

Significance of Access to Justice and Legal Aid: An Analysis of Concepts and Contemporary Adjustments

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Abstract— Law is considered as a set of rules which regulates human conduct. When considering the final outcome of implementing such rules, 'justice' is overwhelmingly important. If there is an incapability of getting access to justice, the fact which states the laws enforced in that society have reached the above mentioned final outcome is hardly acceptable. In the long run, since justice being impalpable to the society, people attempt to circumvent the law and outrageously satisfy their needs. Therefore, getting access to justice is of vital importance.

Legal aid is simultaneously important to expand access to justice. Legal aid generally means providing people who are craving for legal assistance with free legal consultation and representation. This assistance paves the path to social justice as well. Legal aid was formerly limited for free representation in the courts by the lawyers and for criminal matters. Civil matters and free legal consultation were not taken into account within the sphere of 'legal aid', both nationally and internationally.

Due to multifarious social, political and economic changes took place in the world the concepts of 'legal aid' and 'access to justice' faced drastic changes during the past few decades. India and United States of America have immensely dedicated to add a practical value to these concepts.

Sri Lanka has also taken several measures to open the doors of justice, which are in progress but require some contemporary adjustments. The recommendations for the development of access to justice can be introduced considering some of the examples provided in the international sphere.

The above discussion is based on library research and internet research. Legal aid and access to justice are equally important to suffice social justice. Therefore, discovering new dimensions and

identifying both practical and conceptual significance of those concepts are indeed a timely response to the demand for social justice.

Keywords— access to justice, legal aid, social justice

I. INTRODUCTION

The Herculean task of seeking a profound meaning for 'justice' began centuries ago. Anyhow, now it is understood that the term 'justice' has no exclusive meaning and its meaning may vary according to the context within which it is occupied. In the eyes of law, 'justice' generally means the quality of being just; righteousness, equitableness, or moral rightness. Justice is also considered as a system of the administering of deserved punishment or reward.

It is impossible to overlook the perpetual importance of justice under any circumstances, especially in the sense of law it is supposed that the law is *per se* to be about justice. Following Latin maxims reflect a few aspects of justice, which would evident as to why justice has been given this much of importance over centuries. Firstly '*ustitia est constans et perpetua voluntas jus suum cuique tribuendi*' which means justice is constantly and perpetually means to render to each one his rights and secondly, '*nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*', which means we will sell to none, we will deny to none, we will delay to none, either equity or justice. Therefore it is obvious that, ability to get access to the so called justice becomes equally important to a democratic society in order to obtain true benefits of its democratic values.

When access to justice becomes a quite expensive burdensome task, defeasible people with lack of financial capacities and sufficient knowledge suffer without proper and adequate redress or without redress at all. As a long term result of justice being

impalpable to the society, people may attempt to circumvent the law and outrageously satisfy their needs. Hence legal aid provided for such marginalized groups and individuals who are craving for such assistance becomes necessarily important.

This paper aims to discuss the concept of 'access to justice' and 'legal aid', their historical development, and current importance along with a comparative analysis of the adaptation of those concepts in local and foreign jurisdictions. Final outcome of this analysis is to glimpse some contemporary adjustments to enhance access to justice at local level and to upgrade access to justice apropos to international standards.

II. THE HISTORICAL BACKGROUND AND THE CONCEPTUAL FOUNDATION OF 'ACCESS TO JUSTICE' AND 'LEGAL AID'

To make the law and its outcomes sensitive to the demands and needs of the people, 'access to justice' becomes one of the must-haves of a democratic society. It is considered as a universal concept to which all the countries should give effect irrespective of all the disparities.

The United Nations Development Program (UNDP) has defined 'access to justice' as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, in conformity with human rights standards" (UNDP-APRC-2012). As it further explains, 'access to justice' not only denotes people's ability to solve disputes and reach adequate remedies for grievances, using formal or non-formal justice systems, but it also encapsulates the qualitative dimension of justice process which should be implemented in line with the human rights standards.

Access to justice could also be defined as the state of the citizens being able to use justice institutions to obtain solutions to their common justice problems. For access to justice the justice institutions must function effectively to provide fair solutions to citizens' justice problems (ABA, 2012).

The idea of 'access to justice' conceived, when it became apparent to the world that some groups are often susceptible to the attack of getting denied and deprived of the ability to seek

remedies. Accessing the justice systems was arduous for them due to manifold social and financial causes. Owing to that 'access to justice' was brought into light to promote effective, responsive, accessible and fair justice system which is considered as one of the pillars of democratic governance.

'Legal aid' was introduced as a tool to assist the most vulnerable groups to sustain their legal needs which were not met under the prevalent justice system. At the very beginning, legal aid was limited to an extent up to providing the people who were incapable of paying the market price of legal services with free legal consultation and representation. Even that extent was limited to criminal offences and other matters with relevance to that. The reason for this intervention was quite acceptable. In a criminal case the victim is represented by the state or the state prosecutes the accused since a crime is considered as committed against the entire society.

These simultaneous concepts got inspired by manifold political, social and economic changes took place in the world and consequent to that the concept of 'Access to Justice' got merged with 'Legal Aid', intensifying the application of legal aid and attributing a broad and complex meaning to its ordinary meaning.

United States of America became the pioneer in this sphere. Centred in the U.S., in the decade of 1960's the merging of legal aid and access to justice began under the theme of "Legal aid for unmet legal needs of Poor". This started to spread in Australia, Canada and Europe as well.

In the wake of the industrial revolution and simultaneously grown socialist doctrine which brought up a new notion called 'Social Justice'. Social justice is the ability of people to realize their potential in the society where they live and the principles of social justice provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation (Rawls, 1971). This notion geared the access to justice and legal aid concepts along its idea of serving the whole society regardless the diversity.

Legal aid has different dimensions as follows;

- Providing sufficient legal aid when the need arose.
- Legal aid should not be limited to free legal representation and free legal consultation.
- Information on the law should be transmitted through legal aid.
- Legal aid should widen its horizons to an extent of imparting knowledge of law

According to those dimensions, legal aid has broader aspects to cover. In the other hand, it proves access to justice is much more than improving an individual's access to courts, guaranteeing legal representation and consultation for free.

Moreover the idea that, legal aid has to be provided not only in cases which criminal offences are adjudicated but also in other civil cases in which the state becomes a party, began to establish. Both civil and criminal litigations were integrated into the sphere of legal aid. This has led the way to widen the coverage of this concept.

At the 6th Conference of European Ministers of Justice held in the Hague (Netherlands) in 1970, a declaration on Legal aid was issued in which it was stated that, " the right held by a person to get access to justice is an essential requirement by which any democratic state is bound to fulfil". Here the idea that providing legal aid is mere performance of charity was diverted and paved the path to recognize it as a right, boosting the importance attached to the concept of access to justice and its operative tool legal aid in the international sphere.

These concepts got internationalized during the 20th century, parallel to the emergence of International law. Several international conventions contained provisions which enabled the states to enhance access to justice through providing legal aid. For instance, Article 14 of International Covenant on Civil and Political Rights (ICCPR) [G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966)], Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols No. 11 and No. 14), Basic Principles on the Role of Lawyers, 8th United Nations Congress on the Prevention of Crime and the

Treatment of Offenders, Havana, (U.N. Doc. A/CONF.144/28/Rev.1 at 118, 1990) have encapsulated such provisions, but all were equally criticised due to the attempt made on to piggyback the conservative approach of limiting legal aid for criminal matters.

At the International conference on human rights, meeting in Teheran on 13 May 1968 (U.N. Doc. A/CONF.34/41), proclaimed access to justice as a human right without limiting legal aid to criminal matters, which is historic in the sense of giving up the conventional approach of legal aid.

As Lord Diplock in has denoted in Bremer Vulcan Schiffbauand Maschinenfabrik vs. South India Shipping Corp (1981), "Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant." This opinion has widened the horizon of access to justice by directing the forthcoming judges, to give effect to legal aid as a universal right.

III. LEGAL AID LAW AND ACCESS TO JUSTICE IN SRI LANKA

The Constitution of the Democratic Socialist Republic of Sri Lanka(1978) as the supreme law of the country, provides that, 'all persons are equal before the law and are entitled to the equal protection of the law' [Article12(1)]. It also ensures the right of the citizens to be heard in person or by an attorney at law at a fair trial by a competent court [Article 13(3)]. Reading both provisions together, it is assumable that the supreme law of the country indirectly ascertains that poverty or any other social cause should not deprive any citizen of access to justice and also leads the path to assist the needy to be provided with free legal assistance and representation. However the conventional approach related to legal aid is evident in the constitutional provisions as well.

Legal aid was institutionalized in Sri Lanka through the Legal Aid Act (LAA No.27 of 1978) which empowers the Legal Aid Commission (LAC) regarding the operation of an effective legal aid

scheme by providing legal advice, funds to conduct legal and other proceedings for and on behalf of deserving persons, obtaining the services of attorneys-at-law to represent deserving persons, and by providing any other assistance that is necessary to provide legal aid to deserving persons (LAA, s.3).

The LAC is funded by an annual state grant via the Ministry of Justice and additionally, other funding agencies fund some special programs (LAA, s. 18-21).

LAC, whose vision is “equal access to justice for all”, is capable of undertaking civil litigation, anyhow, currently the operation of LAC is mostly limited to civil matters and hardly provides assistance in criminal defense, establishing centres in courts island-wide to provide legal aid for litigation and assist in other related matters, of giving legal advice to the public and to the participants at the awareness programmes via Legal Aid Pages in newspapers and television channels and through the LAC publications, appearing in Supreme Court in cases of rights violations via the Human Rights Bureau of the Commission, enhancing activities of the Developmental Legal Aid Units for migrant workers, the elderly, women and children, prisoners etc, conducting legal aid clinics, legal awareness and training programmes for the public, public officials including police officers, prisoners, lawyers, school-children, the disabled, migrant workers, and the elderly persons.

Legal aid law seems quite effective at the face of it but in practice there are manifold difficulties that people has to face when obtaining legal aid. Especially the enthusiasm of the lawyers in assisting such representations and taking part in the programmes undertaken by the LAC is at a low level due to the loss of financial advantages. So the lawyers’ enthusiastic involvement in expanding access to justice is equivalently important.

LAC is often undertaking maintenance cases to provided for women seeking maintenance for themselves and for their children as the constitution of Sri Lanka assures that actions taken in advancement of women and children don’t amount to inequality before law [Article 12(4)]. Legal counseling is also provided for persons irrespective of their income/financial status.

As a whole the implementation of legal aid services are at a praiseworthy level, but most of the populace is unaware of their rights, the ways in which they could enforce those rights and whether there is assistance available to make them accessible to justice. Legal aid programmes should indeed be closer to the deserving persons and sensitive to their needs.

IV. THE INTERNATIONAL STANDARDS RELATED TO ACCESS TO JUSTICE

Article 8 of the Universal Declaration of Human Rights (1948) provides that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”. As this is the principal instrument related to human rights, being ensured in that, promotes ‘access to justice’ to level of a universally accepted norm rather than a mere human right.

As one of the most binding international covenants, ICCPR (1966) has declared that, all its signatories are duty-bound to provide legal aid and it becomes a right of the citizens of those states to obtain such assistance which makes them accessible to justice. But this provision has attracted the critique of attempting to piggyback the conservative approach of legal aid.

Six key topics are taken into account as standards of access to justice. Hence, an access to justice assessment should address the legal framework, legal knowledge, advice/ consultation and representation, access to institutions of justice, fair procedure, and enforcement of solutions/remedies (ABA, 2012). If a justice system has satisfied the above mentioned elements such a system could be recognized standardized to a level at which only access to justice but also social justice is achievable.

V. IMPROVEMENTS IN ACCESS TO JUSTICE IN FOREIGN JURISDICTIONS AND CONTEMPORARY ADJUSTMENTS TO LOCAL JUSTICE SYSTEM

Unites States of America has taken several measures recently, to improve access to justice. The U.S. Department of Justice established the Access to Justice Initiative (ATJ) in March 2010 to address the access-to-justice crisis both in the criminal and civil justice system. This is praiseworthy as it provides legal assistance

irrespective of the nature of the matter (USDOJ). Moreover, the mission of this ATJI facilitates the justice system to function effectively and deliver outcomes that are fair and accessible to all, irrespective of the financial capacities.

ATJ is mainly guided by three principles. Firstly, promoting accessibility which means eliminating barriers that prevent people from understanding and exercising their rights. Secondly, ensuring fairness which means delivering fair and just outcomes for all parties, including those facing financial and other disadvantages. Thirdly, increasing efficiency, which means delivering fair and just outcomes effectively, without waste or duplication. (USDOJ).

These principles could be attributed to the local sphere not only to amend the legal aid law and promote access to justice, but also to upgrade the administration of the entire system of justice.

Though United States of America (U.S.A) is an opulent country which is in possession of both financial and human resources, has identified that millions of people in the United States cannot get legal help when they are in need. Approximately a fifty million Americans qualify for federally funded civil legal aid, though more than half of those who seek help aren't assisted due to lack of resources. (USDOJ)

This situation had to caution the Justice system of the United States. The resultant fomentation was evident in a statement made by the Attorney General Eric Holder as follows. "Today, the current deficiencies in our indigent defense system and the gaps in legal services for the poor and middle class constitute not just a problem, but a crisis. And this crisis appears as difficult and intransigent as any now before us" (USDOJ).

In order to implement the aforementioned principles, ATJ has adopted three main strategies to which sufficient resources are allocated. These strategies work to advance new statutory, policy, and practice changes that support development of quality indigent defence and civil legal aid delivery systems at the state and federal level; to promote less lawyer-intensive and court-intensive solutions to legal problems; and to expand research on innovative strategies to close the gap between the need for, and the availability of, quality legal assistance (USDOJ). Though the law which

institutionalize legal aid is powerful, it is in vain unless there is a strategic plan to expand the access to justice.

Justice system of a country should be accessible to its people. If it is inaccessible they are dissatisfied with the entire system as it doesn't provide them with adequate remedies for their grievances. This has both long term and short term consequences adverse to the democratic governance and the rule of law of that country. To avoid such adverse consequences, strategies as mentioned above are of vital importance. For instance, promoting less lawyer-intensive and court-intensive solutions to legal problems is important. Since, administration of justice could be done not only through a hierarchy of courts which is lawyer-intensive and court intensive, but also through extra judicial methods or Alternative Dispute Resolution Methods (ADR) which are less expensive and neither court-intensive nor court-intensive. Indeed, this could be marked as a contemporary adjustment which should be made to the justice system of Sri Lanka. Though in Sri Lanka, some emphasis is given to ADR, it is not adequate to widen the access to justice and meet the demands.

Second instance is about expanding the research on innovative strategies in order to narrow the gap between the demand for such legal assistance and the availability of quality assistance with response to such demands. Though legal aid is provided, if it lacks of quality the outcome won't be as expected. Such assistance doesn't satisfyingly respond the demands of justice.

India as the neighbouring country provides a sufficient number of examples to adjust a justice system towards significant expansion of access to justice. India, as a country living on its constitution has provided constitutional safeguards and retained to promote 'access to justice' through Article 39A and the preamble of the constitution of India.

For the effective application of the concept of 'access to justice' two significant components have to be given effect. First is the availability of a strong legal system with rights ensured and supported by substantive legislations. Second is the availability of an accessible judicial/remedial system.

When a set of strong substantive legislations which expressly provides access to justice through its provisions, the relevant adjudicative authorities are unable to deny or question the rights of the parties to seek justice since it is ensured by the law applicable. For instance, Representation of Peoples Act, for Maintenance under Section 125 of the Code of Criminal Procedure, Workmen's Compensation Act, Industrial Disputes Act, Employees State Insurance Act etc., which deal with special kinds of rights in India, have guaranteed the rights through express statutory provisions. Therefore, no authority dealing with such rights could deny the access to justice of whose rights are violated.

This could be noted as an adjustment required to be done to the constitution of Sri Lanka, which has been unable to provide direct constitutional protection to 'access to justice' in the country.

The Indian Supreme Court, which is renowned for dispensing its jurisdiction to maximize access to justice, guides other systems of justice towards another contemporary adjustment. Justice P.N. Bhagwati, who served on the Supreme Court of India as the Chief Justice, has delivered a series of landmark judgments supporting human rights simultaneously expanding access to justice for all Indians.(Columbia, 2009)

For instance, Chief Justice Bhagwati in Maneka Gandhi vs. Union of India (1978) has stated as follows:"This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programmes, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them."

Justice Bhagwati conducting a lecture at Columbia Law school said that, "The Supreme Court developed human rights jurisprudence, much beyond the expectation or even the dreams of the makers of the constitution," (Columbia, 2009). It is obvious that, the Supreme Court Sri Lanka does not enjoy as many powers as the Indian Supreme Court does as mentioned in the statement. But using Public Interest Litigation (PIL) as a tool, the Supreme Court of Sri Lanka is also capable of

expanding Access to Justice as it is being done by the Indian Supreme Court.

In order to do that judicial activism has to be heightened and the rules which govern *locus standi* must be liberalized up to an extent to expand the door step of justice. For instance, even letter sent to the Supreme Court of India, is considered as a petition on which the court would call for investigations. Without delaying and denying justice by adhering to rigid formalities this way of dispensing jurisdiction is clearing the path to access to justice. This is called 'epistolary jurisdiction'.

So the time has come to the Supreme court of Sri Lanka along with the other courts in the hierarchy to make similar changes to its jurisdiction in order to promote access to justice. As an eminent jurist of India, justice Krishna Iyer has stated, "Access to justice which is fundamental in implementation of every human right, makes judicial role pivotal to constitutional functionalism" (Iyer, Krishna. 2003) .

In India another significant fact is the establishment of special courts outside the original hierarchy of courts in India. For instance, in the field of protection of child rights, section 25 of the Commissions for Protection of Child Rights Act (2005) provides for the establishment of the Children's Court, with the purpose of speeding up the trials for speedy trials and provides effective protection to the child rights in the country. Another instance where a special court for the protection of Human Rights. Under the section 30 of the Protection of Human Rights Act (1993) provides for the establishment of the Human Rights Court, for each district, which not only speeds up the process but also expands the access to justice.

As mentioned above ADR methods/ non judicial methods provide out-of-court path to reach justice. India is one of the countries in the world which is well-known for these non judicial methods. As a country of vast ethnic, religious, linguistic diversity with a large population, the disputes arise within India is greater both in numbers and the amount of violence discharged by the disputants compared to the condition of Sri Lanka. So all the disputes are hard to be referred to the ordinary courts and obtain a remedy. It is totally against access to justice. Therefore, as an alternative a few non-judicial methods have been

introduced, particularly targeting these marginalized, disadvantaged but genuine groups of people.

For instance, as India has identified certain classes of people as Scheduled Castes and Scheduled Tribes and in order to investigate and monitor all matters relating to the safeguards provided to those people there is a National Commission for Scheduled Castes constituted under Article 338 and a National Commission for Scheduled Tribes constituted under Article 338A of the Indian Constitution. Without totally depriving the marginalized groups of their rights, providing them access to justice and giving effect to their rights through informal, non judicial methods is vital in strengthening 'access to justice'.

To reduce the workload of the formal courts, to minimize the delays and to increase the user satisfaction of the justice system in Sri Lanka, above non-judicial methods could be introduced widely, which would eventually provide access to justice to the marginalized groups of the society.

In order to widen the horizon of access to justice, there are other rights which are to be ensured along with the right to access to justice. For instance, Right to Information, Right to be heard etc.

VI. CONCLUSION

The concept of 'access to justices' is considered to be a universal right. To promote access to justice state parties together with the legal community are duty-bound to provide the marginalized people who suffering due to lack of access to justice, with legal aid irrespective of the matter to which legal aid was sought. This should be ensured in the constitutions of all the democratic states from which all the other laws of that states derive validity. Those laws should also be in line with the recommended standards of access to justice. Both formal and informal methods of performing justice to be should be introduced with sufficient balance as it gears the promotion of 'access to justice'. Despite of all the disparities when accessing to justice all should be equally provided with opportunities. If an inequality happens due to financial incapacities or unawareness, such groups should be paid special attention as they are quite often deprived of proper remedies owing to their social and

economic disabilities. It is obvious that, Legal aid and access to justice are equally important to suffice social justice. Therefore, discovering new dimensions and identifying both practical and conceptual significance of those concepts is indeed a timely response to the demand for social justice as well.

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