"ACCESS TO JUSTICE AS RULE OF LAW"

PRTHIVI RAJ & TANU KAPOOR

INTRODUCTION

In England, during the reign of Henry II, in the Twelfth Century, the concepts of 'access to justice' and 'rule of law' took roots when the King agreed for establishing a system of writs that would enable litigants of all classes to avail themselves of the King's justice. But soon, the abuses of 'King's Justice' by King John, prompted the rebellion in 1215 that led to the Magna Carta which became the initial source of British constitutionalism; What it represented then and now is a social commitment to the Rule of Law and a promise that even the King is not above the law.[1] The three crucial clauses of the Magna Carta which are the foundation for the basic 'right of access to Courts' are in the following words:[2] "No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in anyway 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…." "Moreover, all those aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all our kingdom, as well clergy as laymen, as far as pertains to them towards their men." "Wherefore, it is our will, and we firmly enjoin, that the English Church be free, and the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all aspects and in all places for ever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intention – Given under our hand – the above named and many others being witnesses – in the meadow which is called Runnymede, between Wonds or and Staines, on the fifteenth day of June, in the seventeenth year of our reign." Rule of Law collates the rules which are based on the principles of freedom, equality, non-discrimination, fraternity, accountability and non-arbitrariness and is certain, regular and predictable. "The concept shares the common English inheritance and apart from the statement of generalities, it embraces a body

[1] Justice M. Jagannadha Roa, Access to Justice pg. 2 ;
http://www.delhihighcourt.nic.in/library/articles/Access%20to%20justice.pdf (last accessed on 13.02.2020)
[2] Supra.

of specific detail."[3] The editors of Prof. de-Smith explain its content: "that laws as enacted by Parliament be faithfully executed by officials; that orders of courts should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised."[4] As Wade says that the "rule of law requires the government should be subject to law, rather than the law subject to the government."[5] In fact, it could be regarded as a modern name of Natural Law. Jurisprudentially, Romans called it 'Jus Naturale', mediaevalists called it the 'Law of God', Hobbes, Locke and Roussueau called it 'Social Contract' or 'Natural Law' and the modern jurists call it 'Rule of Law'. The idea has been developed from the French phrase 'la principle de legalite', i.e. a Government based on the principles of law and not of men. In Indian Constitution, Rule of Law has been adopted under the Preamble where the ideals of justice, liberty and equality are enshrined. The Constitution has been made the supreme law of the country and other laws are required to be in conformity with the Constitution. Nonetheless, the courts have the onus to declare any law invalid, which is found in violation of any provision of the Constitution.[6] 'Access to Justice' in its general term, means the individual's access to court or a guarantee of legal representation. It has many fundamental elements such as identification and recognition of grievance, awareness and legal advice or assistance, accessibility to court or claim for relief, adjudication of grievance, enforcement of relief, of course this may be the ultimate goal of a litigant public.

UNITED NATIONS & INTERNATIONAL PRESPECTIVE ON ACCESS TO JUSTICE

De Smith's Judicial Review of Administrative Action (5th Ed, 1995) was also quoted by Sir John Laws in Witham (para 5.017) as follows: "It is a common law presumption of legislative intent that access of Queens's Court in respect of justiciable issues is not to be denied save by clear words in a statute".

INTERNATIONAL LAWS

The Universal Declaration of Rights drafted in the year 1948 gave universal recognition to these rights including the right of 'access to justice' in the following manner:

[3] Justice J.S.Verma, *50 years of Freedom under Rule of Law*: Indian Experience, Ed. Soli Sorabjee, Law & Justice: An Anthology, Pg.325, Universal Law Publishing Co. Pvt. Ltd. New Delhi, 2003
[4] De Smith, et al: *Judicial Review of Administrative Action*, 5th Ed; pg.14, 1995
[5] Wade & Forsyth, *Administrative Law*, pg.20,343, 2005
[6] http://www.tnsja.tn.gov.in/article/RULE%20OF%20LAW%20-%20FMIKJ-FINAL.pdf (last accessed on 10.02.2020)

Art.6: Everyone has the right to recognition everywhere as a person before the law.
Art.7: All are equal before the law and are entitled without any discrimination to equal protection of the law.
Art.8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.
Art.10: 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.
Art.21:

- *Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*
- *Everyone has the right of equal access to public service in his country.*

There are provisions in the International Covenenant on Civil and Political Rights, the European Convention and other regional conventions that underscore the importance of the right of access to impartial and independent justice. National Commission for Review of the Constitution stated that 'access to justice' must be incorporated as an express fundamental right as in the South African Constitution of 1996. In the South Africa Constitution, Art. 34 reads as follows:
"*Art. 34: Access to Courts and Tribunals and speedy justice*

(1) Every one has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or tribunal or forum or where appropriates, another independent and impartial Court, tribunal or forum.
(2) The right to access to Courts shall be deemed to include right to reasonably speedy and effective justice in all matters before the Courts, tribunals or other forum and the State shall take all reasonable steps to achieve that object"

BARRIERS TO ACCESS TO JUSTICE

From the user's perspective, the justice system is frequently weakened by:

- Long delays; prohibitive costs of using the system; lack of available and affordable legal represent-ation, that is reliable and has integrity; abuse of authority and powers, resulting in unlawful searches, seizures, detention and imprisonment; and weak enforcement of laws and implementation of orders and decrees.

- Severe limitations in existing remedies provided either by law or in practice. Most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent.
- Gender bias and other barriers in the law and legal systems: inadequacies in existing laws effectively fail to protect women, children, poor and other disadvantaged people, including those with disabilities and low levels of literacy.
- Lack of de facto protection, especially for women, children, and men in prisons or centres of detention.
- Lack of adequate information about what is supposed to exist under the law, what prevails in practice, and limited popular knowledge of rights.
- Lack of adequate legal aid systems.
- Limited public participation in reform programmes.
- Excessive number of laws.
- Formalistic and expensive legal procedures (in criminal and civil litigation and in administrative board procedures).
- Avoidance of the legal system due to economic reasons, fear, or a sense of futility of purpose.[7]

NORMATIVE FRAMEWORK FOR JUSTICE

The International Covenant on Civil and Political Rights enshrines the principles of equality before the law and the presumption of innocence, and includes guarantees of freedom from arbitrary arrest and detention and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The independence of the judiciary is addressed in the Basic Principles on the Independence of the Judiciary. This instrument requires that the independence of the judiciary be guaranteed by national law and prohibits the inappropriate and unwarranted interference with the judicial process. The Role of Lawyers requires governments to ensure that efficient procedures and responsive mechanisms for equal access to lawyers are provided, including the provision of sufficient funding and other resources for legal services to the poor and other disadvantaged persons. In addition, it entitles lawyers to form and join self-governing professional association, while at the same time such professional associations are required to cooperate with governments in the provision of legal services. The Guidelines on the Role of Prosecutors identify the responsibility of prosecutors in protecting

[7] https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf (last accessed on 10.02.2020)

human dignity and upholding human rights and ensuring due process. The Guidelines also strictly separate judicial functions from the office of the prosecutor. Requirements of law enforcement officials, including military authorities that exercise police powers, are set out in the Code of Conduct for Law Enforcement Officials. The Code, among other things, requires officers of the law to uphold the human rights of all persons and to provide particular assistance to those who, by reason of personal, economic, social or other emergencies, are in need of immediate aid. Several international instruments address the rights of prisoners and detainees. Among them, the Basic Principles for the Treatment of Prisoners prohibits discrimination, insists on respect for human rights as contained in international instruments and calls for the reintegration of ex-prisoners into society under the best possible conditions and with due regard to the interests of victims.[8]

HUMAN RIGHTS-BASED APPROACH TO ACCESS TO JUSTICE

UNDP is committed to using a human rights-based approach in its programming, guided by international human rights standards and principles. A human rights-based approach is useful to:

a. Focus on the immediate, as well as underlying causes of the problem—the factors impeding access (lack of safeguards to access, or insufficient mechanisms that uphold justice for all under any circumstances);
b. Identify the "claim holders" or beneficiaries — the most vulnerable (rural poor, women and children, people with diseases and disabilities, ethnic minorities, among others);
c. Identify the "duty bearers"—the ones accountable for addressing the issues/problems (institutions, groups, community leaders, etc.); and
d. Assess and analyse the capacity gaps of claim-holders to be able to claim their rights and of duty-bearers to be able to meet their obligations and use analysis to focus capacity development strategies."[9]

ROLE OF JUDICIARY ON ACCESS TO JUSTICE

In R v. Lord Chancellor[10] ex pate Witham, held that "does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written Constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that anyone of them is more entrenched by the law than any other. And if the concept of a constitutional right is to have any

[8] Idbi.
[9] Idbi.
[10] 1997 (2) All ER 779

meaning, it must surely sound in the protection which the law affords to it. Where a written Constitution guarantees a right, there is no conceptual difficulty. The State authorities must give way to it, save to the extent that the Constitution allows them to deny it. There may of course be other difficulties, such as whether on the Constitution's true interpretation the right claimed exists at all. Even a superficial acquaintance with the jurisprudence of the Supreme Court of the United States shows that such problems may be acute. But they are not in the same category as the question: do we have constitutional rights at all?" Lord Diplock in Bremen Vulkan Schiffban and Maschinenfabrik v. South India Shipping Corp.[11] as follows:

"The High Courts' 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 disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."

Steyn LJ in R v. Secretary of State for Home Dept,[12] referred to the principle of 'access to justice'. The learned judge held as follows:

"It is a principle of our law that every citizen has a right of unimpeded access to a court. In Raymond v. Honey[13] Lord Wilberforce described it as a 'basic right'. Even in our unwritten Constitution, it ranks as a constitutional right. In Raymond v. Honey, Lord Wilberforce said that there was nothing in the Prison Act, 1952 that confers power to 'interfere' with this right or to 'hinder' its exercise. Lord Wilberforce said that rules which did not comply with this principle would be ultra vires. Lord Elwyn-Jones and Lord Russell of Killowen agreed…… It is true that Lord Wilberforce held that the rules, properly construed, were not ultra vires. But that does not affect the importance of the observations. Lord Bridge held that rules in question in that case were ultra vires….. He went further than Lord Wilberforce and said that a citizen's right to unimpeded access can only be taken away by express enactment….. It seems (to) us that Lord Wilberforce's observation ranks as the ratio decidendi of the case, and we accept that such rights can as a matter of legal principle be taken away by necessary implication."

[11] 1981 AC 909 = 1981 (1) All ER 289
[12] 1993 (4) All ER 539 (CA)
[13] 1983 AC 1 (1982 (1) All ER 756)

In, P.M. Ashwathanarayana Setty v. State of Karnataka[14], Venkatachaliah J quoted A.P. Herbert's 'More Uncommon Law', where the Judge held that:

"That if the Crown must charge for justice, at least the fee should be like the fee for postage: that is to say, it should be the same, however long the journey may be. For it is no fault of one litigant that his plea to the King's Judges raises questions more difficult to determine than another's and will require a longer hearing in Court. He is asking for justice, not renting house property."

The Judge in the fictional case asked the Attorney General:

"Everybody pays for the police, but some people use them more than others. Nobody complains. You don't have to pay a special fee every time you have a burglary, or ask a policeman the way." Venkatachaliah J observed that the court fee as a limitation on 'access to justice' is inextricably intertwined with a 'highly emotional and even evocative subject stimulative of visions of a social order in which justice will be brought within the reach of all citizens of all ranks in society, both those blessed with affluence and those depressed with poverty'. His Lordship, further observed: "Indeed all civilized governments recognize the need for access to justice being free."[15]

The Law Commission of India in its 189th Report on 'Court Fee' relying on the need to see that 'access to Courts' is not curtailed by excessive demands towards Court fee. In, Bihar Legal Support Society v. The Chief Justice of India & Ors.[16] it was held that –

"the weaker sections of Indian society have been deprived of justice for long long years; they have had no access to justice on account of their poverty, ignorance and illiteracy. …..The majority of the people of our country are subjected to this denial of 'access to justice' and overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings…… The strategy of public interest litigation has been evolved by this Court with a view to bringing justice within the easy reach of the poor and disadvantaged sections of the community."

The famous dictum of Justice Brennan of the US Supreme Court may also be recalled:

"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, 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

[14] 1989 Supp (1) SCC 696
[15] Idbi.
[16] AIR 1987 SC 38

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."

The reason behind widening the access to justice was again explained by the Supreme Court in Akhil Bharatiya Soshit Karamchan Sangh v. Union of India and others[17] 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 Anglo Indian mould, but it is broad-based and people-oriented, and envisions access to justice through 'classactions', '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, People's Union for Democratic Rights and others VS. Union of India and others[18] 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. the people of India, can legitimately boast of a people-oriented jurisprudence with unimpeded access to justice, otherwise Chief Justice Chandrachud in Olga Tellis vs. BMC[19] could not have described the litigants before His Lordship's Court in these rnimitable 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 ?" Justice Krishna Iyer in M/s Central Coal Fields Ltd. v. M/s. Jaiswal Coal Co.[20] 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

[17] (1981) 1 SCC 246
[18] (1982) 3 SCC 235
[19] AIR 1986 SC 180
[20] AIR 1980 SC 2125

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."

CONCLUSION

Professor Roscoe Pound prefaced his classical work on Jurisprudence by referring to Daniel Webster as saving that justice is the greatest interest of man on earth. In the Constitution of India apart from voicing that abiding concern for justice in the Preamble, the cornerstone of Fundamental Right is equality which is rightly called the 'mother of justice'. If equality disappears from the precincts of court, justice is orphaned. Therefore, 'access to justice' in our Constitution is placed on the high pedestal of fundamental right.[21]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."[22] 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."[23] In Bar Council of Maharashtra v. M. V. Dabholkar,[24] widening the access to justice the court 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." A strong and impartial judiciary is a cornerstone of access to justice. There should be effective reforms to access to justice. It must include protection of rights, especially those of the poor and disadvantaged; strengthening capacities to seek remedies through formal and informal mechanisms; improving institutional capacities to provide remedies in relation to adjudication, due process, enforcement mechanisms and civil society efforts to foster accountability.[25]

[21] Justice A. K. Ganguly*, 'Access to Justice'*, Cuttack Conference ILI Golden Jubilee1956-2006
[22] Sir Lesli Scarman, *English Law – The New Dimension* – The Hamlyn Lectures 1974
[23] M.Cappelletti, Access to Justice 672 (1976)
[24] (1975) 2 SCC 702
[25] https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf (last visted on 10.02.2020)