

Judicial Activism, Right to Legal Aid and Access to Justice

AJAY VIKRAM SINGH

Assistant Professor

Govt. P.G. Law College, Sikar (Rajasthan) India

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INTRODUCTION

Judicial Activism finds its expression in the superior appellate courts, for the primary function of a trial court is to ascertain the facts while the superior court has to lay down the rule for the guidance of subordinate courts. To deny judicial activism to the courts is to nullify the judicial process and to negate justice. Justice D.P. Madon,¹ supporting the judicial activism declares that if the law is to operate today so to secure social justice to all that else can do it but judges whose constitutional task is to interpret and apply the law? A Judge who denies to himself judicial activism denies to himself his role of a judge. Nature abhors a vacuum. Take away judicial activism and tyranny will step in to fill the vacant space.

The post-emergency Supreme Court turned active and militant in the field of human rights. The Court enlarged the scope of Article 21 of the Constitution for securing basic human rights to the citizens and especially to the poor and under privileged masses. Article 21 acquired new dimension as a result of Maneka Gandhi,² case and it received its most expensive interpretation in subsequent cases³ and the Supreme Court has almost declared it to the conscience of the Constitution.

Maneka Gandhi is landmark in the field of personal

liberty. It over-ruled the Gopalan case,⁴ and hold that procedure must be just, fair and reasonable and not oppressive, arbitrary or fanciful and this paved the way of procedural justice which was denied in Gopalan in 1950. It thus introduced the concept of 'due process' which was excluded its activism when it ensured certain rights are fundamental rights which had not been included in the Constitution as fundamental right.

Judicial Activism and Right to Legal Aid:

In a complex society the necessity of legal aid arises due to the reason that in collective community each one cannot afford to go to court because it is not worth the candle. Take for example environmental pollution causes insidious injury to the health but it is beyond any individual to start a Legal Aid Proceeding. The purse of a particular person cannot afford to litigate on this score. The first concern of a judge is justice, without involving judicature from top echelon to the floor level. The Legal Aid movement will remain a simple propaganda and declaration if it is not given concrete shape.

Public interest litigation is considered as an arm of legal aid movement. So legal aid in its wider connotation has played an effective role in securing and enforcing the rights of the poor and down-trodden sections of

1. Madon, D.P., J., Judicial Activism – An Essential part of Judicial Function (Bar Council of India Review, Vol. II (1984) 247.
2. Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597
3. Francis Coralie Mullin v. The Administrator Union, Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802; Olga Tellis v. Bombay Municipal Corporation, A.I.R. 1986 S.C. 180.
4. A.I.R. 1950 S.C. 27

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society. As Justice observed:

Public Interest Litigation is the strategic arm of legal aid movement which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity. Rule of Law does not mean that the protection of law must only be for future few.⁵

Legal aid to the poor has come to India in its most recent phase in the social justice and anti-poverty package because it has failed to materialize as part of the civil liberties package. If this thrust could be sustained by a productive and purposeful use of law and legal institutions, legal aid would in the ultimate analysis to strengthen civil liberties through the route of social justice.⁶

In our complex society, the Law has been utilized to regulate all aspects of human activities. The state to which law has been inter-wined with day to day living has fully participated in society without the knowledge of and the ability to participate in integral system of laws. More specially knowledge of and the ability to participate in the legal system enables an individual in the society to participate as a recipient of the rights and privileges that society has deemed necessary to uphold the system of law, for the survival of well-being of the individual in his relationship with his fellowmen and society. But in his attempt to do so, he encounters difficulties because of the complexities of the laws and heavy fees to those specialized mediator – the lawyers.⁷

If the criterion for accessibility to legal services is monetary one, then it would necessarily mean that those who are too poor to pay will have to depend solely on the goodwill of their fellowmen for the upholding and realization of their rights. The only solution, therefore, would be to provide indigent with the means of legal confrontation. Thus the need for legal aid, Public Interest Litigation, Lok Adalats, etc. arises.

In other words, legal aid is an indispensable social necessity.⁸ It is necessary so that equality before law becomes meaningful. In a welfare state, last law must become an instrument of socio-economic justice to ensure

equality before law and equal protection of law to all citizens. Laws have been enacted to improve conditions of the poor people. But in practice it is found that majority of people due to poverty, illiteracy and ignorance of legal rights are unable to enjoy the fruits of beneficial legislations. Further, while rich have ample resources to utilize the services of the best legal talents, a poor and resource less person is unable to afford any or at any rate the service of a talented lawyer. Thus, a resource less poor person very often prefers to forgo his valuable rights rather than to confront a wealthy and powerful person with vast resources. Under the circumstances the state cannot remain a helpless spectator in this matter.⁹

In the field of litigation question arises if there is an equal opportunity for a contest between the contestants can a poor man, a man stricken with penury or for that matter a man of modest means, successfully and effectively contest against a wealthy man or man of affluence? Should there be litigation between the two? In the prevailing scheme of administration of justice it is hardly a personal contest between two persons, but in fact it is contest between the lawyers that the two can engage. A rich man has ample resources to press into service the best of legal talent, while a resources' litigant may not be able to afford any or at any rate a lawyer of reckonable acumen or talent. A large mass of people cannot afford to engage a lawyer, as large mass of people cannot afford a medical practitioner. The contest obviously is unequal and opportunity is denied to a dominant segment of population. It is being increasingly realized that justice should be available to all, and that there cannot be real equality unless legal advice is available to the poor people in the same manner as to others whether in civil or criminal; proceedings. It is indeed being rightly asserted that without free legal aid and advice there is in fact a denial of equal justice to poor.¹⁰

This new change has to come if the judicial system is to become an effective instrument of social justice, for

5. People's Union of Democratic Republic v. Union of India, A.I.R.1982 S.C.1473

6. Singhvi, L.M., Dr., at International Collogium on Legal Aid and Legal Service at London, October, 1976.

7. Jain, D.C., "Legal Aid: A Social and National Responsibility", All India Seminar sponsored by UGC on Legal Aid to Poor, 1.

8. Iyer, Krishna, V.R., J., *Processual Justice to People*, 1 (1973).

9. Srivastava, S.C., "Approaches to Legal Aid", 9th Law Asia Conference, New Delhi, 7-12 Oct. 1985, 154.

10. Bhasin, Lalit, "Legal Aid – A Bread Perspective", 9th Law Asia Conference, New Delhi, 7-12 Oct. 1985, 139.

without it, it cannot survive for long.¹¹ Article 21 says, “no person shall be deprived of his life and personal liberty except according to procedure established by law”. The procedure must be just, fair and reasonable (Maneka). One of the requirements of such a procedure is that the person being deprived of his life or personal liberty must be assisted by a lawyer in his defense otherwise it would be violative of Art.21.

Article 22 ensures every person arrested to consult and to be defended by a legal practitioner of his choice. It implies that a poor detainee should be given legal aid at the cost of the State to defend his case.¹²

There are certain statutory provisions which provide that State shall provide, the necessary legal assistance to the persons who are brought before the court of law for defending themselves.

Role of Supreme Court in Enforcing Right to Legal Aid

Our Constitution is committed to establish of a Welfare State where there shall be justice, social, economic and political in all spheres of life. Its socio-economic engineering is based on legal technology. Justice is delivered according to the process of the law and inequalities are sought to be extirpated by legal process, social justice is thus a high priority item for the three great instrumentalities of the State. The judiciary, therefore, has a special responsibility to see that justice in its triune connotations rich down to the humblest level¹³.

In the year 1951 Mr. Justice Fazal Ali in *Janardhan Reddy v. State of Hyderabad*¹⁴ observed:

The proper view seems to be...that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented the trial should be vitiated.

In *Tara Singh v. The State of Punjab*,¹⁵ a unanimous decision was handed down by Supreme Court regarding Section 304(1) of Cr. P.C. in these words: The right conferred by Section 304(1) does not extend to a right in

an accused person to be provided with a lawyer by the State or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and get his relations engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity.

What was considered historically as a favour to poor to be given as and by way of charity has now universally been recognized not only as a human right but as a social and political need, nay, a solemn duty of the community and the State. It is right which every human being who only because he is a human being must enjoy. If society and the State have been unable to remove poverty or deprivation it is the duty of society and the State to provide legal assistance to all those who need it. It is the responsibility of the community as a whole to provide sufficient machinery and a delivery system to make available to the deprived and the poor, the benefits of machinery which will enforce.

In *M.S. Hoskot v. State of Maharashtra*,¹⁶ right to legal aid was given recognition where a prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner’s defence, provided the party does not object to that lawyer.

Justice Krishna Iyer¹⁷ observed:

Prisoners, men and women, regardless of means, are a peculiarly handicapped class. The morbid cell which confines them wall them off from the world outside. Legal remedies, civil and criminal, are ofte beyond their physical and even financial reach unless legal aid is available within the prison as is provided in some states of India and in other countries. Without legal aid, petitions of appeal, applications for commutation or Parole, bail motions and claims for administrative benefits would be high high

11. Saxena, Manohar Raj, “Legal Aid and Advice Scheme and LokAdalat”, A.I.R. 1986 (Jour.) 104.

12. *Janardhan Reddy v. State of Hyderabad*, A.I.R. 1951 S.C. 217; *M.H. Hosket v. State of Maharashtra*, A.I.R. 1978 S.1849.

13. Quoted by Justice P.N. Bhagwati in his “Report on National Judicature: Equal Justice- “Social Justice”, New Delhi, Govt. of India, Ministry of Law Publication, 62(1977)

14. A.I.R. 1951 S.C. 217

15. A.I.R. 1951 S.C. 441.

16. A.I.R. 1978 S.C. 1548

17. *Id.* at 1956.

impossible. There is a case for systematized and extensive assistance through legal aid lawyers to our prison population.

Another milestone which legal aid has reached was a year later in 1979. In HussainaraKhatoon's case¹⁸ in which Article 21 was analysed and it was held that a procedure which does not make available legal services to an accused person, who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as fair, reasonable and just. But even this right to free legal services would be illusory for an indigent accused unless the Magistrate or the Session Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty and indigence, he is entitled to obtain free legal aid at the cost of the State.¹⁹

Role of Lawyer in Proving Legal Aid:

The service which the legal profession renders to society is of fundamental importance. It is engaged in the administration of justice. Judge Learned Hand said that "Lawyers got by a kind of natural right the authority to interpret justice, since they were in a broad sense genuine representative of all that could achieve representation (they are) an articulate organ of the half understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the highlight of expression the deep impulses of the present....."²⁰ The profession of the law of which he is a part is charged with the articulation and final incidence of the successive efforts towards justice.²¹

According to Justice Bhagwati, Law is a social service of a specialized type. Its goal is social engineering, its end product justice, but the raw reality is that the legal

system does not offer easy access to common people. Only through lawyers can the layman win the rights, the law purports to give him. The journey from injustices to justice has been taken with assistance of other dedicated to poverty-legality.²²

Justice Krishna Iyer observed the importance of Lawyers to M.S. Hoskot's case,²³ that the one of ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, lean upon professional expertise, and the failure of equal justice under the law is on the cards where such supportive skill is absent from one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by Kindered Legal Technology compel the collaboration of lawyer power for steering the wheels of equal justice under the law Krishna Iyer, J, quoting Black, J.²⁴ observed that the "Government hires lawyers to prosecute and defendants who have money hire lawyers to defend are the strongest indications of the widespread belief that Lawyers in criminal courts are necessities and not luxuries".

In case of D.K. Basu v. State of West Bengal,²⁵ the Supreme Court held that "the precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law, by placing such reasonable restrictions as are permitted by law." The Court further ruled that, "the time, place or arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal aid organization in the District and the police station of the area concerned telegraphically within 8 to 12 hours after the arrest."

18. A.I.R. 1979 S.C. 1360 at 1369

19. Ibid.

20. The Spirit of Liberty-Learned Hand, 9th Law Asia Conference, New Delhi, 7-12 Oct. 1985, 236

21. The Speech of Justice – Learned Hand, Ibid.

22. Justice Bhagwati in Role of Voluntary Agencies & Social Services Organisation : Reports on National Judicature.

23. M.S. Hoskot v. State of Maharashtra, A.I.R. 1978 S.C. 1563.

24. Iyer, Krishna V.R., J., Processual Justice to People (1973) 69.

25. AIR 1997 SC 610

26. 1998 (3) Maharashtra LJ 453.

The Division Bench of Bombay High Court in *Bharati Vidyapeeth, Pune v. State of Maharashtra*,²⁶ has observed as under:

In our view, this approach of the Apex Court would necessitate ensuring that there are adequate number of law colleges even in the mucosal areas where citizens do require legal assistance at every step in the day-to-day life in welfare State like ours. Right from the cradle to the grave legal assistance is required at every stage, and therefore, the State must ensure availability of a sufficient number of adequately trained lawyers. Indeed in criminal cases, in order to enable the State to afford free legal aid and guarantee speed trial, a vast number of persons trained in law are essential. Legal aid is required in many forms at various stages even before and after the legal proceedings are initiated in a court of law or other appropriate forum. Legal education has to meet the growing demands of a growing population. If there is lack of sufficient government colleges establishment of

private college has to be welcome, *albeit*, subject to the fulfillment of pre-requisite conditions and the availability of infrastructure.”

Conclusion:

It is now evident from above explanation that equal access to justice has very strong Constitutional backing from preamble, fundamental rights, directive principles and many other Articles of Constitution of India. Indian Judiciary and Parliament of India has also played proactive role in effective implementation of these constitutional provisions. Various landmark judgments of Hon’ble Supreme Court and High Court have interpreted constitutional provisions in such a way so as to bring access to justice within its ambit. Enactment of Legal Services Authorities Act, 1987 has actually contributed in bringing right to access to justice closer to reality.
