

Access to Justice

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Introduction

Indian judicial system, like those in Commonwealth countries, is firmly rooted in the common law tradition. The subject of 'access to justice' is one of great contemporary importance. The words 'access to justice' immediately stir up in our mind the idea that every person who seeks justice must be provided with the requisite monies to approach a Court of Justice. But, that is not the only meaning of these words. They also refer to the nature of different rights, to the number of Courts, to the quality of justice, to the independence of the Judges who man the Courts, to legal aid and public interest litigation and so on.

Part I of this article refers to the history and development of the concept of access to justice in common law. Part II refers to the international law before examining the position in our country. It describes the pre-independence (before 1947), and post-constitutional developments and the evolution of legal aid. Part III refers to the power of judicial review in Indian constitutional courts. It touches upon judicial review of administrative action and PIL. Part IV refers certain issues that are relevant for the access to justice, viz., need for adequate courts, court fees and the independence of the judiciary.

I

History of the Common Law right of ‘access to justice’

‘Access to Justice’ is a basic human right conferred by the common law and exists unless it is taken away under any valid exercise of statutory or constitutional power by the legislature.

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.

As Blackstone stated later, “It is the function of the common law to protect the weak from the insults of the stronger” (3 Blackstone Commentaries, 3). The Magna Carta asserted not only that the King was bound by law but the barons too and this gave protection to all ‘freemen’. 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:

“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.”

In the more than 500 years following the Magna Carta at Runnymede, Courts resolved disputes, created precedents and laid down vast principles which came to be known as the common law. The Commentaries of Sir Edward Coke and of William Blackstone crystallized the fundamental principles of common law that enshrine the basic rights of man. The principles relating to these basic human rights together with experiences in France, US and other countries entered into the Bills of Rights and the Constitutions of various countries. Every right when it is breached must be

provided with a right to a remedy. *Ubi Jus ibi remedium* says the Roman maxim.

The latest theory is that the right to ‘access to justice’ was part of the common law and was later continued and recognized as part of the ‘Constitutional Law’. The “common law” says Justice Laws in *R v. Lord Chancellor, ex parte Witham* 1997 (2) All ER 779, “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 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?”

Laws, LJ. further states “In the unwritten legal orders of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can, in my judgment, inhere only in this proposition, that the right in question cannot be abrogated by the

State save by specific provision in an Act of Parliament or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. Any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.”

Earlier, Lord Diplock, while dealing with the High Courts’ power to control the conduct of arbitrators, incidentally referred to the common law aspect of access to justice. He said in *Bremen Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corp.* (1981 AC 909 = 1981 (1) All ER 289) 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.”

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”

Likewise, Steyn LJ in *R v. Secretary of State for Home Dept, ex p Leech*: 1993 (4) All ER 539 (CA), referred to the principle of 'access to justice'. He was dealing with a prisoner who complained that correspondence with his solicitor concerning litigation in which he was involved or intended to launch, was being considered by the prison authorities under the Prisons Rules, 1964. The prisoner contended that sec. 47(1) of the Prisons Act, 1952 which authorised the framing of Rules, could not authorize the Secretary of State to make a rule which created an impediment to the free flow of communication between him and his solicitor about contemplated legal proceedings. 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*: 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. 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.”

In an earlier case in *Re Vexatious Actions Act 1896, Re Boaler* (1915) (1) KB 21, the right of a person to lay information before a magistrate, it was held, could not be prohibited, as the same could not be brought within the ambit of the words “vexatious legal proceedings” which could be prevented under the 1896 statute. It was held by Scrutton J as follows:

“One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any statute should be jealously watched by the court, and should not be extended beyond its least onerous meaning unless clear words are used to justify extension..... I approach the consideration of a statute which is said to have this

meaning with the feeling that unless its language clearly convinces me that this was the intention of the Legislature I shall be slow to give effect to what is most serious interference with the liberties of the subject”

Laws LJ., again reiterated in *International Transport Roth GmbH v. Home Secretary* 2002 (3) WLR 344, in his separate judgment, that, after the coming into force of the Human Rights Act, 1998 (w.e.f. 2.10.2000), the British system which was once based on parliamentary supremacy has now moved from that principle to the system of constitutional supremacy. He referred to the judgment of Iacobucci J in *Vriend v. Alberta* 1998 (1) SCR 493 where the judge said that after the Canadian Charter of Rights and Freedoms Canada has moved from parliamentary supremacy to constitutional supremacy. He said:

“When the Charter was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of parliamentary supremacy to constitutional supremacy.... Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away”

Laws LJ., stated that in the present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy.....”

These views establish that ‘access to justice’ is a basic fundamental right imbedded into the common law and cannot be taken away except by valid legislation or constitutional amendment.

II

International Human Rights 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:

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.

There are provisions in the International Covenant 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. The decision of the European Court on a like provision in the European Convention dealt with this aspect in *Golden v. UK* 1975 (1) EHRR 524 and *Airey v. Ireland* 1979 (2) EHRR 305 and other cases.

The position in India

In India, the citizens had always access to the King, right from the time of Ramayan and according to our history. When the Indian Courts later absorbed the common law of England, the right to access to courts became part of our 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* AIR 1926 Bom 551. 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. The Magistrate who ordered

the remand 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. Justice Fawcett, who presided over the Bench of the Bombay High Court referred to the report of the Rawlinson Committee in England and noted that “the days have long since gone by, when the state deliberately put obstacles in the way of an accused defending himself, as for instance, in the days when he was not allowed even to have counsel to defend him on a charge of felony.” 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* AIR 1943 Nagpur 26. The petitioners, who had participated in the Quit India 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 Government of the day contended that the Defence of India Act 1939 took away the right to move a habeas corpus petition under S.491 of the Cr.PC 1898. The court rejected this contention relying on the observation of Lord Hailsham in *Eshugbayi v. Officer Administering the Govt. of Nigeria* that “such fundamental rights, safeguarded under the Constitution with elaborate and anxious care and upheld time and again by the highest tribunals of the realm in language of utmost vigour cannot be swept away by implication or removed by some sweeping generality. No one doubts the right and the power of the proper authority to remove, but the removal must be express and unmistakable; and this applies whatever government be in power, and whether the country is at peace or at war.” Justice Vivian Bose, giving the leading opinion of the court, explained that the right to move the High Court remained intact notwithstanding the Defence of India Act, 1939. Further, although the courts allow a great deal of latitude to the executive and presumptions in favour of the liberty of the subject get weakened, “those rights do not disappear altogether.” The court categorically ruled that the “attempt to keep the applicants away from this Court under the guise of these rules, is an abuse of power and warrants intervention.”

Justice Vivian Bose, in the course of his judgment, emphasised the importance of the right of any person to apply to the court and demand that he be dealt with according to law. He said: “The right is prized in India no less highly than in England, or indeed any other part of the Empire, perhaps

even more highly here than elsewhere; and it is jealously guarded by the courts.”

The Constitution and after

The debates in the Indian Constituent Assembly preceding the making of the Constitution of India witnessed interesting exchanges amongst the distinguished gathering. Article 22 (1) was Article 15-A in the Draft Constitution and provided that “no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult a legal practitioner of his choice”. Dr. Ambedkar was conscious of the criticism that had resulted from the omission of “due process” from Article 21 (Article 15 in the Draft Constitution). Therefore, when the debate on Article 15-A was to commence he pointed out that it was being introduced in order to make “compensation for what was done then in passing Article 15. In other words, we are providing for the substance of the law of ‘due process’ by the introduction of Article 15-A”. He further pointed out that “Article 15-A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilized country follows as principles of international justice”, viz., the right of a person arrested to be informed of the grounds of arrest and the right to be defended by a legal practitioner of his choice.

The Constitution recognised importance of access to justice to courts, particularly by resort to the High Courts and the Supreme Court. The right

under Article 32 to petition the Supreme Court for enforcement and protection of fundamental rights is itself a fundamental right. In Keshav Singh Re (AIR 1965 SC 745), the Indian Supreme Court said “The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the court in that behalf.” Kesavananda 1973 (4) SCC 225 recognised judicial review as part of the basic structure of the Constitution, a position that has been reaffirmed by a bench of seven judges in L. Chandra Kumar v. Union of India (1997) 3 SCC 261. That would mean that not even the amendment of the Constitution can take away the power of judicial review vesting in the High Courts and Supreme Court. Any amendment taking away any part of the right to judicial review will be unconstitutional and can be struck down by the Constitutional Courts.

Right to ‘access to Courts’ includes right to legal aid and engage counsel

Article 39-A of the Indian Constitution was introduced by the Constitution (42nd Amendment) Act, 1976 and it provides that “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 in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”.

Major strides were again made in the development of the jurisprudence surrounding the “right to life” under Article 21, particularly after the landmark decision in Maneka Gandhi 1978 (1) SCC 248. The linkage

between Article 21 and the right to free legal aid was forged in the decision in *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81 where the court was appalled at the plight of thousands of undertrials languishing in the jails in Bihar for years on end without ever being represented by a lawyer. The court declared that “there can be no doubt that speedy trial, and by speedy trial, we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.” The court pointed out that Article 39-A emphasised that free legal service was an inalienable element of ‘reasonable, fair and just’ procedure and that the right to free legal services was implicit in the guarantee of Article 21. In his inimitable style Justice Bhagwati declared: “legal aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality”. He reiterated this in *Suk Das v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401 and said “It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.” This part of the narration would be incomplete without referring to the other astute architect of human rights jurisprudence, Justice Krishna Iyer. In *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC 544, he 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’.

Recently it was stated by the National Commission for Review of the Constitution 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”

However, the right to legal aid in India is now firmly entrenched in the Legal Services Authorities Act, 1987. S.12 of that Act provides that legal aid will be available both on the means test as well as the merits test. In fact, for a wide range of litigants with special needs, for instance, persons in custody, children, women, complainants under the SC/ ST Act, workmen, legal aid is

automatically available for filing or defending a case irrespective of the economic status of that person. We have, under the Act, an extensive network of legal aid committees at the taluk, district and State levels. In addition, every High Court and the Supreme Court has its own legal services committee. The task before these committees to provide effective and quality legal aid, that will not be restricted to legal representation in courts but also counselling an advice, is an important and daunting challenge.

III

Judicial review by Constitutional Courts in India

Reference has next to be made to the scope and extent of the power of ‘judicial review’ which, as stated earlier, is an inalienable part of the “basic structure” of our Constitution. The power of the constitutional Courts to go into the validity of the laws made by the Legislature or of the actions of the executive was broadly laid down by Justice Marshall CJ in the famous case in *Marbury v. Madison* (1803) 5 U.S. 137. In India, the power of judicial extends to review of the validity legislation, subordinate legislation and all administrative action by the Federal and State Governments, of actions of the public-sector undertakings, statutory authorities and local bodies. The definition of ‘law’ for purposes of Art. 12 of the Constitution which has to conform to fundamental rights is very wide.

Wednesbury rules and proportionality in Constitutional Courts

The Constitutional Courts are the High Courts and the Supreme Court and are vested with the jurisdiction to issue various types of writs to strike down legislation. They can also strike down action of Executive or statutory authorities in relation to infringement of fundamental rights guaranteed by the Constitution or statutory rights conferred by various statutes. They can be issued to the Government or statutory bodies or public authorities or in certain cases, to persons. The Courts will apply various principles that have been laid down in the judgments of the Supreme Court and High Courts in regard to judicial review of legislative and executive/administrative action. Several of these principles are common to the Indian and US Courts where legislative action can be struck down as ultra-vires. This can be on various grounds, namely, that the concerned Legislature had no legislative competence – having regard to the subjects upon which that legislature is permitted to legislate in the Constitution or as being violative of some other provisions of the Constitution apart from fundamental rights. Again if the legislation is more restrictive of a fundamental right than what is permissible under Art. 19(2) to (6) or Art. 21, the Courts in India can also go into the proportionality of the legislation and strike down the restriction and indicate to what extent a restriction is permissible.

Executive action can also be struck down if it is not permitted by the provisions of the statute concerned or by the Constitution of offends the

fundamental rights. Principles of proportionality are applied to consider the validity of executive action in the context of fundamental rights. Otherwise, Wednesbury Rules are applied. In that case, the Constitutional Courts do not go into the merits of the administrator's decision but will only decide whether it is contrary to law, procedure such as natural justice or is irrational in the sense that no reasonable person could have taken such a decision. Otherwise, they give due deference to the executive. But where the administrative action offends the provisions relating to fundamental rights such as those in Art. 19 or Art. 21, the Courts can also go into merits of the restrictions and indicate to what extent a restriction is permissible. Of course, they give deference to the marginal of appreciation provided in the Constitution.

As to enforcement of judgments, the superior Courts have powers under the Constitution, and under the Contempt Laws to take penal action if their orders are not complied with by the Executive authority. Further, the Constitution requires that the Government shall act in aid of the Supreme Court of India. Thus, in India, every person whose constitutional or statutory rights are violated has 'access' to the Constitutional Courts, namely, the High Court and the Supreme Court.

Public Interest Litigation

The concepts of 'public interest litigation' have come to stay in our Constitutional Courts. The trend of bringing public interest litigation in the Supreme Court and in the various High Courts by social action groups, the

legal aid societies, university teachers, advocates, voluntary organizations and public-spirited citizens has risen in the country. This has helped to ameliorate the miseries of thousands of persons, arising from repression, governmental omissions or excesses, administrative lethargy or arbitrariness or the non-enforcement of beneficial legislation. Cases of undertrials as well convicted prisoners, women in protective homes, unorganized labourers, untouchables, miseries of scheduled castes and tribes, landless agricultural labourers, slum-dwellers etc. are taken up in PIL cases. The concepts of locus standi have been very much expanded to meet the problems created by damage to environment or environmental pollution. Public interest cases have also come to be filed seeking directions against the Police or State for taking action against corrupt individuals. The result is that the strict rules of 'locus standi' which were applicable in the writ jurisdiction of our Constitutional Courts has, practically vanished.

In *Fertiliser Corporation Kamgar Union v. Union of India* AIR 1981 SC 344, Krishna Iyer J stated:

“In simple terms, locus standi must be liberalized to meet the challenges of the time. *Ubi Jus ibi remedium* must be enlarged to embrace all interests of public minded citizens or organizations with serious concerns for conservation of public resources and the direction and correction of public power so as to promote justice in trinity facets.”

Apart from the Constitutional Courts, we have the normal civil and criminal Courts, the Consumer Courts and a large number of Tribunals at the State and National level where the Tribunals are chaired by a sitting Judge or a retired Judge of the High Court or Supreme Court or where he presides along with Administrative Members.

IV

Need for adequate number of Courts and financial support

I now turn to certain important aspects that affect the right of access to justice. For the protection of civil rights, the State has to establish adequate number of Courts, man them by qualified, competent and independent Judges and provide the necessary staff and infrastructure. But today there is an immense gap between the demand and supply. It is well-known that the Law Commission of India had stated in its Report in 1988 that we in India have only 10.5 Judge per million population while countries like US and UK and others have between 100 to 150 per million population. The Union Government and the States in India had taken adequate care to increase the Courts and we are faced with considerable backlog of cases in our Courts. Every law made by Parliament or the State Legislatures creates new civil rights and obligations and creates new criminal offences. Before such laws are introduced, a judicial impact assessment has to be made as to the impact of the Acts on the Courts – such as how many civil cases the Act will generate or how many fresh criminal cases will go before the Courts. To that extent, each Bill must, in its Financial Memorandum, seek budgetary

allocation but in the last five decades this has not been done. I may state that in US a statute specifically requires judicial impact assessment and adequate budgetary provisions to be made.

Long ago, in the Federalist Paper No.78, in the 18th Century, Alexander Hamilton, one of the architects of the American Constitution declared, in an oft-quoted passage, that the judicial branch of the federal government is one that “will always be the least dangerous to the political rights of the Constitution” because the judicial branch

“has **no influence over either the sword or the purse**; no direction of the strength or the wealth of the society”

Therefore, to start with, we must have an adequate number of trial and appellate Courts, civil and criminal, established by the State and adequate budgetary provision must be made before the enactment of any legislation, by making a judicial impact assessment.

Court Fees

Yet another aspect of ‘access to justice’ is the system of demanding ‘court-fee’ from the parties who move the Courts. Lord Macaulay, who headed the Law Commission of India one hundred and fifty years ago declared that the preamble to the Bengal Regulation of 1795 was ‘absurd’ when it stated that high court fee was intended to drive away vexatious litigants. The reason he gave was that such increase will also drive away honest plaintiffs who are unable to pay court fee. Starting from the 14th Report, the Law Commission

has been repeating that the argument that court fee be increased to prevent vexatious litigation, cannot be accepted.

In the Supreme Court, in *P.M. Ashwathanarayana Setty v. State of Karnataka* 1989 Supp (1) SCC 696, Venkatachaliah J (as he then was) quoted A.P. Herbert's 'More Uncommon Law', where the following words of the Judge in the fictional case of *Hogby v. Hogby* were referred to:

“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.”

The Law Commission has given a Report on ‘Court Fee’ recently relying strongly on the need to see that ‘access to Courts’ is not curtailed by excessive demands towards Court fee.

Alternative Dispute Resolution and Plea Bargaining

Today, it is universally recognized that the Courts may not merely adjudicate in civil disputes but also persuade parties to go for arbitration, conciliation, mediation or Lok Adalats. Courts are no longer mere centres for adjudication on disputes but are also centres for promoting settlement. Court-annexed systems can even compel parties to try these alternative modes. Section 89 of the code of Civil Procedure, 1908 (as introduced w.e.f. 1.7.2000) is part of such a policy. Mediation centres are now coming up in a big way in India, a start is made in Mumbai, Ahmedabad, Chennai and other places by voluntary groups of lawyers.

Plea bargaining in criminal cases has been recommended by the Law Commission and the Bill is in Parliament.

Independence of the judiciary

The next aspect, in regard to which we are in fairly on sound ground in India, is the 'independence of the judges' who man the Courts. Our Constitution has taken adequate care to see that the judges in the subordinate Courts and in the superior Courts, namely the High Courts and the Supreme Court, inspire the confidence in the public. The scheme of our Constitution is that in all matters of recruitment, promotions, transfers, disciplinary action etc. of the judges in the subordinate judiciary government is kept out and the High Court is kept in full charge.

So far as the High Court is concerned, as decided in the Judges cases by the Supreme Court, the proposals for appointment of judges are made by a collegium consisting of the Chief Justice of the High Court and two his seniormost colleagues and then the Chief Justice of India and four of his colleagues, and the Supreme Court Judge, if any, from the concerned State, give their views and then the President appoints the person so selected as a Judge. The power to recommend transfer of judges of the High Court is again vested in the Chief Justice of India. The Executive must invariably comply with the recommendations of the Supreme Court. Salaries and privileges are not liable to be diminished during tenure and judges cannot be removed except by impeachment in both Houses of Parliament and that too only for proved misbehaviour. The appointment process of the judges of the Supreme Court is, again in the hands of the collegium consisting of Chief Justice of India and the first four seniormost judges. Other safeguards are

the same as in the case of the High Court Judges. Of course, the collegium principle is not expressly provided in the Constitution but is evolved by the judgments of the Supreme Court.

Our Supreme Court has held in more than one judgment that the independence of the judiciary at all levels is part of the basic structure of the Constitution of India (*Shri Kumar Padma Prasad v. Union of India*: 1992 (2) SCC 428 and *Union of India v. Prathiba Bannerjee*: 1995 (6) SCC 765).

Conclusion

The topic of access to justice is such that legal scholars, judges and lawyers can discuss it ad infinitum and still discover new dimensions. What I have referred to is perhaps only a very broad mapping of the significant aspects.

I wish to conclude by reminding ourselves of the Gandhian dictum that in whatever we do we keep in mind the weakest person and ask how useful to him any system would be. This has been pithily captured in the words of the court in *Bihar Legal Support Society v. The Chief Justice of India & Ors* (AIR 1987 SC 38):

“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 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.”

I thank all of you for the opportunity to share with you some of my thoughts.