

The Legal Service Authority Act, 1987: A Perspective Analysis

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“Discourage litigation persuade your neighbour to compromise whenever you can. Point out to them how the normal winner is often a loser in fee, expenses, cost and time.”

- Abraham Lincon

Introduction

Law which is not rooted in the contemporaneous societal ethos and aspirations finds rough weather in its acceptance by the people. German jurist and legal historian Friedrich Karl von Savigny (1779-1861) has described law as a reflection of the spirit of the people who evolve it. As per this theory, all laws are manifestation of common consciousness. Somewhat in the same spirit, WE, THE PEOPLE OF INDIA, IN OUR CONSTITUENT ASSEMBLY on twenty-sixth day of November, 1949, adopted, enacted and gave to OURSELVES THIS CONSTITUTION. Though, India had achieved independence on 15th August, 1947, on 26th January, 1950, the Constitution of India, came into force and, as an independent country, India became a Republic. 26th November, 15th August and 26th January is celebrated, Law Day, Independence Day and Republic Day respectively every year.

In terms of Article 39-A of the Constitution, a duty has been cast on the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and that State shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Even justice in the perambulatory tone has been depicted in varied proliferated forms such as political, economic and social. By now, it is not clear that social justice includes rule of law and justice in legal sense as well as people's rights.

Concept of Leal Aid

Every legal system is based on the assumption that all persons are equal and capable of invoking appropriate remedies before the courts of law to get justice according to law and nothing prevents them from seeking justice if their rights are violated. Another notion of the administration of justice is that parties to the litigation shall be treated equally. However, of late the actual functioning of the judicial administration has disproved it, especially in view of the plight of the people suffering from social and economic constraints in seeking justice. Theoretically, the law regime bestows equal rights and equal opportunities to all irrespective of one's socio-economic existing but despite the guarantee of equal justice, the legal system operates differently and harshly to the poor who are devoid of resources to ignite it, for in the adversarial system the “throw of dice” matters for admission in the judicial system to seek justice and consequently the poor suffers the situation of justice denial. This situation of legal incompetence to seek justice strongly justifies the provision of legal aid to overcome this imbroglio of the poor in effectively igniting the legal system to protect their interests. The idea of legal aid includes within its ambit various measures such as legal assistance in litigation, legal literacy to enhance the awareness of rights, remedies and processes, legal advice, preventive legal aid etc. to facilitate equal and effective access to justice.

The legal aid needs of the poor become urgent to address on three counts. First, the legal system comes up with all its maze and mystique of the technical and formal statutory law regime. Secondly, the innate and objective relation of law and justice accords recognition to the provision of legal aid to the poor, who cannot have access to justice by reason of social disability and economic destitution. Thirdly, to provide an

effective access to justice on the basis of equal opportunity to claim the equitable distribution of resources and opportunities to reap the benefits of social justice.

The technicality and formality of the vast legal rules makes it very difficult for an ordinary person to ascertain his stand in law, which makes it indispensable for him to seek expert assistance of a lawyer, which in turn requires the payment of fees besides other fringe expenses of litigation that a poor cannot afford. This situation of helplessness calls for the affirmative action on the part of the state to extend legal aid to enable the poor to seek justice. If legal aid is not given to the population suffering from socio-economical disabilities then the entire purpose of the law regime will be redundant and justice will be a mirage to them. Law fails in its purpose if it altogether fails to realize justice to the consumers of justice belonging to the invisible and ignored bracket of the society engrossed in poverty, illiteracy, ignorance and squalor. Thus, legal aid to the poor gives a rationale to the legal system itself if it is at all concerned with equal justice to all.

Concept of Justice

The concept of justice is pregnant with various diverse notions of right, morality, welfare, happiness, liberty and equality. Justice is considered the primary goal of welfare state whose very existence rests on the parameters of justice. The conventional definition of justice is underlined in the *maxim, summ cuique tribuere*, to render each person his or her due.⁸ However, the concrete concept and content of justice has eluded the jurisprudential wisdom. Hans Kelsen has his own way to posit:

“The longing for justice is man’s eternal longing for happiness. It is happiness that man cannot find alone, as an isolated individual and seeks in society. Justice is social virtue and it can be guaranteed by a social order another facet of confronting injustice. As Edmond Cahn said that “justice is not a collection of principle on criteria”, but it is “the active process of preventing or repairing injustice.”¹

Justice has been the highest urge of mankind that directed the earliest laws that justice is done alike to rich and poor. The idea of justice received its classic embodiment and statement in the fortieth paragraph of Magna Carta that reads

“nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam,”

which was a first step in this direction. The notion of freedom and equality of justice has been incorporated almost in every modern constitution. “Right to freedom and equality of justice...was...the most important of all because on it all the other rights, even the rights to life, liberty, and the other pursuit of happiness, were made to depend.”² Therefore, it must be possible for the humblest to invoke the protection of law, through proper proceedings in the courts, for any invasion of his rights by whosoever attempted, or freedom and equality vanish into nothingness.³

The inequalities in the administration of the law are produced, if only indirectly, by economic and social inequalities. As Max Weber noted: “Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But because of the unequal distribution of economic power, which the system of formal justice legalizes, this very freedom must time and again produce consequences which are contrary to the substantive postulates of religious ethics or of political expediency.”⁴ Inequalities in the administration of law result into the disadvantages to the poorer sections of the society. Therefore, to seek protection of legal interests in view of the social and economic inequalities “democratization of remedies” becomes urgent and indispensable for the poor who cannot afford to seek justice because of the high cost of litigation. Justice requires dispensation of justice through impartial and even-handed administration of Legal service.

¹ Lenore L Cahn, (ed) Confronting Injustice, (1962), p. 381..

² Stimson, Federal and State Constitution, p. 10 quoted in RH Smith’s Justice and the Poor, p 4

³ RH Smith, Justice and the Poor, (1926), p. 5.

⁴ Max Weber quoted in Ross Cranston, Legal Foundations of the Welfare State, p.48.

Social Justice

The concept of social justice is best understood as forming one part of the broader concept of justice in general.⁵ Social justice came to be regarded as an attribute which the 'actions' of society, or the 'treatment' of individuals or groups by society, ought to possess.⁶ The expression has a definite meaning, describes a high ideal, and points to great defects of the existing social order which urgently call for correction.⁷ Social justice is the right of the weak, aged, destitute, poor, women, children and other under-privileged persons to the protection of the state against the ruthless competition of life,⁸ proper balancing of the competing claims⁹ and concerns the distribution of benefits and burdens throughout the society, as it results from the major social institutions.¹⁰ The principle of social justice is the concomitant of a just state,¹¹ which strives to establish a just social order to sub serve the common good of the people. Social justice demands the abolition of all sorts of inequalities which result from inequalities of wealth and opportunity, race, caste, religion and title and harmonise the rival claims and interests of different groups and sections.¹²

The concept of social justice, thus, takes within its sweep the objective of removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities.¹³

Social justice is the strong claim of the people against the state for the equitable distribution of the resources and opportunities. According to David Miller, "social justice" is "the social and economic claims...directed towards providing minimum standard of decent living for each person."¹⁴ The 'end' of social justice can only be realized to the marginal sections of the society by 'means' of legal aid, since "legal aid is the delivery system of social justice."¹⁵ Legal aid as a juridical right is not totally related to the traditional political right to approach the courts for securing justice but intimately related to modern struggle against poverty, thereby ameliorate the condition of the poor by securing them social rights like right to adequate diet, to decent housing, to medical care and to merit based employment. Right to legal aid comes to the category of modern social right. The use of law for reducing economic and social inequalities and promoting social justice by affirmative state action provided a new rationale for legal aid in most developing countries...It can mitigate structural imbalances in the legal system functioning against the poor, it can be an essential input in developmental planning and social justice administration. Therefore, an effective legal assistance programme is not only essential to the maintenance of the democratic way of life and the rule of law but it is also a socio-economic necessity.¹⁶

Distributive Justice

The notion of distributive justice deriving from Nicomachean Ethics aims at the distribution of goods among individuals on the basis of their relative claims.¹⁷ According to Aristotle, distributive justice "is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution"¹⁸ and is based on the principle that "there has to be equal distribution among equals."¹⁹

Corrective Justice

⁵ Ibid

⁶ FA Hayek, *Law, Legislation and Liberty*, Routledge & Kegan Paul, London & Henley, p.62.

⁷ Ibid, p. 6

⁸ K Subbarao, *Social Justice and Law*, (1974), p. 2-3.

⁹ John Rawls, *A Theory of Justice*, (1972) p. 10.

¹⁰ David Miller, *Social Justice*, (1976), p. 22.

¹¹ RG Chaturvedi, *Justice-Natural, Social, Political and Economic*, (1990), p. 12.

¹² SMN Raina, *Law, Judges and Justice*, (1979), p. 28.

¹³ PB Gajendragadkar, *Law, Liberty and Social Justice*, (1965), p. 78.

¹⁴ David Miller, *Social Justice*, p. 79.

¹⁵ *Hussainara Khaton v State of Bihar*, AIR 1979 SC 1369, 1377.

¹⁶ *Nicomachean Ethics*, p. 10. 41 Ibid, p112.

¹⁷ Ibid

¹⁸ Nicholas Rescher, *Distributive Justice*, Bobs-Merrill Co., New York (1966), p. 5.

¹⁹ John Rawls, *A Theory of Justice*, (1972), p. 303.

Corrective or remedial justice, for Aristotle, is essentially the measure of the technical principles which govern the administration of law. In regulating legal relations a general standard of redressing the consequences of actions must be found, without regard to the person.²⁰ For him justice in transactions between man and man is a sort of equality and injustice a sort of inequality.²¹ Corrective justice seeks to restore equality when this has been disturbed by wrongdoing, which assumes that the situation that has been upset was distributive just.²² Here comes the role of the courts to restore equality. “The function of the courts is that of applying justice in its corrective sense according to specific rules relating to the application of corrective justice.

Equality Principle

Equality is the basis of all systems of jurisprudence and administration of justice. The notion of equality as an aspect of justice has two phases, namely, equality as a means of doing justice, and equality as an end of justice.²³ The concept of equality cannot be defined in absolute terms in view of the variables in a given society such as place, person, time etc. The concept has multifaceted connotations and contents, as aptly remarked by Justice Mathew: “The claim for equality is in fact a protest against unjust, undeserved, and unjustified inequalities. It is a symbol of man’s revolt against chance, fortuitous disparity, unjust power and crystallized privileges.”²⁴ The concept of legal aid is the very spirit of equality and is dedicated to the principle of equal justice. Equal justice is the fair treatment within the purview of judicial process. It implies an easy access to courts and other governmental agencies on the basis of equality.²⁵

Critical Legal Studies

Critical Legal Studies²⁶ is an overtone of dissatisfaction over the “formalism” of law and inherent bias and prejudices of law and structures and institutions oppressive, unjust and exploitative to the individual. One of the principal advances of CLS is to demonstrate the need to integrate legal theory with social theory.²⁷ CLS theorists were of the view that social “reality is not a product of nature, but is socially constructed.”²⁸ The innovative attempt was to identify the role played by law in the processes through which a particular social order comes to be seen as inevitable and concerns the basic terms of social life. The exponents of CLS hope to emancipate the individual by overturning the existing forms of “legal consciousness”. “By demonstrating that social life is much less structured and much more complex, much less impartial and much more irrational, than the legal processes suggests, the interests served by legal doctrine and theory will surface.”²⁹ To counter this grim reality and emancipate the individual Roberto Unger suggests the creation of “immunity rights” which establish the “nearly absolute claim of the individual to security against the state, other organizations and other individuals”; “destabilization rights” which entitle the individual to demand the disruption of established institutions and forms of social practice that have achieved ‘insulation’ contributing the crystallized plan of social hierarchy and division that the constitution wants to avoid”; “market rights” which give a “conditional and provisional claim to divisible portion of social capital”; and finally “solidarity rights” - the entitlements of communal life - which fosters, inter alia, communal responsibility.³⁰ In his other writings³¹ Unger strongly advocated “opportunity for discovery and self-expression”, “empowerment by self-assertion” and demand for “participatory government”. He is of the conviction that “society belongs to us and so do its laws.

²⁰ W Friedmann, *Legal Theory*, 5th Ed, (1967), p. 10.

²¹ Aristotle, *The Nicomachean Ethics*, p. 115.

²² RWM Dias, *Jurisprudence*, (1985), p

²³ RK Gupta, *Justice: Unequal but Inseparable*, 11 JILI, (1969), P.57.

²⁴ *State of Kerala v NM Thomas*, AIR 1976 SC 490, 513.

²⁵ SS Sharma, *Legal Aid to Poor*, 1993, pp 6-7.

²⁶ CLS grew out of dissatisfaction against unjust laws and structures of governance perpetuating injustice

²⁷ Lloyd’s, *Introduction to Jurisprudence*, p. 1051.

²⁸ See P Berger and T Luckmann, *The Social Construction of Reality*, (1966). See also Upendra Baxi when he says that this is the decisional perpetuation of injustice. *Law and Poverty-Critical Essays*, 1988, p. vi

²⁹ See R Unger, *The Critical Legal Studies Movement*, (1983) 96 *Harvard L Rev*, p. 561

³⁰ A Hutchinson and P Monahan, *The Struggle Between Individuals was Halted and Truce Lines were Drawn Up*, (1984)

³¹ Roberto Unger, *The Critical Legal Studies Movement*, (1983) 96 *Harvard L Rev*, p. 600.

Identification and Analysis of Shortcomings in offering Legal Aid through Law School Based Legal Aid Clinics

The fundamental challenge faced by the Legal Aid Clinics is the lack of resources. Lack of resources includes both; human and material resources. Lack of human resources include insufficient number of trained faculty, lack of expertise, lack of guidance, failure of BCI to involve the Local Bar, support staff, indifference of the judiciary and lack of public support. Problem with material resources includes financial resources, low access to computers and communication infrastructure, low pay to the part time faculty, practical difficulties such as transport for the students to the rural areas, lack of Training Manuals and books on Clinical Legal Education. In addition to these problems, Clinics also face problems like mass legal education, low involvement of other faculty in Clinical programs, part time students, supervision and evaluation of Clinical programs, language and cultural differences. Keeping these issues in mind, ten questions were prepared after careful examination of several concerns expressed by the legal fraternity in running Legal Aid Clinics. These questions were asked to the faculty who are actually involved in imparting training in the practical papers and they were required to rank each question on four parameters. Activities of the Legal Aid Clinics purely depend on the needs of the local community and the resources that are at the disposal of the Clinic have disparities in design, approach, evaluation and assessment. Therefore, the same disparities are expected in identifying the shortcomings. The respondents were asked to respond whether the following are the major shortcomings:

- a. Lack of trained faculty
- b. Lack of financial support
- c. Poor student quality
- d. Restriction on faculty to practice in Court of law
- e. Restriction on students to represent client in Court
- f. Part time students
- g. Lack of involvement of Bar Council
- h. Lack of involvement of Judiciary
- i. Lack of specific directions from Bar Council of India
- j. No training facilities to faculty in practical papers
- k. Absence of academic credit for Legal Aid work for students
- l. Legal Aid not part of workload for faculty
- m. Absence of designated fulltime faculty for Legal Aid activity
- n. Absence/lack of support infrastructural facilities

Best Practices in India

As is mentioned in the methodology, the present study is not only confined to the seven projected States but also to find out some of the best practices that are undertaken by Law School based Legal Aid Clinics in other parts of the country. The purpose of such a study is to identify those practices which are successfully undertaken by these Clinics and the suitability of replicating the same in the other parts of the country. The following Law Schools were identified for the study based on the personal knowledge of the research team acquired due to their constant interaction in Clinical activities in India.

Clinics

National University of Juridical Sciences, Kolkata, West Bengal (NUJS) Legal Aid Society was established in NUJS to offer free Legal Aid to the society and skill development to the students. It consists of two faculty advisors, one retired District Judge and 10 student coordinators. The retired District Judge would be in charge of on campus Legal Aid Clinic. The two faculty advisors would be looking after the policy of and the kind of activities Legal Aid Society would undertake. Legal Aid Society of NUJS conducts various programs to strengthen access to justice. Few of the important initiations are given below:

- a) Legal Literacy camps

- b) Legal advice
- c) Provide referral services
- d) Social outreach programs like night teaching classes for workers at the University, helping the victims of disasters, etc.
- e) Networking with other Law Colleges in West Bengal in continuing Legal Aid activities and sharing the best practices.

Freedom

In collaboration with Human Rights Initiative, the Society carried out legal counseling to the inmates of prisons in West Bengal. One faculty advisor and two student coordinators from the Legal Aid Society are appointed as coordinators for this project. 18 students are selected to work on the project. They visited two prisons in Kolkata, namely Alipur Central Prison and Presidency Correctional Home every Saturday from 12 noon to 4.00 pm. These students are accompanied by a representative from Human Rights Initiative. Every three months they organize a Legal Awareness Camp in the prison and inform all the inmates about the availability of free Legal Aid services. The team of Students fill the necessary applications and forms and send them to District Legal Services Authority and also follow up the cases. Students are given a questionnaire, based on which data would be collected from the inmates. Every Wednesday all the students, students' students with the representative sits in Welfare Office for providing Legal Aid. Coordinators and the faculty meet at the Law School and identify the potential inmates who are in need of Legal Aid. Thereafter, a second set of questionnaire is given to the students to collect further information from the selected inmates for Legal Aid. Based on the data those who require legal assistance would be provided with the same and in cases where there is a need for a lawyer.

District Legal Services Authority

Effective Rural Governance and Access to Justice Project 2011. To ensure effective rural governance in West Bengal, the Legal Aid Society is initiating a project for Effective Rural Governance and Access to Justice from August, 2011. This project aims at sustained training and capacity building to deliver free Legal Aid and services to rural communities of West Bengal.

Project Partners

NUJS Legal Aid Society intends to establish co-operative and working relation with public authorities e.g. Gram Panchayats, Zilla Parishad, Department of Education, Health, Rural Affairs, Food & Consumer Protection Govt. of West Bengal, and State & District Legal Services Authorities of West Bengal. It will also seek co-operation from Non-Governmental Organizations and Civil Society Groups functioning in the project locations.

As a pilot project, the work would be carried out in two villages in the district of North 24 Pargana District of West Bengal. The purpose of this pilot project is to evaluate the viability and modalities for implementing the same on a larger scale. The strategy for implementation of this project contains two components.

Capacity Building Program

This part consist of selecting volunteers for training, preparing training module, conducting regular weekly training class, evaluating the progress of the trainees, monitoring the activities of the volunteers and assisting their activities when required.

Direct Legal Assistance Program

This includes conducting a survey in the selected pilot project site to determine the main legal problems existing in the village. Thereafter, organize weekly Legal Aid Camps in this area jointly with support of the District Legal Services Authority to provide free legal advice and other legal service.

Expected Outcome

The project is expected to benefit a large number to people in rural areas. It aims to generate awareness among common people about laws and legal institutions. It would create a pool of para-legal volunteers among these communities who can advise the people in their localities on basic legal problems and extend the reach of free Legal Aid system to rural communities in a more sustained manner. The Project would bridge the existing gap of information deficiency among the rural people about their legal rights, and develop a culture for better dispute management at grass-root level by revitalizing the institution of Panchayat Court system and other forms of amicable process of dispute settlement. It is also expected to empower the rural people to fight corruption and bring transparency and effective rural governance in their villages.

Law, Policy, and Governance initiative by Institute of Rural Research Development Gurgaon in association with Jindal Global Law School, Haryana. IRRAD works in villages of one of the India's most backward Districts, the Mewat in Haryana. The mandate of Good Governance Project is to empower rural India and reduce rural poverty. It uses Integrated Sustainable Village Development Models. To achieve its objects, IRRAD established PGA Centre which would select group of villagers to prepare them as effective participants in the affairs of local governance. It has three objectives:

- a. Effective participation o the villagers in public affairs
- b. Good governance
- c. Sustainability of the initiatives

For achieving its objectives the PGA Centre focuses on providing access to information and participation with the help of such information. The duration of the project was one year and in a month only half day sessions were allotted for classroom learning and planning. Rests of the time, the villagers participating in the program are required to practice the information that was imparted to them in the classroom. The whole project is client oriented. The class room teachings are based on the needs of the villagers. Mostly the classroom teaching focused on the villagers' entitlements such as right to food under Anganwadi and Mid-day Meals Schemes, Right to Education, Social Security, and Right to Information Act. Villagers learnt how to use RTI in realizing their entitlements. This particular model would suit Law School students in India as law teachers and the students are not allowed to practice law. This model was developed by Prof. Ajay Pandey who is currently a faculty in Jindal Global Law School. Many students from other Law Schools also visit this Centre for placement.

Conclusion

In the Indian legislative history, conciliation gets the legal sanctity for the first time in the Civil Procedure Code, 1908. In this Act provisions were made for the first time for the resolution of disputes by arbitration, conciliation, judicial settlement and mediation. The Industrial Disputes Act was passed in 1947. This Act specifically, makes provisions for the resolution of industrial disputes by conciliation. After India got independence, the Government of India passed a number of legislations, in which provisions relating to conciliation were made. Until 1996 the settlement through conciliation was regulated by the above mentioned Acts, there was no separate law on conciliation. But with coming into force, the Arbitration and Conciliation Act, 1996 we have a separate legislation on conciliation. The Arbitration and Conciliation Act, 1996 makes and define the law relating to conciliation. This Act provides for the settlement of every dispute by conciliation except those which cannot be submitted to conciliation by virtue of any other law for the time being in force. The most important provision of the law of conciliation is that the settlement agreement has been given the same status and effect as if it is an arbitral award. The settlement can be enforced in the court in the same manner as if it were a decree of the court. At present the conciliation has emerged as a better mode to resolves the disputes between the parties instead the ordinary litigation process of the courts. The court process of dispute's settlement is expensive and time consuming while in conciliation if the parties are willing, disputes can be settled with nominal costs and that too in a very short time. Keeping in view the pendency of cases in our judiciary from the bottom to top, conciliation certainly has the capacity to

decrease this workload from the judiciary. Finally, it is suggested that in every dispute efforts should be made to settle the dispute by conciliation and only those matter should be referred to courts where no element of conciliation exists.

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