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## Access to Justice in Contemporary Indian Society: Challenges and Possibilities

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### Abstract

*The present article is an attempt to examine the multiple issues related to access to justice, especially for the marginalized sections of the contemporary Indian society. In view of the fact that Justice, Social, Economic and Political; mentioned in the preamble to the Indian Constitution, being one of the pertinent values, its access for the people gains utmost significance. In the introductory section the paper gives a broad outline of the challenges before the democratic institutions in India with her phenomenal diversities in contemporary times and their consequences on delivering justice to the people. In the section that follows access to justice is given a conceptual clarity in terms of its meaning, nature and safeguards. A discussion on the relations between the legislature and judiciary encompassing confrontation as well as competition follows in the next section. A very humble attempt is attempted in the next section to build a case in favour of a responsible and accountable judiciary for delivering justice to all in an effective manner. In the concluding section the possibilities and prospects of overcoming the hurdles on the path of access to justice are carefully probed before coming up with some useful suggestions.*

**Keywords:** democratic institutions, sustaining the trust, Access to Justice etc.

### Introduction

The democratic institutions in India are passing through very critical times today which could be described as both challenging as well as promising at the same time. In a comparative perspective while it can be fairly argued that the judiciary in India has performed creditably 'sustaining the trust of the people in its independence, fairness and impartiality' it is also not free from criticism either for its 'enormous delay in adjudicating matters and the consequent problems in accessing justice for a large section' of the Indian population, especially the marginalized ones. In view of India's phenomenal diversities and inequalities this is, indeed, a very challenging task. However, there is no denying the fact that 'judicial activism' has been, by and large, given a lot of credit for showing exemplary courage and determination 'in checking the excesses of the executive government' as well as chipping in from time to time filling up the void with useful initiatives and steps so as to protect the rights of citizens. But at the same time 'the falling standards of integrity and independence' of some members of the judiciary, of late, are very disturbing signs of these powerful institutions. In view of such serious lacunae

judiciary tends to become the least accountable branch of the government- a major worry in contemporary times.

### Access to Justice: Meaning, Nature and Safeguards

For an adequate understanding of what is access to justice it is important first, to know and identify the major dimensions of justice. Two major dimensions of justice can be taken up here for consideration. They are: retributive and distributive justice. While retributive justice is primarily concerned with determining punishment of a crime distributive justice, on the other hand, is concerned with the allocation of benefits and burdens according to certain principles. Three conditions can be identified here to ensure justice in the matter of punishment:

- (i) that punishment should only be inflicted on those found guilty of wrong- doing through proper procedure;
- (ii) that punishment be uniformly imposed implying thereby that the differences in penalty should always correspond to differences in wrong-doing; and
- (iii) (iii) that the scale of penalties should be proportionate to the various misdemeanours being punished ( David Miller,1987).

Thus retributive justice requires that punishment should be awarded for a crime duly proved beyond a reasonable doubt and that it should be in proportion to the seriousness of crime. So the main purpose is that punishment should neither be too severe nor too lax. As regards distributive justice the problem of social justice lies in determining 'the principles which should be chosen to govern the distribution of wealth, prestige and other benefits among the members of society' (David Miller, 1976). The question that immediately crops up in our mind is an enquiry as to what these criteria could be which determine the principles of distributive justice? Three such criteria may be identified here which are usually invoked to determine these principles. They are: (i) Protection of acknowledged rights; (ii) distribution according to desert/ merit; and (iii) distribution according to need. But none of these criteria can claim to be full-proof. Each has its own strengths and limitations. So the solution to this problem may be possible in a judicious combination of these criteria so as to blend the principles of liberty, equality, justice and fraternity harmoniously. In India, for example, some special arrangements such as reservation, also known as affirmative actions of the state, for vulnerable groups such as Scheduled Castes, Scheduled Tribes, and Other Backward Classes are made so as to protect them and deliver social justice. It is fair of course, to appreciate such protective measures as justice requires that people who have suffered losses and handicaps in the past for no fault of theirs need to be compensated to bring them on an equal footing with others. Equality of opportunity, in a genuine sense, would exactly require this.

Access to justice", in its general connotation, refers to individual's access to court or a guarantee of legal representation. Identification and recognition of grievance, awareness and legal advice or assistance, accessibility to court or claim for relief, adjudication of grievance and enforcement of relief, which is, certainly, the ultimate goal of a litigant public together form the basic features of "Access to Justice".

One, as a sincere observer of the judicial system in India, may have one's curiosity to enquire what different components of this concept of 'access to justice' are there. Two components immediately come to the mind here. First, there is the existence of a strong and effective legal system with rights enumerated and supported by substantive legislations. Second, there is the existence of a useful and an accessible judicial/ remedial system, which is easily available to the litigant public.

The Constitution of India, the basic law of the land, in its preamble, stands for securing justice to all its Citizens. This aspiration is retained again in Article 39A, where the Constitution aspires to secure and promote access to justice to all its citizens, especially to the marginalized ones with 'free legal aid by suitable legislation or schemes or in any other way'.

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

Several international documents have already recognized 'access to justice' as a prominent and fundamental right. The National Commission to Review the Working of Constitution (NCRWC), which was constituted in India, in the 50th year of her Independence, in its final report, suggested for incorporation of this right as fundamental rights by incorporating Art.30 A, in the Constitution. It was proposed to be 'access to Courts and Tribunals and Speedy justice'.

This was supposed to include the right to access to a court or tribunal for a fair public hearing as well as a right to reasonably speedy and effective justice in all matters before the courts or tribunals or any such forums.

### **30 A. Access to Courts and Tribunals and Speedy justice**

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

(2) *The right to access to courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunal or other forums and state shall take all reasonable steps to achieve the said objectives*

At this stage of the discussion a question may arise as to how the principles of 'access to justice' are going to be formulated? For this one has to identify and recognize one's grievance since this has a direct co-relation to one's right. While formulating the principles of access to justice, the identification and protection of these rights, especially of the poor and the disadvantaged ones, becomes the chief concern and forms the very basis. As we know from our reading of the preamble of our constitution that India is a secular and democratic republic, it is very significant that rights of different people belonging to different religions and those of the minorities, linguistic or cultural, are protected under the Constitution itself.

Apart from the Universal Declaration of Human Rights, the Constitution of India, guarantees, fundamental rights in its Part III, from Articles 14 to 32. This includes, right to equality, freedoms, right to life, religious and minority rights and finally the special right which guarantees constitutional remedies in cases of infringement of fundamental rights. Though these rights are not absolute, but they are protected under Article 13 of the Constitution, which expressly prohibits enacting of law inconsistent with or in derogation with fundamental rights. Additionally, any action abridging the fundamental rights are subject to inherent or implied limitations, as per the Doctrine of Basic Structure or Basic Features.

There are other sets of rights guaranteed as per the express provisions in the Statutes. Right of representation in elected bodies, right to maintenance, right to minimum wages, right to social security, right to vote are some such rights. In India, there are a number of statutes dealing with these special kinds of rights, such as Representation of Peoples Act, Minimum Wages Act, Provisions for Maintenance under Section 125 of the Code of Criminal Procedure, Social securities under Workmen's Compensation Act, Industrial Disputes Act, Employee's Provident Fund and Miscellaneous Provisions Act, Payment of Bonus Act, Payment of Gratuity Act, Employees State Insurance Act etc.

### **Legislature Vs Judiciary: Confrontation and Competition**

The nature of India's federal structure, initially, was in favour of a strong centre which changed only in the early 1970s when the single party (Indian National Congress) dominance came to an end. It was during this time that numerous conflicts arose between the Union and States leading to situations when the Union Executive invoked its powers to dismiss state governments opposed to its authority. The period has been regarded as the darkest phase of democracy in the country. All the democratic institutions suffered a serious setback and a series of authoritarian measures finally culminated in the imposition of national emergency in the country in 1975. Suspension of

fundamental rights, curtailment of dissent and censoring of press freedom became the order of the day. The judiciary in India came to be known as a “committed judiciary”. It even gave a judgment which justified unbridled exercise of executive power during emergency to the detriment of the right to life and liberty (A D M Jabalpur case AIR, 1976 S.C. 1207). Another major happening was the supersession of senior judges who resigned when their junior, because of his closeness with the government, was appointed Chief Justice of India.

In the first 25 years of the constitution’s working, the judgements of the Court rendered on two fundamental rights, namely, right to property and right to equality, are well documented and indicative of the approach the then Court had adopted in looking at State powers vis-à-vis citizens’ rights. The Courts’ approach in the interpretation of the concept of compensation on property matters was contrary to the Parliaments’ agenda on land reform and social justice. As a consequence of such conflict a series of Constitutional amendments including the introduction of the IXth Schedule were made. The introduction of the IXth Schedule consisted of legislations which were expressly declared to be outside judicial review. In the “Privy Purses” abolition matter and in bank nationalization issue the Court again followed the same approach. The government felt so much upset about it that it dropped the right to property from the list of constitutionally guaranteed fundamental rights at the time of emergency. In the matter of reservation for backward classes there arose a similar confrontation between the executive and the judiciary on the scope of the right to equality and the claim for preferential discrimination or affirmative action in favour of certain disadvantaged sections of society. When a Brahmin candidate challenged a government order on the basis of unfair discrimination based only on caste the Supreme Court, in *State of Madras V. Champakam Dorairajan* (AIR 1951S.C.525), went on to invalidate the government order reserving seats for non-Brahmin students in medical/engineering colleges. It was done on the basis of prohibition of discrimination on grounds of religion, caste, sex etc. under Article 15(1). But the judgement was nullified later by the Indian Parliament through a constitutional amendment adding a new provision (clause 4 of Art. 15) which enabled the government to make preferences for socially and educationally backward classes of citizens. But the State action under the amended provisions was also challenged and the Supreme Court again held that the Caste of a group of persons cannot be the sole or predominant factor for ascertaining whether a particular class is backward or not. (*M.R. Balaji V. State of Mysore*, AIR 1963 S.C. 649). Another point which was made by the Court was regarding reservation not exceeding the reasonable limits. Such conflicts continued unabated for quite some time, each organ sticking to its own position, until in the *Mandal judgement* (AIR 1993 S.C. 477) when the Court changed its earlier position and conceded the argument that caste-based reservation is legitimate provided the government excluded the “creamy layer” from among the beneficiaries. In *A.K. Thakur V. Union of India* (April 10, 2008) the Court even went further and allowed reservation in both State and privately managed educational institutions under Article 15(5).

Three independent processes need to be highlighted here which have led to the expansion of civil liberties through Courts. Firstly, the assumption of judicial activism and liberalization of the doctrine of locus standi opened the doors of court for large sections of disadvantaged people to seek justice. The rehabilitation of bonded labour, improvement of conditions of custodial institutions, prevention of environmental degradation, stricter enforcement of labour

welfare, greater accountability of law enforcement agencies and greater respect for rule of law in governance would not have been possible without relaxation of Court procedures and democratization of judicial remedies in PIL matters. The second important process is a liberal and ingenious construction of the phrase “procedure established by law” through which the Court brought in the American concept of “due process” in the interpretation of right to life and liberty under Article 21. A very important development which was simultaneously happening was that the Court adopted an activist approach to read and implement several Directive Principles of State Policy (not judicially enforceable) in conjunction with the fundamental rights of liberty, dignity and equality by invoking the doctrine of harmonious construction. As a result of all this now there was a profusion of rights considered integral to life and liberty. By giving a broader interpretation of the right to life guaranteed under the constitution to mean a life with dignity and not animal existence the court justified its directing the executive to fulfill its obligations under Part IV of the Constitution through writ jurisdiction. Thus a number of rights such as right to legal aid, right to education, right to clean environment, right to better living conditions in jails and mental asylums, right to privacy and right to speedy trial became integral to life and liberty. The third process is the Court’s celebrated theory of “Basic Structure” under which the Court put limitations on Parliament’s power to amend certain fundamental aspects of the Constitution. This is, undoubtedly, much more significant than the other two processes. The “Basic Structure” concept is not clearly specified and it seems to be still evolving. However at present the Court has ‘invented’ some of them as the fundamental rights of citizens, independence of judiciary, judicial review, and democratic character of the polity and many others which may soon be specified.

### **Responsible and Accountable Judiciary: A Need for Constitutional Sanctity**

One is quite familiar with the basic features of a federal polity. Besides a written constitution, an independent and impartial judiciary for delivering free and fair justice is one of the most important features of India’s federal polity. On reading the Indian constitution one will come across detailed provisions intended to secure the institutional independence for the judicial branch of the government. But it is problematic that the process of selection of persons for appointment to higher judiciary is such that the executive has neither any say nor any veto power in this matter. It is, indeed, an entirely judiciary-driven process. It may be very interesting to further know that India is perhaps the only country in liberal democracies where the judges alone appoint judges to the higher judiciary. Besides, judiciary in India becomes very formidable with its vast powers such as contempt jurisdiction to ensure compliance of its orders and directions, power of judicial review over executive and legislative actions and the judicially- evolved recent theory of “basic structure”. Is it not absolutely essential then that such a powerful institution must also be responsible and accountable to prevent it from posing a potential threat to parliamentary democracy? Corruption and narrow loyalties of all kinds pose an imminent threat to constitutional values and principles in contemporary times. Thus the approach of judiciary needs to be transparent, impartial and restrained.

There have been only two instances where the impeachment of judges on grounds of corruption and impropriety was resorted to. But it was only in 1991 that the Chief Justice of India asked the Government to impeach and remove a sitting judge of the Kolkata High Court on grounds of misappropriation of the clients’ money while he was a

lawyer. Recently allegations of corruption and biases against judges of the higher judiciary have been all too very common. Some of these cases have been probed through an in-house mechanism devised by judges themselves and have resulted in resignation or voluntary retirement of the judges concerned. A pertinent question that arises here: is there any provision in the constitution for disciplining a judge of a Superior Court except through an extra-ordinary and very difficult process of impeachment? One will be surprised to know that there is no such provision. This explains why the Bar in some instances adopted the unconventional method of disciplining judges by passing resolutions demanding their resignation and boycotting their courts.

Though there are other organs of the government as well as a host of other institutions which have their role in ensuring access to justice, a greater role for judiciary, which is an integral part and parcel of an effective judicial system, cannot be ruled out at all. This is so since the concept of 'access to justice', primarily, necessitates a potential system securing appropriate legal remedies within the Civil and Criminal justice fields. V.R. Krishna Iyer, a prominent jurist of our Country and a former Judge of the Supreme Court of India, is of the view that judicial role is pivotal to constitutional functionalism. Because 'access to justice' is fundamental in implementation of every human right (V.R. Krishna Iyer, 2003)

### Conclusion

Judicial reforms constitute a very important aspect of strengthening India's democracy in a substantial or qualitative sense. It is important that the government should take into consideration the recommendations and suggestions given by various committees and boards while attempting to do this. Apart from this it is also necessary to consider certain other facets.

Section 89 of CPC which deals with the alternative disputes resolution for settlement in case of civil matters is not fruitful until some circumstances are laid down to guide that the particular matter must first go for settlement outside the court. It is the central government which needs to draft the rules or guidelines laying down clearly the circumstances.

Effective steps need to be taken to ensure that judgments are not allowed to be kept reserved by the judges at various levels for more than two weeks after completion of argument. Although Rule 1 Order XX of Civil Procedure Code deals with the same but it is not strictly adhered by the court. There should be provisions making judges statutorily liable for delay in pronouncement of Judgments. In the Code of Conduct a provision must also be introduced for judges that if a judge hears the case, he should deliver the judgment. Other than exceptions such as death of the judge or retirement the provision must strictly be followed. In the absence of such a provision a new judge takes time to understand the facts and situations of the case afresh thus causing undue delay in the process.

It must also be noted here that some steps need to be taken to assess the performance of judges and advocates. In this connection it may be suggested here that on the basis of statistical data Records of Performance Assessment or Audits of workload of judges and advocates on individual basis should be maintained. The number of cases disposed by each judge, number of adjournments granted by the judges, etc. should be mentioned therein. There should also be publication of such statistics as they are done in the USA and UK. Courts should not grant Second Appeal for the matters leniently and they should do so only on certain conditions, which should be clearly laid down by the High Courts.

The challenges before India's Judiciary for delivering justice are going to multiply in the days to come. When those sections of the society, who have remained oppressed and unaware of their legal rights, thus far, become more aware of their rights due to spread of legal literacy and increased awareness equipped by effective legal aid and advice, the situation is certainly going to be much more demanding. The larger picture is achieving social justice which cannot be possible without an egalitarian politico-social order, where no one is exploited and where everyone is equal and free from Hunger and poverty. So providing basic necessities to these marginalized sections of the population in particular is the key to ensure justice. Justice should not be understood in an absolute or abstract sense. Its definition varies from individual to individual depending on their economic conditions. The saying 'Justice Delayed is Justice Denied' is fraught with disastrous consequences for the poorest of the poor. People with legal problems are like people with pain who want relief and they want it as quickly and inexpensively as possible. It can, then, be argued here that judiciary obviously owes an obligation to deliver quick and inexpensive justice irrespective of the complicated procedures. However, certain things must be kept in mind here. Justice cannot be hurried to be buried i.e. stress on speed alone at the cost of substantial justice may impair the faith and confidence of the people in the system. This may cause greater harm than the one caused by delay in disposal of cases. The sole objective of deciding cases is for imparting justice and not for the sake of their disposal. Secondly, there should be utilization of arbitration procedure as a better option for quick disposal of cases. Finally, Lord Hewet is very right to observe that it is of utmost importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

### Glossary of Key Terms

**Judicial Activism** the willingness of judges to arbitrate in political disputes while going beyond merely saying what the law means; an active role of judiciary in checking excesses of the executive branch of government and taking up initiatives and steps for protecting the rights of citizens.

**Retributive Justice-** it is concerned with punishment of crime; deals with appropriateness of a punishment in proportion to the nature of the crime committed.

**Distributive Justice-** it is concerned with allocation of benefits and burdens in society according to certain principles.

**Affirmative Action** - refer to protective measures or positive steps by the state to provide additional protection to the marginalized or weaker sections in the society so as to compensate their past sufferings and bring them on an equal footing with others.

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