EXPANDING ACCESS TO JUSTICE TO REACH THE POOR AND THE MARGINALIZED COMMUNITIES

Ms. Komal Audichya *
Ms. Nikita Audichya **

Abstract

Access to justice has different meaning in different societies. Even if defined differently, it always has inherent relationship with dispute resolution as the latter's purpose is to do justice only. Hence access to justice is synonym with access to dispute resolution method provided by the state. This natural right didn't require affirmative state action but with the emergence of welfare state it doesn't mean only to litigate or settle the claim but also equal, affordable, quick access to the forums and enforcement of relief which is individually and socially just. The Constitution provides substantive basis for this by guaranteeing certain fundamental rights such as, equal protection of laws, equality of status and opportunity, the right to life and personal liberty to all its citizens and on violation of these rights to approach the court. Even the Supreme Court has always tried to interpret the fundamental rights along with directive principles to make access to justice easier for the poor and underprivileged. However the real experiences show that access to justice has become inaccessible. The cases pending before the courts, high costs, complicated procedure, paucity of awareness etc. have paralyzed the legal system. This paper critically analyses the reasons for lack of access and suggests reforms which need to be initiated to ensure access to justice to the poor and marginalized population of the rural and tribal communities.

Concept: Access to Justice

Law is the means and justice is the end and to achieve that end the law must have legal system accessible to all. Access to justice gives life and meaning to law.

"*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 the rich can enjoy the law,*

* Associate Professor, Jaipur National University, Jaipur.
** Research Scholar, Jawaharlal Nehru University, New Delhi.

as a doubtful luxury, and the poor, who needed most, cannot have it, because, it's expense puts it beyond their reach, the threat to the continued 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 and benefit by its impartiality and fairness"-

MR Justice Brennan of the US Supreme Court.

The phrase "access to justice" can't be defined accurately without defining the term justice. The notion of justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it; it expresses fairness and the implicit recognition of the principle of equality.[1] The concept of '*Access to Justice*' constitutes- "*First* a strong and effective legal system with rights enumerated and supported by substantive legislations." "The *second* is a useful and accessible judicial/ remedial system easily available to the litigant public."[2] It "therefore means that the ability to approach and influence decisions of those organs which exercise the authority of State to make laws and adjudicate on rights and obligations."[3] Access to justice is defined in the black's law dictionary as "the ability within a Society to use courts and other legal institutions effectively to protect one's rights and pursue claims." It considers a potential system acquiring appropriate legal remedies within the Civil and Criminal justice fields. Judiciary, being an effective judicial system, has an important role in ensuring access to justice.

Access to Justice and Constitution in India

Apart from the Universal Declaration on Human Rights[4] and International Covenant on Civil and Political Rights[5] the

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[1] Rawl, J., A Theory of Justice, Edition 1997,Cambridge, Cambridge University press, at 11.

[2] Kaifulla Ibrahim, F.M., J., Rule of Law & Access to Justice, 31.01.2014-02.02.2014, Tamil Nadu State Judicial Academy

[3] Ghai Yash and Cottrell Jill, 2010, "Rule of Law and Access To Justice" Marginalized communities and Access to Justice", *Routledge, New York,* p. 3

[4] Article 8 where everyone has the right or an effective remedy by the competent national Tribunals for acts the fundamental rights granted by the Constitution or by law.

[5] Article 14(3) guarantees to everyone: The right 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 his right; and to have legal assistance assigned to him in any case where the interests of justice shall

Constitution of India, the living document and basic law of this country, provides substantive basis for access to justice. In its preamble only it stands for securing justice social, political and economic to all the citizens. It guarantees fundamental rights, in its Part III from Articles 14 to 32 to every individual. These rights are not absolute but they are protected under Article 13 of the Constitution which prohibits that enactment of any law which is inconsistent with the fundamental rights.

It declares through Article 14 that:-

"The state shall not deny any person equality before law or equal protection of laws within the territory of India."

So every citizen in India, irrespective of his social, economic and political stature, has accessibility to the courts in the same manner equally and indiscriminately by virtue of article 14 of the Constitution.[6]

According to Article 21 of the constitution "*No person shall be deprived of his right to life and personal liberty except in accordance with procedure established by law'*.

The procedure which restricts this fundamental right should be fair and effectuate and must answer the test of reasonableness laid down under Art.14. Therefore this non arbitrary and fair procedure is making available the court process legal services to both the parties of the dispute.[7]

The Constitution provides safeguards when the fundamental rights are violated by the state in the form of right to constitutional remedy i.e.to have direct access to the Supreme Court or High Courts having the power of extra ordinary writ jurisdiction under Article 32 and Article 226 respectively[8]. Article 32 is itself a fundamental right.[9]

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require, and without payment by him any such case if he does not have sufficient means to pay for it.

6 Menon Madhava, N.R., "Serving the justice needs of poor", The Hindu, December 3, 2013

7 Supra note 6

8 The Indian Supreme Court stated in Keshav Singh Re AIR 1965 SC 745 "The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of right in citizens to move the court in that behalf."

9 Article 32 states, "*(1) the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part [Part -III] is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition,*

Directive principles of the Constitution impose on the State to promote and secure justice through Art.39A of the Constitution in following terms;

"*The State shall secure that the operations of the legal system promote justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice is not denied to any citizen by reason of economic or other disabilities".*

In our country where the poor and the people living in rural and tribal areas are socially and educationally backward, the above mentioned provisions of the Constitution become very significant. As discussed above the Supreme Court has widened the scope of these provisions of the Constitution which has helped the indigent and socially disadvantaged class especially in rural and tribal areas. But still large number of such people do not have access to justice. They still regard that the end of justice does not lie within their reach because the means to justice i.e. the law and the legal system create many impediments. For them the law still remains an enigma and justice remains unapproachable. The rule of law provides for equal access to justice to all the citizens but these people have lack of knowledge about fact that law is a social tool designed as a means to access the justice and is not concerned with social and economic factors of the justice seeker.[10] Under such circumstances the National Commission to Review the Working of Constitution (NCRWC)[11] wanted to incorporate this right as fundamental right as Art.30 A in the Constitution in the following terms;

"Access to Courts and Tribunals and Speedy justice".-(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in fair public hearing before an independent court, or where appropriate, another independent and impartial tribunal or forum.

(2) The right to access to courts shall deem to include the right to reasonably speedy and effective justice in all matters before the courts, tribunal or other for and state shall take all reasonable steps to achieve the said objectives."

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quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

[10] Supra note 6

[11] http://lawmin.nic.in/ncrwc/ncrwcreport.htm accessed at 18th October 2015

As one American jurist, professor Vance of Yale says, "*What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?*"[12]

Access to Justice and Public Interest Litigation

One of the recent modes of making access to justice reality is by way of filing a Public Interest Litigation. The judiciary is trying to remove the obstacles between the poor and the justice system. Justice P.N. Bhagwati heralded the new era as now the court permits public interest litigation at the instance of "any member of public or social action group acting bona fide" for defending the Constitutional and Legal rights of the weaker sections.[13] He broadened the concept further in the case of *People's Union for the Democratic Rights v. Union of India*[14] wherein he stated;

"It would not be right or fair to expect a person acting pro bonus public to incur expenditure out of his bag for going to a lawyer and preparing a regular Writ petition. In such a case a letter addressed by him can legitimately be regarded as an appropriate proceeding"

The scope of common rule of locus standi was expanded and the conservative stand was discarded to increase the access to justice for the disadvantaged. Justice Krishna Iyer mentioned, "*If the centre of gravity is to shift, as to the preamble of Constitutional mandate, from the traditional individualism of locus standi to community orientation of Public Interest Litigation."*[15]

But some criticize PIL as an outcome of judicial populism and raise questions about its legitimacy, limitations and impact. It is also limited by public interest advocates' dearth of resources to investigate the disputed matter and achieve definite remedies.

Access to Justice and Right to Free Legal Aid

The concept of legal aid can be witnessed in the 40th paragraph of the Magna Carta, which is stated as under;

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12 *As quoted in MH Hoskot* v *State of Maharshtra* (1978) 3 SCC 544 at 553

13 *SP Gupta* v *Union of India* AIR 1982 SC 149. Now any such person can approach the court in the interest of public or public welfare by filing a petition: In the Supreme Court under Article 32 of the Constitution of India; In the High Court under Article 226 of the Constitution of India; In the Court of Magistrate under Section 133 of the Code of Criminal procedure, 1973

14 AIR 1982 SC 1473

15 *Municipal Council Ratlam* v *Vardhichand* AIR 1980 SC 1622

"*To no one will we sell, to no one will we deny or delay right or justice.*"

Our constitution provides for free legal aid as a right, to persons who due to financial or any other reason cannot afford a counsel through Articles 14, 21, 39 A, already discussed above and Articles 22 (1) and 38[16] of Constitution of India. In a welfare State where the legislation is complex and the people from marginalized communities often find difficult to know what his rights are and how to defend them in a court, this right has utmost importance. It's not only the Constitution but the case laws also have been developed to elaborate this right. The Supreme Court expanded this right in MH Hoskot's case[17] where 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 (to the Supreme Court) for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice."*

In Menaka Gandhi v. UOI[18] Justice P.N. Bhagwati, made the following observations:-

"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*." He stated further in *Hussainara Khatoon* v. *State of Bihar* [19]

"*This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services, on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer*."

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16 Article 22(1) provides that "A person arrested should not be detained in custody without being informed of the grounds for such arrest and should not be denied the right to consult and be defended by a legal practitioner of his choice." Article 38 urges that "The State should strive to promote the welfare of the people by securing and protecting as effectively as it may by a social order in which justice: social, economic and political shall inform all the institutions of national life."

17 Supra note 12

18 AIR 1978 SC 597

19 AIR 1979 SC 13690

The state in pursuance of its role under the Constitution enacted suitable legislation such as NALSA (National Legal Service Authorities) Act 1987 which deals with matters like legal aid, legal literacy and legal awareness.

The legal aid system presumed that the victim was aware about her rights and how to approach the court, the legal aid offices were available in remote villages and tribal areas and that the lawyer appointed was competent to do the job suitable to the needs of rural/tribal population. These presumptions did not work and became irrelevant to the concerned marginalized population.

Access to Justice & Alternative Dispute Resolution

Since large number of people in this country, are poor, illiterate, backward or oblivious, the State laid the concept of Alternative Dispute Resolution to promote justice on the basis of equal opportunities. Lok Adalats[20], Grama Nyayalayas[21], Ombudsman[22] and Legal Service Authorities under Legal Service Authorities Act 1987 are part of this legal system which aim at rendering social justice to such people and which is speedy and inexpensive. Today the courts may ask the party to go for arbitration, mediation and conciliation. Dr A.S. Anand, former Chief Justice of India, had wished that by increasing the power of ADRs, the next century would be not of litigation but rather of negotiation, conciliation and arbitration.[23]

The present ADR system is not very effective. Conciliation and mediation under ADR process are not effective as mediator or conciliator does not have the power or to order a party to appear and defend a claim. Moreover, the losing side can't be compelled to follow a decision. Under ADR process, the party can waive their rights which are against the mandate of the Constitution. This

[20] Lok Adalat is defined 'as a forum where voluntary effort aimed at bringing about settlement of disputes between the parties is made through conciliatory and pervasive efforts. Mentioned in Rao, P.C. and Sheffield, W, Alternative Dispute Resolution, What it is and how it works, Delhi, Universal Law Publishing Co., 1997 at 211.

[21] The e courts constituted under Gram Nyayalayas Act, 2008

[22] Ombudsman is a public sector institution, preferably established by legislative branch of Government, to supervise the administrative activity of the executive branch. Reif, L.C., The Ombudsman, Good Governance and International Human Rights System, Martinus Nijhoff Publisher, 2004, at 1.

[23] Law Commission Of India, Government Of India, April 2009, 222th Report on " Need for Justice-dispensation through ADR etc." , p. 13

mechanism has not been able to maintain a system of access to justice based on parity of power between the parties.

To Expand the Reach and Access of Justice

As discussed above the present legal system is not adequate to protect the legal rights of poor and people living in rural or tribal areas. These people find the system alien and hence do not have access to justice. It requires expansion to reach these marginalized people and for that certain suggestions are given below:-

1. The customary idea of "access to justice" as understood is access to courts of law which has become out of reach of above mentioned people due to different reasons for example, abject poverty, social and political backwardness, illiteracy, ignorance, procedural conventions and the cost. One solution is to educate masses and make them aware about complex legal procedures and rights and reliefs provided to them under Constitution as well as under other statutes. Cost of litigation required to be reduced or make it accessible for the common poor man as it is not possible for him to bear the burden of complex and expensive process of litigation.
2. There exist several barriers to justice in the form of financial, geographic, linguistic, logistical, or gender-specific. Emphasis must be put on improving quality and quantity of justice in the form of better prepared defense attorneys, more citizen-oriented court staff, more reasonable hours, better information about the justice system and more no. of courtrooms in each district. Although procedural conduct and rules have already been laid down, what stands here as an important requisite that there is strict adherence on behalf of police authorities, judges, lawyers, law officers as well as protection of legal rights.[24]
3. Since most judges and lawyers are not aware of the problems present in rural and tribal communities which require legal aid the most, the programmes to enhance and strengthen the knowledge of such people can bring successful change in development of legal aid. To increase the public knowledge of the legal system, legal information

[24] "Necessary Condition: Access to Justice", Guiding Principles For Stabilization and Reconstruction, *United States Institute of Peace Press, Wsahington D.C.*, 2009, p. 86

centres must be constituted which can offer free or low cost legal advice. Legal aid schemes can be supported by para legal aid schemes run by NGOs. The future lawyers at the law college level must be trained and educated to give legal assistance to rural and tribal people to bring the desired changes.

4. More ADR centers should be created for settling disputes out-of-court especially in rural and tribal areas. Mediation and negotiation must now become part of constitutional schemes. Ombudsman does not have the power to make its decision binding on the Government. This limitation must be overcome; its decision should be binding on Government.
5. The dialect of the law, constantly in exceptionally difficult and complicated English, makes it ambiguous even to the proficient or educated individual and this is the dialect that courts and legal counselors are comfortable with. Therefore, the language needs to be simplified so as to make it accessible for the common masses.
6. In a country like India where adversarial model is widely practiced, the expediency of the litigation process has been compromised. Average time taken by civil case to settle is around 20 years. This problem of delay is due to the extended role of advocates in the litigation process. Despite being officers of the Court, they do not have any accountability towards expedient disposal of cases. Similarly there is no accountability of the judges to dispose of cases as early as possible.[25]
7. To increase the physical availability of courts, we must increase number of High Courts and subordinate courts in the states. Moreover, the powers of Family Court can also be strengthened.[26]

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[25] Hussain Bhat, Iftikhar," May. 2013, "Access To Justice: A Critical Analysis Of Alternate Dispute Resolution Mechanisms In India", *International Journal of Humanities and Social Science Invention*, Volume 2 Issue 5, p.48 He further stated that in contrast, the speed of the French justice administration machinery is quite remarkable. In France, the small claims court (Tribunal d'instance) settles the cases within 4- 5 months. Same is true for cases brought before the commercial courts (Tribunal de Commerce). Large claims (brought before the Tribunale de grande instance) take slightly longer 10 months on an average , whereas the appellate proceedings before the Courts of Appeals take 14 months, and the Supreme Judicial Court(Cour de Cassation) take nearly 27 months to hand over its decisions.

[26] The Family Courts Act 1984 was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs

8. More accessibility to constitutional courts is a prime concern. For e.g., fundamental rights can only be filed in High Court and Supreme Court. Subsequently, for example, even petitions emerging out of issues, for example, vanishings, custodial violence, encounter killings or cases where the police can't be enacted because of different reasons, must sent or documented to the High Court. Perpetually, this includes go to the High Court, drawing in a legal advisor there and consistent follow-up. A considerable measure of time and cost is included in this procedure. Even habeas corpus petitions can only be filed in the High Court. Thus the division of jurisdiction between High Courts and subordinate courts needs to be re-examined.[27]
9. The poor and the marginalized rural and tribal communities who cannot afford eminent lawyers or legal experts seek justice through the informal system like Khap Panchayat which leads to their exploitation by such extremist forces flouting the rule of law and constitutional governance. So we must strengthen the Gram Nyayalayas to give force to constitutional values and ensure that such values infuse the content of true aim of adjudication-justice.[28]

There is much felt need to discover new dimensions to make the justice accessible to rural, tribal and poor people but the Gandhian dictum must form the basis of every such initiative that in whatever we do, we keep in mind the weakest or the poorest person and ask how useful any system would be to him.

[27] Supra note 25 at p. 49. He further expatiated that we have the example of South Africa where even the subordinate courts are empowered to enforce some fundamental rights. The inquiry that we have to address is whether we have to allow the subordinate courts to manage some of these basic issues, which have an immediate bearing on the rights to life and freedom, keeping in mind the end goal to encourage access to equity.

[28] Guruswamy Maneka, Singh Aditya, 2010, " Accessing Injustice, The Gram Nyayalayas Act, 2008", *Economic and Political Weekly EPW*, Vol XLV No. 43, p.19