dependent on the legal services for defending their rights in a court of law; this witnessed the evolution of various legislations, committees and judicial pronouncements. From the Report submitted by the Expert Committee on Legal Aid⁷ (1973) to the recommendation given by the National Commission on the working of the Constitution⁸ (2000), all have highlighted the increasing gap between the black letter law and reality, requiring urgent amendments in the Constitution. The high priced legal services with long distance delivery centers, laws with intricate complexities in language, inherent lacunas of the

⁴ Jeremy Perelman, *Book Review: Beyond Common Knowledge: Empirical approaches to the Rule of Law*, SPIRE SCIENCEPO (Sep. 14, 2018, 09:25 PM) <http://spire.sciencespo.fr/hdl/2441/53r60a8s3kup1vc9k15i0i1ig/resources/hilj-47-2-perelman.pdf>.

⁵ J.S. Murlidhar, *The Expectations and Challenges of Judicial Enforcement of Social Rights*, DELHI HIGH COURT (Sep. 14, 2018, 10:05 PM) https://delhidistrictcourts.nic.in/ejournals/Social_Rights_Jurisprudence.pdf.

⁶ Prateeksha Baxi, *Access to Justice and Rule of (Good) Law: The Cunning of Judicial Reform in India*, RESEARCH GATE (Sep. 14, 2018, 10:10 PM) https://www.researchgate.net/publication/228914213_Access_to_Justice_and_Rule-of_Good_Law_The_Cunning_of_Judicial_Reform_in_India.

⁷ V R Krishna Iyer, *Processual Justice to the People*, MINISTRY OF CORPORATE AFFAIRS (Sep. 14, 2018, 02:43 PM), <http://reports.mca.gov.in/Reports/15-Iyer%20committee%20report%20of%20the%20expert%20committee%20in%20legal%20aid,%201973.pdf>.

⁸ Narayan Rao Venkatachalliah, *National Commission for Review of the Working of the Constitution*, THE HINDU CENTRE (Sep. 14, 2018, 02:50 PM), https://www.thehinducentre.com/multimedia/archive/03091/ncrwc_3091109a.pdf.

era old laws, and the existence of a '*processual pyramid*' of vacillating tiers and sophisticated rules have been identified as few of the barriers to access to justice.⁹

On the basis of various committee recommendations, the 42nd Constitutional Amendment Act, 1976, enhanced the access to justice approach of the Constitution of India by adding Article 39A in the Chapter IV under DPSP. Article 39A which is legally unenforceable in a court of law, made the State duty bound to provide free legal aid and services to the poor, vulnerable and underprivileged. It is pertinent to highlight that the legislative decision of introducing "Equal Justice and Free Legal Aid" under Chapter IV was not in consonance with the recommendations of the National Commission Report (2000) which highlighted and emphasized a dire need of an expressed "right to access to justice" provision in the Constitution. This not only challenged the intent of the State in materialization of rule of law but also prodded the judiciary to interpret the constitution in a public spirited manner. Consequently, the Judicial Institutions through various interpretations of the constitution ensured that the right to free legal aid and right to access to justice is evaluated as a part and parcel of Right to equality and Right to Life, thereby pronouncing 'right to free legal aid and services', a fundamental right.

Precedents And Judicial Decisions

In *M.H. Hoskot v. State of Maharashtra*¹⁰, the Supreme Court for the first time expressly held that right to legal aid is an inalienable element of fair proceeding and is an implicit part of Article 21 of the Constitution. This was further reiterated in *Hussainara Khatoon* judgment¹¹ where it was pointed out that Article 39A is an inalienable element of "reasonable, fair and just procedure". Additionally it was held that the right to free legal services is a tacit guarantee under Article 21 of the Constitution. Similarly, in *Suk Das* case¹², Justice Bhagwati held that the free legal service facilitated and paid by the State is a fundamental right of a person. The right to free legal aid was further elaborated and broadened in *Brij Mohan Lal v. Union of India*¹³ where the court upheld that it's the constitutional duty of the state to ensure that the citizens of the country are provided with an efficient means of access to justice to ensure expeditious, inexpensive and fair trial. Despite these pronouncement, the Supreme

⁹ Upendra Baxi, *The Crisis of Law Reform*, JSTOR (Sep. 14, 2018, 10:40 PM) https://www.jstor.org/stable/4372382?seq=1#metadata_info_tab_contents.

¹⁰ *M.H. Hoskot v State of Maharashtra*, 1979 SCR (1) 192 (India).

¹¹ *Hussainara Khatoon v State of Bihar*, 1979 SCR (3) 532 (India).

¹² *Sukh Das v Union Territory of Arunachal Pradesh*, 1986 SCR (1) 590 (India).

¹³ *Brij Mohan Lal v Union of India*, (2012) 6 SCC 502 (India).

Court expressed its concern over Article 39A being part of DPSP¹⁴. It held that the pronouncements highlighted the challenges of non-enforceability of DPSP in the court of law and rebuked the State for not introducing a specific right to access to justice as Fundamental Rights, a recommendation which was also emphasized by the Commission of Review of the Working of the Constitution in 2000.

Thus, in 2016, the Supreme Court pronounced a landmark judgment resting the ongoing and retrospective debates on whether the “right to access to justice” is a facet of Article 21 and Article 14. Emphasizing on the inclusivity of the right to access to justice to be considered a basic inalienable human right, the court identified four facets that constitutes the essences of right to access to justice¹⁵:

- 1) A need for an adequate adjudicatory mechanism
- 2) Such mechanism should be judiciously accessible (distance)
- 3) The adjudication process should be speedy
- 4) And the access to such process should be affordable.

The court further elaborated the extensive meaning and broad analysis of the term “life” under Article 21 with the help of various judicial pronouncements. Such as in *Maneka Gandhi v. Union of India*¹⁶, it was held that “mere animal existence” does not construe right to life but it incorporates everything that makes life livable and meaningful; in *Khatri II v. State of Bihar*¹⁷, the right to free legal aid was held to be part and parcel of Article 21 of the Constitution; in *Sheela Barse v. Union of India*¹⁸, speedy trial was adhered to be an essential part of Article 21; whereas in *Shantistar Builders v. Narayan Khimalal Totame*¹⁹, the court held that the right to shelter, decent atmosphere, accommodation, and clothing was part of right to life. The court further reiterated that if the mere interpretation of “life” incorporates a broad spectrum of rights to be considered as part and parcel of right to life under Article 21, the judgment rightly argued that there is no sound reason or legal argument that mandates that access to justice should not be considered within the purview of the right to life guaranteed under Article 21.

Impact And Implications

¹⁴ *Tamil Nadu Mercantile Bank Shareholders Welfare Association v S. C. Sekar*, (2009) 2 SCC 784 (India).

¹⁵ *Anita Kushwaha v Pushp Sudan*, (2016) 8 SCC 509 (India).

¹⁶ *Maneka Gandhi v Union of India*, (1978) 1 SCC 248 (India).

¹⁷ *Khatri II v State of Bihar*, (1981) 1 SCC 627 (India).

¹⁸ *Sheela Barse v Union of India* (1988) 4 SCC 226 (India).

¹⁹ *Shantistar Builders v. Narayan Khimalal Totame*, (1990) 1 SCC 520 (India).

Precedent : A Publication of Jus Dicere Center of Research In Law

The Legal Services Authorities Act 1987 was enacted after various judicial pronouncements and committee recommendations, with an aim to ensure free and proficient legal aid services to the poor, marginalized, and underprivileged. Within its ambit this Act included every member of Scheduled Caste, Scheduled Tribes, women, children, victims of man-made disasters, victims of human trafficking, to persons with disability etc. Further to ensure materialization of right to equal opportunity, promised in Article 22 of the Constitution, Lok Adalats were also established for exercising jurisdiction in “public utility services”. The inclusive definition of “legal services” ranged from rendering services for legal proceedings before any court/authority to giving legal advice on any matter.²⁰ The Act promised free of cost services of legal representation, legal advice and legal adjudication through institutionalization. Consequently under the Act, National Legal Aid Services Authority (NALSA), a national body, was constituted with an aim to monitor the implementation of the Act and it was also authorized to lay down such policies and rules that makes legal aid services available on ground. Additionally, the Act constituted that every state should have a functional State Legal Services Authority, while every High Court should be equipped with High Court Legal Services Committee, and each districts and taluk shall have an equipped District Legal Services Authority and Taluk Legal Services Committee respectively to effectuate the rules, directions and policies of NALSA of providing free legal aid services to the vulnerable, poor and marginalized.

In 2014, the Department of Justice published a report with whopping success of the Legal Aid initiative where the report highlighted that around 1, 77, 85,875 eligible persons under the Act have benefitted by various legal institutions established to provide free legal aid and services.²¹ However, the key findings from seven states done by UNDP in collaboration with Department of Justice highlights a different plight altogether²². Some of the key findings are as follows:

1. With Respect to Legal Aid:

- The provisions directing the selection criteria of legal aid committee are yet to be fully implemented in all the seven states;

²⁰ Jayant K Krishnan, *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, HARVARD LAW JOURNAL (Sep. 14, 2018, 10:45 PM)

²¹ NLSA, *Brief - National Legal Services Authority*, DEPARTMENT OF JUSTICE (Sep. 14, 2018, 6:51 PM), http://doj.gov.in/sites/default/files/BRIEF-NALSA_0_3.pdf

²² MARG, *Needs Assessment Study of the Legal Services Authorities in the States of Madhya Pradesh, Jharkhand, Bihar, Uttar Pradesh, Odisha, Rajasthan, and Chhattisgarh*, UNDP INDIA (Sep. 14, 2018, 7:40 PM), http://www.in.undp.org/content/dam/india/docs/DG/Marg_Needs-Assessment-Study.pdf

Precedent : A Publication of Jus Dicere Center of Research In Law

- There is no coherent practice of training the paneled lawyers on the various approaches to rights based legal aid or numerous developments in law.
- The selection committee does not have specific rules for empanelling lawyers from vulnerable/marginalized sections.
- There is no feedback mechanism where the clients can evaluate their overall experience with the legal aid lawyers.
- There is no modal of showcasing the progress of legal aid cases.
- There is no evaluation process or criteria to evaluate the performance of the lawyers
- There is no structural follow up with the client or the lawyer.
- The remuneration of 500 per case has been stated to be the very less which is not in consonance with the current time.

2. With respect to Legal Awareness:

- The topics, timings and dates for legal aid awareness camps are not in discussed or consulted with the community.
- The legal aid camps have unstructured sessions in lecture mode which does not attract interaction with the marginalized community.
- No proper feedback mechanism in place.
- The field research in the seven states identified that most of the general people were unaware of the presence of Legal Service Authorities highlighting loopholes in the awareness campaigns methods.

3. With respect to Lok Adalats:

- There is insufficient amount for setting up legal aid clinics, training of paralegal, etc.
- The District and Taluk level legal service authorities lack basic infrastructure such as telephones, computers, vehicles, etc.
- There is no grievance mechanism or accountability of people involved in the process of implementation of the right to access to justice.
- The field research emphasized that the institutions and legal aid authorities are not disable-friendly which violates the right to equality enshrined in the Constitution of India.

Despite addressing the above challenges, and strengthening the already existing mechanism, the state launched three empowerment and legal aid initiatives as part of Digital India Campaign:

1. **Pro-Bono Legal Servicing:** A web based initiative, Pro-Bono Legal Servicing creates a platform for interested lawyers to register themselves for volunteer services for the marginalized and underprivileged litigants. The Department of Justice gave instances of South Korea and U.S. to encourage lawyers to provide pro bono services and claimed to have addressed the issue of providing structure to the legal aid initiatives in India²³. The State highlighted that the litigants from the marginalized and vulnerable communities can apply through online portals for legal services and representation from pro bono advocates.
2. **Tele-law services:**The State claimed that a partnership between NALSA and CSC-e-governance shall effectuate the materialization of legal aid to marginalized communities via CSCs. The program aims to launch across 1800 panchayats in Bihar, Uttar Pradesh, Jammu and Kashmir and North Eastern States. The motive of the project is said to be facilitating last mile delivery of legal services and advice through a selected expert panel of advocates at SLSA via videoconferencing at common service centers.²⁴
3. **Nyaya-Mitra:**With a promise of reducing the delay in the progress of cases, the State has promised that the Nyaya-Mitra shall be run by retired judicial officers who would identify such delayed cases and connect them to DLSA, SLSA or refer the case to the Lok Adalat. The State has proposed launching the scheme in 227 Districts of India.²⁵

Conclusion

The infrastructure failures of the existing institutional mechanisms were not only ignored by the State, but the challenges have been increased by establishing the above e-tele services for the poor and marginalized which further established more institutions and structures. The layers of the bureaucracy coupled with judicial delay has probably been increased by one more step. The sheer ignorance of the state in evaluating the ground reality and the challenges of vulnerable, poor and marginalized people in accessing the promised online services to materialize the right to access to justice has not only widened the gap of black letter law and beyond but it is also a mockery of Right to Equality of status and opportunity enshrined under

²³ Sanjeev Ahuja, *Poor to get free-of-cost legal aid, govt. urges lawyers to offer pro bono service*, THE HINDUSTAN TIMES, April 21, 2017.

²⁴ Dept. of Justice, *Launch of Tele Law Scheme: New Legal Aid and Empowerment Initiatives by Department of Justice*, DEPARTMENT OF JUSTICE (Sep. 14, 2018, 7.40 PM) http://doj.gov.in/sites/default/files/Launch%20of%20Tele%20Law%20Scheme_0.pdf.

²⁵ Dept. of Justice, *Launch of Nyaya Mitra Scheme – District Facilitation Centre*, DEPARTMENT OF JUSTICE (Sep. 14, 2018, 7.44 PM) <http://doj.gov.in/page/nyaya-mitra-scheme>.

the Article 14 of the Constitution. Consequently, following are the few suggestions which could be potential tools for bridging the gap between law, justice and the poor:

1. The Legal Awareness camp's date, timing and issue should be decided after consulting the local people so that they the session is not inclusive but spreads the word of law through mouth. For spreading awareness, help of various NGOs working in the respective fields could be sought, including aanganbadi workers and Gram Panchayat could make the over-all legal awareness camp inclusive, interesting and participative. The aanganbadi workers/social workers should be encouraged to interact with the marginalized people for feedbacks which would prepare the resource person from rectifying the errors in next sessions.
2. The remuneration paid to the legal aid lawyers should be increased so as to bring it at par with the changing economic conditions in the nation. This would also ensure that the amount so fixed is not out dated and is subject periodical amendment. The increased remuneration would work as an incentive for the pro-bono lawyers who would in turn give the same amount of time and energy in the legal aid cases as they would otherwise.
3. A proper progress of the cases should be recorded to ensure that a certain criteria for evaluation of the lawyers can take place. A feedback mechanism should be introduced to create checks and balances.
4. The already existing mechanisms such as Legal Aid Clinics should be linked to the DLSAs to create a wider range of pools of young professional lawyers. The budding lawyers could be guided to organize and conduct legal aid camps, para legal services, and a socially committed legal aid cells.