



## ACCESS TO JUSTICE AND LEGAL AID

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### ABSTRACT

Despite the progressive measures, the 'access to justice' in India has been costly and beyond the reach of poor citizens. Delays in disposal of cases add to the woes of the litigants. Poor and marginalised sections of the society have not been able to fully claim their legitimate stake in the protections provided by the Constitution and legal system, because of which, the realization of justice remains a challenge. Government's efforts to take justice to the door step of people in the form of Gram Nyayalayas has met with partial success as only 7 states have notified 168 Gram Nyayalayas so far, of which only 151 have become operational. Implementation of Gram Nyayalayas Act is affected by several constraints in dispensing justice including the lack of infrastructure below the district level, difficulties in getting support from local administration-police, preference among lawyers to appear in district level courts than the Gram Nyayalayas, limited awareness among villagers about court decorum and limited incentives for judges to attend Gram Nyayalayas. Also higher courts do not refer small cases with limited jurisdiction to these institutions. One of the serious challenges to the protection of rule of law and human rights is the inability of formal justice system to deliver speedy and affordable justice to the poor. The number of pending cases in Indian

courts is an indication of this. Some often major challenges are listed below:

- **Lack of awareness on rights and entitlements**
- **Limited reach of the institutions extending Legal Aid**
- **Inaccessibility of Formal courts, vacancies and judicial delays**
- **Gender discrimination in access to justice**

### INTRODUCTION

The phrase "access to justice" cannot be easily defined. It is a political, legal, and rhetorical symbol of undeniable power and attractiveness for the subjects of statecraft. Access to justice has an intrinsic nexus with the term "justice", in the sense that it is its minimum prerequisite. 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<sup>1</sup>.

Access to justice relates to the ease of entry to a legal institution as also to the nature of the de jure fact that carries its promise<sup>2</sup>. The concept of access to justice has undergone an important transformation; earlier a right of access to judicial protection meant essentially the aggrieved individuals formal right to merely litigate or defend a claim. The reason behind this was that access to justice was a natural right and natural rights did not require affirmative state action. However with the emergence of the concept of welfare state the right of access to justice has gained special attention and it has become right of effective access to justice. In the modern, egalitarian legal system the effective access to justice is



regarded as the most basic human right which not only proclaims but guarantees the legal rights of all<sup>3</sup>.

In today's world, "Access to justice" means having recourse to an affordable, quick, satisfactory settlement of disputes from a credible forum<sup>4</sup>. The words "access to justice" serve to focus on two basic purposes of legal system- the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. Thus it requires that the system, firstly, must be equally accessible to all, and second, it must lead to results that are individually and socially just.

Access to justice can be broadly categorized into formal and informal access to justice. The formal access to justice is basically adjudication of disputes by the courts which follow the rules of civil and criminal procedure. This mode of justice delivery system though the primary model, has numerous shortcomings such as cost hurdles, inordinate delays and other technical hurdles like laches and execution of courts order. On the other hand informal access to justice includes alternative modes of dispute resolution such as arbitration, conciliation, mediation, lok adalats and nyaya panchayats. Contrary to what the nomenclature suggests, alternative modes are more of a supplementary phenomenon and were devised with that very intent. However, one has to remember that these methods of dispute resolution are required to always adhere to certain basic postulates of dispute resolution - parity of power between the contesting parties being one such postulate. If they in their very conceptions offer scope for coercion or influence, they cannot be considered to be imparting justice. It has to

be remembered that justice is the beacon of any dispute resolution method and not just mere settlement of dispute. If mere settlement becomes the beacon, then there comes the element of power imbalance and as a result, the society becomes lopsided leading to tussle and eventual conflict between power holders and power addressees.

With a population of 1.2 billion people, India is a multi-cultural, multi-linguistic, multi-religious and multi-ethnic secular country. India is also the most representative democracy which elects approximately 3 million people in the local self-government bodies - more than 1/3 of them being women. During last two decades, India has made steady progress on economic front and has achieved sustained growth of 8.2 percent for last 5 years but poverty has declined only by 0.8 percent<sup>1</sup>. India ranks 134 out of 187 countries on the UN Human Development Index.<sup>2</sup> The Constitution of India has ensured equality to all its citizens. Article 14 of the Constitution of India reads 'The Stateshall not deny to any person equality before the law or the equal protection of the laws within the territory of India'. The Constitution also prohibits discrimination on grounds of religion, race, caste, sex or place of birth<sup>3</sup>. Article 39A (Equal Justice and Free Legal Aid) of the Indian constitution, under the Directive Principles of State Policy reads '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.



## ACCESS TO JUSTICE

## IN INDIA

The present mode of access to justice through courts, followed in India is based on adversarial legalism. The adversarial system of law is generally followed in common law countries, and is characterized by the state's neutrality and in which the parties are responsible for initiating and conducting litigation except in criminal matters wherein the state initiates the proceedings<sup>5</sup>. This mode of access to justice is an inheritance from the British and was implemented by the British government to exploit the Indian masses.

The whole set up was for the benefit of the power holders and not for the power addressees. In this method there was no parity of power between the parties to the dispute and it was plagued by high cost, delay, uncertainty and exploitation of parties by advocates. This mode of access to justice displaced the community justice system as well as the last vestiges of the inquisitorial model, which was prevalent in ancient India. This inherited mode of access to justice is unable to deliver as it is a relic of colonial rule, was born out of the need of the colonial masters to perpetuate their dominance and was thus primarily designed for the same, with 'justice' being more or less an afterthought. It was fashioned to provide a semblance of justice so as to avoid dissent, which is but the natural fallout of denial of the same. Real and effective justice, for obvious reasons, was not a priority of the colonial masters. The system prevalent then, and unfortunately for us, still in continuation is inherently partial to the well heeled. It discriminates on economic grounds, creating disparities right at the outset, de facto denying to some even access to the

institutions of justice delivery. And the de facto denial is a consequence of us trying to work de jure equality<sup>6</sup> through a mechanism at odds with it, on account it being inherently iniquitous.

After the independence when the Constitution of India came into being the approach towards access to justice was redesigned and modified, and an attempt was made to bring parity of power in modes of dispute resolution. The preamble of the Indian Constitution resolves to secure for all its citizens, justice-social, economic and political. Further, Article 14 of the Indian Constitution reads as follows: "Equality before Law – The State shall not deny to any person equality before the law and the equal protection of the laws within the territory of India." The words "equal protection of laws" indicates two things: Firstly that every person is entitled to protection of all the laws of the land, and secondly, every person within Indian territory is equally entitled to that protection.

Article 14 casts a duty on the State to deliver the substantial promise of the laws, in other words the state has been imposed with a duty of delivering justice to all the people within the territory of India. In addition to this, Article 256 of the Indian Constitution provides for two important things firstly, it obliges the State governments to implement the laws, which are the laws passed by the State and Union Legislatures. Secondly, on failure to do so, the Union government is under an obligation to direct the State government to implement the laws<sup>7</sup>. Thus under the Constitution, a strict duty is cast on the State to ensure that there is compliance with every law. Therefore from the abovementioned, it is logical to conclude that



even the violation of a private right casts a duty upon the state to initiate proceeding against the offender.

Thus, from a reading of the abovementioned provisions one can infer that the Constitution discarded the adversarial mode of adjudication and impliedly adopted the inquisitorial mode. But that idea, unfortunately has not reified as yet, and the old model though in dissonance with fundamental provisions of our Constitution is still operative.

In an inquisitorial system, the court or a part of the court is actively involved in determining the facts of the case, as opposed to an adversarial system where the role of the court is solely that of an impartial referee between parties. However, the constitutional mandate in this regard has been consistently overlooked and we end up, still upholding the adversarial mode of adjudication, inspite of the fact that it is inherently prejudicial to the parity principle and thus contrary to Article 14, and thereby unconstitutional.

#### GOI INITIATIVES AND PRIORITIES

Government of India has enacted several pro-poor laws and has provisioned for policies that seek to protect rights of the citizens. Together, with a vigilant and proactive civil society, the judiciary has played an important role in creating an enabling environment to protect rights of the most marginalized. Having made some progress towards reducing poverty and exclusion during the 11th Plan period, the 12th Plan aims to accelerate faster, sustainable and more inclusive growth. For the first time in the plan process, Planning Commission of India constituted a Working

Group for Twelfth Five Year Plan of the Department of Justice under the chairpersonship of Secretary (Justice) with the basic objective of making recommendations for the 12th Five Year Plan. According to the report of this Working Group, "Governance is facing challenges in the country in terms of accountability, integrity and service delivery and justice delivery institutions play a crucial in restoring public confidence and trust in governance.<sup>15</sup> The Working Group made suggestions for improving the justice dispensation system by strengthening the 'Pre-litigation and Alternate Dispute Resolution system to help the poor and marginalized people to escape high litigation costs.' It also recommended that the 'Capacities of the Legal Services Authorities must be strengthened to effectively serve the poor and vulnerable sections of the society.<sup>16</sup> The Working Group has recommended human resource development, use of ICT, Judicial and Legal Reforms and structural changes to strengthen DoJ and Judiciary. The reduction in numbers of under trials in prisons also remains a big priority for the Government.

#### CONCLUSION

The Informal modes of access to justice are not to supplant the formal modes of access to justice rather to supplement them. But as we have already discussed that the Informal modes of access to justice which includes Nyaya Panchayats, lok adalats, Negotiation, Mediation, Conciliation, Arbitration and Institution of Ombudsman working in India, are not adhering to the principle of parity of power and are also not in consonance with the constitutional mandate. The institution of Nyaya Panchayat is providing easy access to



justice to the people living in villages but it's not only about an access to justice rather one should be able to get justice. The problem is that the powerful factions of the villages are substantially using the nyaya panchayats for their favour at the expense of justice. The lok adalats are also working well and helping courts in relieving their burden but the approach of lok adalats towards the dispute resolution is conciliatory which involves waiver of right and it is against the article 14 of the constitution. The other mode of informal dispute resolution like negotiation, mediation and conciliation are not effective because a mediator or a conciliator has no power to order a party to appear and defend a claim. Nor can a mediator or conciliator compel the losing side to comply with a decision. Moreover these mechanism of dispute resolution they involves waiver of right which is against the article 14 of the Constitution. As far as Arbitration is concerned the award of arbitrator is binding, thus satisfying the coercion count but as the Arbitration and conciliation act provides for the waiver of the right it is against the principle enshrined in article 14 of the constitution. Another lacuna is that it is based on the adversarial model of litigation which results in delay and high costs. The institution of ombudsman popularly known as office of "lokayukta" is not provided with the requisite machinery and powers by the respective state legislation and is thus not working effectively.

Although these modes of informal access to justice were premised on good intentions, their manifest effects are to the contrary. This is confirmed by the facts as have been aforementioned in the course of this paper. The primary and fundamental flaw being that despite making access to the instrumentalities

involved easier, the very quality of justice that they are employed to deliver is warped by their processes. As has been reiterated time and again through this paper, these modes are inclined more to afford convenience to the state than to deliver wholesome justice, and that holds true for the formal modes as well. The quality of justice (the use of the word justice being malapropos here) in the true sense is made ineffectual to a great extent by it being moored in inequitable postulates.

The apocryphal notion that the adversarial system sub serves the object of justice better is exposed by its inherent inconsistency with Article 14 which is as compendious an articulation of the principle of equity as possible. Article 14 impliedly advocates the implementation of an inquisitorial system premised on the parity of power. We can also draw inspirations from the principles of Rajadharma which is based on the inquisitorial pattern. What we need is model which can suit our society and principle of Rajadharma answers the present problems of the Indian society. The principles of Rajadharma are embedded in the Constitution also. Under the Constitution it is the duty of the state to provide equal protection of laws and to enforce compliance with every law. Thus a state has to play a proactive role in providing justice; what is required is a reading and enforcement of the Constitution in the true spirit.

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#### Reference

1. Rawl John, " A Theory of Justice" (Harvard University press, Edition 1997) p11



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2. *This view is contrary to the general notion wherein the nature of justice as contained in the law (procedural or otherwise) is considered beyond the scope of this head.*
  3. *See Article 14 of the Constitution of India.*
  4. *See Article 256 of Constitution of India.*
  5. *Article 15 of the Constitution of India.*
  6. *Article 39A of the Constitution of India, 1950.*
  7. *Article from Doj.gov.in*

