ACCESS TO JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION

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The topic suggests a discussion on the role of alternative dispute resolution, in facilitating Access to Justice. However, it must be said that this construction obviously limits the scope of discussion. Therefore, Alternative Dispute Resolution apart, I propose to treat "Access to Justice" as a separate topic which has two thematic aspects. One, the quality of justice to be administered by the courts. The other is the ability of an aggrieved person to have access to that justice. This approach to the subject brings to fore that the objective in contemplation of this paper is to have an idea of how to improve the quality of justice and facilitate common man's access to that justice, which is the core necessity of a democratic dispensation.

WHAT IS JUSTICE

2. At the outset, we may appreciate the significance and importance of the word "justice" with reference to the people for whom the access is required to be facilitated. The word "justice" has been defined in various law dictionaries, but I will refer only two explanations. In his Dictionary of Law, Sherman has defined the word "justice" as (a) the basic value underlying a system of law, or the objective which that system seeks to attain; (b) the virtue which results in each person receiving his due (Justinian); and (c) the impartial resolution of disputes arising from conflicting claims. It is also said that "justice is the correct application of a law, as opposed to arbitrariness", and that it is the dictate of right, according to the conscience of mankind generally, or the ideas of those who may be governed by the same principles or morals, or the consent of that portion of mankind who may be associated in one goal, that is, members of the community".

3 Something, which in my considered view, controls these definitions is the famous doctrine that "justice should not only be done but also seen to have been done" by those who hold the stakes. It is obviously suggestive of the premise that the cases should not only be decided on merits after due observance of procedural formalities, but also that the deciding judge causes an impression to whosoever is concerned, by his conduct in and outside the

court that his impartiality can never be a matter of doubt. The Judges must remember that just decision of a matter is not enough and their conduct must be such as would inspire confidence of litigant public.

4. It is now universally recognized that access to justice is one of the fundamental rights and that in its absence, the exercise of other rights may not be possible. There can be no denial of the proposition that a court of law is a forum for exercise of the right of expression. Inability of an aggrieved person to have access to justice has got two aspects. One which is within, is on account of poverty, illiteracy, lack of legal awareness and consciousness of rights, social conditions, feudal system, exploitation, discrimination and deterioration of moral values. The other which is without, is the absence of rule of law, wide discretionary powers with the government functionaries, enormous court delays, judicial inertia and absence of judicial independence.

RULE OF LAW

5. For an Access to Justice, the first requirement is the prevalence of the rule of law, which means that everything must be done according to law. It requires, if applied to the powers of the government, that every authority acting for the government must be able to justify its actions as authorized by law. Every act of governmental power, which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The aggrieved persons should be put in a position to have recourse to the courts of law for the redress of their grievances and the courts must invalidate the Act if it is not found to be in order.

6. This is the principal of legality. However the rule of law demands something more in a situation where the government authorities are given wide discretionary powers, with the result that whatever they do is within the law. They say the sovereign's will has the force of law. I concede that it is perfectly a legal principle, but it expresses rule by arbitrary power rather than one according to an ascertainable law. The secondary meaning of the rule of law, therefore, is that the government should be conducted within a frame work of recognized rules and principles which restrict the grant and use of discretionary power.

7. An essential part of the rule of law, accordingly, is a system of rules for preventing the abuse of discretionary power. The principle of legality is a clear cut concept, but limitations to be put upon discretionary powers are a matter of degree. Confronted with the fact that parliament freely confers discretionary powers with little regard to the dangers of abuse, I would say that the courts must attempt to strike a balance between the needs of fair and efficient administration and the need to protect the citizen against arbitrary dispensation.

EQUALITY BEFORE THE LAW – PRECEPT OF INDEPENDENCE

8. Yet another connotation of the rule of law is that disputes as to the legality of Acts of Government, should be decided by judges who are wholly independent of the executive. The right to carry a dispute with the government before the ordinary courts, manned by judges of the highest independence is an important element of the concept of rule of law. As Sir Guy said in the Australian Law Journal, "Independence is a precept for any judiciary operating within West Minister System of Government. This percept has been defined as the capacity of the courts to perform their constitutional functions free from actual or apparent interference. Judicial independence is an essential element of democracy and the independence of judiciary is a bastion against the absolutist theory of democracy. The separation of power doctrine, under the system in vogue, provides a mechanism of mutual checks and balances between the executive, legislative and judicial arms of the government, so that one branch of government is incapable of arrogating power to itself at the expense of the other branches. It is within this context that jurists see an imperative for an independence judiciary to act as an impartial arbitrator of disputes between citizens and the state. It must be emphasised that the law should be even handed between the government and the citizen. The rule of law requires that the government should not enjoy unnecessary privileges or exemption from ordinary law.

DOCTRINE OF ULTRA VIRES

9. Professor Wade, an eminent jurist, held the view that it is a cardinal axiom that every power has legal limits, however wide the language of empowering Act. If the court finds that the power has been exercised oppressively or unreasonably, or if there has been

some procedural failing, such as not allowing a person affected to put forward his case, the act may be condemned as unlawful. Those appearing for government department often argue that the Act of Parliament confers unfettered discretion, but I would say, with esteem, that they are guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns. The notion of unlimited power can have no place in the system. The Ultra Vires Doctrine is, therefore, not confined to cases of plain excess of powers; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure. The judges must remain alive to the truth that all power is capable of abuse, and that the power to prevent abuse is the acid test of effective judicial review.

NATURAL JUSTICE

10. In actual fact, natural justice which denounces unheard condemnation is a branch of the doctrine of ultra vires. I go along with Professor Wade in saying that lawyers are a procedurally minded race. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable. In Shaughnessy V. United States (345 US 206.1953-Jackson J.), a judge of the United States Supreme Court has said: “Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. He went on to say that it might be preferable to live under Russian Law applied by common law procedures than under the common law enforced by Russian procedures. One of his colleagues said: `The history of liberty has largely been the history of the observance of procedural safeguards”. I hold that the rules of natural justice can be said to promote efficiency rather than impede it, provided that the courts do not let them run riot and keep them in touch with the standards which good administration demands.

LAWS DELAY

11. Eversince William Shakespeare cited "law's delay" as a reason for preferring suicide to continuing life and then, in the nineteenth century William E. Gladstone said that "Justice delayed is justice denied", so much has been said about court delays that makes volumes. However much of this was about the delay in the lower dispensaries of

justice and either nothing or very little was said about pendency of thousands of the cases in the superiors courts for disposal. I remember that as a Civil Judge, I was required to report one year old cases to the High Court and heavens would fall if we allowed a case to remain pending for more than two years. I believe the same judicial culture is even now obtaining in the subordinate courts.

12. Very little and that too seldom, has been said about the large number of cases pending in the High Courts and the Supreme Court. If the statistics are anything to go by, as many as 11965 petitions and 5405 appeals were pending in the Supreme Court on 31-12-2002. The total number of cases of all categories in the High Courts of Lahore, Karachi, Peshawar and Quetta was 65685, 87511, 10879 and 3079 respectively on that date. I may say this was inspite of the fact that thousands with meagre resources are unable to have re-recourse to superior courts with their grievances and they sit back home to suffer in total frustration.

FINAL DISPOSAL OF A CASE

13. I believe the final disposal of a case means disposal at the highest level. Strange enough, I see people crying themselves hoarse about the delay caused in the subordinate courts, but nothing is being, or seems have ever been said about cases lying for years in the cold storage of the superior courts. Hardly any serious attempt seems to have ever been made either for improvement of the system or augmentation of the superior courts, that has brought about a paradoxical situation. Even in the ongoing reform process, we hear very little about this important aspect of the matter. They are apparently concerned about delay in the subordinate courts and they speak of pilot courts, case flow management, time and stress management in the district courts and they have held delay reduction workshops. They are suggesting judicial leadership, docket control, passion for work, all about the subordinate courts, but nothing worthwhile is being said about the conditions obtaining at the higher level. I am trying to highlight that “Access to Justice Programme” is not going to yield any result, unless it addresses itself to this most important aspect of the matter. What after all will be the advantage of quicker dispatch of judicial business in the subordinate courts if the cases have to remain stuck up for years in superior courts. There can be no relief to the litigant public unless the case is finally

decided. I go with the firm belief that this problem will have to be upgraded in the priority list for a sustainable solution.

PUBLIC CRITICISM

14. This is a period of intense critical scrutiny of the judiciary. The criticism targets mostly the performance of judicial system as a whole and on a perceived failure of the judiciary to reflect the society over which it is seen to preside. I feel there is nothing unusual about this scrutiny and it rather provides us with an important means to demonstrate its competence, while preserving the integrity of its independence. I am in no doubt that there is need for the judiciary to find out and formalize the means to enhance its performance in the light of this public criticism and to demonstrate its concern for public perception of judicial weaknesses.

CONTINUING JUDICIAL EDUCATION

15. It is the judiciary's willingness to rise to the challenge of this criticism, which establishes the relevance of continuing judicial education, for acquisition of skills that match the expectations and demands of the Bar and the litigant public. For appreciation of the role of this education in improving the quality of justice, it is necessary to recognize the overarching importance of the process of professionalization and the significance of the pursuit of competence. To underscore its importance, I would say that continuing judicial education provides a formalized process, to promote the continuing learning of judges, meant to improve judicial performance and thereby the quality of justice.

ACCOUNTABILITY

16. I may say that introduction of judicial education should be seen in the context of the need to demonstrate judicial accountability. I am conscious of the fact that accountability is a complex issue for the judiciary. This is so because the question is not whether it should be amenable to accountability, but how it can be ensured without any inroad into its independence. But I am of the considered view that the judiciary's exposure to accountability is not necessarily militant against the notion of its independence: Considered in the light of Quranic philosophy that judicial power is a sacred trust and that a judge should conduct himself honestly, proficiently

and to the best of his knowledge and capabilities, keeping always in mind that he is accountible to God, the concept of judicial accountability no longer remains inconsistent with that of judicial independence. This rule of judicial power being a sacred trust incidentally makes the judge accountible to the community and thus rather ensures his complete independence in every respect. This approach brings us to the recognition that judges should participate in continuing education because this, interalia, is an appropriate means to increase accountability which, in turn, consolidates judicial independence in a democratic society.

RULE OF LOCUS STANDI

17. The ordinary rule of jurisprudence is that an action can be brought only by a person to whom an injury is caused. I am of the view that we must depart from this view in appropriate cases because of extreme poverty, ignorance, illiteracy and absence of awareness of rights by millions of people who are constantly clamouring for justice and vindication of their rights. I may make a reference to a decision of the Supreme Court of India where in the "Judges Appointment and Transfer case" it was held that we are in need of departure from the ordinary rule of Anglo Saxon jurisprudence that only an aggrieved person can have recourse to court of law, having regard to massive poverty and ignorance of the people. It was observed where legal injury is caused to the person or class of persons who by reason of poverty or disability or socially and economically disadvantaged position cannot approach the courts for judicial redress, any member of the public or NGO may maintain an application in the court seeking judicial redress for the legal injury caused to such other person or class of persons. This widening of the rule of locus standi has introduced a new dimension to the judicial process and has opened a new avenue for public interest and social action litigation, for vindication of the rights of poor and deprived sections of the society. Although public interest litigation may have its drawbacks, it is neutralized by the fact that it gives relief to the poor and ensures the perseverance of their dignity. We must encourage it, to provide the poor and down trodden an easy access to justice.

CITIZEN-COURT LIAISON PLAN

18. There is no gainsaying the fact that one of the major obstacles in access to justice is lack of knowledge and information in vast majority of the population in our country,

particularly those who have rural background and belong to far flung areas. They do not know even the location of the courts and how to manage the assistance of a counsel. We are obviously in dire need of working out a strategy for the preparation of a comprehensive citizen Court Liaison Plan. I strongly recommend the creation of Citizen-Court Liaison Committees at each district headquarter in the country as a means of establishing an institutionalized interface between citizens and the formal judicial system. An institutional mechanism is required to be designed to facilitate the public in accessing the judicial system in a friendly and service-oriented environment. The interaction in contemplation between the citizens and the judicial system is a logical extension of the current reforms initiatives.

19. It will be in place to point out an important circumstance. It is that at least in some of the cases, learned advocates know that they do not have a case. They also know that the judge knows that they know that there is nothing to prosecute or defend. In such cases, I may suggest that they must try to curtail the duration of their arguments to save not only their own valuable time, but also that of the courts to enable them to deal with other cases. I say it with full responsibility that this will facilitate the access of large number of people to justice. I must say I am conscious of the fact that the advocates do have their limitations and compulsions and that they should be accommodated to the extent of those compulsions. Even then it is in the interest of fair and speedy disposal of cases that sincere efforts should be made to save time of the court as far as possible.

LEGAL AND MORAL EDUCATION

20. The object of improvement in the quality of judicial work cannot adequately be achieved without raising the standard of legal assistance rendered to the lower dispensaries of justice at the district level. It is my considered opinion, on the basis of what I learn from the quality of judicial work or out put at the lower rung of the ladder that the legal assistance rendered by the Bar is in need of lot of improvement, particularly in procedural laws and pleadings. It may be asserted that legal education is not producing lawyers, judges, legal scholars and law officers, equipped with necessary knowledge and skills to meet the legal, economic, social and cultural challenges of poverty, civil conflict, social stratification and the abuse of

rights we are facing. We must improve the standard of legal education to provide relief to the common man.

21. I also assert that a separate subject of legal ethics and moral education should be introduced in the law colleges and it should be made a part of the syllabus. I quote Imam Ghazali who maintained that "education must not only seek to fill the young minds with knowledge, but must at the same time stimulate moral character and make it alive to the properties of social life". Though said in the 11th Century, it still holds the ground and has not become a cliché.

THE QUESTION OF ACCESS

22. Measures to improve the quality of justice apart, the problem within, is the inability of the poor to have Access to Justice for want of necessary means. I have mentioned it before in this paper that right of access to justice is the basic human right and that it embraces all other rights such as social, legal, religious and political rights, not only guaranteed by all the Constitutions of the world, but also covered by the United Nations charter of human rights.

ALLEVIATION OF POVERTY

23. It is universally recognized that it is the foremost duty of the State to create a society free from human sufferings and depriviation and ensure the dignity of its citizens by providing safeguards, security and basic necessities of life, particularly in the developing countries, where poverty is widespread. In Pakistan, one third of the population lives below the poverty line and we are making efforts for alleviation of poverty for social development. The Bar and the Bench can also play a vital role in the elimination of injustice, poverty and the safeguarding of human dignity. Access to Justice can be possible only if we improve the quality of life with purpose oriented reforms in the economic field. It is gratifying that the superior courts have always been vigilant to protect human rights. The subordinate judiciary in Pakistan has also played an effective role in safeguarding the legal rights of the people.

MASS AWARENESS

24. Since the literacy rate is rather low and the people are not aware of their rights and obligations, we are in need of mass awareness of human rights. In pursuit of this objective the Government of Pakistan has lodged a country wide project of human rights, mass awareness in education through the Ministry of Law, Justice and Human Rights. The purpose of this Project is to spread awareness regarding Human Rights and its focus is on Mass Awareness through Media, Legal Education and Curriculum Development. I maintain that spread of education and awareness of rights can play a very important role in facilitating the access of poor masses to justice. The new millennium is the millennium of Human Rights, in which the civilization of the individual as well as that of the nation would be judged on the touchstone of human rights to eradicate social and economic injustice.

ALTERNATIVE DISPUTE RESOLUTION

25. Last but by no means the least is role of Alternative Dispute Resolution in facilitating access to justice. It may be said that it deserves a separate treatment because of its significance and importance in the speedy dispatch of judicial work. I am afraid I will not be able to do justice to the topic in this paper. It must, however, be said that A.D.R techniques should be freely applied to expedite the disposal of cases, particularly in the subordinate judiciaries of Punjab and Sindh where the pendency of cases is enormous.

26. The provisions of Family Courts Act and the Shari-Nizam-e-Adal apart, optimum use of the A.D.R methods has been further encouraged by the insertion of section 89-A and Rule 1-A of Order X in the Code of Civil Procedure. Section 89-A lays down that the court may, where it considers necessary, having regard to the facts and circumstances of the case with the object of securing expeditious disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternative dispute resolution methods, including mediation and conciliation. Rule 1-A of Order X provides that “the court may adopt any lawful procedure not in-consistent with the provisions of this code to: (a) conduct preliminary proceedings and issue order for expediting processing of the case; (b) issue, with the consent of parties, commission to examine witnesses, admit documents and take other steps for the purpose of trial; (c) adopt, with

the consent of parties, any method of alternative dispute resolution including mediation, conciliation or any such other means".

27. It must be emphasized that heavy pendency of cases at all levels is a big challenge and we can come up to it only if we take the bull by the horns. We have to devise and launch a comprehensive work plan, with clear definition of our objectives and the strategies to be employed for their achievement. It should be intensive in range and ambitious in scope, putting in place the whole series of new measures for the management and clearance of the backlog.

CONCLUSION

28. In the context of this discussion, I have to say that my paper has a simple brief. It is to bring home the message, with all sincerity, that we need to create a landscape and an environment, viable for a regimented system of alternative dispute resolution to serve as easy access to justice, that is not only done but is also seen to have been done. It amounts to the establishment of a social order which ensures the willingness of parties involved in a dispute to accept a particular mode of dispute resolution. I must say that the achievement of this goal can be possible only with the positive participation and involvement of not only the members of legal and judicial fraternities, but also that of the government. I would, therefore, say that the submissions made in this paper may be taken by the hon'ble members of the bar and the bureaucratic set up under the government as an appeal to get together and join hands for the creation of such a landscape, where the poor and down-trodden of our country will feel that after all they too have got a place to go to for the redress of their grievances.

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