

LEGAL AID: ACCESS TO JUSTICE AND ROLE OF JUDICIARY

DURING COVID-19

Linda Francesca Macedo Borges & Lara Joanna Macedo Borges
Symbiosis Law School, Pune

INTRODUCTION

As William E. Gladstone, the erstwhile Prime Minister of the UK, rightly said, "*Justice delayed, is justice denied.*"¹ The main take away from this statement is if there is a provision for legal redressal and a piece of machinery to address grievances of the aggrieved party, none of it is truly valuable if it is delivered in an untimely fashion. Denying or not providing effective justice is equivalent to not providing justice at all. A legal maxim that adds weight to this premise is "*Ubi jus, ibi remedium*", which states, "When there is a right, there is a remedy". Thus, if a remedy is not provided instantly, a lack of timeliness would creep in.

As a member of the legal fraternity, we have a responsibility towards society and helping those in need. According to John Rawls, in his book: A Theory of Justice, he explains how there are two kinds of barriers that prevent people from approaching courts to seek relief.

- Natural barriers: These barriers are usually faced by people belonging to the low strata of society, as a result of poverty, illiteracy and lack of understanding about their rights.
- Artificial barriers: These barriers are faced by people, not belonging to a specific section of society, as a result of prejudices, physical disability, caste, ethnicity, sexual orientation.

When one talks about concepts such as legal aid and access to justice, it is crucial to understand, that the above two themes are interconnected, however, the underlying gap is bridged by the people who are willing to make a difference. For a broad categorisation, these people include- pro bono lawyers, social workers, people working at NGO's, and not to forget, law students. Thus, it is this section of people that would provide legal aid to the marginalised sections of society and give them the likelihood and hope of receiving timely

¹ Burstyner et al., *Justice Delayed is Justice Denied*, Victoria University Law and Justice Journal 46, 46-48 (2014).

and effective access to justice. In a democratic country like India, equal opportunity for access to justice is indispensable. Being ignorant, lacking awareness or simply having apprehensions about the legal recourse are not grounds to pose as a hindrance while obtaining justice. The preamble of our constitution rightly uses the words like, 'justice, and social, political, economic'. Thus, fulfilling and achieving constitutional goals is paramount. The constitution recognises the need for justice and reflects its beliefs in Article 38 and Article 39A.

It was Mahatma Gandhi who advocated the practice of '*Rule of Law*', as opposed to '*Law*'. It is via rule of law that the principle of equal opportunity is effectuated. In this system, arbitrary actions by the legislature and executive are not followed, as compared to a system that strictly advocates law, thereby based on the supreme law, leaving little room for the procedural aspect of law. Thus, rule of law aims at improving the kind of relations, firstly between government and the citizens and secondly, among the people themselves.² B. R. Ambedkar rightly emphasised the essence of Article 32 of our Indian constitution, being the heart and soul, which provides people with a reliable platform to be heard and seek remedy if their legal right has been infringed. These footsteps are made in the right direction to empower citizens with wherewithal while approaching courts

IMPORTANCE OF LEGAL AID

Meaning

Legal aid simply means providing legal services, either free of cost or at a minuscule amount. The main purpose of providing legal aid is simple - ensuring no one gets left behind in the search for justice and not allowing insufficient funds to act as a deterrent for the weaker sections of society.

Legal aid to the marginalised sections helps to conserve and advocate rule of law in society. If a person is functionally illiterate and is not provided legal guidance, then it can be concluded that he was given an inadequate opportunity for relief. The judiciary has played an important role in its dealings with the legislature and brings about much-needed laws and provisions for the benefit of the poor and needy. In India particularly, there are a plethora of opportunities in providing aid, as the oppressed section of society still lack a platform in

² Shapiro et al., Government benefits and the rule of law: towards a standards-based theory of due process. A.L.R., 57, 107-108 (2005).

exercising their fundamental rights. Legal aid aspires to reflect different facets of the constitution in letter and spirit.³

Origin & History

Legal aid originated from Magna Carta in 1215, and still today, its effects are resonating since its inception promoting: right to a non-discriminatory trial and the right to justice. The English propagated the Magna Carta in their colonies, and invariably became the proponents of rule of law. This essentially eliminated all rules and laws dictated by the ruler and introduced a system of fairness while exercising rights and accessing privileges.

Article 21 of the Indian Constitution states "no person shall be deprived of his life or personal liberty except according to procedure established by law". Thus, we can say fundamentally Article 21 was introduced, keeping in mind the principles and what Magna Carta stands for today. However, in prevalent times, it is subject to interpretation and subjectivity due to the evolution of mankind and its principles.

Below are a few cases to document the progression and adaptation of the effects of the Magna Carta in the Indian scenario.

- ***ADM Jabalpur vs. Shivkant Shukla (1976)*⁴:**

When this case was first tried in 1976, the Supreme Court concurred that liberty is a fundamental right; however, it is not absolute, especially during unprecedented times such as an Emergency. However, this is a glaring exemplar, for if any political party decides to overstep the right of an individual and curtail their freedom and liberty, could easily get away scot-free, simply because there exists a lacuna in exercising fundamental rights in a democratic country. This case is well known as the "Habeas Corpus" case, leaving no room for national authorities to undertake numerous arrests indiscriminately. Article 22 protects if the accused is wrongly incarcerated under the Preventive Detention Act, proving to be a solace for them.

³ Mallikarjun, Legal Aid in India and the judicial contribution, 7 NALSAR LAW REVIEW 234, 235-36 (2013).

⁴ *ADM Jabalpur vs. Shivkant Shukla* (1976) 2 SCC 521

- ***Maneka Gandhi vs. Union of India (1978)*⁵:**

This case is a turning point, as the principle of the "Golden Triangle Rule" was introduced. The triangle signifying intersecting points between Article 14: "Right to Equality", Article 19: "Right to Freedom", and Article 21: "Right to Life and Liberty." Thus, the three above rights, are concurrent and coinciding in nature. For instance, if a law introduces a procedure to restrict people of their liberty, then it can do so, only if it meets relevant and coinciding requirements in Article 14 and Article 19. The court, in this case, ruled that right to travel abroad comes under the ambit of Article 21. Moreover, introducing a law to curtail personal liberty is not adequate to be implemented. The enactment needs to be justifiable, reasonable and practical.

The takeaway from the above two cases and the court's holding signifies that no person or even national authority for that matter can impinge and intrude on a person's right and privilege. At the end of the day, our constitution along with sensible and humane judgements dictated by the court gives us true and fair justice.

NEW WAVE IN INDIAN LEGAL AID & JURISPRUDENCE

In the opinion of Justice P.N. Bhagwati, legal aid can be defined as "*means providing for an arrangement in society which makes the machinery of administration of justice easily accessible to people.*" This has been said, keeping in mind that India being a welfare state is accountable for social welfare on an individual basis and on a societal level too.

The government at the centre, state and even private companies have introduced a gamut of schemes and ensured the implementation of the same. They have affirmative faith that they along with bodies such as law students, teachers, lawyers, social workers can truly revamp the legal system in providing legal aid. Below are some methods and platforms to provide speedy legal aid:

Your One Stop Legal Destination

- **Pro Bono:**

The above term in English translates to "for the public good". It essentially means providing skilled legal work either free of cost or at a nominal fee, to the struggling sections of society. The objective of pro bono is to provide a platform for the underprivileged, to voice their

⁵ *Maneka Gandhi vs. UOI (1978)* AIR 597

concerns. It is only when they are heard and represented by lawyers, can amendments, redrafting and adaptation take place. An ancillary objective of such pro bono lawyers is to spread awareness about their rights and viable solutions.

- **Tele Law:**

As the name suggests, this form of legal advice is provided online via videoconferencing. For people who fall within Section 12 of the Legal Services Authorities Act, 1987, the legal aid provided is gratuitous, whereas, for the people who do not fall within this scope, a subsidised amount is charged. This scheme enables people to connect remotely, belonging to any part of the country.

- **Nyaya Mitra Scheme:**

This scheme comes under the ambit of the Department of Justice and helps courts on cases that have pendency for more than 10 years.⁶ It is a way of restoring people's belief and attitude towards the judiciary which may have been affected due to the incessant pile on of cases. It tackles cases and approaches them by keeping in mind Article 39 of the constitution.

- **Lok Adalat:**

This is famously titled the "People's Court" and is a good way to provide immediate relief by suggesting a quick solution, which in turn helps in reducing the burden of courts. Thus, before a lawsuit can be filed, this is an amicable way to come to terms in the presence of an arbitrator. It does not foray into cases dealing with the criminal subject matter. Its reason for establishment is to provide fair justice and does not charge fees for the services provided.

- **Alternate Dispute Resolution (ADR):**

ADR is a mechanism used to settle disputes out of the court with the consultation of a third party. Section 89 of the Code of Civil Procedure provides for "an option of settlement of disputes outside the judicial courts."⁷ ADR can be broadly categorised into Arbitration, Mediation and Conciliation, with arbitration being the most effective in enforcement, power, and ability to decide which is binding on all parties.

⁶ Bharatendra Singh, Nyaya Mitra Scheme, Ministry of Law & Justice, 2018, Lok Sabha.

⁷ Code of Civil Procedure, Part V of 1908, §89.

CONSTITUTION OF INDIA - ACCESS TO JUSTICE

Below, legal aid is categorised into two phases: The pre-independence period and the Post-independence period.⁸

Pre-Independence Period

The Pre- British period was monarchical- where all the affairs of the state were handled and run by the monarch (a single ruler). To add to it, the constitution lies in the hands of the monarch, making power easily accessible to them. When states were ruled by Muslims and Hindus, people were provided justice; however, it was in an inexpensive form and immediate form, thereby compromising on quality. The British revamped the system and introduced an expensive administration of justice, where legal aid was mandated under the Code of Civil Procedure and exempted those people who were in an extreme state of poverty to pay court fees. Bombay Legal Aid Society was introduced in 1924 and is aimed at rendering legal advice to the needy, free of cost.

Post-Independence Period

Even though India became independent in 1947, it still faced turmoil due to battles like religion, poverty, illiteracy but that did not stop legal aid schemes from being introduced by Justice Bhagwati. The Law Commission made it a point to introduce different legal aid schemes, one of them introduced by M.C. Setalvad where he iterated that legal service must be provided to the needy free of cost by the State and they must appropriate funds in such a way that the poor are benefitted. The Law Commission also introduced different approaches in the Code of Criminal Procedure and the Code of Civil Procedure.

Code of Criminal Procedure, 1973

Section 304: "Legal aid to accused at State expense in certain areas"

"Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State."⁹

⁸ KALPESHKUMAR GUPTA, LEGAL AID & AWARENESS IN INDIA: ISSUES & CHALLENGES 91 92 (Viralkumar Mandaliya, LAP Lambert Academic Publishing) (2018).

Code of Civil Procedure, 1908

Order XXXIII: "Court to assign a pleader to an unrepresented indigent person" (9A) - "Where a person, who is permitted to sue as an indigent person, is not represented by a pleader, the court may, if the circumstances of the case so require, assign a pleader to him." Thus, from the above two clauses, it is evident that the State provides recourse to indigent persons.

ACCESS TO JUSTICE IN OUR CONSTITUTION

Article 14

Article 14: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India, prohibition on grounds of religion, race, caste, sex or place of birth."

Two important takeaways from this article are that there should be "equality before the law" and "equal protection of the law". An important legal maxim to be highlighted is *Audi Alteram Partem*, which means "listen to the other side." However, in India, there are lurking evils such as illiteracy, social class, language barriers, and the religion which hinder the path in accessing equal opportunity for justice. Thus, equal opportunity of legal aid cannot be emphasised upon.

Article 21

Article 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law."¹²

Article 21 is a fundamental right that aims at protecting life and personal liberty. Here, this article is strictly made enforceable, and no person shall be at a disadvantage while accessing their right, unless it is established by law. It is mentioned in Part III of the Constitution. For instance, a case in point- *Sukh Das vs. Union Territory of Arunachal Pradesh*⁹ held that "free legal aid at the State's cost is a fundamental right of a person accused of an offence."

Article 32

Article 32 (2): "The Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto

⁹ *Sukh Das vs. Union Territory of Arunachal Pradesh* (1986) AIR 991.

and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

Here, Supreme Court is given the power to safeguard citizens' rights and plays the role of a warrantor. Having a list of fundamental rights is ineffective unless there is functional machinery to enforce one's rights and privileges. Another legal maxim called *Locus Standi*, which means "the person who has the right to be in court" is applicable in the legal system, where only the person who has faced some wrong can initiate a suit. However, there are exceptions such as Public Interest Litigation which allows representatives to initiate a suit, especially on behalf of indigent persons.

Article 39 (a)

Article 39 A: *"Citizen, men and women equally, have the right to an adequate means of livelihood."*¹⁵

Article 39 (A) of the Constitution provides free legal aid and justice to indigent persons, even if the persons are prisoners. A case in point- *Hussainara Khatoon vs. the State of Bihar*¹⁰, which held that "if an accused or even criminal is unable to afford legal services then he has a right to have free legal aid at the cost of the State and it is the utmost duty of the State to watch that the legal system promotes justice on basis of equity." This article emphasises that these rights are inviolable, and possess characteristics of being reasonable, balanced and justifiable in the eyes of law. It is mentioned in Part IV of the Constitution which talks about Directive Principles of State Policy (DPSP).

NATIONAL LEGAL SERVICES AUTHORITY (NALSA):

The Legal Services Authority Act was introduced in 1987, to set up a national web for granting legal services to the marginalised population. NALSA implements various legal schemes and oversees its functioning. It has its authorities at the district, state and taluka levels. Till 2019, there were 5.35 lakh legal awareness workshops conducted.¹¹

¹⁰ Hussainara Khatoon vs. State of Bihar, 1979 SCR (3) 532.

¹¹ Legal Services Authority Act, Chapter II of 1987, § 3.

LEGAL AID IN THE COVID-19 SCENARIO

The pandemic of Covid and the ensuing lockdown has greatly impacted and caused misery to the underprivileged and poor sections of society. The National Legal Services Authority aimed at addressing the concerns of such poor and weaker sections of society. In furtherance of their aim, NALSA issued a direction to the State Legal Service Authorities (SLSA) for the provision of legal aid to those who require it. NALSA highlighted the paramount importance of legal aid during such unprecedented events.

The United Nations High Commissioner for Human Rights made recommendations in relation to the effect of the outbreak of this virus in jails and prisons. The recommendations suggested different states ought to consider the release of prisoners to decongest the prison and thereby reduce the possibility of an outbreak. Based on the recommendations, the Supreme Court of India directed state governments to consider the release of some prisoners on parole to decongest prisons and prevent the further spread of the disease.

The High Powered Committee of each state along with the respective State Legal Service Authorities issued guidelines of which categories of prisoners will stay in jail and which can be released. The former mostly consisted of prisoners on trial for offences under the Protection of Children From Sexual Offences (POCSO) Act, the Narcotic Drugs and Psychotropic Substances (NDPS) Act. As of data on April 15 provided by NALSA, 11,077 prisoners under trial across 232 districts were released from jail during the lockdown. Additionally, around 5,981 prisoners convicted of non-heinous offences were released on parole and furloughed to decongest the prisons. NALSA is offering assistance to such prisoners by way of a panel of lawyers.

Another pertinent issue was the increase in domestic violence incidents. To curb the problem NALSA requested coordination between SLSAs with the One-Stop Centres established by the Ministry of Women and Child. The paralegals and volunteers would assist the victims by filing cases, affidavits, and informing them about their rights. Additionally, helpline numbers were issued to provide women with assistance and legal aid. These are some of the initiatives taken by the legal service authorities and the government to ensure justice. Such initiatives illustrate the importance of legal aid enable basis subsistence and equality in poor and weaker sections of society.