LAW COMMISSION OF INDIA

189TH REPORT

ON

REVISION OF COURT FEES STRUCTURE

FEBRUARY, 2004

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Dear Shri Arun Jaitley ji,

I have great pleasure in forwarding the 189th Report of the Law Commission on 'Revision of Court Fees Structure'. The Commission took up the subject on a reference received from the Dept. of Legal Affairs vide OM No.A-60011/14/2003 Admn.III.LA dated Feb. 11, 2003. In fact, the Dept. of Justice vide its letter No.L-11018/1/2002-Jus. dated 29.8.2002 made a request to the Dept. of Legal Affairs for referring the matter of 'upward revision of Court fees structure vis-à-vis the need to build financial disincentives to discourage vexatious litigation', to the Law Commission for consideration. The Dept. of Justice, as mentioned in its letter, is of the view that the Court fees in majority of cases has not been revised for a very long time, although valuation of rupee has come down, and currently it covers only a fraction of the administrative costs of the judicial process.

This being the first occasion for the Law Commission to give a Report exclusively on subject of Court fees, the basic principles in regard to the collection of Court fee, have been elaborately discussed in this Report.

The Law Commission examined the issue of Court fee in the light of the modern concept that the right of access to justice, is a 'basic right' and dealt with this aspect in Chapter II of the Report. The Commission is of the firm view that as the right to access to justice is now recognized as a basic human right world over, high rates of Court fee may become a barrier to access to justice and this view is shared today in all the countries governed by the common law and civil law systems of jurisprudence.

As discussed in Chapters IV and V of the Report, it is now recognized that it is one of the primary duties of the State to provide the machinery for administration of justice. Administration of criminal justice is, as accepted in all countries, a sovereign function of the State and the view is that no fee can, in fact, be levied. So far as the administration of civil justice is concerned, the view in all countries is that the principle of recovery of full costs of civil justice is no longer tenable. This is the view of various Law Commissions, Courts and jurists. It is their view that these costs have to be met from general revenues of the State. The Central and State Governments should therefore have to meet substantial costs of the administration of justice out of general revenues collected from the tax payers. We may reiterate that in respect of the problem of finding funds for meeting the costs of administration of justice, the trend, both in common law and civil law jurisdiction countries is that, it should be met through general appropriation and governmental funding and not through the device of increase in Court fees.

It has been suggested in the reference that Court fee must be increased to discourage vexatious litigation. In regard to discouraging vexatious litigation, the Law Commission, in agreement with the view consistently expressed earlier by Lord Macaulay and in the judgments of Courts, is of the view that the idea of enhancing the Court fee to discourage vexatious litigation is not correct in principle. Jurists and Courts have pointed out that, on the contrary, higher rates of Court fee will certainly discourage even honest and genuine litigants, which cannot be allowed to happen. However, in order to curb vexatious or frivolous litigation, the Commission recommends that a Central legislation may be made on the lines of the State Act of former Madras State, namely, 'Vexatious Litigation (Prevention) Act, 1949 (Madras Act 8 of 1949). Such statutes are in force in UK, Australia etc. Apart from this, exemplary costs may also be imposed in cases of vexatious or frivolous litigation.

It is necessary to mention that the subject of 'Court fee payable in any Court except the Supreme Court' falls under Entry 3 of List II (State List) of Schedule Seventh to the Constitution of India. Court fee payable in the Supreme Court falls under Entry 77 of List I (Union List). As the Court fees payable in any Court except the Supreme Court falls under the 'State List', ten States have already repealed the Court Fees Act, 1870 in application to their respective states and have enacted their own Court fees legislation. Most of the other States have also amended the Court Fees Act, 1870 as applicable in these States. Union Territory of Pondicherry has also enacted a separate Court Fees Act. Parliament can make law only for Union Territories and the Supreme Court on the subject of Court fee. The Supreme Court has made Rules in this behalf.

On a detailed survey, the Law Commission recommends that in order to eliminate the effect of devaluation of the rupee, and increase in rates of inflation, the rates of fixed Court fee as prescribed in Schedule 2 of the Court Fees Act, 1870 may be appropriately revised. However, ad valorem Court fees need not be revised inasmuch as the Court fee will be paid in proportionate to the value of the claim which in any event would reflect the enhanced value of the claim after inflation.

Therefore, the recommendation is that, in so far as the Union Territories, not covered by any special Acts, are concerned, it will be sufficient if the rates of Court fee as prescribed in the Court Fee Act, 1870, be enhanced keeping in mind the devaluation of the rupee over the years.

We place on record the valuable contributions of Dr. S. Muralidhar, Part time Member of our Commission, in the preparation of this Report.

With regards,

Yours sincerely,

Sd./-
(M. Jagannadha Rao)

Sri Arun Jaitley
Union Minister for Law and Justice
Government of India
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CHAPTER I

INTRODUCTION

The Reference

The Department of Legal Affairs, with approval of Hon'ble Minister of Law & Justice, has referred to the Law Commission, the matter relating to the 'upward revision of court fees structure vis-à-vis the need to **build financial disincentives to discourage vexatious litigation'**, vide O.M. No.A-60011/14/2003/Admn.III LA, dated Feb. 11, 2003. The Department of Legal Affairs was requested by the Department of Justice vide its letter No.L-11018/1/2002-Jus. dated 29.8.2002 for referring this matter of revision of court fees structure, to the Law Commission.

It was suggested in the meeting of Standing Committee of Secretaries, held on 19th July, 2002, that there is a need to **build financial disincentives in the legal system so as to discourage vexatious litigation**. Accordingly, it was decided in that meeting that this suggestion may be referred to the Law Commission for its consideration. It was informed to the Standing Committee, that the **court fees** in majority of cases had not been revised for a very long time and currently **covered only a fraction of the administrative costs of the judicial process**. The Department of Justice, in

its above mentioned letter has also expressed the similar view. It is stated in the letter, that the court fees **has not been revised for a very long time**, although valuation of Rupee has came down tremendously compared to the valuation in the year 1870 when the Court Fees Act came into force.

It is observed that it was also informed to the Standing Committee that the Central Government is concerned with court fees payable in the Supreme Court and other courts situated in the Union Territories. This is the view of the Deptt. of Justice also.

Previous exercise

It is necessary to mention here, that the Deptt. of Justice in 1999, had examined in detail the proposal to amend the Court Fees Act, 1870 in pursuance of the recommendations of the Expert Group, appointed by the Ministry of Home Affairs. However, the Department of Justice, with the approval of the then Minister of Law & Justice, decided not to amend the Act, especially in view of provisions of the Devolution Act, 1920 (Act 38 of 1920), which empowers States to amend the Court Fees Act, 1870. (The Devolution Act, 1920 (Act 38 of 1920) has been repealed by Act 1 of 1938)

The approach of the Law Commission

The Commission is aware that it is taking up for consideration, the question of revising court fee structure, and consequently the relevant legislation(s),

that has been in vogue for over 130 years. It is not safe to proceed on an assumption that a legal regime that may be chronologically ancient is necessarily irrelevant or an anachronism. In many significant areas, the contrary is true as the Commission itself realised recently when it took up the revision of the Evidence Act, 1872. The Indian Penal Code, 1860 is an instance of a legislation that is seemingly 'timeless' and of universal application. Therefore, the mere fact that the Court Fees Act, 1870 is a pre-independence legislation or has survived for over a century, cannot by itself necessitate its wholesole revision.

On the other hand, the reference itself is premised on certain other parameters. These can be usefully delineated as under:

(i) The court fees, which has not been revised for a very long time, at present covers only a fraction of the administrative costs of the judicial process. This premise, in its turn, presupposes that the cost of administration of justice have necessarily to be met from user charges or court fees. It is proposed to closely examine such a presupposition;

(ii) There is a need to build financial disincentives in order to discourage vexatious litigation. The premise here is that court fee can be used as a device to curb frivolous litigation. In other words, increase in court fees would deter the frivolous/vexatious litigant. This premise also requires to be examined and tested for its legal tenability.

(iii) The steady devaluation of the rupee over the years has not been accounted for in the present court fee structure which has remained frozen in time. Therefore, notwithstanding the aforementioned impelling reasons, court fees would nevertheless have to be revised to reflect the present value of the rupee.

The first and second premises throw up important constitutional and legal issues touching upon the right of access to justice. The third issue delineated falls in the realm of law and economics.

Questions for Consideration

Accordingly, the Commission proposes to address the following questions that arise for consideration:

(1) What is the modern concept of 'access to Justice'? This is dealt with in Chapter II.

(2) Whether the Court Fees Act, 1870 can be amended by Parliament and whether Parliament can enact a law relating to the court fees payable in High Courts and other subordinate courts? In what manner has the court-fee legislation been amended from time to time? These are addressed in Chapter III.

(3) Whether court fees structure should be revised in order to meet the increased expenditure in civil administration of justice? This is discussed in Chapter IV.

(4) What is the practice in other countries with regard to the concept of full cost recovery? Chapter V deals with this aspect.

(5) Whether there is a need to revise the court fees structure in order to build financial disincentives to discourage vexatious litigation? This is taken up for consideration in Chapter VI.

(6) What are the alternatives to check frivolous litigation? Chapter VII examines these alternatives.

(7) Whether court fees structure should be revised owing to the fall in the value of rupee over a long period? The question of revision of court fees consistent with the devaluation of the rupee is addressed in Chapter VIII.

The conclusions and recommendations of the Law Commission are set out in Chapter IX of this Report.

CHAPTER II

RIGHT OF ACCESS TO JUSTICE

I

History of the Common Law right of 'access to justice'

In England, during the reign of Henry II, in the Twelfth Century, the concepts of 'access to justice' and 'rule of law' took roots when the King agreed for establishing a system of writs that would enable litigants of all classes to avail themselves of the King's justice. But soon, the abuses of 'King's Justice' by King John, prompted the rebellion in 1215 that led to the ***Magna Carta*** which became the initial source of British constitutionalism. What it represented then and now is a social commitment to the Rule of Law and a promise that even a King is not above the law.

As Blackstone stated later, "It is the function of the common law to protect the weak from the insults of the stronger" (3 Blackstone Commentaries, 3). The Magna Carta asserted not only that the King was bound by law but the barons too and this gave protection to all 'freemen'. The three crucial clauses of the Magna Carta which are the foundation for the basic 'right of access to Courts' are in the following words:

> "No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in anyway ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.

> To no man will we sell, to no one will we deny or delay right to justice.
>
> Moreover, all those aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all our kingdom, as well clergy as laymen, as far as pertains to them towards their men.
>
> Wherefore, it is our will, and we firmly enjoin, that the English Church be free, and the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all aspects and in all places for ever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intention – Given under our hand – the above named and many others being witnesses – in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign."

In more than 500 years following the Magna Carta at Runnymede, Courts resolved disputes, created precedents and laid down vast principles which came to be known as the common law. The Commentaries of Sir Edward Coke and of William Blackstone crystallized the fundamental principles of common law that enshrine the basic rights of man. The principles relating to these basic human rights together with experiences in France, US and other countries entered into the Bills of Rights and the Constitutions of various

countries. Every right when it is breached must be provided with a right to a remedy. *Ubi Jus ibi remedium* says the Roman maxim.

The latest theory is that the right to 'access to justice' became part of the common law and was later continued and recognized as part of the 'Constitutional Law'. The "common law" says Justice Laws in *R v. Lord Chancellor, ex pate Witham* 1997 (2) All ER 779, "does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written Constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that anyone of them is more entrenched by the law than any other. And if the concept of a constitutional right is to have any meaning, it must surely sound in the protection which the law affords to it. Where a written Constitution guarantees a right, there is no conceptual difficulty. The State authorities must give way to it, save the extent that the Constitution allows them to deny it. There may of course be other difficulties, such as whether on the Constitution's true interpretation the right claimed exists at all. Even a superficial acquaintance with the jurisprudence of the Supreme Court of the United States shows that such problems may be acute. But they are not in the same category as the question arises: do we have constitutional rights at all?"

Laws, LJ. further states "In the unwritten legal orders of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can, in my judgment, inhere

only in this proposition, that the right in question cannot be abrogated by the State save by specific provision in an Act of Parliament or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. Any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it."

Interestingly, the above decision in Witham was given in judicial review proceedings challenging the validity of the Supreme Court Fees (Amendment) Order, 1996, Article 6 of which amended the Supreme Court Fees Order, 1980 and repealed the provision which relieved litigants in person who were in receipt of income support from the obligation to pay Court fees and permitted the Lord Chancellor to reduce or remit the fee in any particular case on grounds of undue financial hardship in exceptional circumstances. Striking down the amendment which had been issued by the Lord Chancellor, acting under the powers conferred on him by s.130 of the Supreme Court Act, 1981, the High Court (Queen's Bench Division) held that the effect of the amendment was to "bar absolutely many persons from seeking justice from the courts". It was emphatically asserted (at page 788): "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 express provision – permits the Executive to turn people away from the court door."

Earlier, Lord Diplock, while dealing with the High Courts' power to control the conduct of arbitrators, incidentally referred to this aspect and said in *Bremen Vulkan Schiffban and Maschinenfabrik v. South India Shipping Corp.* (1981 AC 909 – 1981 (1) All ER 289) as follows:

> "The High Courts' power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilized system of government requires that the State should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."

Likewise, Steyn LJ in *R v. Secretary of State for Home Dept, ex p Leech*: 1993 (4) All ER 539 (CA), was dealing with a prisoner who complained that correspondence with his solicitor concerning litigation in which he was involved or intended to launch, was being considered by the prison authorities under the Prisons Rules, 1964. The prisoner contended that sec. 47(1) of the Prisons Act, 1952 which authorised the framing of Rules, could not authorize the Secretary of State to make a rule which created an impediment to the free flow of communication between him and his

solicitor about contemplated legal proceedings. The learned judge held as follows:

> "It is a principle of our law that every citizen has a right of unimpeded access to a court. In *Raymond v. Honey* 1983 AC 1 (1982 (1) All ER 756) Lord Wilberforce described it as a 'basic right'. Even in our unwritten Constitution, it ranks as a constitutional right. In *Raymond v. Honey*, Lord Wilberforce said that there was nothing in the Prisons Act, 1952 that confers power to 'interfere' with this right or to 'hinder' its exercise. Lord Wilberforce said that rules which did not comply with this principle would be ultra vires. Lord Elwyn-Jones and Lord Russell of Killowan agreed… It is true that Lord Wilberforce held that the rules, properly construed, were not ultra vires. But that does not affect the importance of the observations. Lord Bridge held that rules in question in that case were ultra vires… He went further than Lord Wilberforce and said that a citizen's right to unimpeded access can only be taken away by express enactment… It seems (to) us that Lord Wilberforce's observation ranks as the *ratio decidendi* of the case, and we accept that such rights can as a matter of legal principle be taken away by necessary implication."

In yet another case in *Re Vexatious Actions Act 1896, Re Boaler* (1915) (1) KB 21, the right of a person to lay information before a magistrate was held, could not be prohibited, as the same could not be brought within vexatious 'legal proceedings' which could be prevented under the 1896 statute. It was held by Scrutton J as follows:

> "One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any statute should be jealously watched by the court, and should not be extended beyond its least onerous meaning unless clear words are used to justify extension….. I approach the consideration of a statute which is said to have this meaning with the feeling that unless its language clearly convinces me that this was the intention of the Legislature I shall be slow to give effect to what is most serious interference with the liberties of the subject"

De Smith's Judicial Review of Administrative Action (5th Ed, 1995) was also quoted by Sir John Laws in *Witham* (para 5.017) as follows:

> "It is a common law presumption of legislative intent that access of Queens's Court in respect of justiciable issues is not to be denied save by clear words in a statute"

Laws LJ., again reiterated in *International Transport Roth Gmbitt v. Home Secretary* 2002 (3) WLR 344, in his separate judgment, that, after the coming into force of the Human Rights Act, 1998 (w.e.f. 2.10.2000), the British system which was once based on parliamentary supremacy has now

moved from that principle to the system of constitutional supremacy. He referred to the judgment of Iacobucci J in *Vriend v. Alberta* 1998 (1) SCR 493 where the judge said that after the Canadian Charter of Rights and Freedoms, Canada has moved from parliamentary supremacy to constitutional supremacy. He said:

> "When the Charter was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of parliamentary supremacy to constitutional supremacy…. Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away"

Laws LJ., stated that in the present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy……"

Thus, from the above decisions, the concept of access to justice, can be understood as constituting an integral part of the constitutional and common law jurisdictions, and is considered sacrosanct and attempts to lightly interfere with the right are generally viewed strictly.

II

International Human Rights Laws

The Universal Declaration of Rights drafted in the year 1948 gave universal recognition to these rights including the right of 'access to justice' in the following manner:

Art.6: Everyone has the right to recognition everywhere as a person before the law.

Art.7: All are equal before the law and are entitled without any discrimination to equal protection of the law.

Art.8: 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 law.

Art.10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him.

Art.21: (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

Similarly, clause 3 of Article 2 of International Covenant on Civil and Political Rights, 1966 provides that each State party to the covenant undertakes 'to ensure that every person whose rights or freedom as recognized violated, shall have an effective remedy' and 'to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, and the State should also ensure to develop the possibilities of judicial remedies.

There are provisions in the International Covenant on Civil and Political Rights, the European Convention and other regional conventions that underscore the importance of the right of access to impartial and independent justice. The decision of the European Court on European Convention 1950, dealt with this aspect in *Golden v. UK* 1975 (1) EHRR 524 and *Airey v. Ireland* 1979 (2) EHRR 305 and other cases.

The position in India

In our country, there can be no doubt that the citizens had always access to the King, right from the time of Ramayan according to our history. When the Indian Courts later absorbed the common law of England, the right to access to courts became part of our constitutional law, even long before the coming into force of our Constitution. That continued even after the Constitution because of Art. 372. We wish to refer to two interesting cases that arose in the pre-independence era which would indicate that concept of a non-derogable right of access to justice was recognised and enforced by the courts in this country.

Among the early decisions was one rendered by the Bombay High Court in *Re: Llewelyn Evans* AIR 1926 Bom 551. In that case, Evans was arrested in Aden and brought to Bombay on the charge of criminal breach of trust. At the stage of granting remand of the prisoner to police custody, Evans' legal adviser was denied access to meet the prisoner. The Magistrate who ordered the remand held that he had no jurisdiction to grant access despite the fact that s.40 of the Prisons Act, 1894 provided that an unconvicted prisoner should, subject to proper restrictions, be allowed to see his legal adviser in jail. The question that arose was whether this right extended to the stage where the prisoner was in police custody. Justice Fawcett, who presided over the Bench of the Bombay High Court which heard the case referred to the report of the Rawlinson Committee in England and noted that "the days have long since gone by, when the state deliberately put obstacles in the way of an accused defending himself, as for instance, in the days when he was not allowed even to have counsel to defend him on a charge of felony." Referring to s.340 of the Code of Criminal Procedure, 1898 the Judge held that "the right under that provision implied that the prisoner should have a reasonable opportunity "if in custody, of getting into communication with his legal adviser for the purposes of preparing his defence". The other judge on the Bench, Justice Madgavkar added that "if the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely, and fairly, before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice – advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very

state which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance".

Another instance of the courage and craftsmanship of our Judges, particularly during difficult times of our political and legal history, is provided in the decision in *P.K. Tare v. Emperor* AIR 1943 Nagpur 26. The petitioners, who had participated in the Quit India Movement of 1942, challenged their detention under the Defence of India Act, 1939 as being vitiated on account of refusal of permission by the authorities to allow them to meet their counsel to seek legal advice or approach the court in person. The Government of the day contended that the Defence of India Act 1939 took away the right to move a habeas corpus petition under S.491 of the Cr.PC 1898. The court rejected this relying on the observation of Lord Hailsham in *Eshugbayi v. Officer Administering the Govt. of Nigeria* that "such fundamental rights, safeguarded under the Constitution with elaborate and anxious care and upheld time and again by the highest tribunals of the realm in language of utmost vigour cannot be swept away by implication or removed by some sweeping generality. No one doubts the right and the power of the proper authority to remove, but the removal must be express and unmistakable; and this applies whatever government be in power, and whether the country is at peace or at war." Justice Vivian Bose, giving the leading opinion of the court, explained that the right to move the High Court remained intact notwithstanding the Defence of India Act, 1939. Further, although the courts allow a great deal of latitude to the executive and presumptions in favour of the liberty of the subject are weakened, "those rights do not disappear altogether." The court categorically ruled that the

"attempt to keep the applicants away from this Court under the guise of these rules, is an abuse of power and warrants intervention."

Justice Vivian Bose, in the course of his judgment, emphasised the importance of the right of any person to apply to the court and demand that he be dealt with according to law. He said: "The right is prized in India no less highly than in England, or indeed any other part of the Empire, perhaps even more highly here than elsewhere; and it is jealously guarded by the courts."

The Constitution and after

The debates in the Constituent Assembly preceding the making of the Constitution of India witnessed interesting exchanges amongst the distinguished gathering. Article 22 (1) was Article 15-A in the Draft Constitution and provided that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult a legal practitioner of his choice". Dr. Ambedkar was conscious of the criticism that had resulted from the omission of "due process" from Article 21 (Article 15 in the Draft Constitution). Therefore, when the debate on Article 15-A was to commence he pointed out that it was being introduced in order to make "compensation for what was done then in passing Article 15. In other words, we are providing for the substance of the law of 'due process' by the introduction of Article 15-A". He further pointed out that "Article 15-A merely lifts from the provisions of the Criminal Procedure Code two of the

most fundamental principles which every civilized country follows as principles of international justice", viz., the right of a person arrested to be informed of the grounds of arrest and the right to be defended by a legal practitioner of his choice. It may be noted that clause (a) of Art. 22 of the Constitution creates only two exceptions and they are (a) enemy alien and (b) persons detained under preventive detention laws. They have no right to consult a lawyer nor be defended by a lawyer nor produced within 24 hours before a Magistrate.

The Constitution recognised importance of access to justice to courts, particularly the High Courts and the Supreme Court. The right under Article 32 to petition the Supreme Court for enforcement and protection of a fundamental right is itself a fundamental right. In re under Art. 143, Constitution of India, (Keshav Singh case) (AIR 1965 SC 745), the Supreme Court said "The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the court in that behalf." *Kesavananda* recognised judicial review as part of the basic structure of the Constitution, a position that has been reaffirmed by a bench of seven judges in *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261.

Right to 'access to Courts' includes right to legal aid and engaging counsel

Article 39-A was introduced in the Constitution (42nd Amendment) Act, 1976 and it provides that "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".

We need not dilate here on the major strides made in the development of the jurisprudence surrounding the right to life under Article 21, particularly after the landmark decision in *Maneka Gandhi.* The linkage between Article 21 and the right to free legal aid was forged in the decision of *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81 where the court was appalled at the plight of thousands of undertrials languishing in the jails in Bihar for years on end without ever being represented by a lawyer. The court declared that "there can be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21." The court pointed out that Article 39-A emphasised that free legal service was an inalienable element of 'reasonable, fair and just' procedure and that the right to free legal services was implicit in the guarantee of Article 21. In his inimitable style Justice Bhagwati declared: "legal aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality". He reiterated this proposition in *Suk Das v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401 and said "It may therefore now be taken as settled law that free legal assistance at State cost

is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21." This part of the narration would be incomplete without referring to the other astute architect of human rights jurisprudence, Justice Krishna Iyer. In *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC 544, he declared: "If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice".

Recommendation of the Commission for Review of the Constitution on right of access to justice

Recently the Commission for Review of the Constitution recommended that 'access to justice' must be incorporated as an express fundamental right as in the South African Constitution of 1996. In the South Africa Constitution, Art. 34 reads as follows:

> "Art. 34: Access to Courts and Tribunals and speedy justice
>
> (1) Every one has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or tribunal or forum or where appropriate, another independent and impartial Court, tribunal or forum.

(2) The right to access to Courts shall be deemed to include right to reasonably speedy and effective justice in all matters before the Courts, tribunals or other forum and the State shall take all reasonable steps to achieve that object."

Accordingly, the National Commission for Review the Working of Constitution has recommended insertion of Art. 30A on the following terms:

"30A: 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 a 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, tribunals or other fora and the State shall take all reasonable steps to achieve the said object."

However, the right to legal aid in India is now firmly entrenched in the Legal Services Authorities Act, 1987. S.12 of that Act provides that legal aid will be available both on the means test as well as the merits test. In fact, for a wide range of litigants with special needs [for instance, persons in custody, children, women, complainants under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, workmen], legal aid is automatically available for filing or defending a case irrespective of the

economic status of that person. We have, under the Act, an extensive network of legal aid committees at the taluk, district and State levels. In addition, the Supreme Court and every High Court has its own legal services committee. The task before these committees is to provide effective and quality legal aid, that will not be restricted to legal representation in courts but also counselling and advice, and this is an important and daunting challenge.

III

Constitutional Courts and Judicial Review

We would now like to dwell briefly on the scope and extent of the power of judicial review which we have noticed is an inalienable part of the basic structure of our Constitution. The power of the constitutional Courts to go into the validity of the laws made by the Legislature or of the actions of the executive was broadly laid down by Justice Marshall CJ in the famous case in *Marbury v. Madison* (1803) 5 U.S. 137. He reviewed the common law, Blackstone, the Federalist papers and the language of the American Constitution itself. After first deciding that Marbury, the petitioner, had a **right** to a writ of mandamus, to compel the Secretary of State, Madison to issue his Commission as a justice of the peace in the District of Columbia, he reached the next stage of the decision. The question was

> "if he (Marbury) has a right, and that right has been violated, do the laws of his country afford him a remedy?"

Marshall CJ answered as follows:

> "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"

He quoted Blackstone to the following effect:

> "It is settled and invariable principle in the laws of England, **that every right, when withheld, must have a remedy** and that every injury its proper redress. The government of the United Sates has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right"

Public law and private law divide

Rights which are breached may belong to private law or public law. The distinction between these two sets of rights is well known to students of constitutional law. Rights which exist as between one individual and another or even against the State can be private rights such as those arising out of contract or tort. Rights which are against the State or entities to which the function of State are assigned such as statutory corporations or

autonomous public sector units are governed by the Constitution or are regulated by statutes which the Constitution permits to be framed so that the rights are regulated and balance is struck between individual rights on the one hand and public interest on the other. These are governed by public law principles.

For breach of private rights parties approach the ordinary Courts Civil or Criminal. There are offences which are committed by individuals against the individuals or the State or public entities. Barring a few where private action is permissible under the criminal law, the others are taken up by the State through its prosecution agencies so that law and order can be maintained. The State steps in because it is its duty to maintain law and order.

As to enforcement of judgments, the superior Courts have powers under the Constitution, and under the Contempt Laws to take penal action if their orders are not complied with by the Executive authority. Further, the Constitution provides that the Government shall act in aid of the Supreme Court of India. Thus, it is clear that the person whose constitutional or statutory rights are violated has 'access' to the Constitutional Courts, namely, the High Court and the Supreme Court.

Public Interest Litigation

We shall next refer to the system of ‘public interest litigation’ that has come to stay in our Constitutional Courts. The trend of bringing public interest litigation in the Supreme Court and in the various High Courts by social action groups, the legal aid societies, university teachers, advocates, voluntary organizations and public-spirited citizens has risen in the country. This has helped to ameliorate the miseries of thousands of persons, arising from repression, governmental omissions or excesses, administrative lethargy or arbitrariness or the non-enforcement of beneficial legislation. Cases of undertrials as well convicted prisoners, women in protective homes, unorganized labourers, untouchables, miseries of scheduled castes and tribes, landless agricultural labourers, slum-dwellers etc. are taken up in PIL cases. The concepts of locus standi have been expanded to meet the problems created by damage to environment or environmental pollution. Public interest cases have also come to be filed seeking directions against the Police or State for taking action against corrupt individuals. The result is that the strict rules of ‘locus standi’ which were applicable in the writ jurisdiction of our Constitutional Courts has, practically vanished.

In *Fertiliser Corporation Kamgar Union v. Union of India* AIR 1981 SC 344, Krishna Iyer J stated:

> “In simple terms, locus standi must be liberalized to meet the challenges of the time. *Ubi Jus ibi remedium* must be enlarged to embrace all interests of public minded citizens or organizations with

serious concerns for conservation of public resources and the direction and correction of public power so as to promote justice in trinity facets."

IV

Need for adequate number of Courts and financial support

We now turn to certain important aspects that affect the right of access to justice. For the protection of rights, the State has to establish adequate number of Courts, man them by qualified, competent and independent Judges and provide the necessary staff and infrastructure. But today there is an immense gap between the demand and supply. It is well-known that the Law Commission had stated in its 120th Report that we in India have only 10.5 Judge per million population while countries like US and UK and others have between 100 to 150 Judges per million population. The Union Government and the States in India had not toned up the judicial system in the last five decades so that today we are faced with tremendous backlog of cases in our Courts. Every law made by Parliament or the State Legislatures creates new civil rights and obligations and creates new criminal offences. Before such laws are introduced, a judicial impact assessment has to be made as to the impact of the Acts on the Courts – such as how many civil cases the Act will generate or how many fresh criminal cases will go before the Courts. To that extent, each Bill must, in its Financial Memorandum, seek budgetary allocation but in the last five decades this has not been done. We may state that in US a statute specifically requires judicial impact

assessment and adequate budgetary provisions to be made. Unfortunately, this is not done in India. The principle here is that the expense for the judicial branch must be met from the general taxes that are collected by the State.

Further, the trial Courts on the civil and criminal side which are located over the length and breadth of our country adjudicate upon civil rights or criminal offences created by various legislations made both by Parliament and State Legislatures. We are all aware that the Constitution in its VII Schedule, contains three lists. The entries in List I are subjects on which the Parliament alone can make laws, entries in List II are subjects on which the State Legislatures alone can legislate while in respect of entries in List III both the Parliament and State Legislatures can legislate. Today, the factual position is that the subordinate Courts established by the State Governments are adjudicating upon the civil and criminal matters arising out of legislations made by Parliament and the State Legislatures. Bulk of the laws like the Transfer of Property Act, the Indian Contract Act, the Sale of Goods Act, Indian Penal Code, Civil and Criminal Codes etc. are referable to List III. The statutes enacted by Parliament on the subjects listed in List I and List III have the effect of leading to a large number of civil and criminal cases. In other words, the Central Government is bringing forward legislation in Parliament and burdening the subordinate Courts established by the State Governments with cases arising out of the Central legislation. The Central Government has however not been making any contribution for establishing the trial and appellate Courts in the States. This lacuna has been pointed out by the Commission for Review of the Constitution. There is an

immediate need for the Central Government to come forward with a package which will substantially increase the number of our subordinate Courts.

Today, more than seventy per cent of those who are detained in our jails are undertrials whose guilt is yet to be declared. By detaining such persons for unreasonable terms without providing adequate number of criminal Courts, the Union and the States are in a continuing breach of the 'right to access' to justice in our Criminal Courts and the right to 'speedy justice' guaranteed by Art. 21. Speedy justice, the Supreme Court, has held is a fundamental right within the meaning of the words 'right to life' referred to in Article 21.

Long ago, in the Federalist Paper No.78, in the 18th Century, Alexander Hamilton, one of the architects of the American Constitution declared, in an oft-quoted passage, that the judicial branch of the federal government is one that "will always be the least dangerous to the political rights of the Constitution" because the judicial branch

> "has **no influence over either the sword or the purse**; no direction of the strength or the wealth of the society"

Therefore, to start with, we must have an adequate number of trial and appellate Courts, civil and criminal, established by the Central Government and State Governments and adequate budgetary provision must be made before the enactment of any legislation, by making a judicial impact

assessment. The expenditure must be borne from the general taxes collected by the Central and the State Governments.

Court Fees

Yet another aspect of 'access to justice' is the system of demanding 'court-fee' from the parties who move the Courts. Lord Macaulay, who headed the Law Commission one hundred and fifty years ago declared that the preamble to the Bengal Regulation of 1795 was 'absurd' when it stated that high court fee was intended to drive away vexatious litigants. The reason he gave was that such increase will also drive away honest plaintiffs who are unable to pay court fee. Starting from the 14th Report, the Law Commission has been repeating that the argument that court fee be increased to prevent vexatious litigation, cannot be accepted.

In the Supreme Court, in *P.M. Ashwathanarayana Setty v. State of Karnataka* 1989 Supp (1) SCC 696, Venkatachaliah J (as he then was), while dealing with the issue as to whether the fixation of ad valorem Court fees without any limit, as proposed by legislation in the Rajasthan and Karnataka Acts, was constitutionally valid, quoted A.P. Herbert's 'More Uncommon Law', where the following words of the Judge in the fictional case of *Hogby v. Hogby* were referred to:

> "That 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 one 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."

The Judge in the fictional case asked the Attorney General:

> "Everybody pays for the police, but some people use them more than others. Nobody complains. You don't have to pay a special fee every time you have a burglary, or ask a policeman the way."

Venkatachaliah J observed that the court fee as a limitation on 'access to justice' is inextricably intertwined with a 'highly emotional and even evocative subject stimulative of visions of a social order in which justice will be brought within the reach of all citizens of all ranks in society, both those blessed with affluence and those depressed with poverty'.

Thus, while upholding the constitutionality of the said legislations, the Court suggested for the rationalization of the levy of Court fee by the States and more particularly lower the fees for litigants at lower level, on the principle that those who have less in life should have more in law.

His Lordship, further observed:

> "Indeed all civilized governments recognize the need for access to justice being free."

Alternative Dispute Resolution and Plea Bargaining

Today, it is universally recognized that the Courts may not merely adjudicate in civil disputes but also persuade parties to go for arbitration, conciliation, mediation or Lok Adalats. Courts are no longer mere centres for adjudication of disputes but are also centres for promoting settlement. Court-annexed systems can even compel parties to try these alternative modes. Section 89 of the Code of Civil Procedure, 1908 (as introduced w.e.f. 1.7.2000) is part of such a policy. In the US, more than 90% of civil cases are settled through mediation and do not go for trial. Lawyers who promote mediation are the lawyers most in demand. Mediation centres are now coming up in a big way in India, a start is made in Mumbai, Ahmedabad, Chennai and other places by voluntary groups of lawyers.

Plea bargaining in criminal cases has been recommended by the Law Commission in its 154th Report on Criminal Procedure Code, 1973 and also in 177th Report on 'Law Relating to Arrest' and the Bill, namely, "The Criminal Law (Amendment) Bill, 2003" is pending in Parliament. This means that those accused who confess before Court may plead for reduced sentences.

In *Bihar Legal Support Society v. The Chief Justice of India & Ors* (AIR 1987 SC 38), the Supreme Court observed:

> "the weaker sections of Indian society have been deprived of justice for long long years; they have had no access to justice on account of their poverty, ignorance and illiteracy. …..The majority of the people of our country are subjected to this denial of 'access to justice' and overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings…… The strategy of public interest litigation has been evolved by this Court with a view to bringing justice within the easy reach of the poor and disadvantaged sections of the community."

The famous dictum of Justice Brennan of the US Supreme Court may also be recalled:

> "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness."

The right of access to justice is integral to the rule of law and administration of courts in accordance with the Constitution. It serves as the guiding principle in regard to any measure that affects the administration of justice- whether civil or criminal. The socio-economic realities of our country have thus far impacted every measure of legal reform. It assumes even greater significance when it involves an element of economic and financial reform.

With this essential understanding of the basic issue of access to justice, we proceed to examine the central issues that we have posed for consideration in Chapter I (supra).

CHAPTER III

POWER OF PARLIAMENT TO ENACT OR AMEND A LAW RELATING TO THE COURT FEES PAYABLE IN HIGH COURTS AND SUBORDINATE COURTS

(i) Legislative History of Court Fee in India

Before the advent of British rule in India, the administration of justice was considered to be the basic function of the State as guardian of the people without the levy of any charge on the party approaching the court for redress of its grievances. During the Mughal rule and the period prior to that, there was no fee payable even on administration of civil justice and the administration of justice was totally free. It was only after the British rule that regulations imposing court fees were brought into existence (see *Secretary to Govt. of Madras v. P.R. Sriramulu* (1996) 1 SCC 345, at para 6).

The first legislative measure in India on court fee was the Madras Regulation III of 1782 which was followed by subsequent regulations. Subsequently, in Bengal, Bengal Regulation XXXVIII of 1795 was passed, which was also followed by subsequent regulations. In Bombay, Bombay Regulation VIII of 1802 was passed by the British Government, which was also subsequently replaced by other regulations. All these provincial regulations were amalgamated into a single Act XXXVI of 1860, which was enacted for whole of British India. This Act was also followed by

subsequent Acts; and in last, the present Court Fees Act, namely, 'The Court Fees Act, 1870' (Act VII of 1870) came into existence. This Act of 1870 has been amended from time to time.

Statement of Objects and Reasons of 1870 Act speaks of need for reduction of Court fee:

The Statement of Objects and Reasons (SOR) to the Court Fees Act, 1870 indicates that prior to this legislation the rates of stamp fees leviable in Courts and offices established beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay and in proceedings on the appellate side of such High Courts, were fixed by Act XXVI of 1867, and this was to a great extent tentative. Acknowledging that there was a direct nexus between increased court fees and litigation, the SOR proceeded to state: "The experience gained of their working during the two years in which they have been in force, ***seems to be conclusive as to their repressive effect on the general litigation of the country***. It is, therefore, ***thought expedient to make a general reduction in the rates now chargeable*** on the institution of civil suits, and to revert to the principle of maximum fee which obtained under the former law." (emphasis supplied). The legislation also reduced the fee on certain petitions filed in the criminal courts "from one rupee to eight annas" bowing to the "strong objections entertained by the local authorities in certain Provinces."

To make up for the loss of revenue which was expected to result from the general reduction of fees, it was proposed to discontinue the refund of any portion of the amount, levied on the first institution of suits, and also to raise the fees heretofore chargeable on probates and letters of administration granted under the Indian Succession Act, and on certificates issued under Act XXVII of 1860, to the *ad valorem* rates leviable under the English law in like cases.

The 1870 legislation also implicitly recognised the principle of non-discrimination among litigants in the matter of process fees. The SOR stated: "In lieu of the existing rates of process-fees, which vary according to the distance of the Court by which the processes are issued from the place where they are to be served or executed, it is proposed to levy, by means of stamps, a uniform rate in all cases. ***All suitors will thus be required to contribute in equal proportion to the maintenance of the establishment employed in the serving of processes, without reference to the length of time occupied in each service and the consequent amount of work rendered on behalf of each person at whose instance any process is served or executed***." (emphasis supplied)

Though, the Court Fess Act 1870 was applicable to the whole of British India, the 'Devolution Act 1920' (Act XXXVIII of 1920) empowered the 'Provinces/ States' to amend the Court Fees Act, 1870 while making it applicable to the concerned State/Province. The Devolution Act, 1920 has since been repealed by Act 1 of 1938.

Legislative powers of Parliament and State Legislatures as to the making of law on Court-fees

a) ***Position after the Government of India Act, 1935 came into force***

At the time when the Government of India Act, 1935 came into force, the Court Fees Act, 1870 was applicable to the whole of British India, as amended by provincial legislatures. It continued to be in force even after the Government of India Act, 1935 came into force, in view of the provision contained in the section 292 of the Government of India Act, 1935, which read as follows:

> "Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the laws in force in British India immediately before the commencement of Part III of this Act, shall continue in force in British India until altered or repealed or amended by a competent legislature or other competent authority."

Now we have to ascertain which was the competent legislature which was entitled to alter, repeal or amend the Court Fees Act, 1870. The relevant provision is contained in section 100 of the Government of India Act, 1935. As per sub-section (1) of section 100 of the said Act of 1935, the Federal Legislature had exclusive power to make laws with respect to any of the matters enumerated in List I of the Seventh Schedule to that Act and under sub-section (3) thereof a provincial legislature alone had power to make

laws with respect to any of the matters enumerated in List II of the said Seventh Schedule to that Act. The relevant entry relating to court fees was Entry 1 of List II of the Seventh Schedule, which included: "fees taken in all courts except in Federal Court".

In view of the above provisions, the provincial legislature became the competent legislature in respect of matters relating to the court fees payable in all courts except the Federal Court. In this regard, the Bombay High Court in *M/s Brindalal v. M/s Gokal and Haffman Ltd.*, AIR 1960 Bom 96, held (at para 5):

> "Therefore, the Legislature competent to legislate in connection with court fees was a Provincial Legislature and not the Federal or Central Legislature because of the provisions of sub-section (3) of section 100, "Court fees" was very clearly with the exclusive legislative powers of a Provincial Legislature, after the coming into operation of the Government of India Act, 1935 and the Federal Legislature did not have any such power. It is quite clear that it was a Provincial Legislature alone which could alter, repeal or amend the Court Fees Act, after the coming into operation of the Government of India Act, 1935."

b) ***Position after the Constitution of India came into force***

When the Constitution of India came into force on 26th January, 1950, the Court Fees Act, 1870 was already in force by virtue of section 292 of the

Government of India Act, 1935, as mentioned above. It continued to be in force after the Constitution of India came into force by virtue of Art. 372 of the Constitution of India.

Art.372 of the Constitution provides that pre-Constitutional laws shall continue to be in force, until altered or repealed or amended by a competent Legislature, however subject to the other provisions of the Constitution. Clause (1) of Art.372 reads as follows:

> **"372. Continuance in force of existing laws and their adaptation.** -
>
> (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."

Moreover, the object of the Art.372 of the Constitution is to maintain the continuity of the pre-existing laws after the Constitution came into force till they were repealed, altered or amended by a competent legislature or other competent authority. (*South India Corporation (P) Ltd. v. Secy., Board of Revenue*, AIR 1964 SC 207). The Court Fees Act, 1872 was an 'existing law' within the meaning of Art.366. By virtue of Art.372, it has been a continuing enactment even after the Constitution of India came into force. While interpreting Art.372, the Supreme Court in the above-noted case held as under:

> "that a pre Constitutional **law made by a competent authority, though it has lost its legislative competence under the Constitution**, shall continue in force, provided the law does not contravene the other provisions of the Constitution". (emphasis supplied)

Pre-Constitutional law can continue to be in force only in its original form, and can only be altered or repealed or amended by a competent legislature or other competent authority. The following words in Art.372(1) make it clear; "shall continue in force therein **until altered or repealed or amended by a competent legislature** or other competent authority".

The Bombay High Court in *M/s Brindalal v. M/s Gokal and Haffman Ltd.* (supra), has stated:

> "The position, therefore, is the same as that under the Government of India Act, 1935 and it is the State Legislature alone which has the exclusive power to legislate in respect of court fees payable in that particular State."

It is necessary to ascertain which is the competent legislature, which is entitled to make laws relating to fees payable in various Courts. Similarly whether now Parliament can amend the Court Fees Act, 1870, which was originally enacted as a Central Act?

Powers of Parliament and State Legislatures

Article 246 (1) of the Constitution of India refers to the powers of the Parliament and the State Legislatures in respect of matters referred to in the Seventh Schedule. Parliament has the exclusive power to make laws with respect to any of the matter enumerated in List I (Union List). Parliament can also make laws with respect to any matter mentioned in List III, i.e. Concurrent List, [Art. 246(2)]. So far as making of a law in respect to any of matter enumerated in List II (State List) is concerned, only the legislature of a State has the exclusive power to make laws [Art.246(3)]. However, the Parliament can enact a law on a subject mentioned in the 'State List' only in the following circumstances:-

(a) Law, which is applicable to any part of the territory of India not included in a State, i.e. Union Territories [Art.246(4)]

(b) When it is necessary in national interest (Art.249)

(c) When proclamation of Emergency is in operation (Art.250)

(d) When two or more States desire and pass a resolution (Art.252) and

(e) For giving effect to international agreements etc. (Art.253)

Specific entries in the Lists I, II and III of the Seventh Schedule to the Constitution of India relate to the subject of ‘Court fees’ and reads as follows:

List I (Union List)

Entry 77 – “Constitution, Organisation, jurisdiction and powers of the Supreme Court (including contempt of such court), and **fees taken therein**; persons entitled to practice before the Supreme Court.

Entry 96 – “Fees in respect of any of the matters in this list, **but not including fees taken in any Court.**”

List II (State List)

Entry 3 – “Officers and servants of the High Court; procedure in rent and revenue Courts; **fees taken in all Courts except the Supreme Court**.

Entry 66 – “Fees in respect of any of the matters in this List, **but not including fees taken in any Court**”.

List III (Concurrent List)

Entry 11A – “**Administration of Justice**; constitution and organization of all Courts, except the Supreme Court and the High Courts.”

Entry 47 - “Fees in respect of any of the matters in this List, **but not including fees taken in any Court**”.

From the above entries, it is evident that the subject of Court fees, so far it relates to Supreme Court, falls under Entry 77 of List I (Union List). Court fee in High Courts and other Subordinate Courts, falls under Entry 3 of List II (State List).

Entry 96 of List I, entry 66 of List II and entry 47 of List III also deal with 'fees', but 'fees taken in any Court' is specifically excluded in these specific entries.

(a) Law on Court fees payable in the High Court & subordinate Courts

It is necessary to mention here that the entry relating to the 'administration of justice', was originally in Entry 3 of List II. But by virtue of the Constitution (Forty-Second) Amendment Act, 1976, the said entry has been shifted to List III with effect from 3.1.1977. Though administration of justice now falls under Entry 11A of List III, the subject of '**fees taken in any court**', which may be said to be related to administration of justice, does not fall under List III in view of the explicit bar under Entry 47 of List III mentioned above. The effect of this Constitutional amendment still remains the same i.e. the power to legislate on matters of court fees remains in the competence of the State Legislatures, so far as the High Courts and Courts subordinate thereto are concerned.

Thus, as far as Parliament is concerned, under Art.246(1) read with Entry 77 of List I, it can enact a law relating to Court fees which is payable in Supreme Court, and under Art.246(4) read with Entry 3 of List II, it can enact a law for Court fees payable in other Courts situated in any Union Territory. But for High Courts and other subordinate Courts exercising jurisdiction in any State, laws relating to Court fees can only be made by the Legislature of State as per Art.246(3) read with Entry 3 of List II.

(b) **Law on Court fees payable in the Supreme Court**

As per Entry 77 of List I read with Art. 246(1) of the Constitution of India, Parliament is competent to make a law on Court fees payable in the Supreme Court. Subject to any law made by the Parliament, the Supreme Court can also make rules relating to fees payable in the Supreme Court, under sub-clause (f) of clause (1) of Art. 145 of the Constitution.

The Supreme Court in exercise of its rule making power conferred on it by Article 145 of the Constitution of India, has framed rules, which include rules relating to the Court fees payable in the Supreme Court. Those rules are known as 'Supreme Court Rules, 1966' and the third schedule to the Rules provides table of Court fees payable in the Supreme Court. However, these rules are subject to any law made by the Parliament.

(c) Law on Court fees payable in Courts in Union Territories

As far as Court fees payable in other Courts exercising jurisdiction over the Union Territories are concerned, no doubt Parliament can enact any law by virtue of power conferred on it under Article 246(4) of the Constitution of India. Apart from Art. 246(4), the President of India may also under Art. 240 of the Constitution, make regulations for the peace, progress and good government for the Union Territory of:

(a) Andaman and Nicobar Island (b) Lakshadweep

(c) Dadra and Nagar Haveli (d) Daman and Diu

(e) Pondicherry

However, for Union Territory of Pondicherry, any regulation can only be made by the President when the Legislative Assembly of Union Territory of Pondicherry is dissolved or is under suspension.

Any regulation so made by the President under Art. 240 of the Constitution, may repeal or amend any law made by Parliament which is applicable to the particular Union Territory for which regulation has been made and the regulation so made by the President shall have the same force and effect as an Act of Parliament [see Art. 240(2)]. A five Judge Bench of the Supreme Court in *T.M. Kanniyan v. I.T. Officer, Pondicherry* AIR 1968 SC 637, while interpreting Art. 240 of the Constitution, has observed:

> "By the express words of Art. 240, the President can make regulations for the peace, progress and good government of the specified Union Territories. Any regulation so made may repeal or amend any Act made by Parliament and applicable to that territory. When promulgated by the President, the regulation has the same force and effect as an Act of Parliament applicable to that territory. This general power of the President to make regulation extends to all matters on which Parliament can legislate."

At present there are only seven territories having status of Union Territory. These are:

(1) Delhi	(2) Andaman and Nicobar Island
(3) Lakshadweep	(4) Dadra and Nagar Haveli
(5) Daman and Diu	(6) Pondicherry
(7) Chandigarh	

Among these seven Union Territories, Delhi and Pondicherry are having their own Legislative Assemblies also. These Legislative Assemblies can also enact any law on a subject falling in List II (State List) of the Seventh Schedule to the Constitution. (See for Delhi – sub-clause (a) of clause (3) of Article 239AA of the Constitution of India; for Pondicherry – section 18 of the Government of Union Territories Act, 1963). However, Parliament's power under Article 246(4) is unaffected and any law made by Parliament

will prevail over any law made by any Legislative Assembly mentioned above. (See sub-clauses (b) and (c) of clause (3) of Article 239AA of the Constitution of India and sections 18(2) and 21 of the Government of Union Territories Act, 1963). In fact, Pondicherry Legislative Assembly has already enacted 'The Pondicherry Court Fees and Suit Valuation Act, 1972'.

High Courts for Union Territories

Art. 241 of the Constitution provides that Parliament may be law constitute a High Court for a Union Territory or declare any Court in any such territory to be a High Court for such territory. The existing position of High Courts having jurisdiction over Union Territories is as follows:

(1) ***Delhi*** - A separate High Court has been constituted by the Delhi High Court Act, 1966.

(2) ***Chandigarh*** – As per section 29 of the Punjab Reorganisation Act, 1966, the Punjab and Haryana Court has been conferred jurisdiction over Chandigarh Union Territory.

(3) ***Andaman and Nicobar Islands*** – The jurisdiction of the Calcutta High Court has been extended over the Andaman and Nicobar Island by the Calcutta High Court (Extension of Jurisdiction) Act, 1953.

(4) ***Dadra and Nagar Haveli*** – Jurisdiction of the Bombay High Court has been extended to this Union Territory by section 11 of the Dadra and Nagar Haveli Act, 1961.

(5) ***Daman and Diu*** – Bombay High Court is having jurisdiction over Daman and Diu (see section 20 of the Goa, Daman and Diu Reorganisation Act, 1987).

(6) ***Lakshadweep Island*** – As per section 60 of the State Reorganisation Act, 1956 the Kerala High Court is having jurisdiction over Lakshadweep Island.

(7) ***Pondicherry*** – As per section 4 of the Pondicherry (Administration) Act, 1962, the Madras High Court is having jurisdiction over this Union Territory.

The manner in which the Court-fee legislation was being amended from time to time

The Court Fees Act, 1870 was originally passed as 'Central Act' by the Governor General in Council and was extended to the whole of then British India. The Act continued to be in force by virtue of section 292 of the Government of India Act, 1935. The Court Fees Act, 1870 continues to be in force even after Constitution of India has come into force, by virtue of Art.372 of the Constitution.

The Devolution Act, 1920 empowered then Provinces to amend the Court Fees Act. As mentioned above, the subject of Court fees was mentioned in item 1 of List II of the Seventh Schedule to the Govt. of India Act 1935 and similarly as per Entry 3 of List II of VII Schedule to the Constitution, the Court fees has become a State subject as per the Constitutional scheme. As

it had become a 'State' subject, many States have amended the Court Fees Act, 1870. Some of the States have even repealed this Central Act in their State and enacted a new Act for Court fees.

States which have repealed the Court Fees Act, 1870 in their territories and enacted their own Court Fees Act

1. ***Andhra Pradesh*** – A.P. Court Fees and Suits Valuation Act, 1956 (A.P. Act 7 of 1956).

2. ***Gujarat*** – Bombay Court Fees Act 1959 (Bombay Act 36 of 1959) as adopted by Gujarat A.L.O., 1960.

3. ***Himachal Pradesh*** – H.P. Court Fees Act, 1968 (H.P. Act 3 of 1968).

4. ***Jammu and Kashmir*** – Jammu and Kashmir Court Fees Act, 1977 (J&K Act 7 of 1977).

5. ***Karnataka*** – Karnataka Court Fees and Suits Valuation Act, 1958 (Karnataka Act 16 of 1958).

6. ***Kerala*** – Kerala Court Fees and Suits Valuation Act, 1960 (Kerala Act 10 of 1960).

7. ***Maharashtra*** – Bombay Court Fees Act, 1959 (Bombay Act 36 of 1959).

8. ***Rajasthan*** – Rajasthan Court Fees and Suits Valuation Act, 1961 (Rajasthan Act 23 of 1961).

9. ***Tamil Nadu*** – Tamil Nadu Court Fees and Suits Valuation Act, 1955 (Tamil Nadu Act 14 of 1955).

10. ***West Bengal*** – West Bengal Court Fees Act, 1970 (West Bengal Act 10 of 1970).

11. ***Union Territory of Pondicherry*** – Pondicherry Court Fees and Suits Valuation Act, 1972 (Pondicherry Act 6 of 1973).

The following States have amended various provisions of the Court Fees Act, 1870 from time to time, as applicable in respective States –

1. Assam
2. Bihar
3. Madhya Pradesh
4. Orissa
5. Punjab
6. Haryana
7. Meghalaya
8. Uttar Pradesh

Position of other States

Manipur and Tripura – Manipur and Tripura were formerly Union Territories. As per section 2 of the Union Territories (Laws) Act, 1950, the Central Government is empowered to extend to Union Territories of Delhi, Himachal Pradesh (now State), Manipur (now State) and Tripura (now State), any enactment which was in force in a State. In exercise of this power, the Court Fees Act, 1870, as in force in the State of Assam was extended to Manipur and Tripura with modification vide G.S.R. No. 1119-1120 dated 29.6.1963 (w.e.f. 15.7.63) – Gazette of India 1.7.63 pt. II section

3(1) Extraordinary pp. 501 and 531. Manipur and Tripura have now become States by the North Eastern Areas Reorganisation Act, 1971.

Goa – The territory of Goa was formerly part of Union Territory of Goa, Daman and Diu. By Regulation 11 of 1963 (w.e.f. 3.9.1964) the Court Fees Act, 1870 has been extended to Goa, Daman and Diu. This Act was further amended vide Goa Act 5 of 1966 and Act 8 of 1970. Now Goa has become a State vide (The) Goa, Daman and Diu Reorganisation Act, 1987.

Arunachal Pradesh, Mizoram and Nagaland – The territories of all these three States were formerly a part of the Assam State. The Court Fees Act, 1870, as applicable in the State of Assam, continues to be in force in these States.

Nagaland was made a State vide (The) State of Nagaland Act, 1962. As per section 26 of the said Act, all laws which were in force in the territory of Nagaland are continued to be in force.

Mizoram and Arunachal Pradesh were made separate Union Territories vide sections 6 and 7 of the North Eastern Area (Reorganisation) Act, 1971. As per section 77 of the said Act of 1971, all laws which were in force in these territories are continued to be in force.

Arunachal Pradesh was made a ‘State’ vide the State of Arunachal Pradesh Act, 1986. As per section 46 of this Act of 1986, all laws which were in force in the territory were continued to be in force.

Mizoram was made a State vide the State of Mizoram Act, 1986. As per section 43 of this Act, all laws which were in force in the territory of Mizoram were continued to be in force.

Jharkhand, Chattisgarh and Uttaranchal – These States were formerly part of State of Bihar, Madhya Pradesh and Uttar Pradesh respectively. The Court Fees Act, 1870, as applicable in these States before the reorganization of States in the year 2000, is still continued to be in force by virtue of section 84 of the Bihar Reorganisation Act, 2000, section 86 of the U.P. Reorganisation Act, 2000 and section 78 of the M.P. Reorganisation Act, 2000, respectively.

Sikkim – By the Constitution (Thirty Sixth Amendment) Act, 1975, the territory of Sikkim was included in the territory of India and made a ‘State’. As per Art. 371F of the Constitution of India, the High Court and other Courts situated in Sikkim continued to be in existence (clause (i) and (j) of Art. 371F). Similarly, all laws which were in force at that time in Sikkim were declared to be continued in force (clause (l) of Art. 371F).

Court Fees Act, 1870, as applicable in Union Territories

1. ***Delhi*** – The Court Fees Act, 1870 as amended by Punjab Acts 4 of 1939; 31 of 1953; 19 of 1957 and 14 of 1958 and East Punjab Act 26 of 1949 have been extended to Delhi by S.R.O. 422 dated 21.3.1951 and G.S.R. 842 of 1959 with effect from 1.8.1959 – See Gazette of India, 25.8.1959 Pt. II section 3(i) p.1039. The Court Fees Act, 1870, as applicable in Delhi was further amended by Court Fees (Delhi Amendment) Act, 1967 w.e.f. 16.12. 1967.

2. ***Chandigarh*** – The territory of Chandigarh was formerly a part of Punjab State. It became a separate union territory by virtue of the Punjab Reorganisation Act, 1966. Laws applicable before the reorganization are continued to be in force.

3. ***Andaman and Nicobar Island*** – It was a Chief Commissioner's province under the Government of India Act, 1935. Formerly it was shown as a part D State in the Constitution of India and now known as a union territory. The Court Fees Act, 1870 was extended to the new provinces (now known as union territories) by section 3 read with Schedule to the Merged States (Laws) Act, 1949. For the Andaman and Nicobar Island, the Court Fees Act, 1870 has been amended by the Court Fees (Andaman and Nicobar Island Amendment) Regulation, 1957 (Regulation 2 of 1957).

4. ***Dadra and Nagar Haveli*** – The territory of the free Dadra and Nagar Haveli was made a Union Territory vide Constitution (Tenth Amendment) Act, 1961. The Court Fees Act, 1870 has

been extended to this union territory by section 3 of Regulation 6 of 1963.

5. ***Daman and Diu*** – The Court Fees Act, 1870 has been extended to this union territory by Regulation 11 of 1963. The Court Fees Act was further amended vide Goa Acts 5 of 1966 and 8 of 1970.

6. ***Lakshadweep Island*** – It was a part of the former madras State. It was made a Union Territory by section 6 of the State Reorganisation Act, 1956. Its old name was Laccadive, Minicoy and Amindive Island. It became Lakshadweep by the Laccadive, Minicoy and Amindivi Island (Alteration of Name) Act, 1973. The Court Fees Act, 1870 has been extended to this Island vide section 3(1) of Regulation 8 of 1965. (see also Act 34 of 1973, mentioned above)

7. ***Pondicherry*** – As mentioned above, the Legislative Assembly of Pondicherry Union Territory has enacted 'Pondicherry Court Fees and Suits Valuation Act, 1972'. The Court Fees Act, 1870, which was applicable in Pondicherry, has been repealed by section 72 of the Pondicherry Act, mentioned above.

To sum up the conclusions from the above survey of extant legislation, both Central and State:

(i) The power to legislate on matters of court fees remains in the competence of the State Legislatures, so far as the High Courts and Courts subordinate thereto are concerned. Many

States have amended the Court Fees Act, 1870. Some of the States have even repealed the Central Act in their State and enacted a new Act for Court fees.

(ii) As far as Parliament is concerned, under Art.246(1) read with Entry 77 of List I, it can enact a law relating to Court fees which is payable in Supreme Court, and under Art.246 (4) read with Entry 3 of List II, it can enact a law for Court fees payable to other Courts situated in any Union Territory.

(iii) For High Courts and other subordinate Courts exercising jurisdiction in any State, laws relating to Court fees can only be made by the Legislature of State as per Art.246(3) read with Entry 3 of List II.

(iv) The Supreme Court Rules which include rules relating to the Court fees payable in the Supreme Court are subject to any law made by the Parliament.

(v) As regards Union Territories, Parliament can enact any law under Article 246(4) and the President of India may also make regulations under Article 240 .

Having examined the basic constitutional and legislative framework within which laws relating to court fees are enacted and enforced, we will now proceed to consider the legal issues that arise in the context of attempts at altering the court fee structure through legislative measures either by the Centre or the States. In doing so, it is important first to understand the

nature of the levy and its justification in the context of the constitutional right of access to justice.

CHAPTER IV

CAN COURT FEE BE ENHANCED TO RECOVER COST OF ADMINISTRATION OF JUSTICE? (VIEWS OF COMMISSIONS, COMMITTEES, COURTS ETC.)

In this chapter we grapple with the central issue posed for our consideration: Given the existing costs of administration of justice, civil and criminal, is it advisable to revise upwards the existing court fee? But we find that such a question perhaps obfuscates several other supplementary questions that arise. Thus we propose to approach the question posed by raising and attempting to answer the following questions:

(a) Is court fee a fee or a tax? The answer to this will shape the approach to the principal question whether court fees can and should be enhanced to meet the costs of administration of justice.

(b) Can access to justice be for a price?

(c) Does the issue require a different treatment in the context of administration of criminal justice?

(d) Does collection of court fee impede access to civil justice?

(e) Is it fair on the part of State to charge Court fee?

(f) Is there a need for governments providing more money for the better administration of justice?

(g) Does the suggestion already made for total abolition of court fees merit acceptance?

Is court fee a fee or a tax?

Levies can generally be divided into two broad categories: fees and taxes. According to De Marco ('First Principles of Public Finance' at p. 78) a 'fee' is a "charge for a particular service of special benefit to individuals or to a class and of general benefit to the public, or it is a charge to meet the cost of regulation that primarily benefits society".

There are various pronouncements of the Supreme Court on the conceptual distinction between 'fee' and 'tax'. It emerges from these pronouncements, that if the essential character of the impost is that some special service is intended or envisaged as a quid pro quo to the class of citizens which is intended to be benefited by the service and there is a broad and general correlation between the amount so raised and the expenses involved in providing the service, the impost would partake the character of a 'fee'. But it loses its character as such if it is intended to and does go to enrich the general revenues of the State which are meant to be applied for general purposes of government. A Constitution Bench of the Supreme Court in *Govt. of Madras v. Zenith Lamps* AIR 1973 SC 724 has held that 'fees taken in Court' are not taxes and cannot be equated to taxes (para 30). The Law

Commission in 14th Report after examining the amazing figures of collection of Court fees and expenditure in the administration of civil justice has stated that the Court fee that was being charged was, in fact, no longer a fee and that it was a heavy tax (p. 489). This was held not permissible.

Access to justice cannot be for a price

Dicta of the Supreme Court

In Chapter II, we have referred to the principle of 'access to justice'. Just as the State has to maintain a police force to maintain law and order within the country and for which no special tax or fee is contemplated, the position with regard to the duty of the State to provide a system for 'administration of justice' is no different. We may once again refer to the dicta of the Supreme Court.

Speaking through Krishna Iyer J., the Supreme Court in *Central Coal Fields Ltd. v Jaiswal Coal Co.*, AIR 1980 SC 2125 observed that effective access to justice is one of the basic requirements of a system and high amount of court fee may amount to sale of justice. He said (para 2):

> "(I)t is more deplorable that the culture of the magna carta notwithstanding, the Ango-American forensic system and currently free India's court process – shall insist on payment of court fee on such a profiteering scale without corrective expenditure on the administration of civil justice that the levies often smack of sale of justice in the Indian Republic where equality before the law is a

guaranteed constitutional fundamental and the legal system has been directed by Article 39A "to ensure that opportunities for securing justice are not denied to any citizen by reason of economic………. disabilities". 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."

The learned Judge further observed (para 5):

> "The State, and failing it some day the Court, may have to consider from the point of view of policy and constitutionality, whether such an inflated price for access to Court is just or legal."

In *P.M. Aswathanarayana Shetty v. State of Karnataka* 1989 Suppl (1) SCC 696, Venkatachaliah J (as he then was) speaking for 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*. We have quoted it in Chapter II but it would be worthwhile to repeat the quotation:

> "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"

Later in *Secy. to Govt. of India v P.R. Sriramulu*, 1996 (1) SCC 345, the Court pointed out that it could not be disputed that the administration of justice is a service which the State is under an obligation to render to its subjects.

Law Commission's views

The Law Commission in its 14th Report on 'Reform of Judicial Administration' (1958) has recommended that providing the mechanism for the administration of justice is the primary duty of the State. It has recommended at para 42 of Chapter 22 as follows:

> "It is one of the primary duties of the State to provide the machinery for the administration of justice and on principle **it is not proper for the State to charge fees from suitors in courts**". (emphasis supplied)

The Law Commission also observed (at para 8, Chapter 22):

> "A modern welfare State cannot with any justification sell the dispensation of justice at a price."

Court fee is also a limitation and deterrent to access to justice. In the same 14th Report, the Law Commission had observed that if access to the court is dependent upon the payment of court fee and if a person is unable to have access to court, justice becomes unequal. It observed (at p.587):

> "Equality in the administration of justice thus forms the basis of our Constitution. Such equality is the basis of all modern systems of jurisprudence and administration of justice. Equality before the law necessarily involves the concept that all the parties to a proceeding in which justice is sought must have an equal opportunity of access to the Court and of presenting their cases to the Court. But access to the Courts is by law made dependent upon the payment of court fees, and the assistance of skilled lawyers is in most cases necessary for the proper presentation of a party's case in a court of law. In so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose."

The Law Commission again observed in its 114th Report on 'Gram Nayayalaya' (1986), that it is the fundamental duty of every government to provide mechanism for resolution of disputes. The Commission observed (at para 4.3):

"It is the **fundamental obligation** of every centralized governmental administration to provide for mechanism for resolution of disputes arising within their jurisdiction. No civilized government can escape this responsibility. No government can afford to have their citizens perpetually engaged in finding solution to their disputes by an unending process which may be simultaneously costly and open ended. This fundamental duty can not be disowned under the pretext of non-availability of requisite finance."

Constitutional Provisions

We may now refer to a few provisions of the Constitution to underscore the importance given to the obligation of the state to provide access to justice.

The Preamble as well as Article 38 of the Constitution of India mandate that the State shall secure and protect as effectively as it may, a social order in which justice (social, economic and political) shall be available to its citizens. For the purpose of translating this promise into reality, Article 39A was introduced in the Constitution in the year 1976 by way of 42nd Amendment to the Constitution. It reads as follows:

"39A – **Equal Justice and Free Legal Aid**

The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable 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 has been held by the Calcutta High Court in *United Bank of India v Rashyan Udyog*, AIR 1990 Cal. 146, that the principle enshrined in Art. 38 and 39A, like all other directive principles in Part IV of the Constitution are fundamental in the governance of the country, and that these principles (Art. 38 and 39A) must also to be taken to be fundamental to the administration of justice.

Article 8 of the Universal Declaration of Human Rights, 1948 provides that:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights guaranteed him by the Constitution or by law."

Similarly, clause (3) of Article 2 of International Covenant on Civil and Political Rights, 1966 provides that each State party to the covenant undertakes 'to ensure that every person whose rights or freedom as recognized violated, shall have an effective remedy' and 'to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, and the State should also ensure to develop the possibilities of judicial remedies".

The upshot of the above discussion is that it is one of the fundamental obligations of the State to provide effective fora for better administration of justice. Where access to justice is made to depend on the price that a litigant is willing to pay, it would, given the realities of our country, tantamount to denial of access to justice. The state cannot possibly disown its constitutional obligation to provide easy and affordable access to justice on the pretext of non-availability of requisite finance.

Criminal Justice is sovereign function: no Court fee is payable

Administration of justice has two broad wings: (1) **Civil Justice** and (2) **Criminal Justice**. The Law Commission in its 127th Report on 'Resource Allocation for Infrastructural Service in Judicial Administration' (1988) discussed distinction between civil and criminal justice system. The Commission observed at para 5.1 as follows:

> "The distinguishing feature between the civil justice system and criminal justice system lies in the fact that civil justice system provides fora for resolution of disputes between individuals, between individuals and the State, and even between the State and the States where a party complains of wrong being done to it and seeks redress. Administration of criminal justice system partakes the character of a regulatory mechanism of the society whereby the State enforces discipline in the society by providing fora for investigation of crime and punishment."

The obligations of the State in respect of administration of civil and criminal justice materially differ. In respect of the obligation of the State so far as it relates to administration of criminal justice, the Law Commission in its 128th Report on 'Cost of Litigation' (1988), categorically stated that **administration of criminal justice is the obligatory duty of the State as part of its sovereign functions**. It is also stated in the Report that as it is, being part of the sovereign function of the State, **no fee can be levied for performing the same and also because the system does not render any service to the litigant**. The Commission stated at para 3.11 as follows:

> "It is the State which must ensure internal peace. It is part of its duty to adopt regulatory measures and it is equally part of its duty to set up forum for determining whether a violation of regulatory measures has or has not taken place and a punishment need or need not be imposed. This is the obligatory duty of the State as part of its sovereign functions. This can be broadly comprehended in the expression 'administration of criminal justice'. Ordinarily this being the part of the sovereign functions of the State, no fee can be levied for performing the same and also because the system does not render any service to the litigant."

Earlier the Law Commission in 14th Report also recommended (page 508) that the cost of the administration of public justice (criminal justice) should be borne entirely by the State. The Law Commission in 127th Report also stated (at para 5.1) that it is the duty and obligation of the State to set up Courts for administration of criminal justice. The State must pay the entire costs of administration of criminal justice.

Civil Justice – collection of Court fee cannot impede access to justice

This subject is discussed generally in this chapter and the question whether in relation to civil justice, full cost recovery should be made or not, is discussed separately in Chapter V.

In respect of administration of civil justice system, the Law Commission in its 128th Report on **Cost of Litigation** (1988) has observed at para 3.12 as follows:

> "When it comes to civil justice, the approach has to undergo a change. Civil disputes include disputes between an individual and individual, between individual and groups of individuals, between group of individuals on one hand and group of individuals on the other hand and between individuals and group of individuals on one hand and State on the other. A writting (sic written) Constitution with an inbuilt chapter on fundamental rights and division of powers amongst Federation and States provide a fruitful ground for disputes coming into existence. These disputes have to be resolved because a continuous simmering dispute is not conducive to growth and development of society. However, when the disputes are between two individuals, say an employer and an employee, a husband and a wife, or between members of the same family, it is open to them to choose their own forum to get the dispute resolved. An arbitrator appointed by the parties for resolution of dispute partakes the character of the court because parties agree to treat its decision binding. The costs of

> such arbitrator has to be met by the parties who agree to refer the disputes to arbitrator. The arbitrator renders service to the disputes and charges fees. The position of the State is identical to that of an arbitrator. All parties cannot go continuously in search of an arbitrator. Parties to a dispute may not agree to go for arbitration. The State, therefore, sets up courts for administration of civil justice which term will comprehend all disputes other than those comprehended in administration of criminal justice. The court would be a readily accessible forum for a party complaining of violation of his right or a threatened invasion of his right or denial of his right and he may approach the court and seek redress of his right grievance. The court enjoys the judicial power of the State and can force the attendance of the other side to the dispute and adjudicate the dispute. Nonetheless, the court renders service. And to the extent this is service, fees, for service is chargeable."

The Supreme Court has pointed out that while Court fee can be collected for purposes of civil justice, this should not be confused with the obligation to collect Court fee. There is no such obligation. In *P.M. Aswathanarayana Shetty v. State of Karnataka* (supra), it was clearly observed (at para 96):

> "**The power to raise funds through the fiscal tool of a 'fee' is not be confused with a compulsion so to do**. While 'fee' meant to defray expenses of services, cannot be applied towards objects of general public utility as part of general revenues, the converse is not valid. General public revenues can with justification, be utilized to meet,

wholly or in substantial part, the expenses on the administration of civil justice." (emphasis supplied)

Is it fair on the part of State to charge Court fee for judicial services?

(Views of Commissions, Judicial dicta, views of Jurists)

There is considerable authority to say that the very concept of charging Court fee for rendering judicial services is no longer acceptable today.

Law Commission's Reports

In this regard, following recommendations of the Law Commission made in 14th Report (para 42 p. 509) are also worth mentioning:

"(1) It is one of the primary duties of the State to provide the machinery for the administration of justice and on principle it is not proper for the State to charge fees from suitors in courts.

(2) Even if court fees are charged, the revenue derived from them should not exceed the cost of the administration of civil justice.

(3) The making of profit by the State from the administration of justice is not justified.

(4) Steps should be taken to reduce court fees so that the revenue from it is sufficient to cover the cost of the civil judicial establishment. Principles analogous to those applied in England should be applied to measure the cost of such establishment.

> The salaries of judicial officer should be charged on the general tax payer."

The Law Commission in its 128th Report on **Cost of Litigation** (1988), has observed that high cost of litigation is one of the impediments or road blocks in access to justice. The court fee was considered as the most important component of cost of litigation.

Judicial dicta

The view of the Supreme Court regarding court fee as a limitation on access to justice expressed in *P.M. Aswathanarayana Shetty v. State of Karnataka* (supra), is worth recalling. The Court said:

> "The court fee as a limitation on access to justice is inextricably intertwined with a 'highly emotional and even evocative subject stimulating visions of a social order in which justice will be brought within the reach of all citizens of all ranks in society, both those blessed with affluence and those depressed with their poverty'. It is, it is said, like a clarion call to make the administration of civil justice available to all on the basis of equality, equality and fairness with its corollary that no one should suffer injustice by reason of his not affording or is deterred from access to justice. The need for access to justice, recognizes the primordial need to maintain order in society as disincentive of inclination towards extra-judicial and violent means of setting disputes."

The Court further observed:

> "The stipulation of court fee is, undoubtedly a deterrent to free access to justice."

The Court also said:

> "Indeed all civilized government recognize the need for access to justice being free."

The Court also observed (at para 95):

> "The levy of court fee at rates reaching 10 per cent ad valorem operates harshly and almost tends to price justice out of the reach of many distressed litigants. The Directive Principles of State Policy, though not strictly enforceable in courts of law, are yet fundamental in the governance in the country. They constitutes fons juris in a welfare State. The prescription of such high rates of court fees even in small claims, as also without an upper limit in large claims, is perilously close to arbitrariness and unconstitutionality. The idea is, of course, a state of affairs where the State is enabled to do away with the pricing of justice in its courts of justice."

Views of jurists

Need for access to justice has been described by a learned author Cappelleti in his book “Access to Justice”, Vol. I Book 1. He says (at page 419):

> “The need for access to justice may be said to be twofold; first, we must ensure that the rights of citizens should be recognized and made effective for otherwise they would not be real but merely illusory; and secondly we must enable legal disputes, conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case, so as to promote harmony and peace in society, lest they foster and breed discontent and disturbance. In truth, the phrase itself ‘access to justice’ is a profound and powerful expression of a social need which is imperative, urgent and more widespread than is generally acknowledged.”

Recently, V.R. Krishna Iyer J. in an article published in ‘The Hindu’ dated October 10, 2003 has stated:

> “Access to justice is basic to human rights and Directive Principles of State Policy become ropes of sand, teasing illusion and promise of unreality, unless there is effective means for the common people to reach the Court, seek remedy and enjoy the fruits of law and justice.”

On high amount of Court fees in India, a former Chief Justice of Madras observed as follows:

> “They (the litigants) pay high Court fees and it is beyond question that the aggregate amount is far more than sufficient to cover the total

> cost of the administration of civil justice. When I came to India, I was amazed at the high Court fees which litigants were called upon to pay, the position being so different in England." (Madras Law Journal 1947, Vol. I Journal)

A learned author Findlay Shirras observed in his book 'Science of Public Finance', Vol. II at p. 674-675, as follows:

> "Fees are levied in order **to defray usually a part, in rare cases the whole of the cost of services** done in public interest and conferring some degree of advantage as the fee payer."

Levying high court fees is also criticised by the noted jurist H.M. Seervai, in his book Constitutional Law of India, 3rd Ed. Vol. II p. 1958. He observed that court fees should not be a weapon to stifle suits or proceedings and that though in fixing the court fees regard may be given to the amount involved, "a stage is reached when an increasing amount ceases to be justified".

Need for providing more money by the Governments for the better administration of justice

(a) Views of the Supreme Court, the Law Commission and Judicial Pay Commission

There is need that whatever amount is collected in the form of court fees, should be spent on administration of justice. The Supreme Court has

observed that the income from court fees is more than the expenditure made in the administration of justice, as per figures made available in the publication of the Ministry of Law and Justice. The Supreme Court in *All India Judges Association v. Union of India*, AIR 1992 SC 164, after analyzing the concept of Court fees and quoting from a judgment of a Constitution Bench reported in AIR 1973 SC 724, observed as follows (at para 51):

> "We adverted to these authorities and the views of this Court to bring support for the view that what is collected as court fee at least be spent on the administration of justice instead of being utilized as a source of general revenue of the States. **Undoubtedly, the income from court fees is more than the expenditure on the administration of justice**. This is conspicuously noticeable from the figures available in the publication in the Ministry of Law and Justice." (emphasis supplied)

States are not spending much on the administration of justice. Law Commission in 127th Report on **Resource Allocation for Infrastructural Services in Judicial Administration** (1988) has stated (at para 5.8): "it is imperative to point out that the **State today spends precious little or, to say the least, practically nothing on the administration of justice**". The Commission has pointed out that during 1981-82 barring Manipur and Tripura most of the States spent only between 0.15% (A.P.) to 3.53% (M.P.) of the total tax receipts of the State, on the administration of justice. These figures show that administration of justice has received negligible funds for upkeep as well as its growth. The first National Pay Judicial Commission

chaired by Mr. Justice K.J. Shetty, in its Report dated 11.11.1999 has stated that the expenditure on the judiciary in India in terms of Gross National Product (GNP) is relatively low. It is not more than 0.2%. The Justice Shetty Commission also recommended that as the administration of justice is the joint responsibility of the Centre and the State Governments, the Central Govt. must, in every State share half on the annual expenditure on subordinate Courts. The Supreme Court in *All India Judge's Association case* (2002) 4 SCC 247, has stated that no doubt whenever the State Govt. will approach to the Central Govt. or Planning Commission for more funds, such request shall be considered favourably.

(b) ***Views of National Commission to Review the Working of the Constitution***

No doubt, the judiciary has been included as a plan subject by the Planning Commission (Sawant J. in All India Judges case, 1993 (4) SCC 288 at p. 310), but the manner of giving grants by the Central Government is criticized by the National Commission to review the Working of Constitution (NCRWC). In a Consultation Paper on 'Financial Autonomy of the Indian Judiciary', the NCRWC after mentioning the observation of Sawant J. in 1993 (4) SCC 288, regarding including of judiciary as a plan subject, has stated (paras 9.15.1 – 9.15.2):

> "There is no exclusive grant by the Centre for Court expenditure. All that we have is an insignificant 'centrally sponsored scheme' for Courts prepared by the Planning Commission while allotting some monies for each State on population basis.

> Further, the present scheme has become nothing but an eye wash for it requires the States to provide matching grant, or else the central grants lapses. Most States are not able to provide matching grant and the result is that the central grant lapses. To put it bluntly, the so called inclusion of judiciary as a plan subject is no inclusion at all as it is totally unrealistic, unplanned and unrelated to the scenario at the grass root level and also at the level of appellate and superior courts."

Even otherwise, there is no proper planning and adequate financial support for administration of justice in our country. In this regard, National Commission to Review the Working of Constitution in its Report (Vol. I) has observed as follows (at para 7.6.1):

> "Judicial administration in the country suffers from deficiencies due to lack of proper planning and adequate financial support for establishing more courts and providing them with adequate infrastructure. **For several decades the courts have not been provided with any funds under the Five Year plans nor has the Finance Commission been making any separate provision to serve the financial needs of the courts**." (emphasis supplied)

The NCRWC in its report has also emphasized the need for providing financial support by the Central Govt. in administration of justice. It has recommended that (para 7.8.2):

> “Government of India should not throw the entire burden of establishing the subordinate Courts and maintaining the subordinate judiciary on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure on subordinate Courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demand of the State judiciary in every of the States.”

(c) Empirical Evidence that the Judiciary earns more than it spends

A study of the budgets and working of the Supreme Court and the Allahabad High Court in 1984 revealed some interesting facts (**Litigation Explosion in India** prepared by Dr.Rajeev Dhavan, published by the Indian Law Institute). The figures for the years 1957 to 1977 (Table III at pages 67-68) showed that the Supreme Court invariably spent less than the sum it received under the head `grant allocated’ and `other receipts’. The amount collected as court fee virtually remained unspent. As regards the judiciary in Uttar Pradesh (including the Allahabad High Court) (Table VI at p. 113), the figures for the years 1961-62 to 1978-79) showed that the income earned by the courts (from judicial stamps and fees on writs, vakalatnama etc.) was always in excess of what was spent on them thus leaving a substantial surplus in each year. Dr.Dhavan who prepared the text comments (at p.112): “The judiciary is India’s best nationalized industry. As a whole it earns more than it spends. In that sense, it can also be described as the `least expensive branch’.”

(d) Views of the Adviser, Planning Commission – Dismal Allocation

As per the information and data given in an article of Mr. Surendra Nath, Adviser, Planning Commission of India, published in 'The Hindu' dated July 22, 2003, the Centre's plan investment in justice started only in the 8th Five Year Plan (1992-97) in compliance with a Supreme Court direction of 1993-94. During the Eighth Plan, the Centre spent about 110 crores on improving judicial infrastructure, such as constructing court rooms etc. An equal amount was spent by the Sates. In the Ninth Plan, about Rs.385 crores were spent by the Centre, and the States also made a matching contribution. This was 0.071 per cent of the total Centre's Ninth Plan expenditure of Rs.5,41,207 crores. During the Tenth Plan (2002-07), the allocation for justice is Rs.700 crores, which is 0.078 per cent of the total plan outlay of Rs.8,91,183 crores.

(e) Fast-tracking criminal cases

Over two crore cases are pending in about 13000 district subordinate courts. About two-third of these cases are criminal cases. And about a million are sessions cases which involve heinous offences such as murder, rape, dacoity etc. About 30 per cent of sessions cases have been pending for three years or more. When trial gets delayed, witnesses lose interest. They often get coerced and justice becomes a casualty. The conviction rate in offences under the IPC fell from 65 per cent in 1970s to about 40 per cent in 2000. Justice delayed is justice denied. One of the main reason for delay in administering justice is that the courts have to deal with more cases than

their capacity. Result is that courts have no options but to give frequent adjournments. Expeditious trial of cases require more Courts.

As mentioned above, this plan investment in the administration of justice is totally inadequate. It was for this reason that the Dept. of Justice approached the 11th Finance Commission for non-plan assistance to set up additional Courts for expediting the trial of long pending sessions cases.

The 11th Finance Commission, after discussing with Law Secretaries of major States, recommended a grant of Rs.502.9 crores under Art. 275 of the Constitution of India to set up 1,734 additional Courts known as Fast Track Courts. These Courts are to continue till 2005. The grant covers the entire functioning of fast track Courts. So far States have notified 1,366 fast track Courts and the Central govt. has released about Rs.360 crores. As grants under Art. 275 of the Constitution are a devolution to the States, the Union Territories were left out. The Delhi High Court proposed setting up fast track Courts in Delhi and so did the Union Territory of Chandigarh. Funds were provided in the current financial year for setting up fast track Courts in Delhi.

These fast track Courts have been assigned 3,14,777 cases and by June 2003, fast track Courts had disposed of 1,60,487 cases – more than half of the total number of cases transferred to them. It is a significant progress. If the Central Govt. continue to give adequate financial support to the States

for better administration of justice, obviously quality of justice will improve and there be no need to put more monetary burden on litigant.

These fast track Courts address the problem of only sessions cases and of cases pending in the Magistrate Courts. Therefore, the Dept. of Justice approached the Twelveth Finance Commission in March 2003 with a proposal to set up fast track magisterial Courts.

In this scenario, more allocation is necessary from the general taxes received by the Government. There is no justification in enhancing the court fee structure. It is true that with the passage of time the cost of administration of justice is increasing but to meet this increased cost of administration of justice enhancing the court fees is not the proper approach. On the contrary, it will be a roadblock to the access to justice, which is recognized as a basic right world over.

Past recommendations for total abolition need reiteration

There was, indeed, a move at one time, for abolition of Court fees altogether. The Consultative Committee attached to the Ministry of Law and Justice, at its meeting in June 1980, set up a Sub-Committee to go into the question of court fees in trial Courts. **The Sub-Committee in its report recommended abolition of court fees**. The exercise was again undertaken by a Sub-Committee set up by the Conference of Law Ministers which submitted its report in October 1984. This Sub Committee did not

recommend abolition of court fees but recommended rationalization in the structure of court fee, broadly through reduction in ad valorem fee, exemption of certain categories of litigants and certain categories of cases from payment/levy of court fee and refund of court fee under certain circumstances. The Law Commission in 128th Report on **Cost of Litigation** (1988) expressed its views in favour of abolition of court fees. The Commission stated (para 4.6):

> "However, the Law Commission would be extremely happy if the State Governments or the Government of India, as the case may be, view the **court fees as something incompatible with a society governed by rule of law and would, therefore, like to abolish it**."
>
> (emphasis supplied)

There was a proposal to amend the Court Fees Act, 1870 which was examined in detail in 1999 by the Department of Justice. The exercise was undertaken in pursuance of the recommendations of the Expert Group appointed by the Ministry of Home Affairs to review Acts etc. administered by the said Ministry. However, with the approval of the then Minister of Law and Justice, it was decided not to amend the Act.

Summation

Summarising the position, we may state that there are many other ways to cover the cost of administration of justice. As mentioned earlier, administration of criminal justice system is a sovereign function of the

State, hence no fee can be levied. Even for administration of civil justice, it is not desirable (as stated in detail in Chapter V) that entire cost should be recovered by levying court fees. State should spend a considerable amount on administration of civil justice from its general revenue collected from the ordinary tax payer so that entire burden will not be on the litigant. Another way of raising the revenue is to increase the amount of fine prescribed under the Indian Penal Code, 1860 and other penal enactments. Since a long period of time, amounts of fines have not been increased. The amount of fine to be imposed on commission of a crime should be increased in relation to reduction of the value of the rupee over all these years. Once this is done, there may be periodic re-evaluation to eliminate the effect of inflation. If it is done, it will be helpful for the States in meeting the increased cost of administration of justice.

CHAPTER V

FULL COST RECOVERY: AN ANATHEMA TO THE CONCEPT OF ACCESS TO JUSTICE: THE EXPERIENCE IN OTHER COUNTRIES

The letter of reference of the Department of Justice, which has been adverted to in Chapter I, appears to be premised on the concept of testing the economic efficiency of an organization or department (usually, of the government) by asking whether it earns more than it spends. We have just seen why such an approach may not only be inapposite but legally and constitutionally untenable as far as the judiciary is concerned. On the contrary, since financial independence of the judiciary is integral to its functioning as an independent organ of state, this can and should never be the criteria for testing its performance. Nevertheless, as discussed in the previous chapter, the judiciary has thus far not received the funds it requires from the governments both at the Centre and the States. Further, available data reveal that it invariably earns more by way of fees and judicial stamps than what is spent on its upkeep. This prompts a questioning of the factual basis for the reference that the court fees being levied at present covers "only a fraction of the administrative costs of the judicial process."

The principle that the costs of administration of justice should be met entirely through court fees levied on users is termed as `full cost recovery'.

In this chapter it is proposed to examine the practice in some of the commonwealth countries where this principle which was applied long ago, has now been either modified or given up altogether. In fact, a survey of the available literature reveals that the full cost recovery principle has been found to be wholly unsupportable and is not accepted in any country in the Commonwealth or in Europe.

The position in England

In the past, in England, the principle governing the levy of Court fee was that the salaries and pensions of judges were paid by the State out of public funds. It was being accepted that it is the obligation of the State to provide the machinery for the dispensation of justice in all its Courts – civil, criminal and revenue – and that only the other expenses of administration of justice shall be borne by the litigants. (14th Report of Law Commission, p. 505)

In this regard, the Committee on Court Fees in England presided over by Mr. Justice Macnaghten observed as follows:

> "The Supreme Court is not merely engaged in the work of dispensing justice to the private suitors who resort there; it administers public justice not only in criminal cases but also in civil maters, such as proceedings on the crown side of the King's Bench. For the cost of administration of justice, where the public itself is directly concerned, the State ought, it is suggested to provide the necessary funds, since

> there can be no reason why the private suitors should do so. Though it would no doubt be difficult to calculate exactly how much of the expenditure of the Supreme Court is attributable to the administration of public, as distinguished from private justice, the salaries and pensions paid to the judges may perhaps be taken to represent fairly that figure." (quoted in the Second Interim Report of the Committee on Supreme Court Practice and Procedure, p. 43)

A learned author Dr. R.M. Jackson points out the dependence of Royal Justice in England in part at least, on the profits earned out of the administration of justice:

> "In the past the growth of royal justice was partly due to the profits that accrued from exercising jurisdiction. The early inherent justice were more concerned with safeguarding the king's fiscal rights than with the trial of ordinary actions. **A law Court was expected to pay for itself and show a profit for the king.** It is some time since justice has been a substantial source of income, but the old idea survives in the idea that the Courts ought not to be run at a loss." (see 'Machinery of Justice in England', 5th Ed. p. 324) (emphasis supplied)

Lord Chancellor's recent suggestion for full cost recovery criticized in England

Detailed prescription addressing the twin policies of access to justice and recovery of full cost is given in the guide published by the Treasury of Her

Majesty called 'The Fees and Charges Guide', published by the Stationery Office in 1993. The Lord Chancellor also announced in Parliament on 15th November, 1998 following principles regarding fees for civil proceedings and access to justice:

i) Fees should not prevent access to justice

ii) Protection must be provided for litigants of modest means

iii) Fees should match the cost of the service for which they are charged

iv) The pay-as-you-go system should be extended without deterring access to justice

v) Flat rate fees reflecting the cost of the stage or application should be paid at other charging points

vi) Issue and enforcement fees should reflect the value of the claim

vii) Flat rate fees should be set on the basis of average not actual costs

viii) Fees should be paid by the claimant or where a specific application is made, by the party who made that application

ix) Fees should be paid in advance

These suggestions have invited serious criticism. In an earlier chapter, reference was made to the decision of the High Court (Queen's Bench Division) in *R v. Lord Chancellor ex parte Witham* (1997) 2 All ER 779 where it was emphasized that the right of access to justice was a common

law constitutional right which could only be abrogated by specific statutory provision or by regulations made pursuant to the legislation which specifically conferred the power to abrogate that right. The decision was given in a case that challenged the 1996 amendment by the Lord Chancellor to the Supreme Court Fees Order 1980 which had the effect of repealing a provision which relieved litigants in person who were in receipt of income support from the obligation to pay court fees and permitted the Lord Chancellor to reduce or remit the fee in any particular case of undue financial hardship in exceptional circumstances. While declaring the amendment invalid, the court held that the effect of the 1996 amendment was to "bar absolutely many persons from seeking justice from the courts." (at p.788)

In September 2002, the Court service published a Consultation Paper recommending a range of increases in the setting of civil Court Fees and seeking to ensure a balance between cost recovery and access to justice. The policy of the Government was stated at para 1.7 of the Executive Summary of Consultation Paper, which is as follows:

> "1.7 Government policy is that fees should normally be set to recover the full cost of a service although there may be cases in which Ministers agree a service should recover less than full cost. For the provision of proceedings in the Supreme Court and County Courts and of Family and Insolvency proceedings, allowance is made for automatic exemption for those on mean tested benefits or tax credits; for remission or reduction of fees where hardship would otherwise prevent a case being brought; and for a public subsidy for Family

> proceedings due to their special nature. These allowances act to meet Government policy of protecting access to justice.”

> Again at para 3.2 it is stated:
>
> “Access to justice is protected by automatic exemption for litigants on specified means tested benefits and discretionary remission (in part or in full) for those who do not benefit from exemption but would face exceptional hardship if required to pay fees, or required to pay them in full. A leaflet ‘Court fees and do you have to pay them?’ telling the public more about exemption and remission and how to apply for them is available from any Court office.”

The above policy of the full cost recovery has been criticized by many eminent jurists. Lord Woolf in July 2002 accused the Government of ‘flawed thinking’ over their proposal that Civil Court could fund themselves. He said, the policy was ‘self-evidently nonsense’. No other country in the world had such a policy and the effects were ‘pernicious and dangerous’.

The Civil Justice Council which is an advisory non-departmental public body established under the Civil Procedure Act, 1997 and chaired by the Master of the Rolls, Lord Phillips in November 2002 published advice to the Lord Chancellor on the impact of the Treasury policy of full cost recovery on the Civil Justice System. The reports provide four broad

reasons why the Government is wrong to consider that civil justice should be largely self-financing. It says full cost recovery

a) is not possible without inappropriate cross subsidy;

b) limits arbitrarily the nature and quality of the service provided within the civil justice system;

c) may limit access to Courts; and

d) is wrong in principle.

The Civil Justice Council concluded: "The policy of full cost recovery is relatively recent in historical terms. It is not the approach followed in the major English-speaking common law jurisdiction, nor is it the approach followed in most, if not all, other European jurisdictions."

"In the view of the Civil Justice Council **the policy should be abandoned**. The Council accepts that litigants should be charged fees, but they should not be disproportionate in relation to the amount claimed, and proportionality should be the primary factor in determining the level of fees. While it is of course necessary to forecast fee income as accurately as possible, it should not bear any set relationship to Court Service expenditure."

The Chairman of the Council, Lord Phillips of Worth Matravers, Master of the Rolls, said:

> "The policy of full cost recovery in the civil justice system has only existed since the early 1980s and has never been properly debated in Parliament. **It is not the approach followed in other major common law jurisdiction, nor is it followed in European jurisdiction**.
>
> Whilst it is not wrong to require the citizen to pay Court fees, access to the civil courts must be seen as providing a social and collective benefit, as well as a service to the individual. Fees should be proportionate to the amount at stake."

In March 2003, the peers in the House of Lords amended the Courts Bill, to require the Lord Chancellor to have regard to access to justice, when fixing court fees. New civil court fees have come into effect from April 1, 2003, designed to balance costs with access to justice, when fixing court fees.

We have referred to the above developments in the United Kingdom only for the purpose showing that the concept of recovery of the expense on the justice delivery system from the litigants has been more or less condemned. It has been pointed out that no civilized system in any commonwealth country or in the continent has come forward with such a concept.

The above views, particularly expressed by Lord Woolf and Lord Phillips are on the same lines as the views of the Law Commission, other Committees, Judges and Jurists etc., to which we have elaborately referred to above.

The position in Australia

In 1999, the Australian Law Reforms Commission (ALRC) took up for consideration a reference made to it that it should "give particular attention to the causes of excessive costs in legal services and to the need for a simpler, cheaper and more accessible legal system." (Report of the Australian Law Reforms Commission titled **Managing Justice: A review of the federal civil justice system Report No.89**, Chapter 4 on Legal Costs, para 4.1 – http://www.austlii.edu.au/au/other/alrc/publications/reports.89/) The ALRC in this Report has pointed out that full cost recovery is not pursued because "the judicial system has a key role in the democratic system of government which goes well beyond the resolution of individual disputes, encompassing progressive development of the law, providing the check on executive authority and protecting human rights." It further explains why it is not easy to correlate the payments received from the users of the court system to the services provided by the courts. This is because "It is difficult to conceptualise who the users of the service are: whether respondents or applicants, either of whom may benefit from the outcome. There are community benefits in the effective operation of the court system and in precedents created by individual disputes. There are also practical difficulties in developing a court fee structure that reflects the actual costs

of the services provided and takes into account the complexity and cost of different matters".

The ALRC also repelled the suggestion that fee exemption and waivers be more widely applied at the discretion of the court to counteract fee charges. The reason was that: "Court registry staff could have real difficulties investigating and evaluating broader discretionary categories for exemption and waiver".

In effect, the ALRC <u>has also not supported the demand that there should be full cost recovery</u>. It has realised that "cost factors are easier to identify than to control. The Commission's research and consultations made clear that there is no single, simple solution which will reduce legal costs in federal jurisdiction, although the Commission had identified a number of strategies for government, courts, tribunals and practitioners which could assist to contain costs in many cases."

<u>U.S.A</u>

In the United States of America, the issues concerning the judiciary as a whole are dealt with by the Judicial Conference of the United States (JCUS). The JCUS has recently come forward with a ***Long Range Plan*** to guide future administrative action and policy development by the JCUS and other judicial branch authorities. Among its recommendations are: "The Federal courts should obtain resources adequate to ensure the proper

discharge of their constitutional and statutory mandates.” The JCUS notes that “chronic failure to provide adequate resources puts federal judges in the unfortunate position of supplicants, constantly begging the Congress for funds”. Reiterating its plea to the Congress that the latter should “refrain from enacting new legislation that adds to the workload of the federal courts without also approving sufficient funds for the judiciary to meet its obligations under that legislation”, it also recommends that alternatively “Congress should be urged to reduce the judiciary’s existing obligations sufficiently to offset the impact of any new legislation with a quantifiable judicial impact”. (**Long Range Plan for the Federal Courts**, Chapter 8 ‘Resources’, p. 94)

The JCUS has unambiguously expressed its view against increase of user fees to meet additional costs of administration of justice. Its recommendation in this regard is that “the federal courts, including the bankruptcy courts, should obtain funding **primarily through general appropriations**.” (page 95) This is how the JCUS explains its recommendation (pages 95-96):

> “Federal courts are an indispensable forum for the protection of individual constitutional rights; their costs are properly borne by all citizens. Unlike other governmental operations such as national parks, for which substantial funding through user fees may be appropriate, the mission of federal courts could not be performed if users were denied access because of an inability to pay reasonable user fees.”

> "At least three reasons support continued reliance on general appropriations instead of user fees. First, given that the frequency of federal court filings can vary substantially from year to year, economic uncertainty about the amount of revenue that can be raised annually through user fees makes user fees an unreliable and, therefore, undesirable source of funding. Second, with that uncertainty, constant fee adjustments might be necessary in order to sustain ongoing judicial programs. Finally, and most importantly, litigants should not be so burdened with fees as to effectively eliminate the access of some low and moderate income users to our federal forum."

The position in the United States of America is that full cost recovery is not a favoured method of meeting costs of administration of justice. The persistent recommendation has been that these costs should be met through general appropriations.

European jurisdictions

The position in Europe, as noted by the Civil Justice Council in its paper on **Full Costs Recovery**, is also some what similar. In Spain, for instance, no fees have been charged in civil cases since 1984. In Italy, there was no issue fee for very small money claims, family cases or cases relating to employment and social security. In Sweden, 6% of the total cost of civil cases in courts was met by "registration fees" and the balance of the total cost was paid from central funds.

In relation to Switzerland, the paper notes that "the proportion of costs met from fees varied between cantons and between types of court; the highest proportion in the sample was approximately 40% in the case of the District Courts of the Canton of Zurich, with 10-15% being more typical".

Summation

It is not felt necessary to multiply the instances of developments in foreign jurisdictions in relation to the move away from full costs recovery. It can safely be concluded that both in the common law jurisdictions or the civil law jurisdictions, the trend is to find funds for meeting the costs of administration of justice through general appropriations and Central/State government funding and not through the device of increase in user fees.

It is next proposed to examine the other premise on which the view of the Standing Committee of Secretaries, as expressed in its letter dated 19.7.2002 is based (this letter has been referred to in the first chapter). This premise is that "there is a need to build financial disincentives in the legal system so as to discourage vexatious litigation." Whether there is such a need and if so whether increasing court fees is the answer thereto will be taken up in the next chapter.

CHAPTER VI

WHETHER THERE IS A NEED TO REVISE THE COURT FEES STRUCTURE IN ORDER TO BUILD FINANCIAL DISINCENTIVES TO DISCOURAGE VEXATIOUS LITIGATION

Consistent view – court fee not to be increased as a disincentive to litigation

The Department of Justice and the Standing Committee of Secretaries (SCOS) has suggested that there is an urgent need to stop frivolous litigation which increases the burden of arrears on the courts. It was also suggested in the Eighth meeting of the Standing Committee of Secretaries, held on 24th July, 2002 that there is a need to build financial disincentives in the legal system so as to discourage vexatious litigation. It appears that, to achieve the objective of discouragement of vexatious litigation, the revision of court fees structure has been suggested. But, this approach has not been accepted by the Law Commission of India or the Courts in India and abroad.

In fact, Lord Macaulay had described this concept as 'absurd' as long been as 1835.

In fact when it was stated in the Statement of Objects and Reasons of the Bengal Regulation, 1795 that the imposition of high rates of court fees is to put a stop to groundless and frivolous and speculative cases, Lord Macaulay in his minute dated the 25th June, 1835 described the preamble of Bengal

Regulation, 1795 as "the most eminently absurd preamble, that was ever drawn".

The view of Lord Macaulay, has since been referred to with approval by the Law Commission of India in its 14th Report on 'Reform of Judicial Administration" (Chapter 22, para 5). Indeed, the Supreme Court in *Secy. to Govt. of Madras v. P.R. Sriramulu*, 1996(1) SCC 345 and *P.M. Ashwathanarayana Shetty v State of Karnataka* (1989 Supp. (1) SCC 696) also affirmed the same view. It is worthwhile to refer to this aspect in some detail.

Lord Macaulay had said:

> "It is undoubtedly a great evil that frivolous and vexatious actions should be instituted. But it is an evil for which the Government has only itself and its agents to blame, and for which it has the power of providing a most sufficient remedy".

He further stated:

> "Why did dishonest plaintiffs apply to the courts before the institution fee was imposed? Evidently because they thought that they had a chance of success. Does the institution of fee diminish that chance? Not in the smallest degree. It neither makes pleadings clearer, nor the law plain….

> It will no doubt drive away dishonest plaintiff who cannot pay the fee. <u>But it will also drive away honest plaintiffs who are in the same situations</u>".

The view of the Lord Macaulay has been kept at the highest pedestal. The Law Commission, in its 14th Report (Chapter 22, para 6) has observed that there is no substance in the argument that rates of high court fees are to be introduced so as to prevent frivolous litigation. The Law Commission observed thus:

> "29. The argument that it is necessary to impose high court fees to prevent frivolous litigation, already referred to has no substance …… These increases have been generally justified, as far as we know, on the ground of the need of increased revenue by reason of the increased cost of the administration of justice". (Chapter 22, para 29).

After three decades, a similar view were expressed by the Law Commission in its 128th Report on **Cost of Litigation** (1988) (para 3.6). Agreeing with the view of Lord Macaulay and reiterating the view of the Law Commission of India expressed in its 14th Report, and of the Supreme Court, the Commission is of the view that, enhancement in the court fee to prevent frivolous or vexatious litigation cannot and has never been accepted as a reason in the last nearly one hundred and fifty years.

Further, the Supreme Court in *Secy. to Govt. of Madras v. P.R. Sriramulu* (1996) 1 SCC 345 has also deprecated the concept of enhancement of court fees for preventing frivolous litigation. The court observed as follows:

> "In the beginning the imposition of the (court) fee was nominal but in the course of time it was enhanced gradually under the impression that it would prevent the institution of frivolous and groundless litigation and as an effective deterrent to the abuse of process of the court without causing any impediment in the institution of just claims. However insignificant this view may be that the levy of fees would have a tendency to put a restraint on frivolous litigation, that view at any rate had the merit of seeking to achieve a purpose which was believed to have some relevance to the administration of justice. Since about past two decades the levy of court fees on higher scales would seem to find its justification, not in any purpose related to the sound administration of justice, but in the need of the State Government for revenue as a means for recompense". (para 6).

It was thus pointed out that the argument that increase in Court fee was meant to foster the due administration of justice was given a go bye very soon when the legislatures started increases in Court-fee as a measure of recompense of its expense.

Earlier the Privy Council in *Rachappa Subrao v Shidappa Venkatrao* (AIR 1918 PC 188) had also critically observed that the provisions of the Court Fees Act, instead of arming the litigant, tended to secure revenue for the benefit of the State.

The Commission does not find any reason to take a different view than the one expressed by the Supreme Court and the Law Commission in its 14th and 128th Reports that the underlying real reason for enhancement of court fees appears to be the collection of more revenue by the States which is not

sound public policy. On the other hand, higher court fee will discourage the honest and genuine poor litigant.

The aspect that now requires to be addressed is whether there are alternatives available to curb vexatious litigation without having to resort to the device of increasing user/court fees. The next chapter addresses itself to this.

CHAPTER VII

MEASURES AVAILABLE TO CURB FRIVOLOUS OR VEXATIOUS LITIGATION

In this chapter, it is proposed to examine what alternatives to enhancement of user costs are available to curb frivolous or vexatious litigation in courts. Broadly, two alternatives have been tried and have been found more or less effective. One is the imposition of exemplary costs by the courts in individual cases. This serves as a specific deterrent on the recalcitrant litigant. The other device is by empowering the courts through a separate legislation or by a specific provision in a statute. This has the effect of a general deterrent on litigants as a whole and puts them on guard if they were to resort to abuse of the process of law. The illustrations of these two devices will be presently discussed.

(1) *Imposition of exemplary costs*

No doubt, frivolous or vexatious litigation is a serious problem and it is required to be dealt with effectively. The Supreme Court in *Dr BuddhiKota Subbarao vs. K. Parasaran*, AIR 1996 SC 2687, has criticized the practice of frivolous petitions. The Supreme Court observed:

> "No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner **as he wishes**. Easy access to justice should not be misused as a licence to file misconceived frivolous petition."

As observed in Chapter VI, enhancing the Court fee for purpose of limiting vexatious litigation is not an appropriate step as suggested by the Department of Justice and Standing Committee of Secretaries. On the contrary, enhancement in the Court fees would adversely affect the rights of genuine litigants to get justice. There are many other ways which up to some extent can curb the flood of vexatious litigations. One way is **awarding exemplary costs**. The Court can pass an order of exemplary costs in cases of vexatious or frivolous litigation. Supreme Court and other Courts in fact have passed an order of exemplary cost in many cases. In *Rajappa Hanamantha Ranoj v. Mahadev Channabasppa*, (2002) 6 SCC 120, the Supreme Court has held:

> "It is distressing to note that many unscrupulous litigants in order to circumvent orders of Courts adopt dubious ways and take recourse to ingenious methods including filing of fraudulent litigation to defeat the orders of Courts. Such tendency deserves to be taken serious note of and curbed by passing appropriate orders and issuing necessary directions including exemplary costs."

The Supreme Court in this case passed an order of exemplary costs of rupees twenty five thousand against appellant for filing of vexatious case.

In another instance in *Charanlal Sahu v. Dr. A.P.J. Abdul Kalam* (2003) 1 SCC 609, the Supreme Court imposed exemplary costs of rupees twenty

five thousand on the petitioner for filing a frivolous petition challenging the election of the President of India, Dr. A.P.J. Abdul Kalam. The Court observed that the petitioner who is an advocate had earlier filed four election petitions challenging the election of the returned candidates in the President's elections held in the years 1974, 1977, 1982 and 1997. All these election petitions were dismissed on the ground that the petitioner had no locus standi. The Court in *Charanlal Sahu v. Giani Zail Singh* 1984 (1) SCC 390, observed:

> "In order to discourage the filing of such petitioners, we would have been justified in passing a heavy order of costs against the two petitioners."

In that case the Court did not pass any order as to costs it would create a needless misconception that Supreme Court, which is the exclusive forum for deciding election petitions relating to election of the President and the Vice President, is loathe to entertain such petitions. Instead, the Court expressed its disapproval of the high-handed and indifferent manner in which the petitions were drafted and filed. But when the same petitioner again filed another election petition in 1998, the Supreme Court imposed costs of rupees ten thousand on him (*Charanlal Sahu v. K.R. Narayanan* (1998) 1 SCC 56).

There are other instances where the Supreme Court had passed order of exemplary costs. (*Sivamoorthy v. University of Madras* (2001) 10 SCC 483; *State of Punjab v. Bhajan Singh* (2001) 3 SCC 565.

Section 26 of the Consumer Protection Act, 1986 provides that whenever the Dist. Forum, State Commission or the National Commission finds that any complaint instituted before it is frivolous or vexatious, it shall dismiss the complaint with a reasoned order along with an order directing the complainant to pay to the opposite party, costs not exceeding rupees ten thousand as may be specified in the order.

Section 35A of the Code of Civil Procedure, 1908 also provides for compensatory costs in respect of false or vexatious claims or defences. Any party to suit or other proceeding may object to the claim or defence on the ground that such claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward. And if thereafter, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court may hold that such claim or defence to be false or vexatious and make an order for payment of costs to the objector by whom such claim or defence was put forward.

In *T.S. Arivandanan v. T.V. Satyapal*, AIR 1977 SC 2421, Krishna Iyer J. condemned the petitioner for the gross abuse of the process of Court to which he resorted unrepentantly. It was held that if the trial Court was satisfied that litigation was inspired by vexatious motives and altogether groundless, it should take deterrent action under sec. 35A to the CPC.

The National Commission to Review the Working of the Constitution has also stated (para 7.11) that an award of exemplary cost should be made in appropriate cases of abuse of process of law.

(2) *Enacting a separate legislation to curb vexatious litigation*

The other device to curb the vexatious litigation is to enact a separate legislation to deal with such cases. Though there is no Central enactment on the subject, it is significant to note that the Legislature of the State of Madras has enacted the **Vexatious Litigation (Prevention) Act, 1949** (Madras Act VIII of 1949). This Act is similar to the English statute 16 and 17 Vict. Ch. 30 (now repealed by the Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo V.C. 49). It is therein provided that when the High Court on an application made to it by the Advocate General, is satisfied that any person has habitually and without any reasonable grounds has instituted vexatious civil or criminal proceeding, in any Court or Courts, it may, after giving an opportunity of being heard to that person, pass an order that no proceeding civil or criminal shall be instituted by him in any Court in the State without the leave of Court. In case of the Presidency town leave may be granted by the High Court and for elsewhere the leave may be granted by the District and Sessions Judge. The leave could only be granted when the Court is satisfied that prima facie ground exists for such proceedings being initiated. Any proceeding instituted by such person without obtaining such leave is liable to be dismissed. Copy of the order is liable to be published in the Gazette. A five Judges Bench of the Supreme Court upheld the constitutional validity of the Madras Act in *P.H. Mowle v. State of A.P.,* AIR 1965 SC 1827.

Hidayatullah J. (as he then was) for himself and for K. Subba Rao J., Wanchoo J. and Sikri J. held as follows:

> "The next argument of the appellant before us is that this Act is unconstitutional because it prevents some citizens from approaching the court and obtaining relief to which every one is entitled in a State governed by Rule of Law……….. This argument is not acceptable to us because the litigants who are to be prevented from approaching the Court without the sanction of the High Court are a class by themselves. They are described in the Act as persons who habitually and without reasonable cause file vexatious action civil or criminal. The Act is not intended to deprive such a person of his right to go to a Court. It creates a check so that the Court may examine the bona fides of any claim before the opposite party is harassed. Such an Act passed in England, has been applied in several cases to prevent abuse of the process of Court. In its object, the Act promotes public good because it cannot be claimed that it is an inviolable right of any citizen to bring vexatious actions without control either legislative or administrative. The Act subserves public interest and the restraint that it creates is designed to promote public good. The Act does not prevent a person declared to be habitual litigant from bringing genuine and bona fide actions. It only seeks to cut short attempts to be vexatious. In our judgment, the Act cannot be described as unconstitutional or offending either Art. 19 or 14."

A Central Act may be enacted on the same lines to curb the vexatious litigation. Even in the absence of such a law made by the legislature, the

High Court in exercise of its rulemaking power relating to its own procedure and procedure of the Civil Courts, can make rules prescribing the procedure for dealing with vexatious litigation for purpose of declaring persons as vexatious litigant. Part X of the Code of Civil Procedure, 1908 which consists of Sc. 121 to 131 deals with power of the High Court to make rules regulating its own procedure and the procedure of the Civil Courts subject to its superintendence and may by such rules annul, alter or add to all or any of the rules in the First Schedule. Art. 225 of the Constitution of India provides for making of rules by the High Court. Similarly, sec. 23 of the Contempt of Court Act, 1971 also provides rule making power of the High Court. There was a question before the Division Bench of the Kerala High Court in *Jose v. Madhu* 1994 (1) KLT 855, that whether in the absence of any legislation by the State Legislature for declaring litigants as vexatious litigants, the High Court can make rules under its rule making power? Relying on the decision of the Australian High Court in *Jones v. Skyring* (1992) 66 Aus. L.R. 810, the Kerala High Court held that such a rule can clearly be made by the High Court under its powers to make rules of 'procedure' as provided in Part X of the CPC, Art. 225 of the Constitution of India and in sec. 23 of the Contempt of Courts Act, 1971. It is not necessary that the Legislature alone should intervene. The Kerala High Court after relying on another decision of the Australian High Court reported in *Williams v. Spautz* (1992) 66 ALJR 585 also held that before any such rules are made by the High Court in exercise of its rule making power, it is permissible for the High Court to grant 'permanent stay' of cases amounting to abuse of process, after such cases are filed in Court. The High Court can grant 'permanent stay' in exercise of its 'inherent power' of section 151 of the Code and as a Court of record.

The above discussion makes it clear that problem of vexatious or frivolous litigation can be sorted out by the abovesaid modes and there is no need to enhance the Court fee for curbing the vexatious litigation. On the contrary, it may adversely affect the right of a poor genuine litigant to knock at the doors of the Court.

The question whether court fees need to be revised in order to account for the steady decline in the value of the rupee in order to reflect the actual costs is considered in the next chapter.

<u>CHAPTER VIII</u>

REVISION OF COURT FEES OWING TO THE DEVALUATION OF THE RUPEE

It is stated in the minutes of the meeting of the Standing Committee of Secretaries held on 19.7.2002 that the Court fees, in a majority of cases, had not been revised for a very long time and currently covered only a fraction of the administrative costs of the judicial process. Amount of Court fees required to be paid in any judicial proceeding are prescribed in the Schedule 1 and 2 of the Courts Fees Act, 1870. Schedule 1 of the Court Fees Act, 1870 prescribe Ad Valorem Court fees, which means Court fees has to be paid according to the value of the subject matter. Schedule 2 prescribe fixed Court fees. It is true that value of rupee has depreciated considerably in last four decades, but the rate of Court fees has not been revised by any Central enactment for a very long time. However, various States have amended Court fees rates by State amendments to the Court Fees Act, 1870 or in their own Court fees Acts. One of the recent changes is made in Madhya Pradesh. The said State has amended rate of Court fees by M.P. Act 12 of 1997 w.e.f. 1.4.1997. Now, in M.P. Court fees on filing of plaint etc. have to be paid on the basis of percentage of amount of value of subject matter. Similarly, rate of Court fees in Maharashtra has been revised by amending Bombay Court Fees Act, 1959, by Maharashtra Act No.33 of 1997 w.e.f. 21.2.97. Other States have also amended rate of Court fees from time to time.

However, in view of the devaluation of rupee and increase in the rate of inflation, rates of fixed Court fee as prescribed in Schedule 2 of the Court Fees Act, 1870 may be revised so that effect of inflation may be eliminated.

The Law Commission in its 127th Report at p.5-13, has also suggested that because of reduction of value of rupee, Court fee may be increased with certain exceptions.

As regards ad valorem court fees, since the levy is a percentage of the value of the claim, it may not be necessary to enhance the percentages consequent upon the devaluation of the rupee. This is because the court fee paid will be proportionate to the claim which in any event would be enhanced to reflect the changed value of the rupee. However, in the context of fixed court fees there may be a need to revise the charges to reflect the present value of the rupee. At the same time, it requires to be emphasised that any enhancement of Court fee should not adversely affect the right of access to justice. Further, the amount collected by way of Court fee should not be more than the expenditure incurred in administration of civil justice. Subject to these limitations, the amount of fixed Court fee prescribed under Schedule 2 of the Court Fees Act, 1870 may be enhanced in proportion to the extent of devaluation of the rupee.

CHAPTER IX

CONCLUSIONS AND RECOMMENDATIONS

On the basis of our discussion in preceding chapters, following conclusions emerge:

1) Right to access to Courts is now recognized as a basic human right and its origin can be traced to Art. 8 of the Universal Declaration of Human Rights passed by the United Nations Organisation in 1948 and to Art. 2 of the International Covenant on Civil and Political Rights to which India is a party.

2) The concept that Court fee should be increased to prevent frivolous and vexatious litigation (an aspect to which reference is made in the Reference) has not been accepted as a basis for Court fee increase right from the time of Lord Macaulay, as well as in subsequent Reports of the Law Commission and in the judgments of the Supreme Court of India. This concept is not consistent with Arts. 21, 38 and 39A of the Constitution of India.

3) The Court Fees Act, 1870 was enacted as a Central Act and it continued to be in force by virtue of provisions of section 292 of

the Government of India Act, 1935 and Art. 372 of the Constitution of India. But under the Constitution, it can be amended or repealed only by a Legislature competent to enact a law relating to Court fees.

4) In view of the specific entry on Court fees i.e. "fees payable in any Court except Supreme Court", mentioned in Entry 3 of List II (State List) of Seventh Schedule to the Constitution of India, the subject of Court fees payable in all Courts (except Supreme Court) is a State subject and only State Legislatures are competent to enact or amend any law on Court fees payable in High Courts and other Courts subordinate thereto (Art. 246(3)), having jurisdiction in any State.

5) So far as the subject of Court fees payable in Supreme Court, it falls under Entry 77 of List I (Union List) of Seventh Schedule to the Constitution of India and Parliament is competent to enact or amend any law on Court fees payable in the Supreme Court. As per Art. 145(1)(f) of the Constitution of India, Supreme Court can also make rules relating to fees payable in the Supreme Court, however, subject to any law made by the Parliament. In fact, Supreme Court in exercise of its powers conferred under Art. 145 of the Constitution, has made rules known as 'Supreme Court Rules 1966' and the Third Schedule to the Rules provides table of Court fees payable in the Supreme Court. In the light of the Rules made by the Supreme Court, which that Court is competent to modify or amend, the Law Commission does not propose to

suggest any amendments so far as the Supreme Court is concerned.

6) So far as Union Territories are concerned, as per Art. 246(4) of the Constitution of India, Parliament can make or amend any law relating to Court fees payable in any Court while exercising jurisdiction over any Union Territory. Apart from it, the President of India under Art. 240 of the Constitution of India can also make Regulations for any Union Territory except for Delhi and Chandigarh. Any Regulation so made by the President, may repeal or amend any law made by the Parliament applicable to that Union Territory and the regulation so made shall have the same force and effect as an Act of Parliament. However, for the Union Territory of the Pondicherry, any Regulation can be made only if the Legislative Assembly of the Pondicherry is under dissolution or suspension.

   Union Territories of Delhi and Pondicherry are also having separate legislative assemblies. These legislative assemblies are competent to make any law on a subject falling in State List (List II) of the Seventh Schedule to the Constitution of India. No doubt, Parliament can still make any law for these Union Territories under its power under Art. 246(4) of the Constitution, and any law made by the Parliament may prevail over any law made by any of those legislative assemblies mentioned above.

7) As mentioned above, the Court fees is a State subject as per constitutional scheme. Following States have repealed Court Fees

Act, 1870 in application to their respective States and have enacted their own Court Fees Acts. These States are:

(1) Andhra Pradesh (2) Gujarat (3) Himachal Pradesh

(4) Jammu & Kashmir (5) Karnataka (6) Kerala

(7) Maharashtra (8) Rajasthan (9) Tamil Nadu

(10)West Bengal (11) Union Territory of Pondicherry

Most of the other States have amended the Court Fees Act, 1870 in application to their States. These are:

(1) Assam (2) Bihar (3) Madhya Pradesh

(4) Orissa (5) Punjab (6) Haryana

(7) Meghalaya (8) Uttar Pradesh (9) Goa

8) Since a long period of time, rates of fine prescribed under the Indian Penal Code, 1860 and other old penal enactments, have not been increased, though there is considerable reduction in the value of the rupee over all these years.

The Law Commission suggests that amount of fine prescribed under the Indian Penal Code, 1860 and other penal enactments may be enhanced in proportion to reduction in the value of the

rupee. It will, to some extent, cover the increased cost of administration of justice.

9) Administration of justice falls under the Concurrent List (Entry 11A of List III of Seventh Schedule to the Constitution of India). The High Courts and other Courts subordinate are today dealing not only with the cases relating to laws made by the States under the State List and Concurrent List but all the bulk of the cases relating to laws made by the Central Legislature or Parliament under Union List and Concurrent List. For example, the Transfer of Property Act, Contract Act, Sale of Goods Act, Indian Penal Code, Civil and Criminal Procedure Codes, are referable to the Concurrent List and are Central Laws. The Negotiable Instruments Act is referable to List I and is a Central Act. Cases arising out of these Central Laws are now being disposed of by the subordinate Courts established by the States. As of now Central Government is not bearing any part of the expenditure for subordinate Courts. The Central Government is only bearing the expenses for the Supreme Court and other Courts in the Union Territories. Expenses for the High Court and subordinate Courts in States are borne by the concerned State Government.

The Law Commission is in total agreement with the recommendations made by the National commission to Review the Working of the Constitution (at para 7.8.2) that "the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demand of the State judiciary in every one of the States".

We also recommend accordingly.

10) So far as prevention of vexatious litigation is concerned, there is a State Act of former composite Madras State known as 'Vexatious Litigation (Prevention) Act, 1949 (Madras Act VIII of 1949). It was made on the line of English Statute 16 and 17 Vic. Ch. 30 (now repealed). The said Madras Act VIII of 1949 provides that when the High Court on an application made to it by the Advocate General, is satisfied that any person has habitually and without any reasonable grounds instituted vexatious civil or criminal proceeding, in any Court or Courts, it may, after giving an opportunity of being heard to that person, pass an order that no proceeding civil or criminal shall be instituted by him in any Court without the leave of Court. A five Judge Bench of the Supreme Court upheld the constitutional validity of the said Act in *P.H. Mowle v. State of A.P.*, AIR 1965 SC 1827.

We recommend that, on the line of this above mentioned Madras Act VIII of 1949, a Central Act may be enacted to curb vexatious or frivolous litigation.

11) As stated in above paragraphs, power of the Central Government and Parliament in respect of Court fees is limited to the Court fee payable in the Supreme Court and other Courts exercising jurisdiction over Union Territories. Rate of Court fees as prescribed in the Court Fees Act, 1870, wherever applicable, has not been revised by the Central Government or Parliament since a long period of time, but the value of the rupee has considerably come down. Therefore, we recommend that the fixed Court fees payable in the Courts exercising jurisdiction

over the Union Territories and where it is governed by Schedule 2 of the Central Court Fee Act, 1870, should be enhanced in proportion to the reduction in the value of the rupee.

12) As regards ad valorem court fees, since the levy is a percentage of the value of the claim, it may not be necessary to enhance the percentages consequent upon the devaluation of the rupee. This is because the court fee paid will be proportionate to the claim which in any event would be enhanced to reflect the changed value of the rupee. However, in the context of fixed court fees there may be a need to revise the charges to reflect the present value of the rupee. At the same time, it requires to be emphasised that any enhancement of Court fee should not adversely affect the right of access to justice. Further, the amount collected by way of Court fee should not be more than the expenditure incurred in administration of civil justice. Subject to these limitations, the amount of fixed Court fee prescribed under Schedule 2 of the Court Fees Act, 1870 may be enhanced in proportion to the extent of devaluation of the rupee.

We acknowledge the extensive contribution made by Dr. S. Muralidhar, Part-time Member of the Law Commission, in preparing this Report.

We recommend accordingly.

(Justice M. Jagannadha Rao)

Chairman

(Dr. N.M. Ghatate)

Vice-Chairman

(Dr. K.N. Chaturvedi)

Member-Secretary

Dated: 25th February, 2004