JUSTICE AND ACCESS TO JUSTICE

Mr. Girish A. Deshpande*

Introduction

Both, justice and access to justice in India are regarded as important and sacred rights of an individual. India is rightly acclaimed for having achieved a sound constitutional order, and a vibrant and activist judicial wing. Yet, there remain some unresolved issues that need to be reconsidered, and raises questions time and again on the validity and effectiveness of right of access to justice.

This paper aims to focus on the idea of justice enshrined in the Constitution of India by examining background of the right of access to justice which seems to have its roots in common law. The paper also intends to point out chief hurdles and obstacles in its way to achieve justice. As a net resultant it emphasizes that mere right of access to justice would not help the poor litigants but there must be a new right called right to incessant, unimpeded and inexorable access to justice that needs to be emerged on the crimson canvas of the justice delivery system.

The Constitutional Saga and Holy Idea of Justice

Justice is a divine, blessed and wide notion the attainment of which is the ultimate goal of every legal system. The conscience of the Constitution of India, 1950 speaks through its preamble and the vital insights of the directive principles of a welfare state set out under Article 38 as well as Article 39A. In this context, it would be appropriate to explore and distil the possibilities of these constitutional provisions in order to generate an insightful understanding of the issue.

Preamble of the Constitution of India is endowed with a place of pride and is a solemn determination by the people of India to constitute a sovereign, secular, socialist republic, as well to secure certain cherished human rights to "all its citizens". It principally demands justice-social, economic and political. Thus, the term "justice" in the preamble has three aspects in the sense that it must be political, economic as well as social. Justice is the harmonious

* Civil Judge, Junior Division and Judicial Magistrate First Class, Sangli.

blending of selfish nature of man and the good of the society.[1] Every word in this pious pledge of preamble has a profound commitment towards the people of India, and reflects the great social, economic and political ideologies, and other manifestations of justice.[2]

Apart from these triple facets of justice, Article 38 firmly sets out the following goal:

> "The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social economic and political, shall inform all the institutions of the national life."[3]

The words of Article 38 reincarnate the pledge taken by people of India and reasserts whatever has already been said in the preamble.

---

[1] J.N. PANDEY, THE CONSTITUTIONAL LAW OF INDIA 31 (46th ed., Central Law Agency 2009).

[2] The constitutional ideologies of justice enshrined in the preamble can be well determined by the following observation made by Dr. Ambedkar, addressing the concluding stages of the Constituent Assembly:

> We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in trinity……We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation of some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January, 1950, we are going to enter into a life of contradictions. In politics we will be recognizing the principle of "one man one vote and one vote one value". In our social and economic life we shall, by reason of our social and economic structure continues to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must resolve this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.

Krishna Iyer, J., *The Judicial System-Has it a Functional Future in Our Constitutional Order,* (1979) 3 S.C.C. (Jour.) 1. *Also See* KEER, DR. AMBEDKAR: LIFE AND MISSION 143 (2nd ed., Popular Prakashan, Bombay).

[3] The Constitutional (44th Amendment) Act, 1978. This amendment had inserted a new directive principle in art. 38 of the Constitution which provides that the state shall, in particular, strive to minimize inequalities in income and endeavor to eliminate inequalities in status, facilities and opportunities, not only against individuals but also amongst groups of people residing in different area or engaged in different vocations. The new clause aims at equality in all spheres of life.

Recently a three judges bench of the apex court has explained the concept of social justice in Article 38 as follows:

> "The concept of social justice consists of diverse principles essential for the orderly growth and development of personality of every citizen. Social justice is then an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, *dalit*, tribals and deprived sections of the society, and so elevate them to the level of equality to live a life with dignity of person. Social justice is not simple or single idea of a society but is an essential part of complex social change to relieve the poor etc., from handicaps, penury, to ward of distress and to make their life livable, for the greater good of the society at large. The aim of social justice is to attain substantial degree of social, economical and political equality which is the legitimate expectation and constitutional goal."[4]

Thus, social revolution seems to be the eventual aspiration of the founding philosophers of the Constitution. Judicial justice is the means whereas social justice is the end says Justice Krishna Iyer.[5]

In much similar appearance, one also needs to pore over yet another complementary, in a sense, but important article of the Constitution of India which is the outcome of newly wedded policy of the government to give legal aid to economically backward classes of people. Article 39A vibrantly declares:

> "The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."[6]

Energetically, the terms like "legal aid" and "speedy trial" have now been considered as sacred rights protected under the sunshade of fundamental rights under Article 21 of the Constitution available to

---

[4] Air India Statutory Corporation v. United Labour Union, A.I.R. 1997 S.C. 645. The three Judges Bench in this case further elaborated the concept of "social justice" and held that in a developing society like ours, where there is vast gap of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc., to reach the ladder of social justice.

[5] *See supra* note 2.

[6] *Added by* the Constitutional (42nd Amendment) Act, 1976.

all prisoners and also enforceable in the temple of justice.[7] The legal aid programme which is meant to bring social justice to the people cannot remain in its traditional limits but its pace must be accelerated by adopting more ignited approach towards it keeping in mind the socio-economic conditions prevailing in the country. The apex court which is the supreme apostle of justice in the country has held that in order to achieve the objectives in Article 39A, the state must encourage and support the participation of voluntary organizations or social action groups in operating the legal aid programme.[8] Again in a landmark judgment in *State of Maharashtra v. Manubhai Bagaji Vashi* [9], the Supreme Court has held that Article 21 read with Article 39A casts a duty on the state to afford grants-in-aid to recognized private law colleges, similar to other faculties, which qualify for receipt of the grant. The state shall ensure the effective functioning of the legal system to promote justice and to prop up access to justice. The central words of Article 39A are to provide free legal aid "by suitable legislation or by schemes" or in any other way.

Legal aid has multiple facets and is required in many forms and at various stages. It is said that the need for a continuing and well organized legal education is essential in order to meet the various challenges and for this purpose a vast number of persons trained in different branches of law are needed every year. However, this can be made possible through the participation of the adequate number of law colleges/schools where required infrastructure including expertise law teachers and staff are well-established. Now the tragedy with these law colleges brings out yet another sad story. The entire legal education system is poisoned with the elements of commercialization. In most of these law colleges legal aid programmes are scheduled annually without any provision for re-visit of the legal aid delegation, if required. Further, there is no scope for any follow up programme. Poor villagers in these free legal aid camps come to these law college delegations with fresh rays of hope and tell their own stories of injustice, their hard and struggling times in the temple of justice; but due to absence of the follow up system their hopes are scattered and also remaining courage is destroyed. Who cares! Unless and until, there comes some serious commitments from within, the concept of "free legal aid" will only be a farce and therefore, managerial and intellectual renovation in these legal aid programmes

---

7 The state is under a duty to provide a lawyer to the poor person and it must pay to the lawyer his fee as fixed by the court. *See* H.M. Haskot v. State of Maharashtra, A.I.R. 1978 S.C. 1548; *also see* Hussainara Khatoon v. Home Secretary, State of Bihar, A.I.R. 1979 S.C. 1322.

8 Centre of Legal Research v. State of Kerala, A.I.R. 1986 S.C. 1322.

9 (1995) 5 S.C.C. 730.

and camps is the need of hour. "Renovate or innovate" is the burning slogan in this context.

Access to Justice: A Call for Reconsideration

The inquisitive theme of access to justice is of great contemporary significance. The term "access to justice" brings to our mind the notion that everyone who seeks justice must be blessed with his right or means to approach the court of justice.

As per *Webster's New World Dictionary*, the term "access" means the act of coming forward or near to approach.[10] Thus, access to justice in strict sense deals with an individual's right to approach the court. However, it does include an array of paired rights intended to protect an individual in his journey toward the destination of justice. They also refer to different kind of rights, various kinds of courts, the quality of justice, independence of judges, legal help and social action litigation etc.

Justice is a generic notion, and includes both substantive and procedural justice. The wheels of justice starts rolling right from the moment we set the law in motion.[11] Mere filing a First Information Report (FIR) gives mild vibrations and ignites an individual's right of access to justice. After filing an FIR, the procedural law requires the parties to approach the court of law for pursuing a normal trial in consequences of the series of acts that violated an individual's various rights. At the trial, the court of law manned by the professional judges conducts the proceedings and delivers a final verdict. After the court delivers the judgments there comes the enforcement part whereby efforts are made to give effect to the judgment of the court. During each and every stage of the abovementioned procedure an individual's right of access to justice remains in great hazard. While climbing each step of justice the litigants has to suffer many time which results into his never before frustration.

Background of the Right of Access to Justice

It is widely accepted and believed that the earlier notions of the common man's right of "access to justice" and "rule of law" took roots when the king in England, during the reign of Henry II, agreed for

---

10 AGNES MICHAEL, WEBSTER'S NEW WORLD-COLLEGE DICTIONARY 8 (4th ed., Wiley-Dreamtech India Pvt. Ltd., New Millennium, reprint 2004). It also further defines access as "a way or means of approaching, getting, using etc."

11 In the civil and criminal law jurisprudence in India, it is said that we set the law in motion when we lodge a FIR in the nearest police station regarding the alleged crime.

setting up a system of writs by virtue of which all litigants could avail themselves of the king's justice. However, the abuses of "king's justice" by King John resulted into the rebellion that led to the adoption of *Magna Carta.*[12]

In more than 500 years following the adoption of *Magna Carta*[13], courts resolved disputes, invented new principles by virtue of precedents and laid down different principles which came to be known as common law. The adoption of various constitutions, legislations, research works done by renowned intellectuals and commentaries by experts resulted into emergence of new doctrine called *ubi jus ibi remedium* that says every right when breached must be provided with a right to remedy.

The traces of this right in the common law traditions are evident from a number of verdicts from great judges like Lord Diplock[14] and Steyn, LJ.

Steyn, LJ., held in one of the celebrated case as follows:

> "It is a principle of our law that every citizen has a right of unimpeded access to court. In *Raymond v. Honey*, 1983 AC 1 (1982 (1) All ER 756) Lord Wilberforce described it as a "basic right". Even in our unwritten Constitution, it ranks as a constitutional right."[15]

---

[12] M. Jagannadha Rao, J., *Access to Justice*, http://www.lawcom.govt.nz/sites/default/files/speeches/2004/04/India%20Law%20Commission%20paper.pdf.

[13] *Id. Magna Carta* became the initial source of British constitutionalism. It is also said that what it represented then and now is a social commitment to the rule of law and a promise that even a king is not above the law. It would be worthwhile to note some of the words of the great document which says:

> "No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right to justice."

Also see the inscription in *Magna Carta* ¶ 40.

[14] Bremen Vulkan Schiffban and Maschinenfabrik v. South India Shipping Corp., 1981 AC 909–1981 (1) All ER 289. Lord Diplock effervescently observes:

> "The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. 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 all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights."

[15] R. v. Secretary of State for the Home Dept., ex p Leech (1993) 4 All ER 539 (CA).

Similarly, references can also be taken from the international human rights law in this perspective. The Universal Declaration of Human Rights (UDHR) is one of the important document which sets out the right of access to justice by virtue of some of its puissant articles.[16] It vibrantly stresses down that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law. Article 10 further says that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him.

Besides this, there are also other similar provisions in International Covenant on Civil and Political Rights (ICCPR), the European Convention and other regional conventions.

Right of Access to Justice: Indian Panorama

It is said that in India citizens always had access to the king for seeking justice since time immemorial. In later period, the Indian courts inherited the common law of England, and the right of access to justice became part of our formal law. Thus, this particular right existed even prior to the emergence of Constitution.[17] After the adoption of the Constitution, due recognition was given to the right of access to justice to courts by resort to the High Courts and the Supreme Court.[18] In the Constitution of India there are express articles that secure the right of access to justice. Article 39A was introduced by the Constitution (42nd Amendment) Act, 1976 and is the essential component of the right of access to justice. It also includes within its ambit the right to legal aid and to engage a counsel.

The jurisprudence of Article 39A has further been developed through the renowned judgments of the apex court manned by the courageous judges. In M.H. Haskot's case Justice Krishna Iyer declared:

> "If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and

---

16 UDHR arts. 8-9.

17 For the cases decided by Indian court in pre-independence era, *see re* Llewellyn Evans, A.I.R. 1926 BOM. 551; P.K. Tare v. Emperor, A.I.R. 1943 Nagpur 26.

18 *See* INDIA CONST. arts. 32, 226.

39A of the Constitution, power to assign counsel for such imprisoned individual "for doing complete justice"."[19]

Now right to legal aid in India is fervently protected and provided by the Legal Services Authorities Act, 1987. There is a wide network of legal aid committees at *taluka*, districts and state levels. Furthermore, the Supreme Court and High Courts have their own legal services committees.

Hurdles in Path of Access to Justice

There are many obstacles in way to achieve justice for the litigants and especially for the disadvantaged and poor litigants. Due to their ignorance and illiteracy many poor litigants are unaware of their rights, and are often exploited by the expensive and time-consuming procedures in the temples of justice.

Court fees is one of the neglected area wherein there remains a need to re-consider the provisions that provide for the court fees. The poor litigants sell their houses, properties, even their jewelries to seek justice in the court of law. Some litigants even avoid medicines necessary for their health to continue the litigation proceedings. The situation becomes worst when it comes to women litigants. The Law Commission Reports time and again have strongly opposed the current system of court fees and rejected the contention that the heavy court fees would drive away vexatious litigants.[20]

Unfortunately no steps were taken in this regard. Generally, the state government has legislative competence on the issue of court fees and the few state governments have taken efforts to relax court fees for women litigants.[21]

Abnormal delay in justice is yet another paradox which needs to be considered. There seems to be a huge backlog of cases pending in the court. It seems that as on March 31, 2009 there are 50,163 cases pending in the Supreme Court, 38.7 *lakh* cases pending in 21 High Courts and 2.64 *crore* cases pending in 13,556 trial courts in the country.[22] One must remember the fact that justice delayed is justice

---

[19] *See supra* note 7.

[20] *See supra* note 12. It is said that Lord Macaulay, who headed the Law of Commission of India 150 years ago declared that the preamble to the Bengal Regulation of 1975 was "absurd" when it stated that High Court fees was intended to drive away vexatious litigants.

[21] The State of Maharashtra is one such state government which has relaxed the court fees for women litigants.

[22] K.C. JAISINGHANI, LOOP HOLES IN LAW (Hind Law House, Pune 2009).

denied. There remains a need to solve the problem of pendency of cases.

The shortage of courts in India is also a matter of concern. With over 2.5 *crore* cases pending, the then Chief Justice of India, K.G. Balakrishnan demanded 10,000 more courts and as many judicial officers, to erase the ever mounting backlog of litigations. There are 15,000 sub-ordinate courts, but only 13,800 have working strength. The worry is large number of increasing number of cases and less number of courts in India.[23]

Conclusion

In this context it is expeditious to confer a far liberal approach towards the right of access to justice. We must realize that the mere right of access to justice would not help the poor, ignorant and illiterate litigants, but a new right called incessant, unimpeded and undisturbed right of access to justice must be invented. During all pre-litigation, during litigation and post-litigation stages this right must be recognized. The wheels of justice must be allowed to roll smoothly in order to be more effective.

More efforts are desired to be made for preventing undesired and unnecessary delay in justice. There should be more courts of law for effective and speedy functioning of the judiciary. Something must be invented and applied immediately in order to restore the faith and confidence of people over the judiciary. The darkness of injustice must be abandon by lighting up the bright lamp of truth and justice.

Taking solace from the ringing words of Justice Brennan of the U.S. Supreme Court who said:

> "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only rich can enjoy the law, as a doubtful luxury, and the poor who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness."[24]

---

[23] DNA, Jan. 19, 2009.
[24] *See supra* note 12, at 27.

The dark clouds of injustice must be cleared as rapidly as possible and fresh rays of hope must come for the help of justice. I am reminded of an Urdu phrase of the classic Urdu poet Mirza Ghalib who put this situation in his following lovely diction: *Khak ho jayenge hum tumko khabar hone tak* (we will be destroyed by the time you will realize our pain).