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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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ROLE OF JUDICIARY IN PROTECTING THE INTERESTS OF MARGINALIZED COMMUNITIES

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Abstract:

Martin Luther King said – *Injustice anywhere is a threat to justice everywhere* and it can be explicitly seen, when the marginalised section of society because of their poverty, illiteracy, ignorance, social and economic backwardness are denied their most basic fundamental right of having access to justice. The concept of equality lies in the core of justice and to achieve justice, equality has to be ensured in the society. But as the society is divided on educational, social and economic grounds it becomes difficult to render justice to the vulnerable section of society. Thus, it becomes a bounden duty on the state to provide them equal opportunities and to give them legal assistance so that their voices can be heard and proper adjudication can take place. Although a number of acts and statutes have been enacted by the state and even our Grundnorm-“The Constitution” contains many provisions for promoting the interests of the marginalised section but it is the judiciary who actually brought these rights into enforcement and did a commendable job in making access to justice a reality. The credit goes to the judicial activism which took step to make the downtrodden and marginalised section more and more inclusive in the mainstream so that they can have an easy access to the justice. This paper deals with the judgments rendered by the Supreme Court of India which laid the basis for the promotion and welfare of the interests of marginalised sections of society. It also deals with the flaws which are present in the legal aid system and throws light on the weakness present in the judiciary and the current legal system which is preventing the effective inclusion of marginalised section into the society and making lack of access to justice widespread.

Key Words: Fundamental right, Judiciary, Legal Aid, Lok Adalat, Human Right

I. Introduction

“To no one will we sell, to no one will we deny, or delay right or justice” says clause 40 of the great charter, the Magna Carta which establishes the rule of equality for all and the basis of a just society. Justice is a very important aspect of life and that is why, the preamble of our constitution provides for “We, the people of India having solemnly resolved to constitute India into a Sovereign, Socialist, Secular and Democratic Republic and to ensure to all its citizens Justice Social, Economic and Political.” Justice in itself encompasses the concept of equality as justice means to give equal and fair treatment to all and this equality can be ensured only when both the parties are provided equal opportunities of representation and when they are at equal platform. The first step towards attaining justice is having “access to it”. The word “access to justice” in its narrow sense means “approaching the court” but in broader sense it means to know about one’s right and to also know the means and procedures through which one can ask for one’s claims and rights.

II. INDIAN SCENARIO

Now, if we look at the setup of Indian society, it is divided on many economic and social differences and the large proportion of population comprises of illiterate people who are completely oblivious of the cumbersome procedures of law and there are many who are stuck in poverty which make them incapable to bear the exorbitant costs of judicial set-up. For the people belonging to marginalised sections, law and judiciary is like a stranger who is there only to exploit them and rip them off even from the things which they possess. As rightly observed by Justice Krishna Iyer “*The poor cannot reach the court because of heavy court fees and other expenditure, the mystique of legal procedure. The hierarchy of courts, with appeals, puts the justice beyond the reach of the poor.*” He has rightly observed that depressed sections of society have this strange feeling towards laws and justice because of the shortcomings of the existing judicial set-up which includes the factors like it is very burdensome, costly, time consuming, comprises of confusing procedures and full of legal complexities which are unfathomable by the people belonging to such sections of society and thus, all this leads to the biggest injustice happening against them which is the denial of the right to access to justice. As political philosopher; Charles de Montesquieu said that; “*In the state of nature...all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law.*” Thus, this denial of justice can only be eliminated when as the custodian of the fundamental rights of people, the Supreme Court of India, steps in the picture to rescue its citizens and to provide them access to

their most basic human rights. Access to justice can be ensured to a great extent by doing these two things: if the cost of litigation is taken care of and awareness is created among the masses. It is to serve these purposes that the scheme of legal aid was made so as to provide assistance and aid to the marginalised and vulnerable sections of society. The earliest movement of legal aid dates back to France in 1851¹ when enactment was introduced to provide assistance to poor and vulnerable sections of society. It was followed by Britain where in 1949 the Legal Aid and Advice Act was passed².

Access to justice is also an International obligation on India as India has ratified the International Covenant on Civil and Political Rights (ICCPR) 1966³ whose Article 14(3) provides that everyone should be entitled to the following guarantees in full equality “ to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed if he does not have legal assistance of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”. Moreover, Article 1 of Universal Declaration of Human Rights provides that all human beings are born free and equal in dignity and rights and its Article 3 stipulate that everyone has the right to life, liberty and security of person. Thus, providing opportunities so as to make people equal is one of the fundamental human rights of each and every person.

III. ROLE OF LAW COMMISSION

In India so as to resolve the issue of access to justice, legal aid was seen as an answer by the first law commission of India in its 14th report on “Reform of Judicial Administration” (1958) in which it was suggested that some provision should be made for assisting the ignorant and poor man for the payment of lawyer’s fees and court fees and unless this is done he is denied his right of equality. Again in the 41st report (1969) commission provided that accused should be represented by an advocate at government’s expense in all cases tried by a court of session. In its 48th report also commission suggested for providing free legal aid to the accused person who were not represented by an advocate for want of money.

¹ <http://www.legalserviceindia.com/articles/laid.htm>

² <http://www.legalserviceindia.com/articles/laid.htm>

³ https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&ved=2ahUKEwi2dXdsInlAhUKRo8KHTQeBBUQFjAPegQICBAB&url=http%3A%2F%2Fshodhganga.inflibnet.ac.in%2Fjspui%2Fbitstream%2F10603%2F34296%2F11%2F11_chapter%2520iv.pdf&usg=AOvVaw3m6VCeDtP7w7rRPE_rxFuz

As a result of these continuous suggestions made by law commission regarding access to justice parliament inserted the article 39-A as a Directive Principle of State Policy by Constitution Amendment Act, 1976 which stipulates equal justice and free legal aid. It directs the state to promote a system of justice which is based on equal opportunity and where no one should be denied justice because of economic disability. The only fact that it has been inserted in Directive Principle in no manner diminishes its importance as it imposes a duty upon the state to remove all the difficulties which are there in the road of access to justice.

It is not only the Constitution which provides for legal aid but other statutes like CrPC and CPC also have provisions regarding this. Section 304(1) of the old code, 1898, as well as section 303 of the new code, 1973, provides that any person who is accused of an offence before a criminal court, or against whom proceedings are instituted under this code, may of right be defended by a pleader of his choice. In Civil Procedure Code, 1908, order 33 deals with the suit of indigent persons and order 44 provides for the appeals without paying any court fee.

IV. ROLE OF SUPREME COURT

In spite of such recommendations by law commission and insertion of article in Directive Principle access to justice was still a far dream and legal aid was not able to fulfill the purpose for which it was made. It is here, that Supreme Court of India took upon itself the task of making legal aid a reality through its judgments and also by providing that it is a constitutional imperative not only under article 39-A but also under article 14 and 21 and thus conferring on Legal aid a status of fundamental right .Article 14 of the constitution provides that the state shall not deny to any person equality before law and equal protection of law which means that every person is equal in the eyes of law irrespective of their social and economic position. The concept of Audi Alteram is implicit in article 14 which means that other party should be heard and the courts in true sense can hear and decide a case only when equal opportunities is provided to both the parties to represent themselves so that proper adjudication can take place. Article 21 states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. In *Menaka Gandhi v. Union of India*⁴ it was held that “under article 21 the procedure under which a person may be deprived of his life should be fair, just and reasonable.” Now the procedure

⁴ AIR 1978 SC 597

which do not provide legal assistance to a person who is not able to afford a good lawyer because of his poverty and who has to face the whole legal trial without any assistance cannot, for sure, be a fair procedure and thus by denying legal aid there is an infringement of article 21 of the constitution as well. Moreover article 22(1) of the constitution provides that “No person, who is arrested, shall be detained in custody, without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied of the right to consult and to be defended by a legal practitioner of his choice.” Article 14 and 22(1) makes it obligatory on the state to ensure equality of all persons and everyone should be provided equal opportunities to have an access to justice.

As Justice Hugo Black said that “*There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has.*” In India where majority of people are living below poverty line or are illiterate it is very important to provide them access to justice as certainly justice cannot be based on one’s economic position. Providing free legal aid is not a charity but a constitutional mandate and right of public.

V. POORS ARE PRICED OUT

The Supreme Court of India in *Hussainara Khatoon Vs State of Bihar*⁵ observed that “Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system and they have always come across “Law for the poor” rather than “Law of the poor.” The law is regarded by them as something mysterious and forbidding, always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefit on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can only be done by dynamic and activism scheme of legal services. Legal assistance to poor and indigent accused person is sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundation of democracy and rule of law.” By this judgment Supreme Court strongly recommended the government of India and all the state government to implement and introduce legal service programme diligently in the country.

⁵ AIR 1979 SC 1369.

VI. ILLITERACY AND UNAWARENESS

In another case of *Sukh Das v UT of Arunachal Pradesh*⁶ Supreme Court observed that most of the people in rural India are illiterate and are not aware about their rights and claims. It is this absence of legal awareness which causes the exploitation of marginalised sections of society and makes them not the beneficiary but a sufferer at the hands of law. Their ignorance prevents them from knowing their legal troubles and approaching a lawyer for advice and their poverty magnifies their hurdles in the road to access to justice. These people cannot help themselves and law ceases to be their guardian as they are unaware whether they are entitled to the protection of law or whether they have the right to avail legal service programme. Thus, in this case it was held that Free legal aid at the state's cost is a fundamental right of a person accused of an offence and this is implicit under article 21 of the constitution as there is a requirement of fair and reasonable procedure

VII. LEGAL AID SHOULD BE PROVIDED AT FIRST STEP

In *Khatri v state of Bihar*⁷ Supreme Court went a little further and held that the constitutional obligation of the state to provide free legal services to an indigent accused person extends not only at the stage of trial but also at the stage when he is first produced before the magistrate. This has been done because of lack of legal awareness among the poor and ignorant persons and if this is not provided than it would be mockery of the legal aid system as they cannot ask for a right about which they themselves are oblivious. This is the reason why the magistrate or the session judge before whom an accused appears is under an obligation to inform him that if he is unable to hire lawyer then he can take resort to free legal aid services at the cost of the state.

Supreme Court in *M.H Hoskat v State of Maharashtra*^{8,9} held that if a prisoner is unable to exercise its constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, then it is the obligation of the court under art 142 read with article 21 and 39- A of the constitution to assign counsel to the prisoner provided he does not object to the lawyer assigned by the court.

⁶ AIR 1986 SC 991

⁷ AIR 1981 SC 928

⁸ AIR 1978 1548

⁹ AIR 1979 SCR (1) 192

In *Mohd Ajmal Amir Kasab v State of Maharashtra*¹⁰ Supreme Court directed that it is the duty of all the magistrates before whom a person accused of any cognizable offence is being produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and if he does not have enough means to hire a lawyer then he would be provided legal aid at the expense of the state and this right flows from art 21 and art 22(1) of the constitution. This duty has to be strictly enforced by the magistrate and in case of any failure to discharge this duty it will vitiate the whole trial and the magistrate can also be subjected to departmental proceedings.

Apart from these constitutional mandates on free legal aid the government has also constituted a committee in 1976 under the chairmanship of Justice P.N Bhagwati for examining the question of legal aid which was a revision, modification, updating of the previous report of Justice Krishna Iyer and it recommended many points like legal services clinics must be created in universities and law schools, Legal aid must be specifically provided to women, weaker sections and working class and also there should be blanket reduction in court fee and access to justice must be easy and panchayati system of justice must be strengthened.

VIII. PUBLIC INTEREST LITIGATION

Public Interest Litigation, which is borrowed from American jurisprudence, has been devised as a tool to secure benefit to all such people who are not able to knock the doors of the courts personally because of reasons like ignorance, poverty, helplessness, destitution or any other kind of social or economic disadvantage. Public Interest litigation is such kind of litigation in which the litigation is introduced not by the aggrieved party but by a third person or social organization regardless of any personal injury. Such kind of litigations has helped the vulnerable section of society and it has also helped in breaking every procedural law in order to provide justice to the people. The traditional rule in regard to locus standi allows judicial redress only to such person who has suffered injury as a result of any violation of right but now this rule has been made flexible as the gates of the Supreme Court and High Court are thrown open for the marginalised and vulnerable sections of society through Public Interest Litigation. The first Public Interest Litigation was filed in 1976 and credit goes to Justice Krishna Iyer for sowing the seeds of this great initiative. Later on, it was more developed and diversified by Justice Bhagwati in the

¹⁰ 2012 9 SCC 1, Supreme Court

judgment of *S.P Gupta v President of India*¹¹ in which it was held that “where there is a legal wrong to a person or to a determinate class of persons by reason of any violation of constitutional or legal provision and such person or determinate class of person is by reason of poverty, helplessness is unable to reach the court for relief, any member of the public can maintain an application for an order or writ in the High Court and Supreme Court of India.” Supreme Court has taken many steps to broaden the sphere of Public Interest Litigation so that justice can be given in a very easy manner to the oppressed and depressed sections of society and in *Bandhua Mukti Morcha v UOI*¹²; it was held that whenever poor or members of marginalized sections of society approach the court for the enforcement of their fundamental right then the courts can depart from the adversarial procedure and can evolve new laws or procedure so as to enable the poor people to bring all the relevant material before the court so that fundamental right can be more meaningful for the large masses of the people.

IX. EASE OF PROCEDURE

The liberal interpretation made by Supreme Court of Article 21 in *Maneka Gandhi* case and by making legal aid a fundamental right and by pronouncing so many judgments Supreme Court has ensured, that legal aid gains a momentum in the country and every person should be provided opportunities to stand on equal grounds.

Realizing the importance of legal aid and such strong judgments regarding the same by the Supreme Court, the parliament has finally enacted the legal services and authorities act, 1987 to provide for the creation of statutory legal services authorities at the national, state district and taluk levels to provide for free legal aid mechanism in a systematic and uniform manner. But this was enforced after 8 years in 1995 as National Legal Services Authority Act (NALSA) and Hon'ble Justice R.N.Mishra, the then Chief Justice of India has played a key role in the enforcement of this act which replaced Centre for Implementing Legal Aid Scheme, 1980 (CILAS).

X. LOK ADALAT

Lok Adalat which is one of the alternate dispute resolution mechanism, have been given a statutory recognition by the National Legal Services Authority Act. It is a Para-judicial institution

¹¹AIR 1982 SC 149

¹² AIR 1984 SC 802

for speedy trial and it act as a supplementary to the existing courts. Apex court in S.N Patil v Mahesh Yadav¹³ observed that “it is the bounden duty of the courts in India to ensure that social justice should reach to the poorest of the poor in all its manifestations through an appropriate apparatus of justice delivery.” Lok Adalat incorporates this idea of social justice and reach to the doorsteps of all the persons in order to provide them their basic right of justice.

XI. IMPEDIMENTS

Judiciary has taken a lot of steps to make access to justice through legal aid effective but still there are a lot of defects which are hindering its efficiency. The first one is that free legal aid has become a breeding ground for corruption. Although it is a free practice but reality is that around 16.30% of beneficiaries claimed that their legal aid counsel often demands money either before or after every court hearing. One of the reasons that can be attributed to this corruption is the meager remuneration paid to the lawyers by legal aid committee because of which they resort to such practices.

Another impediment in the road of free legal aid is the quality of legal assistance and lawyers in the legal aid committee. According to the research conducted by Prof. Jeet Singh Mann of National Law University, Delhi pointed out in his research that majority of the judicial officers (52%) rated the overall skill set of lawyers engaged in legal aid as moderately low quality and inadequate. Because of low quality of legal aid services the poor people are in reality not properly represented. Thus, legal aid is losing its credibility.

XII. SUGGESTIONS AND CONCLUSION

Although the Supreme Court has played its part well and has pronounced many judgments for empowering the marginalised section and to provide them their basic natural rights but still a lot can be done so as to improve the legal aid system like more and more drives should be conducted so as to make people aware about their rights and claims, the government should increase the remuneration provided in legal aid services which will act as an incentive for the advocates to participate in this, it should also come up with qualification criteria so that the experienced and skilled advocates can work in legal aid panels which will ensure true representation of the poor and vulnerable people, training should be given to the young advocates for making them well

¹³ AIR 1987 SC 294

versed with all the realities and pragmatic working of the court. The Legal aid counsels should not be hired on ad-hoc basis as if stability and permanence is promised to counsels then there are higher chances that they will work more effectively and with a higher sense of responsibility. State Government should develop a system to maintain a regular check on the legal services authority to ensure its smooth functioning.

Thus, Judiciary has really played a very important role in uplifting the marginalised section and in protecting and promoting their interest and it can become more effective when all the pillars of democracy and the authorities and functionaries at each and every level work in unison with only one objective in mind and that is to ensure the full incorporation of the marginalised section in the mainstream so that a society based on equality, justice, unity and integrity can be established.

