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Access to Justice – Right or Service?

Authored by – Ishita

Justice is the most important and desirable facet of every civilized society. Like human beings can't survive without oxygen, society can't survive without justice. Justice not only deters crime in society but also provides safety to society. After being such an important part of society, access to justice is a still problem in every society. In this article, I dealt with the issue of court fees which by costing justice, is limiting the ambit of the justice system in society. Court fees are the very oldest concept and prevail almost in every society. While discussing the concept of court fees, I discussed how court fees are affecting the justice system of society. With that, I provide recommendations to do instead of charging court fees. In the end, the conclusion of this article reflects the answer to the theme of the article, whether access to justice is – Right or Service?

The famous Latin phrase, “ubi jus ubi remedium” means that where there is a right, there is a remedy. The process of enforcing the person’s right and providing a remedy is known as justice. There would not be a civilized society without access to justice. According to the United Nations, Access to justice is a basic principle of rule of law. In the absence of access to justice, people are unable to have their voices heard, exercise their rights, and challenge discrimination¹. The declaration on the High-level meeting of the general assembly on rule of law emphasized that it is the duty of the state to provide an access to justice to all people². The concept of access to justice can trace back to the formation of the magna carta in 1215 in England. It was the social commitment from the king that no one is above the law and everyone would have access to justice it quotes “*To no one we will sell, to no one will we deny or delay right to justice*” Access to justice after being a fundamental part of civilized society, still is not easily accessible to the general public. According to the report of the World Justice Project on access to justice :

- 1.5 billion people cannot access to justice in civil, administrative and criminal problems.

¹ <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>

² <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>

- 4.5 billion people are excluded from the opportunities law provides such as employment and housing.
- 253 million people live in extremely injustice conditions.
- 5.1 billion people faced one of these justice problems³.

Recognition :

After being part of every civilized society, components of excess to justice are very vast. To know, whether access to justice is right or a service. It is very important to know in what sense International law recognizes access to justice. Access to justice is recognized in many international covenants and commentaries which are given below:

1. The Universal Declaration of Human Rights (UDHR) recognizes a broad conception of access to justice under Article 8 which says,

“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 law⁴”

2. The International Covenant on Civil and Political Rights (ICCPR) also provides the right to access justice by putting the responsibility on the state:

According to Article 2 of the covenant, each state party has to undertake,

“a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c. To ensure that the competent authorities shall enforce such remedies when granted⁵.”

According to article 14(1):

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be

³ World Justice Project, “Global insights on access to justice”

⁴ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

⁵ <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights#article-12>

entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”

3. The International Covenant on Rights of the Indigenous person also provides the special right to access to justice under Article 40 of this covenant which says :

“Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights⁶.”

4. The Convention on Rights of Persons with disabilities also provides a provision for easy access to justice to all the persons having disabilities under Article 13 of this convention which says,

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.⁷”

5. In the Vienna Declaration and program of action, 1993 while focusing on the state’s duty to provide access to justice says,

“ Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions

⁶ <https://humanrights.gov.au/our-work/un-declaration-rights-indigenous-peoples->

⁷ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>

concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice.⁸

6. In general recommendation given by the committee on the elimination of discrimination against women says for access to justice :

“Discrimination may be directed against women on the basis of their sex and gender. Gender refers to socially constructed identities, attributes and roles for women and men and the cultural meaning imposed by society on to biological differences, which are consistently reflected within the justice system and its institutions. Under article 5 (a) of the Convention, States parties have an obligation to expose and remove the underlying social and cultural barriers, including gender stereotypes, that prevent women from exercising and claiming their rights and impede their access to effective remedies⁹”

By reading all of the definitions given under different declarations and conventions, we can deduce five basic principles accepted to determine what comes under the ambit of access to justice or not. These principles are as follows:

1. For access to justice, *there is a need for an effective remedy* for every crime because only this can produce a deterrent effect in society and hence justice will be served.
2. Judicial courts are the only organization for enforcing the rights of people, and hence it is mandatory that *all the courts should be impartial*.
3. With the independence of the courts, for access to justice in society, it is mandatory that *all the hearings shall be impartial in the court*.
4. As justice can be difficult to access for disabled persons, women, and children. Due to this, access to justice also *encourages making special provisions for disabled persons, women, and children*.
5. Right to access justice is a human right, and there *shall not be any discrimination in the courts during justice*.

⁸ <https://www.ohchr.org/en/about-us/history/vienna-declaration>

⁹ <https://digitallibrary.un.org/record/807253?ln=en>

Right or Service? :

After knowing the principles of access to justice, one thing is clear access to justice is directly related to access to the judiciary. The judiciary is the only organization which is dealing with justice. The judiciary is an inseparable part of every civilized country and it is the duty of the State for making this institution. As the question of access to justice is directly related to access to the courts, the question is whether courts are easily accessible as of right of citizens or they are working as a service institution to society.

The distinction between rights and services is very clear, Rights are the common claim of every individual in society and services are the claim of a specific person who fulfilled the condition to get a service.

Now as the question is whether access to justice is given as a right to society or as a service to Society. For this, we would know, how the justice system of every country is working.

According to DLP Piper, Global litigation guide, 2019

- **Australia**: All courts in Australia, impose court fees in addition to some other fees. As of 2019, the rate of commencing proceeding in the Federal court of Australia is AUD 4,045.
- **Canada**: In Canada, court fees are on the basis of procedural steps, like filing a suit, defending a suit, and motion in a suit, and in each step the fees would be less than CAD 400.
- **United Kingdom**: In the United Kingdom, court fees depend on the amount of the claim.
- **United States of America**: In the USA, court fees include, transportation fees, copying fees, and Fees of translators and experts.
- **India**: In India, there is a court fees act, 1850 which court fees depend on the amount claimed.¹⁰

According to the above data, it can be clearly seen that for access to justice, all the countries are taking special amounts in the face of court fees, from society. By charging the court fees, States made access to justice a service to society and this narrowed the ambit of access to justice in society.

Judicial Dictum :

We see the legislative and executive points of view on access to justice, but it is important to

¹⁰ <https://www.dlapiperintelligence.com/litigation>

know what the judiciary is thinking about the court fees that are taken in the courts. For this, I collected different approaches of different courts of the countries on the court fees and these views are given follows :

In, **Hussainara Khatoon v. State of Bihar**¹¹,

The Supreme Court held that free legal aid services are an indispensable part of Article 21 of Indian Constitution which talks about right to life and personal Liberty.

In, **Madbury v. Madison**¹²,

The USA Court quoted "*The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his Court*"

In P.M. Aswathanarayana Shetty v. State of Karnataka¹³

the Court stated that a person who lodges a complaint before the police is not expected to pay for the services of the police on the basis whether the subject of complaint is big or small in terms of money. So also in the case of the system of delivery of justice, the State is not supposed to collect fee depending on the nature of the subject matter in dispute. The Court quoted the dictum in the fictional *Hogby v. Hogby*.

"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 the 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"

In, **Central Coal Fields Ltd. v Jaiswal Coal Co.**,¹⁴

The court observed, The right of effective access to justice has emerged in the Third World countries as the first among the new social rights what with public interest litigation, community based actions and pro bono publico proceedings. 'Effective access to justice' can thus be seen as the most basic requirement - the most basic 'human right' - of a system which purports to guarantee legal rights."

¹¹ 1979 AIR 1369

¹² 5 U.S. 137 (more)1 Cranch 137

¹³ 198 AIR 1009

¹⁴ AIR 1980 SC 2125

In, **Trial Lawyers Association of British Columbia v Attorney-General of British Columbia**¹⁵,

The Canadian court while declaring no power to governments for imposing fees to resolve civil disputes from superior court said, there cannot be a rule of law without access, otherwise, the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.

In **R v. Lord Chancellor**,

The common law court s¹⁶aid, Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by the express provision – permits the executive to turn people away from the court door. After reviewing all of the judgments of different courts, it can be seen that even the courts are against the Court fees. Every court is of the belief that it is the duty of the state to provide justice and hence it should be given to everyone in the form of their right and not in the form of services.

Shortcomings :

As we see how states are taking fees from the society for providing them justice, it is important to know due to this, what are the problems that are arising :

1. **Discourage honest Litigation** : The history of court fees act can taken back to Bengal regulation of 1795. At that time, Lord Macaulay, headed the law commission, declared court fees absurd because this would also lead to the discouragement of honest litigations. Before filing a case, every person should have to pay the court fees and this only discourages them to go to court. According to the Survey of World Justice Project, 2019¹⁷, a total of 49% experience legal problems but out of which only 17% of people go to a third-party authority or courts for resolutions.
2. **Financial issues**; Despite having provisions for free legal aid services, finance is still a bigger obstacle on the road to access to justice. As free legal aid services are provided to a limited section of society, the majority of people still suffered from financial losses. According to the

¹⁵ [2014] 3 SCR 31

¹⁶ [1997] 2 All ER 779

¹⁷ *Supra* note 3.

World Justice Report¹⁸, out of 17% who went for resolution, 16% think never would have justice because of lack of money.

3. **Lack of Justice Infrastructure:** According to proponents of court fees, they believe this fee would help them for making infrastructure for the justice system. The court fees are of decade long act and still, there are 14.7 judges per million population in India.¹⁹ According to the 189th report²⁰ of the Law commission, the amount of court fees is more than the amount spent on the infrastructure of judicial system.
4. **Criminalizing Poverty :** According to the recent report²¹, court fees can criminalize poverty. As due to the poverty, they are unable to pay the court fees and eventually it helps the opposition, and it leads to injustice in the society.

Recommendations :

1. **End court fees :** I strongly recommend on the basis of above evidence to end court fees. In 2020, California became first state in United State of America to end court fees by considering the poor families²². Court fees is nothing but just an extra burden to the poor families which make access to court more difficult.
2. **Inclusion in Tax:** Every countries have their own tax system, as all the public duties are performed by that money. This should also include judiciary. As, that recently happened in California, all the judiciary expenses incurred from the government which they received in the form of taxes from the citizens.
3. **Deterrent Laws:** The proponents of court fees are of believe that court fees helped against the frivolous proceedings. The state can make deterrent laws to prevent frivolous proceeding instead of costing the justice. In one of the study reports, It shows that court fees do not have any deterrent effect over frivolous proceedings²³.

¹⁸ *Supra note 3.*

¹⁹ <https://archive.pib.gov.in/archive/releases>

²⁰ Law commission report, " 189th report on revision of court fees" 2003.

²¹ American Sociological Association, " Criminalizing Poverty: The consequences of court fees in randomized experiment" 2022.

²² <https://sftreasurer.org/california-becomes-first-state-nation-end-collection-fees-criminal-legal-system>

²³ Brennan centre of justice, "The steep costs of criminal justice fines and fees" 2019.

Conclusion :

Justice System is the oxygen of every civilised society and by charging the justice, they limit their ambit to society. As a person can't live without food, a civilised society also can't live without justice. It is the basic necessity of every individual and that shall be provided by the state.

There is no doubt that in every country, there is presence of free legal aid services which covers court fees as well but as these services are not available to very person and by considering the length of case, people have to pay heavy amounts for the justice. As we don't pay to the police for the investigation and filing a case, same should be in the case of judiciary because without enforcing machinery of judiciary, every investigation is toothless.

