SOUTH ZONE REGIONAL JUDICIAL CONFERENCE ON
'ROLE OF COURTS IN UPHOLDING RULE OF LAW'

RULE OF LAW AND ACCESS TO JUSTICE

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In a civilized society until about 2500 years, there was usually nothing like Rule of Law. It was only might is right and the words of the King was the Rule of Law by which the subjects were governed. Mostly private disputes were settled. Any wrong done against the King was fraught with dire consequences. However, things gradually started to change. The famous Greek Philosopher Aristotle had said that it is more proper that law should govern than any one of the citizens. But it was applied where the governance was by way of democratic means. In our country, in some parts, even though feudal system was in vogue, yet Rule of Law was the foundation on which the judicial system worked.

For example, in our State of Tamil Nadu, the famous Chola King Manu Needhi Chozhan who ruled South India around 250 BC, believed in even justice towards friend and foe on occasions of dispute at law. Legend is that he had hung a giant Bell in front of his palace and announced that anyone seeking justice could ring the bell and voice will be heard. One day, it so happened that

a young calf had got crushed under the wheels of his chariot, in which his only son, young Prince Veedhividangan, was going around the city. The mother of the calf, which helplessly watched its little one die, walked to the palace gates and rang the huge bell, demanding justice from the king. The king came out and saw the cow, he learnt from his courtiers about the death of the young calf under the wheels of his son's chariot. Unrelenting from his promise for justice, he ordered his own son to be killed for his recklessness. The prince was killed the same way the calf had died, being crushed under the wheels of his chariot. The king went through the same pain the cow had as he witnessed his son die and thereby, being just at all costs.

Another example we find in the history is about Mogul Emperor Jehangir, who ruled North India between 1569 to 1627 AD. He had also hung a bell with a rope at his palace gate. One day, a lady named Mehrunissa rang the bell. The Emperor came out and heard her woes. Her husband had been killed by an arrow shot by the Emperor himself while he had gone for hunting. Emperor Jehangir immediately asked the woman to kill him by the arrow in the same way in which her husband had been killed. The woman forgave the Emperor. The rest is history. There may be many more such examples in our country but this shows that there had been a desire to apply the principles of Rule of Law as the situation warranted.

Former Chief Justice of India, Mr. Justice Y.K. Sabharwal in his remarks on 'Access to Justice' pertinently observed that "*it is surprising that same topic which has been spoken for number of years is the topic for discussion of this seminar. It is equally surprising that the subject is even now as relevant as before and the issue involved which will be addressed is still equally (if not more) pressing.*" While it is disheartening that access to justice remains an issue in the 65th year of the Indian Constitution, the observation is as accurate as it was 8 years ago when it was made.

What is the significance of the topic of this present session? Through the course of the sessions yesterday, 'Rule of Law' has been discussed extensively – its classical origins, constitutional understanding and its relationship with human rights. I would briefly address these themes later in the context of the present session. The importance of 'Access to Justice' in ensuring and upholding the 'Rule of Law' however cannot be emphasised enough. For if an individual cannot approach the courts for effective administration of justice, 'Rule of Law' would remain a principle only on paper in reported judgments and scholarly works.

The 'Supremacy of Law' over everything else was envisioned and propagated by Greek Philosophers Plato and Aristotle even two thousand years ago. 'Rule of Law' as a phrase however was popularised by A.V. Dicey in his

seminal work in 1885, An Introduction to the Study of the Law of the Constitution. He explained that 'Rule of Law', which stipulates 'supremacy of law' over the Government, 'equality before the law' for all its citizens, and the predominance of legal spirit, was a basic feature of the English judicial system.

Since then, democracies throughout the World have adopted this principle. In fact, it finds express mention in the Constitution of South Africa and the Universal Declaration of Human Rights. While the Indian Constitution does not expressly state 'Rule of Law', that the 'Rule of Law' pervades throughout the Constitution is well settled. In the words of Soli Sorabjee, it runs like a golden thread in the Indian Constitution. Shri Shankarra Deo on 21 November 1949 in the Constituent Assembly stated: "*Part III of the Constitution—the Fundamental Rights, and Part IV—the Directive Principles of the State—put forward in unmistakable terms the awareness of the makers of the Constitution of the principle of Rule of Law which is the bulwark of British liberty.*" Indeed, the principle is reflected in the Preamble, in Part III particularly Articles 13, 14, 21 and 32, in provisions relating to the separation of powers and so on.

This has even been affirmed by the Supreme Court time and again consistently though its jurisprudence. For instance, in *A.K. Kraipak v. Union of India* [(1969) 2 SCC 262], the Supreme Court observed: "*In a welfare State like*

ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the Rule of law." More significantly, in *Indira Nehru Gandhi v. Raj Narain* [(1975) Supp SCC 1], the Supreme Court held that the rule of law was a basic feature of the Indian Constitution.

So, what exactly does the 'Rule of Law' stipulate? According to Dr. Surya Deva, an academic, rule of law has three main aspects – *first*, it operates as a check on governmental powers; *second*, it implies equal treatment of people and human rights guarantees and; *third*, judicial review of governmental actions by an independent judiciary. While the India's performance with respect to limited government, strong constitutional order, separation of powers and the independence of the judiciary has been appreciated around the World, corruption and administration of justice remain serious concerns which need to be address to ensure the 'Rule of Law' in reality.

'Access to Justice' therefore is a crucial pre-requisite for ensuring the 'Rule of Law'. During the framing of the Constitution, Dr. Subbarayan of the Madras constituency in the Constituent Assembly explained this relationship between the 'rule of law' and 'access to justice': "*If there is anything which I would like to cling to in the future of this country, it is <u>this rule of law</u>. Professor Dicey in his Law of the Constitution has explained this position fully and I think we have provided in the Constitution, in the powers vested both in the Supreme Court and the High Courts of this country <u>for any citizen</u> to have*

his right established as against the government of the day, whether Central or Provincial, so that there is no question of encroachment of rights, and the judiciary has been left independent enough to fulfil this task."

Simply put, 'access to justice' means the ability of any person to approach a Court of law for effective redressal of his disputes and to seek justice. But 'access to justice' is not ensured merely by establishing courts of law where individuals are allowed to submit disputes. Instead, it is multi-dimensional and more substantive in nature. It envisages equality of access to Courts for all, effective representation for all, and speedy disposal of disputes for all. Indeed, the Supreme Court in *Veena Sethi v. State of Bihar* [1982 (2) SCC 583] poignantly observed that the "*Rule of law does not exist merely for those who have the means to fight for their rights and very often do so for the perpetuation of the status quo, which protects and preserves their dominance and permits them to exploit a large section of the community*."

Nevertheless, the stark reality is that due to a combination of poverty and illiteracy plaguing large parts of the Indian population, 'access to justice' has remained elusive to the masses. This is reflective of a broader vicious circle. The Constitution has guaranteed to every citizen various fundamental rights. The Government, in its welfare role, has tried to alleviate poverty through various schemes. Yet, the enforcement of these rights often requires the

intervention of Courts. On the other hand, the non-enforcement of the rights also reduces a person's ability to approach Courts in the first place.

This unfortunate situation exists despite crucial intervention by the Higher Judiciary. In fact, the 'Public Interest Litigation' movement was spearheaded by Mr.Justice Bhagwati precisely so as to improve access to justice. Recognising that the *locus standi* requirements under Article 32 were too restrictively interpreted to ensure justice, 'Public Interest Litigation' was styled more as a collaborative model of delivering justice where not only the people directly affected could advance their grievances but also concerned citizens. As Mr.Justice Bhagwati notes in an article: "*The strategy of [Social Action Litigation], evolved by the Supreme Court has brought justice within the ken and reach of the common man and it has made the judicial process readily accessible to large segments of the population who were hitherto excluded from claiming justice.*" Various landmark pronouncements in this era by the Supreme Court sought to directly improve access to justice, for instance, *Hussainara Khatoon v. State of Bihar* [AIR 1979 SC 1364] in relation to the right to a speedy trial, *M.H. Hoskot v. State of Maharshtra* [(1978) 1 SCC 248] in relation to the right to legal aid and so on.

At the same time, it is apparent that 'access to justice' remains a problem in India. Despite the landmark pronouncements of the Supreme Court, its

procedural innovations, and creative remedies for dispensation of justice, structural restraints in the nature of judicial enforcement prevent 'access to justice' from permeating to the grassroots. As Marc Galanter notes, this is a top-down approach and has its limitations. After all, it is a task of Herculean proportions for the higher judiciary to monitor the effective implementation of its entire rights-based jurisprudence.

It is here that I want to impress upon you the vital role that can be played by the lower judiciary which has traditionally been overlooked. In an excellent research initiative by a group of researchers (Professor Krishnan *et al*), to be published in the Harvard Human Rights Journal, it was found that the Judges of the lower Courts were considered by litigants "*as being honest and as the primary champions and defenders of their rights*." Indeed, the lower Courts are the primary, and for a lot of litigants, the only, judicial body that an individual engages with for administration of justice. However, pursuing claims in the lower courts is a difficult process. But, the lower courts have a duty to best preserve and protect the economic and social rights of individuals at the grassroots.

At the same time, I also empathise with the difficulties faced by the lower judiciary. In November, 2005, a workshop was conducted for district judges here in Chennai on 'access to justice'. Mr. Justice Muralidhar of Delhi High

Court analysed the findings in an article: "*Each participant was asked to respond to two questions. The first required the recounting of an instance where the judge had been able to ensure effective access to justice; the second, the identification of a barrier to justice. For most judges, the positive experience lay in successfully encouraging parties to resolve a long-pending dispute through a mediated settlement ... Among the principal barriers to justice identified were lawyers and, surprisingly, laws themselves.*" As I stated in my inaugural speech yesterday, this may be improved by providing more resources and greater financial commitment to the lower courts. The judges of the lower courts are overburdened and the immediate need of the lower courts is additional Judges. In line with the 230th Report of the Law Commission of India, the Hon'ble Supreme Court of India and the Government of India are already taking steps to reform the system and double the strength of Judges in particular and proposals in this regard have been sent to the State Government also.

I believe that the three biggest impediments to ensuring access of justice are the huge backlog of cases, lack of awareness about legal rights and the financial inability to seek effective representation. These are inextricably linked with upholding the 'rule of law'. I also believe that the lower judiciary can significantly contribute towards the removal of these impediments.

Backlog of Cases

At the cost of repetition, I would like to say that endemic delay in administration of justice is caused by a huge backlog of cases. It is often remarked that 'Justice delayed is justice denied' and to that effect, a backlog of cases also harms 'Rule of Law' in India. While I wholeheartedly support structural reforms to reduce this backlog, I still think a lot can be done otherwise. For instance, the Former Chief Justice of India, Mr.Justice Kapadia gave an important suggestion that focus should be on the expeditious disposal of those cases which are more than five years old – "*'Five plus free' should be the initiative*."

The general tendency to place the entire blame on judges is inapposite. In fact, as the experience from the workshop in 2005 and the research undertaken by Professor Krishnan cited earlier suggests, the unfortunate use of delaying practices and tactics by lawyers contribute to this backlog. Such practices should be actively discouraged by the lower judiciary. The legal profession's role in upholding the rule of law is crucial. This was even recognised by the famous Delhi Declaration of 1959 by the International Commission of Jurists on the Rule of Law which noted that lawyers should practice law which seeks to implement it in a positive manner in the society.

Finally, 'Alternate Dispute Resolution' or ADR is gaining a lot of mileage recently. I exhort you to utilise the ADR system for a speedier and

effective dispensation of justice. The ADR system greatly reduces the burden on the courts as it cuts down the appeals and reduces backlog significantly. The benefits of ADR also include flexibility of procedure, speedier settlements, preservation of relationships, solutions tailored to parties' needs and so on. In fact, I had the opportunity to be present in the inauguration of new ADR Centre in the Madras High Court and its results have been promising. Similarly, the Lok Adalat System should also be utilised when appropriate. The Hon'ble Chief Justice of India had recently observed: "*The Lok Adalat system provides an approachable forum to the poor, weaker and ignorant people who are often intimidated and confused by the greasy substantive and procedural laws.*"

I believe that apart from the structural changes, such steps would go a long way towards reducing the backlog of cases and ensuring greater 'access to justice' as a result.

Lack of Awareness about Legal Rights

Awareness about legal rights, both procedural and substantive rights, is an essential pre-requisite for ensuring 'access to justice'. As Former Chief Justice of India, Mr.Justice Y.K. Sabharwal noted: "*The poor and the deprived often remain so and are unable to seek redress simply because they are not at all aware of the rights guaranteed to them and the remedies that are available.*" The National Judicial Academy, in collaboration with the United Nations

Development Program, has undertaken several commendable initiatives to increase awareness about rights amongst the people. Similarly, the Tamil Nadu Legal Aid Authority has released various manuals and established numerous centres for guiding people on legal aspects.

In the same manner, I believe that the lower judiciary can also play a vital role in ensuring that the litigant in civil cases, and the accused in criminal cases, is aware of his rights. Mr. Justice Khanna opined in an article that 'Rule of Law' suffers when "*prisoners and those under arrest are subjected to humiliation*." The lower judiciary can play a pro-active role in preventing the same. Take the case of bail for instance, it was found in the case of *Hussainara Khatoon v. State of Bihar* (*supra*), that a lot of under trial prisoners had been in prison for a term exceeding the maximum punishment prescribed for the offence they had been charged with. Since then, Section 436-A of the Code of Criminal Procedure, 1973 has been inserted which stipulates that an under trial person who has spent more than half the prescribed punishment shall be released on his personal bond. A lot of under-trial prisoners are those that have been charged with bailable offences alone despite the fact that Section 436 of Code of Criminal Procedure states that such persons shall be released on bail. In most cases, this is because the bail amount is too high. The Supreme Court observed (*Hussainara Khatoon v. State of Bihar* (*supra*)): "*It is a travesty of justice that many poor accused, "little Indians, are forced into long cellular*

servitude for little offences" because the bail procedure is beyond their meagre means...." In such situations, judges of the lower judiciary should adopt a different approach in consonance with Supreme Court decisions.

In this regard, I also see that the proposed sessions for today specifically deal with 'Rule of Law' and Civil Justice Administration, and 'Rule of Law' and Criminal Justice System. I hope that these sessions prove to be useful and helpful for the participants in devising solutions for improving 'access to justice'.

Financial Inability to seek Effective Representation

The Supreme Court in *Sheela Barse v. Union of India* [(1986) 3 SCC 596] remarked that "*Legal assistance to poor and indigent accused is sin qua non of justice, if not provided leads to injustice and it corrodes foundation of democracy and rule of law.*" This is merely affirming the important goal envisaged in Article 39A of the Constitution which states: "*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*."

It was with this objective that the National Legal Services Authority and the Tamil Nadu State Legal Services Authority was created. The preamble of the Act emphasises three essential functions of the legal services authorities i.e. provide free and competent legal services to the weak and poor, ensure that opportunities for security justice are not denied and organize lok adalats. The Legal Services Authority has established various centres for giving legal advice to people and providing effective administration. I have requested the District Legal Services Authority to organise more legal aid programmes. At the same time, however, a few criminal cases are considered at the appellate level wherein the right to legal aid was inadvertently ignored or improperly applied in the initial stages of the trial. In such cases, the appellate Court has no other alternative but to remand the case again for trial. The trial has to be unnecessarily conducted again. In such a scenario, I call upon the lower judiciary to effectively ensure the right to legal aid of the people.

Conclusion

In conclusion, I would like to re-emphasise the relevance of the current issue in today's time. Professor Baxi has noted that 'Rule of Law' is a combination of four interrelated notions of governance, rights, justice and development. These notions pervade throughout the Constitutional principles and decisions of the Supreme Court. At the same time, there are large parts of the populations for whom these ideas are merely on paper. Access to Justice

therefore is a crucial pre-requisite before ‘Rule of Law’ can be really upheld. The role of Courts in this endeavour is immense as the Indian Courts today, more than just for a for dispute settlement, are guardians for the trust of its citizens. The higher judiciary has played an important role in ensuring greater ‘access to justice’ through ‘Public Interest Litigation’ and other procedural innovations. Yet, the structural limitations of such orders have prevented a substantial increase in access to justice. It is here that I have tried to emphasise on the hitherto understated significant role of the lower judiciary. Structural reforms aside, I truly believe that a slight change in approach, as I have suggested here, while dealing with the administration of justice would go a long way in ensuring greater ‘access to justice’ and upholding the ‘rule of law’ as a result. I hope the participants of this Conference will make best use of the deliberations here.

Thank You.

JAI HIND