Access to Justice: How Far it is a Human Right?

Sheeba Varghese[1]

Abstract

Access to justice is one of the constitutionally recognized fundamental and human rights. Access to justice means to reach justice easily by legally proceedings in appropriate time and place. Delivery of justice should be impartial, and also take all necessary steps to provide transparent, effective, fair and accountable service to all people irrespective of caste, colour, sex, religion, economic status etc that promote access to justice. legal aid programs and campaigns are a central component of strategies to enhance access to justice for every person. Access to justice is often used as a term for access to the formal institution of the legal system by those in search of a legal remedy either by individuals or collectively or constitutional challenges. It is essential today that the effectiveness of the rule of law should go hand in hand with access to justice. The Constitution of India has provided for Article 39A, Article 14, and Article 21 that guarantee the citizens the right to access to justice. Yet, access to justice as a human right remains problematic in international as well as national law.

In this article, I explore the reasons why access to justice is not being delivered to many? The popular reasons include low level of awareness about the functioning of the legal system in India, high costs quoted by lawyers and delays in passing judgements that make it heavily inaccessible to justice.

Key Words: *Constitutionally Recognized Fundamental, Human Rights, Legal System*

Introduction: Access to justice and International Human Rights Laws

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

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:(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

[1] Assistant Professor in law Al Azhar Law College Thodupuzha, Kerala.

There are provisions in the International Covenant on Civil and Political Rights, the European Convention and other regional conventions that given the importance of the right of access to independent and impartial justice. The decision of the European Court on a like provision in the European Convention dealt with this aspect[2] and other cases.

Access to justice and Indian Position

In India, the citizens had always access to the King, right from the earlier time according to our history. When the Indian Courts later absorbed the principles of common law of the England, the right to access to courts became part of our Indian law, even long before the coming into force of our Constitution on 26th January, 1950. Rights in existence before the Constitution came into force were continued even after the Constitution because of Art. 372 of the Constitution. Two interesting cases that arose in the pre-independence era which would indicate that concept of a non-derogable right of access to justice was recognised and enforced by the courts in this country may here be referred to. Among the early decisions was one rendered by the Bombay High Court in *Re: Llewelyn Evans*[3]. In that case, Evans was arrested in Aden and brought to Bombay on the charge of criminal breach of trust. At the stage of granting remand of the prisoner to police custody, Evans' legal adviser was denied access to meet the prisoner.

It was held that he had no jurisdiction to grant access despite the fact that s.40 of the Prisons Act, 1894 provided that an unconvicted prisoner should, subject to proper restrictions, be allowed to see his legal adviser in jail. The question that arose was whether this right extended to the stage where the prisoner was in police custody. Referring to s.340 of the Code of Criminal Procedure, 1898 the Judge held that "the right under that provision implied that the prisoner should have a reasonable opportunity "if in custody, of getting into communication with his legal adviser for the purposes of preparing his defence". The other judge on the Bench, Justice Madgavkar added that "if the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely, and fairly, before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice – advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very state which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance".

Another instance of the courage and craftsmanship of our Judges in India, particularly during difficult times of our political and legal history, is provided in the decision in P.K. Tare v. Emperor[4]. The petitioners, who had participated in the Quit India

[2] Golden v. UK 1975(1) EHRR 524 and Airey v. Ireland 1979 (2) EHRR 305

[3] Llewelyn Evans AIR 1926 Bom 551

[4] P.K. Tare v. Emperor AIR 1943 Nagpur 26

Movement of 1942, challenged their detention under the Defence of India Act, 1939 as being vitiated on account of refusal of permission by the authorities to allow them to meet their counsel to seek legal advice or approach the court in person.

The Constitution of India through Article 32and Article 226 promises to provide an effective mechanism and secure the fundamental right of every person to get access to courts in India. These Articles are a speed track mechanism and provide quick remedies. A person has the right to directly approach the Supreme Court through Article 32 without having to go through the hassle of approaching lower courts.[5]

The Constitution is thus the protector and assurer of our fundamental right to get access to courts. Similarly, the High Courts have a power through Article 226 of the Constitution that ensures that a person can approach the High Court for a fundamental right violation or any other matter[6]. In this regard, Article 32 is restrictive as compared to Article 226, as a person can apply Article 32 only in cases of fundamental right violations. But through Article 226, the High Courts can be approached for any matter (matters that do not necessarily revolve around fundamental right violations).

Legal aid is a fundamental facilitator to ensure access to courts. The Supreme Court, time and again has taken progressive measures to promote access to justice and has upheld the Constitution that guarantees this as a fundamental right. It has done so by applying a twin strategy of loosening the traditional rules of locus standi and relaxing procedural rules in such cases. In many cases, the courts have taken up the initiative of appointing commissioners and expert bodies to treat pro bono cases or cases where the party needs representation. Essentially, the courts use the procedure of Public Interest Litigation to address grievances of the poor and weaker sections of the society. It is a tool that is used to ventilate public grievances where the society as a whole, rather than an individual feels aggrieved. Apart from the above, there are several sections of the Constitution that are interpreted and read along with Article 32 and Article 226. These include: Article 13 which deals with laws inconsistent with or in derogation of the fundamental rights[7], Article 14 which deals with equal treatment and equality before the law[8] and Article 21 which refers to the protection of life and personal liberty[9] which directly extends to the right of access to courts and judicial redress in all matters.

Since large number of people in India, are poor, illiterate, backward or oblivious, the State laid the concept of Alternative Dispute Resolution to promote justice on the basis

[5] CONSTITUTION OF INDIA. art 32

[6] CONSTITUTION OF INDIA. art 226

[7] CONSTITUTION OF INDIA. art 13

[8] CONSTITUTION OF INDIA. art 14

[9] CONSTITUTION OF INDIA. art 21

of equal opportunities. Lok Adalats[10], Grama Nyayalayas, Ombudsman[11] 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.[12]

Conclusion

The Indian 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 to access justice. The customary idea of "access to justice" as understood is access to courts of law which has become out of reach of those people due to different reasons for example, 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. 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 litigating process. Despite being officers of Indian Courts, 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. More ADR centres 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. Thus, access to justice will become the human right to those persons who need it really.

[10] 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

[11] Ombudsman is a public sector institution, preferably established by legislative branch of Government, to supervise the administrative activity of the executive branch.

[12] Law Commission of India, Government of India, April 2009, 222nd Report on "Need for Justice-dispensation through ADR etc.", 13 https://lawcommissionofindia.nic.in/reports/report222.pdf (Last visited Nov. 10, 2021).