ACCESS TO JUSTICE – THE RULE OF LAW AND THE LEGAL SYSTEM

Paper by Professor A.W. Bradley[1]

1. National constitutions and treaties concerned with human rights (such as the International Covenant on Civil and Political Rights) are based on two assumptions: (a) that all persons within the jurisdiction concerned must be able to benefit from human rights provisions; and (b) that national courts have a role to play when individuals suffer action that erodes or ignores their human rights.[2] Under many Commonwealth constitutions, the High Court or Supreme Court has a special responsibility for protecting human rights, including a power to provide appropriate relief for breaches of such rights even if this goes outside the usual remedies available from the court.

2. These constitutions also provide for the independence of the national judiciary. The Latimer House Guidelines for the Commonwealth on parliamentary supremacy and judicial independence (adopted on 19 June 1998) sought to promote an effective relationship between national legislatures and the judiciary based on mutual respect for the constitutional functions of each institution. Amongst the guidelines there adopted was that

> "People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed".

3. At Bangalore, between 29 June and 3 July 1998, a workshop on access to justice organised by the Commonwealth Secretariat was attended by participants from six Commonwealth countries in the Asia region and from diverse professional backgrounds. A workshop on the same theme had earlier been held in Kingston, Jamaica from 30 March to 3 April 1998 for participants from Caribbean and Pacific jurisdictions. These workshops sought to identify the reasons why, despite the crucial importance of access to justice, it is a complaint from very many jurisdictions that individuals and groups are excluded from access to the courts and the legal system. Such exclusion is in itself a breach of a fundamental right; it also deprives those excluded from seeking judicial protection for other fundamental rights that the national constitution affords to them. Indeed, the implications of exclusion go further than this, since those excluded are not merely deprived of special constitutional protection for their human rights; they are also at risk of being excluded from the benefits of living in a society that has a legal system. The effect of exclusion at the extreme is that individuals cannot by recourse to due process of law protect themselves as citizens, as consumers and as employed persons, as owners or possessors of their homes or other resources, and as family members; they cannot by legal means prevent themselves and their families from being exploited, nor their physical environment from being ravaged and polluted.

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[2] ICCPR 1966 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 entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ..." American Convention on Human Rights 1969, Article 8(1); and Article 25: "Everyone has the right to simple and prompt recourse ..... to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention ....." . African Charter on Human and Peoples' Rights 1981, Article 7(1): "Every individual shall have the right to have his cause heard. This comprises: [a] the right to appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force ..." See the Indian Constitution, Part III, especially Article 32(1): "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed." and the Constitution of Jamaica, sections 18 [provisions to secure protection of law] and 25 [enforcement of protective provisions].

4. The Bangalore workshop in 1998 identified the causes of exclusion from access to justice as including status, poverty, gender discrimination, ignorance, language, delay, high cost of legal services, inadequate and outdated procedures, lack of adequate training for justice personnel (including the police), geographical and structural impediments. Some causes of exclusion derive from factors that exist outside the legal system, such as issues of infrastructure, geography and level of economic development, resources for education and social structures within the community. Other causes of exclusion derive directly from the legal system itself:

- the mystique about the law fostered by some lawyers;
- the complexity or obscurity of legal procedures;
- the high cost of contentious litigation;
- the failure to ensure that legal services are available to all persons;
- the frequent lack of legal aid and assistance that might to some extent redress economic inequality in society;
- a failure to reform substantive rules of law;
- procedures and rules of evidence that are inappropriate or outdated;
- judicial attitudes that emphasise legal technicality for its own sake at the expense of justice or that tend to delay justice for no good reason.

5. Some of these 'legal' obstacles to access to justice are directly related to developmental issues. Thus the effectiveness of some social legislation depends on public awareness of the law and on advice and assistance for members of the public being available to those who need it, and this may be more likely to come from non-governmental organisations (NGOs) rather than the legal profession. Those communities affected by the greatest inequality or discrimination (resulting, for example, from ethnic, cultural or gender-related causes) are the least likely to benefit from legal measures, or to be able to take advantage of legal procedures relating to the problems. By contrast, other obstacles result from failures of a professional or personal kind: inexperienced, untrained or overworked prosecutors; judges who grant unnecessary adjournments because they do not wish to deal with the substance of the case; lawyers who invoke inappropriate procedures from ignorance or as an excuse for time-wasting and piling up costs in the hope that the other side will go away – and so on.

6. To a greater or lesser extent, problems of this kind exist in all jurisdictions. As Professor Hazel Genn has commented,

> "Concern about the 'failure' of the civil justice system is everywhere. It is argued that the courts are too slow, too expensive, too complicated, and too adversarial to provide litigants with what they want".[3]

In the same article, the author said:

> "The perception is that the legal system is costly, time-consuming, frustrating and unlikely to deliver the desired objective".

She also drew attention to the problem that there are

> ***"profound dysfunctional effects of legal process. Law can create and reinforce inequalities in society. Litigation can exacerbate and prolong conflict. Litigation can simply offer an outlet for vindictiveness rather than an opportunity for vindication. Regulation can be seen as burdensome.. ... Laws can be unjust in both design and effect".***[4]

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[3] See her stimulating paper "Understanding Civil Justice" in Freeman and Lewis (ed), *Law and Opinion at the End of the Twentieth Century*, OUP 1997, p 155.

[4] Ibid., pp 172 and 164.

7. Perceptions such as these must not be ignored. Even in a country which at a national level has an adequate supply of well-trained and experienced lawyers, this can conceal great inequality in access to legal services within local communities. It is never possible to assume that there are no unmet legal needs in society. In other jurisdictions, it may be immediately evident that the judicial system is not functioning particularly well, that many people have no realistic prospects of benefiting from it (for example, if there is no scheme for legal aid), and that the legal system is inadequately resourced.

8. Given the wide variations that exist within Commonwealth jurisdictions, it is worth considering whether there are any generally applicable principles by which the problem of access to justice may be approached. And are there practical measures that should be encouraged by governments, the courts and the legal profession that would help without requiring an impossible provision of new resources?

9. The workshops on access to justice held in Kingston, Jamaica and in Bangalore in 1998 could not have been expected to solve these intractable questions. Nonetheless, based on their proceedings it is possible to draw out various conclusions.

Need for Effective Rights

10. The starting point must be that human rights treaties and national constitutions are "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".[5] Access to justice is both a human right in itself and also a gateway to enforcement of other human rights. It is also a fundamental condition of life under the rule of law.

Proper Functioning of the Courts

11. The scope for effective judicial protection of human rights is likely to be small if the legal system in general (including decision making by the courts in 'private law' matters; the executive's willingness to respect judicial decisions that affect official power; and the law reform process) is not functioning effectively. Why should we expect judicial remedies for the protection of human rights (as a matter of public law) to be working effectively if ordinary judicial remedies are not available to those who have suffered wrongs such as breach of contract, commission of a tort or invasion of property rights? Is justice being properly dispensed when the legal system is prone to long delays, even in the trial of serious offences?[6]

Responsibilities of the State

12. The essential measures to enable the courts to exist and justice to be done by an independent judiciary must be a direct responsibility of the state. The court system needs to be established at several levels (national, regional and local), but more is required than court buildings, qualified judges and a trained court staff. There must be a legal profession capable of meeting the public's various needs for legal services, advice and representation. In a market economy, the provision of some legal services may be left to the market, since over time lawyers are likely to respond to the needs of those with resources to pay for them. But there are likely to be unmet needs for legal services if some means of ensuring public provision is not found.

Legal Aid Provision in the Interests of Justice

13. Both the Kingston and Bangalore workshops heard from participants about the great diversity that exists in different jurisdictions as regards the provision of legal representation to assist those who do not have the resources to pay for it. In some jurisdictions, there is an acute need for legal aid for those accused of serious (even capital) crimes and no answer has been found to the question of how to ensure legal assistance for those whose constitutional rights have been ignored and whose vulnerability has

[5] *Airey v Republic of Ireland* (1979) 2 EHRR 305, 314

[6] See eg *Sookermany v DPP of Trinidad and Tobago* (1997) 1 BHRC 348 (trial for murder ten years after the killing; held, that the national constitution did not include the right of a person accused of crime to be tried within a reasonable time).

been exploited by others. International treaties set minimum standards for entitlement to legal assistance, at least in criminal cases; thus the International Covenant on Civil and Political Rights entitles someone facing criminal charges "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it": Article 14(3)(d). Even in a civil case the interests of justice may require that legal representation be provided at public expense.[7] Because of the extent to which justice in the common law tradition depends on the adversarial system, other problems giving rise to access to justice questions arise when in jurisdictions that provide for a full legal aid scheme, it is no longer possible to maintain provision at the same level and economies have to be made.

Judicial Independence and Public Accountability

14. The constitutional importance of an independent judiciary is undoubted, but judicial independence is not an excuse for a failure by the state to make proper provision for the structure of justice. Nor is judicial independence a reason why there should not be public accountability for the legal system and the functioning of the courts. The safeguard of an appeal to a higher court and the duty of a judge to formulate reasons for judicial reasons together impose on judges a mechanism of accountability. So too does the rule against bias, in particular the rule that no-one must be judge "in his own cause".[8] Difficulties of accountability may arise in other circumstances, such as when justice is delayed, as in the English case involving a judge who was held by the Court of Appeal to have delayed unreasonably in delivering judgment,[9] or with other forms of judicial misbehaviour, as in the case of a Scottish sheriff who despite many warnings acted in an eccentric and wholly unreasonable way to those in his court and was dismissed for inability to perform his judicial duties.[10]

Judicial Training

15. While it is fundamental to judicial independence that the judiciary should be under no duty to account to the legislature or to the government for decisions that it has made in cases coming before it, judicial independence is not incompatible with requiring judges to receive training on appointment and from time to time thereafter. Indeed, the Bangalore workshop concluded that judicial training "is an essential element of the measures for ensuring the independence of the judiciary" and recommended that adequate arrangements including the establishment of judicial academies should be made so that all judicial officers might be appropriately trained, both on appointment and thereafter. One necessary warning note to be sounded here is that the control of judicial training must remain in the hands of the judiciary and not be taken over by politicians or civil servants. As well as the need for training in court-room techniques and judicial behaviour, there should be training from time to time on major new legislation that is likely to affect the conduct and decision of cases in court._

16. Training of judges should extend to international treaties and other instruments that may not have the full effect of law within a particular jurisdiction but which are likely to

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[7] In *Airey v Republic of Ireland* (1979) 2 EHRR 305, a married woman needed an order of judicial separation from the High Court to protect herself and her children from assaults and abuse by her violent and drunken husband. Held, by the European Court of Human Rights, that legal representation was necessary to ensure that she had a fair trial of her civil rights and obligations and to ensure due respect for her private and family life.

[8] The example of a senior UK judge, Lord Hoffmann, in taking part in the Pinochet extradition appeal (in which Amnesty International were permitted to be a party) without declaring that he was a director of Amnesty International's charitable arm is a salutary one: see *R v Bow Street Magistrate, ex parte Pinochet (No 2)* [1999] 1 All ER 577.

[9] *Goose v Wilson Sandford & Co*, Times Law Report, 19 February 1998.

[10] See *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81.

influence the outcome of relevant cases, whether involving human rights or other issues. Judges in many jurisdictions are increasingly likely to have to decide cases with a human rights dimension and need to understand the problems to which such cases give rise and (so far as may be reasonable) need to be familiar with comparable case-law from other jurisdictions.

Judicial Appointments

17. The Bangalore workshop emphasised that it is the responsibility of the state to ensure that the method by which the judiciary are selected for appointment is open and transparent. Various constitutional procedures exist that seek to ensure that proper judicial appointments are made, but these do not always go far enough in achieving a sufficiently open method of appointment.

Public Interest Litigation

18. The obstacles that confront under-privileged individuals and groups in securing access to justice are such that there is a case to be made for enabling a court to investigate a particular cause of injustice, even though the matter has been brought to the court in the public interest, and not by the plaintiff or applicant acting to defend his/her own rights or interests. Public interest litigation has (under the inspiration of Justices V R Krishna Iyer and P N Bhagwati) gone to its furthest extent in the Indian scheme of constitutional protection, where disadvantaged groups (including most recently child labourers and female employees)[11] may by a simple letter invoking what has been called the 'epistolary jurisdiction', that can lead to remedial orders being issued by the court to improve the position for the future. An experienced practitioner in this jurisdiction has written:

> "The Indian PIL [public interest litigation] revolution is a unique response to a felt necessity. It has worked to make justice accessible to the masses, cutting across procedural and technical barriers. It has made fundamental rights a reality for the victims of undeserved deprivation".[12]

The Resolution of Disputes outside the Courts

19. There is little value in enabling the public at large to have access to the ordinary court system if this will not give them access to justice in the full sense of that word. There is abundant evidence from many jurisdictions that: (a) there is not a single model of civil procedure that is suitable for resolving all disputes; cheap and practical procedures are essential for many small claims; (b) many disputes (e.g. in the fields of housing or employment) are suitable for resolution by bodies such as employment or housing tribunals, in which lawyers do not have a special privilege of representation; (c) in many cases a just and equitable outcome to a dispute can be attained through alternative methods of dispute resolution, such as arbitration, mediation and conciliation. There is a strong case to be made for regarding the ordinary civil courts as one amongst a whole spectrum of procedures, and also for enabling traditional civil procedures to benefit from the experiences of other methods of decision-making.

Scope for Commonwealth Standards and Support

20. Many of the matters discussed here affect the public's perception of the courts and the legal system within a particular jurisdiction. Detailed decisions as to how best to promote access to justice and judicial accountability can only be made in each jurisdiction, particularly as changes in existing arrangements may have resource implications. Nonetheless, within the framework for co-operation and mutual learning that exists within the Commonwealth, there is scope for a continuing initiative intended to promote continuing awareness of the problems and of the main ways of resolving them. Each Commonwealth jurisdiction may have its own laws, but questions of access to justice and judicial accountability arise in virtually every

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[11] See *Mehta v State of Tamilnadu* (1997) 2 BHRC 258 and *Vishaka v State of Rajasthan* (1997) 3 BHRC 261.

[12] See Indira Jaising, "Public interest litigation: the lessons from India" in R. Smith (ed), *Shaping the Future: New Directions in Legal Services* (1995), chap 12, at pp 186-7.

jurisdiction. Continuing work in this field seems justified in respect of:

(a) access to justice generally, the main obstacles and the most likely means of seeking to overcome them;

(b) how to ensure that when an individual secures access to the couirt system, he/she has access to a system that does dispense justice;

(c) questions of law reform and the replacement of archaic procedures by simpler and more cost-effective process;

(d) the provision of legal services to disadvantaged groups, individuals and localities, including legal aid schemes, and the role of voluntary organisations and paralegals;

(e) the appointment, training and accountability of judges;

(f) the use of alternative methods of dispute resolution;

(g) an assessment of the legal system from the perspective of the citizen-consumer, rather than that of the legal practitioner, the magistrate or the judge.