ACCESS TO JUSTICE

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> "Access to justice" as a human right concept of ancient vintage was not unknown in Ancient India. The idea of Dharma which was all pervasive included within its sweet the concept of access to justice.[1] In ancient India, 'state was not sacerdotal, nor even paternalistic'. "The concept of "Dharma" was multi-dimensional and it was something which sustained humanity in all its facets and coherence. So within the broad sweep of Dharma comes both human rights and law."[2]

In every society there is a struggle to ensure access to justice. But, the nature of the struggle and the rights achieved thereby is vastly different in the socio-economic set up of different countries. However, there are some common features in an otherwise divergent scenario and to my mind they are, firstly, a basic instinct for survival with dignity and secondly, which is an obvious corollary of the first, is to evolve a mechanism to redress deprivation of basic rights without which human dignity is a teasing illusion.

People fought for access to justice over the obscure mists of past centuries. Out of such fierce fights, emerged the 'Magna Carta' on 5th May 1215. Though the promises in the 'Magna Carta' were exacted by the feudal barons in their own interest, but, the famous Clause 30, figures as the first codification of individual freedom which assures common man's right to get justice. The words "To no one will we sell, to no one will we refuse or delay, right or justice" are of great moral significance and have inspired the universal quest for justice for almost ten centuries.

This charter is, thus, the starting point of the constitutional history of England and the first link in the long chain of correlatives between the constitutional concepts of India and Great Britain.

Based on the vision of this Epic Charter, we find a later statute of Henry VII, 1495 which stated;

> "The Justices shall assign to the same poor person or persons counsel by their discretions, which shall give their counsel, nothing taking for the same.... and likewise all justices shall appoint any attorney for the same poor person or persons".

The seeds of our constitutional ethos on legal aid which guarantees access to justice are clearly found in these words.

Professor Roscoe Pound prefaced his classical work on Jurisprudence by referring to Daniel Webster as saying that justice is the greatest interest of man on earth. The same was true of our founding fathers. In their arduous quest for justice during the National Freedom Struggle they felt the prime importance of framing a Constitution for a free nation where justice for its citizen becomes easily accessible. Apart from voicing that abiding concern for justice in the Preamble, the cornerstone of Fundamental Right in our National Charter is equality which is rightly called the 'mother of justice'. If equality disappears from the precincts of court, justice

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1 Chief Justice P.B. Gajendragadkar, Historical Background and Theocratic Basis of Hindu Law II THE CULTURAL HERITAGE OF INDIA 414.

2 *Ibid.*

is orphaned. Therefore, 'access to justice' in our Constitution is placed on the high pedestal of fundamental right. Access to justice is an inbuilt content of Article 14 which guarantees equality before law and equal protection of laws. If in accessing justice, the common man has to encounter barriers and impediments, the equality clause in our Constitution becomes a mere promise on paper. So in a judiciary where access is gagged and the judges do nothing to remove the obstacles, such a system ceases to be an independent judicial system. As early as in 1956, the Apex Court while interpreting Article 14 decided that our Constitution is not meant only for the elite, but it is also for "the butcher, the baker and the candlestick maker".[3] In subsequent years the Apex Court incorporated access to justice in Article 21 by various judicial interpretations. Articles 22(1) and 22(2) specifically ensure the 'access to justice' for persons who are arrested and detained in custody. The right to move the Apex Court for enforcement of Part III rights by appropriate proceedings is a guaranteed fundamental right under Article 32. This right of the Supreme Court is plenary and the Apex Court while exercising power under this Article, in the words of the then Chief Justice Gajendragadkar, has to play the role of a '*sentinal on the qui vive*' for protecting the fundamental rights of citizens. This fundamental right was conferred as it was thought that a right without a remedy is a legal conundrum of the most grotesque kind. The Supreme Court's right to do 'complete justice', cutting across all procedural wrangles, has been recognized in Article 142. At times the Supreme Court exercises its jurisdiction under Article 32 in conjunction with its power under Article 142. Acting under these powers, the Apex Court has granted relief, where there is manifest illegality and never felt inhibited on the question of standings.

The Supreme Court has taken upon itself this task of expanding 'access to justice' not only in view of the duty cast on it by the Preamble and the Fundamental Rights but also in view of the clear mandate under Article 38 of the Constitution which is based on the concept of Article 14. Article 38 imposes a duty on the State, which obviously includes the judiciary, to usher in a social order in which justice-social, economic and political, must inform all institutions of national life. So by widening the 'access to justice', the Court is discharging its constitutional duty to promote a just social order. Realizing that free and unrestricted access to justice is the hallmark of an independent judiciary which is committed to the Rule of Law, Justice Krishna Iyer in *M/s Central Coal Fields Ltd.* v. *M/s. Jaiswal Coal Co.*[4] drew inspiration from Magna Carta and held that India is a Republic:

> " where equality before the law is a guaranteed constitutional fundamental and the legal system has been directed by Article 39A 'to ensure that opportunities for securing justice are note denied to any citizen by reason of economic... disabilities.' The learning Judge further held "that right of effective access to justice has emerged in the Third World countries as the first among the new social rights with public interest litigation, community based actions and pro bono publico proceedings."

Starting with a *non-obstante* clause, Article 226 of the Constitution confers on the people the right to access the Court for protection of other rights apart from those granted under Article 32. Article 226 has been designedly couched in very wide terms and has been repeatedly construed by the Apex Court as wide enough to reach injustice wherever it is found. So one discerns a common thread which originates from the Preamble and runs through the texture of all these Articles, namely, Articles 14, 21, 22(1), 22(2), 32, 38, 39A, 142 and

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3 *Per* Justice Vivan Bose in *Bidi Supply Co.* v. *Union of India* AIR 1956 SC 479 at 487.

4 AIR 1980 SC 2125

226. Rights guaranteed under these Articles are not confined to citizens alone but are available to any person who may not be even a citizen of this country. This underlines the lofty ideas in the access jurisprudence in our Constitution and endows these provisions with an international character which can be compared only with the International Charter on Human Rights.

So the judges in India who are sworn to uphold the constitutional precepts share this commitment to secure justice to all those persons who knock at their door of justice. The gradual widening of the access to justice is the culmination of this commitment.

Even in Britain where there is no written Constitution, the Judges are motivated by the same commitment. Lord Scarman in his Hamlyn Lectures voiced the same concern:

> "I shall endeavour to show that there are in the contemporary world challenges, social, political and economic, which, if the system cannot meet them, will destroy it. These challenges are not created by lawyers; they certainly cannot be suppressed by lawyers; they have to be met either by discarding or by adjusting the legal system".[5]

Cappelletti in his thesis pointed out that "Effective access to justice can thus be seen as the most basic requirement – the most basic human right of a system purports to guarantee legal rights".[6]

Lord Warren, one of the greatest Chief Justices of all time, played the same tune when His Lordship said "Our judges are not monks or scientists, but participants in the living stream of our national life ..... Our system faces no theoretical dilemma, but a simple continuous problem : how to apply ever changing conditions to never changing principles of freedom".

So life in its 'infinite variety' has entered the portals of Indian Courts to make our judicial system so vibrant that rule of law intermingles with rule of life. Our Supreme Court has opened its doors to the tortured prisoners, victims of custodial violence, degraded slumdwellers, homeless pavement-squatters, bonded labourers, sweated workers, discriminated and sexually harassed women employees, raped adivasi girls, dowry-burnt brides, physically challenged persons, social activists and to various other categories of persons.

In this context I may refer only to a few decisions of the Apex Court.

Emphasizing the importance of widening the access to justice, the Hon'ble Supreme Court in *Bar Council of Maharashtra* v. *M. V. Dabholkar*,[7] ruled that the apprehension that widening the access may unloose a flood of litigation is a misplaced one. On the other hand, the Court found that public resort to Court in greater numbers is a tribute to the justice system. The learned Judges found that such a view was also shared by the Australian Law Reforms Commission.

The reason behind widening the access to justice was again explained by the Supreme Court in *Akhil Bharatiya Soshit Karamchari Sangh* v. *Union of India and others*.[8] The learned Judges held that for correctly interpreting the Constitution one must understand the people for whom it is made. Their ethos, their frustrations, aspirations must be appreciated in the context of the parameters set by the Constitution for an adequate solution of people's problems. The current processual jurisprudence of India, the Court held, "is not of individualistic

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5 Sir Leslie Scarman, *English Law- The New Dimension- The Hamlyn Lectures* 1974.

6 M. Cappelletti, *Access to Justice* 672 (1976).

7 (1975) 2 SCC 702

8 (1981) 1 SCC 246.

Anglo Indian mould, but it is broad-based and people-oriented, and envisions access to justice through 'class-actions', 'public interest litigation' and 'representative proceedings'. The Court concluded by saying that "the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions". In *S.P. Gupta* v. *Union of India*,[9] the Supreme Court held that the Court can take cognisance of violation of person's fundamental and legal rights on the basis of letters. This mode of taking cognisance on the basis of letters, known as Epistolary Jurisdiction of the Court, originated from the American Supreme Court in an unanimous verdict of *Gideon* v. *Wainaloright*.[10] The Supreme Court took cognisance of a hand written scrawl from Gideon whose complaint from behind the bar was that his conviction must be set aside as it was reached denying his right to a counsel. The American Supreme Court upheld the pleas of Gideon. Following the same principle our Apex Court held where persons are living in poverty and destitution and are helpless victims of an exploitative society and do not have easy access to justice, Court will not insist on regular writ petition to be filed by those persons who actually suffer, but will readily respond even to a letter addressed by any public spirited individuals acting *pro bono publico*. The Court held that justice can never be thwarted by the tyranny of technicalities. The Court ruled that in an appropriate case it will unhesitatingly and without the slightest qualms of conscience caste aside the rules of procedure and treat the letters of the public-minded individual as a writ petition and act upon it. The Court perceived that the theatre of the law was fast changing and the problems of the poor were coming to the forefront. In such a situation, the Court has to innovate new methods and devise new strategies for the purpose of providing access to justice. The decision in *S.P. Gupta* though overruled on other points but the opinion of the Supreme Court on access to justice is still holding the field.

In *People's Union for Democratic Rights and others* v. *Union of India and others*,[11] commenting on the emergence of public interest litigation, the Court held that the same is a strategic arm of the legal aid movement and also has been resorted to for establishing the rule of law. The Court held that the rule of law does not mean that the protection of the law is to be confined only to a fortunate few for protecting and upholding the status quo under the guise of enforcement of their so-called civil and political rights.

In *State of Himachal Pradesh* v. *A Parent of a Student of Medical College, Simla and others*,[12] the reason behind the Court's passing orders in public interest litigation was explained by saying that while passing order the Court does not mock at legislative or executive authority. Nor is the Court motivated by any spirit of confrontation. The Court merely ensures that benefit under the provision of the Constitution does not remain confined only for a fortunate few. The feeling that Constitution means nothing for the large numbers of half-clad, half-fed people of this country should not be allowed to grow.

The right to food is the most basis human right, but those who are starving can hardly come to Court. The Apex Court took cognisance of their plight on a petition filed on their behalf by People's Union for Civil Liberties. Accepting that petition the Court observed: "The anxiety of the Court is to see that the poor and the destitute and the weaker sections of the society do not suffer from hunger and starvation". The Court has passed at least sixteen orders between 23rd July, 2001 and 9th May, 2005 in order to see that there is proper distribution of food amongst those who are ill-fed and are below the poverty line.

9 (1981) SUPP SCC 87
10 372 US 335
11 (1982) 3 SCC 235
12 (1985) 3 SCC 169

The Hon'ble Supreme Court in *Dr. B. Singh* v. *Union of India and others,*[13] cautioned that before entertaining a public interest litigation the Court should be careful to see that in the guise of redressing a public grievance, reckless allegations and publicity should not get prominence as that may entail loss of scare judicial time.

It was felt that mere widening the access to justice was not enough to secure redress to the weaker sections of the community in the matter of realization of their rights. It was evident that litigation was getting increasingly costlier and there was agonizing delay in the process. That is why the idea of alternative dispute resolution by way of *Lok Adalat* was thought of as a viable strategy. The concept of *Nyayapanch* is the older version of *Lok Adalat* and was not unknown to our tradition. But this Indian tradition was virtually pushed into oblivion during the British Rule. After Independence and adoption of the Constitution with its emphasis on social justice it was felt that this concept must be revived once again.

Mr. M.C. Setalvad, the Chairman of the first Law Commission in Independent India in his Report on Legal Aid submitted in the year 1958 observed:

> "In so far as a person in unable to obtain access to a Court of law for having his wrongs redressed..... justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fall in their purpose."

Mr. Setalvad, was of the view that equality before law means equal opportunity of access to Court. The access to Court is dependent upon payment of court-fees and the assistance of skilled lawyers in most cases. For a poor man these are matters of great predicaments. So the Chairman of the Law Commission thought that rendering of legal aid to the poor litigant, is "not a minor problem of procedural law but a question of a fundamental character".

From this report we find that the government of India was thinking of Legal Aid since 1945. There were two reports to that effect, one was the report by Justice Bhagwati, the then Judge of Bombay High Court and the other by Justice Arthur Trevor Harries, the then Chief Justice of Calcutta High Court. The models suggested in those report were more or less litigation oriented. But the Kerala Rules of 1957 signalled a refreshing innovative approach to the issue and the moving spirit behind the same was Justice V.R. Krishna Iyer in his capacity as a Minister. Kerala Rules 1957 paved the way for representative class action on which PIL is based. Then in 1971 came the Gujarat report which recognized class action test as important instruments for redressing collective wrongs. Then by notification dated 27th October 1972, the Ministry of Law and Justice, Government of India, appointed an Expert Committee on Legal Aid with Justice V.R. Krishna Iyer as its Chairman. The said Committee gave its report in May 1973 with wide ranging proposals for overhauling the prevalent system of Administration of Justice focusing on legal services to the poor. On 16.12.1976 came the 42nd amendment of the Constitution adding Article 39-A to the Directive Principle of State Policy whereby the legal aid movement got constitutional recognisation. Immediately thereafter, the National Legal Services Bill was drafted in 1977 but it became an Act only on 11th October, 1987. But in order to make the Act effective and purposeful, several amendments were suggested. It took about another four years for the amending provision to be approved by the Parliament and then received the assent of the President on 29th October, 1994. One of the most vital aspects of this Act is legal literacy: unless a person knows his rights, he/she cannot think of its implementation. Legal literacy leads to legal empowerment. Legal Literacy Mission is now a post of legal aid movement. So the judicial intervention and the legal services movement go hand in hand and one supplements the other. Under

[13] (2004) 3 SCC 363

influence of these concurring forces, our access jurisprudence is pulsating with immense vitality and has gathered tremendous momentum.

In this connection the Speech of Lord Brougham to the House of Common on Law Reforms delivered way back in 1828 comes to my mind. In words that have become immortal Lord Brougham said "It was the boat of Augustus that he found Rome of brick and left it of marble. But how much nobler will be Sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter, found it the patrimony of the right, left it the inheritance of the poor, found it the two-edge sword of craft and oppression, left it the staff of honesty and the shield of innocence."

Under our constitutional dispensation, sovereignty vests in the people. So we, the people of India, can legitimately boast of a people-oriented jurisprudence with unimpeded access to justice, otherwise Chief Justice Chandrachud in *Olga Tellis*[14] could not have described the litigants before His Lordship's Court in these inimitable words:

> "The first group of petitions relates to pavement dwellers while the second group related to both pavement and Basti or slum dwellers. Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters come of age, bathe under the nosy gaze of passers by, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say: "Who doesn't commit crimes in this City ?"

Grievances of these homeless people were redressed by the Constitution Bench of our Apex Court. That is a glowing tribute to the success of access jurisprudence in our Courts and to establish that Courts in India do not exist for the few, by the few or of the few.

[14] AIR 1986 SC 180