Dedicated to

Bhaiya

ACCESS TO JUSTICE: ANALYSIS OF THE LEGAL AID REFORMS IN INDIA

Dissertation submitted to the Jawaharlal Nehru University
In partial fulfilment of the requirements
for the award of the Degree of

MASTER OF PHILOSOPHY

PALLAVI BAHAR

CENTRE FOR STUDY OF LAW AND GOVERNANCE
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI-110067
INDIA
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Jawaharlal Nehru University
Centre for the study of Law and Governance
New Delhi 110067

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DECLARATION

I declare that the dissertation entitled **"ACCESS TO JUSTICE: ANALYSIS OF THE LEGAL AID REFORMS IN INDIA"**, submitted by me in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** of this university is my original work. This dissertation has not been previously submitted for any other degree of this or any other University.

PALLAVI BAHAR

CERTIFICATE

We recommend that the dissertation may be placed before the examiners for evaluation.

Dr. Amit Prakash
(Chairperson)

Prof. Niraja Gopal Jayal
(Supervisor)

Chairperson
Centre For the Study Of Law and Governance
Jawaharlal Nehru University
New Delhi-110 067

Tel (off) : 2670 4021 ☐ Telefax (off) : 2671 7506 ☐ Email : dir_cslg@mail.jnu.ac.in

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My M.Phil dissertation has brought me in touch with the harsher realities of living in India. It is a topic that has consumed my mind for more than a year, with enormous influence on my intellectual and emotional outlook. At every step of my research, my supervisor, Prof. Niraja Gopal Jayal has stood behind me, offering her support. Her unwavering faith in me has pushed me to look beyond my own expectations and give my best to this dissertation.

I wish, I could find a better word than 'thank you' to express how I feel and I wish every student may be blessed with patient, encouraging and perceptive guide like her.

I would also like to thank her for referring me Mr. Julian Moti, whose invaluable inputs and suggestions have helped me to deepen my research. Thank you, sir for your time and help.

My sincere gratitude to Mr. Videh Upadhyay, Pratiksha Baxi, Anuvinda Varkey, Mr. Tokas and all the lawyers of the Supreme Court, High Court, Patiala House and Karkarduma court.

I also compliment the support granted to me by the library staff of the CSLG, JNUL and ILI.

I would like to thank my parents for their constant encouragement. Without my friends Niru, Siddhartha, Manali, Jagjit, DD, Amjad, Jaffar and all others for lending their incredible support throughout my dissertation.

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CONTENTS

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Finally, all the errors therein, I claim solely as mine.

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ABBREVIATIONS

AIR	All India Reporter
BLAS	Bombay Legal Aid Society
CILAS	Committee for Implementation of Legal Aid Services
DPSP	Directive Principles of State Policy
DVB	Delhi Vidyut Board
DDA	Delhi Development Authority
DLSA	Delhi Legal Services Authority
EPW	Economic and Political Weekly
IJPA	Indian Journal of Public Administration
IBR	Indian Bar Review
ISLJ	Indian Socio-Legal Journal
JILI	Journal of Indian Law Institute
JCPS	Journal of Constitutional and Parliamentary Studies
KLT	Kerala Law Times
LSAA	Legal Service Authority Act, 1987
Mah LJ	Maharashtra Law Journal
MCD	Municipal Corporation of Delhi
MTNL	Mahanagar Telephone Nigam Limited
NALSA	National Legal Services Authority
NGO	Non-Governmental Organisation
OUP	Oxford University Press
PIL	Public Interest Litigation
SCC	Supreme Court Cases
SCJ	Supreme Court Journal

CHAPTER 1

INTRODUCTION

The primary aim of law is to establish a just and egalitarian social order where universal norms govern and protect the rights of every individual on an equal basis. The aim of law and legal institutions, such as courts and tribunals, is to secure justice, more specifically 'equal justice'. The presence of law and legal institutions is a necessary condition to protect the rights of rich and poor alike. However, it is not a sufficient condition to guarantee equal justice to all sections of society. The accessibility of these arrangements to citizens constitutes justice[1] enabling them to preserve their freedom and liberty. However, the requirements of freedom and justice have been so demanding and complicated, and the procedures of courts so slow and expensive, that only people with appropriate means and resources at their disposal can reach them to take the advantage of these arrangements .This dissertation, therefore, seeks to examine and explore various impediments in the path of obtaining justice by the socially, financially and educationally deprived poor masses in India.

Some of the major hurdles which limit the opportunity to equally access legal machinery are the high cost of litigation[2], high fees charged by lawyers, excessive legal formalities, huge pendency of cases and delays, professional malpractices and organisational problems. Only the affluent sections of society,

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[1] Christine, Parker (1999) *Just Lawyers: Regulation and Access To Justice*. Oxford: OUP. pp.46-47.
[2] Mamta, Rao (2002) *Public Interest Litigation in India: A Renaissance in Social Justice*. Lucknow: Eastern Book Company. pp.61-63.

who possess money, connection and muscle power, are the actual beneficiaries of the established legal system. Thus, there is a need to better understand the practical functioning of law vis-à-vis underprivileged people. More robust provisions are required to realize the purposes for which law emerged and legal institutions were established. It was with this aim that reforms in the direction of equal access to justice emerged across throughout the world, and gained momentum after the 1960s. These were classified in 3 waves[3] by Cappelletti:-

1. Legal aid movement.
2. Public interest Law.
3. Alternative Dispute Resolution.

The underlying aim of the movement was to establish adequate provisions to empower the weak and deprived sections, i.e. those who are inefficient in using the legal system to protect their rights and claims, to have an equal access to justice through equal access to legal representation and legal assistance.

The focus of this dissertation is to study and analyse the Legal Aid Movement in India. The judicial system, in post-independent India, was adopted with the noble aspirations of serving every section of society equally and of protecting and safeguarding the rights and interests of all citizens. The constitution was carefully drafted, keeping in view the goals of freedom, as it promised to secure justice, liberty and equality for all its citizens through its various provisions

[3] Mauro, Cappelletti and Garth (ed) (1978) *Access to Justice: A World Survey.* (Vol.1.Book 1), Milan : Dott.A.Guiffre Editore.

and articles. The Indian judiciary aimed at securing and realizing the ideals of justice enshrined in the Constitution. However, despite the promises and concerns of the national leaders for the poor, the administration of justice for the common citizen remained totally neglected due to the inherent limitations of a slow and expensive legal procedure. Given the extent and intensity of poverty, it is difficult for the poor to approach the expensive and time consuming judicial machinery to claim their rights and demand justice.

Recognizing the inadequacies in the Constitutional provisions and the functioning of the Indian Judicial system to serve the disadvantaged, the Government of India initiated the process of addressing the issue of enhancing the accessibility of the legal system to the poor, and of strengthening social justice through Legal Aid Reforms. Various committees and conferences were organized to realize the goal of securing justice to the underprivileged sections of the society. It was emphasized by the 14th Report of the First Law Commission,[4] 1958 that,

> *"unless some provision is made for assisting the poor man for the payment of court fees and lawyers' fees and other incidental costs of litigation ; he/she is denied equality in the opportunity to seek justice.".*

Thereafter, first achievement of the 20year reform attempts was observed with the enactment of 42nd Amendment Act through Article 39-A in DPSP in 1976 which authorized the enactment of legal aid legislation and

[4] The Fourteenth Report of the Law Commission of India (1958) on *Reforms in the Administration of Justice.* Also see Bahadur, Singh (1st Jan.2002) "Legal Aid in India ; A Profile". AIR . Vol.89. p.193.

formulation of legal aid schemes and obliged the state to provide legal aid so that the operation of legal system promotes justice based on equal opportunity for all.[5]

A significant contribution was also made by various Supreme Court judgments to speed up the process of establishing equal access to justice as a Constitutional right. Landmark judgments in the direction of reforming the judicial system to cater to the needs of the poor and deprived masses were those of M.H. Hoskot v State of Gujarat (1978) , Hussainara Khatoon v State of Bihar (1980) and Khatri v State of Bihar (1981) cases. These judgments proved crucial in highlighting the defects and loopholes in the reform movement. Along with the active involvement of the judiciary, some structural innovations were attempted with the setting up of Nyaya Panchayats, Lok Adalats and other informal dispute resolution mechanisms. These provided at least some relief and compensation to aggrieved claimants whose cases would otherwise have been hanging endlessly in regular courts.

Though the reform initiatives were constantly sought to be improved, the implementation of these reforms has been rather slow and tardy. This concern was raised in 1980, with the establishment of the Committee for the Implementation of Legal Aid Services under the chairmanship of P.N.Bhagwati. It was for the first time, with the Legal Services Authority Act (1987) which established the National Legal Services Authority and State level legal aid services, that the reforms were translated into reality and implemented at the ground level. The primary aim of the LSAA was to provide free and competent legal services to

[5] *Processual Justice to the People*: Report of the Expert Committee on Legal Aid (1973). pp.27-34.

the weaker sections of the society and to organize Lok Adalats and Legal Aid Cells for the purpose of achieving these goals. It included in its purview a wide category of the deprived and poor, such as Scheduled Castes, Scheduled Tribes, the mentally ill or otherwise disabled, women, children, victims of mass disaster, floods, ethnic violence and those in custody etc. In societies with deeply embedded socio-economic disparities, such provisions are necessary for a reasonable and fair justice system.

Though the reforms have earned some credit for making the law and legal institutions accessible to the disadvantaged, they have been severely limited in the extent of making these available on a larger scale. Our judicial system still suffers from serious maladies such as huge pendency, delays, a non-accountable Bar, excessive freedom to lawyers for charging any fees from their clients, and so on. A number of factors are responsible for these problems. They include structural and operational obstacles, lack of awareness, legal language, unwillingness on the part of the state and Bar to implement these programmes, low salaries of the legal aid lawyers, insensitive attitudes of lawyers towards the needs of the poor and their aspirations for high fees. Due to such defects, the legal system continues to remain extremely cumbersome, expensive, time consuming and effectively out of the reach of the poor and needy. The system exhausts the energy, resources and patience of the poor and so deprives them of justice.

The socio-legal study presented here seeks to demonstrate the fact that the poor do not have equal opportunities to approach the machinery of justice, as their powerful and better off compatriots do. The legal aid movement started

with the intention of enhancing access to justice for the poor and disadvantaged. However, the actual functioning of the legal aid system has not significantly improved such access. The dissertation will explore the reasons for the limited performance of the legal aid reforms and suggest some measures to deal with the shortcomings of the judicial system. With a view to analysing the Legal Aid Reforms, various primary sources such as Reports, Government Acts and so on, along with secondary readings such as, books, journals, newspapers and magazines were consulted. Seminars, relating to the study, were attended such as the Seminar on Recent Legal Developments in British Council Library, Murlidhar on Access to Justice in Centre for Study of Law and Governance.

Conforming to the aim of the study, a field survey was conducted which provided an insight into the practical functioning of the law through the responses of lawyers and poor litigants. The scholar's visits to the courts in Delhi also proved useful in understanding the real picture. The survey was conducted through questionnaires and personal interviews. The four courts covered were the Supreme Court, the High Court, and the Patiala House and Karkarduma district court. Valuable insights were also provided by activist lawyers whose experiences and information proved crucial in tracing the roots of the loopholes in the working of the entire legal machinery. Also the responses of the survey conducted in 2004 in Tihar Jail, Delhi, to analyse the violation of rights of prisoners, had a significant impact in framing an opinion for the defects of the Criminal Justice System and the limitations in the implementation of legal aid schemes and court judgments. With as much experience gained from the survey, it can be inferred that there is no

coherence between the law as mentioned in the books and law as practiced in a working system. Though reforms have been initiated, much remains to be done.

Overview of the Dissertation

Chapter 1, "Access to Justice: The Concept and Evolution", traces the history and evolution of the idea of access to justice as a right since the emergence of the concept of rule of law. It provides an understanding of the conceptual and theoretical evolution of the Access to Justice Movement throughout the world and the background to the emergence of the practice of Legal Aid in India. Chapter 2, "Limitations of the Indian Judicial System: Problems faced by poor in accessing justice", briefly examines the position of the judiciary in colonial times and proceeds to analyze the problems of the underprivileged while dealing with the judicial system in the post-independence phase. In the light of these problems, the paper attempts to examine the rationale for the establishment of the scheme of legal aid in India. Chapter 3, "Legal Aid Movement In India", maps the progress of the legal aid reform drive in India right since the initial efforts during the colonial times in 1924 up to 1977 and thereafter till 2005. The chapter provides a simultaneous analysis of developments with respect to the provision of legal aid to the poor and deprived masses. The judgments of some important cases, such as Janardhan Reddy (1951), Tara Singh (1951), Maneka Gandhi (1978), Hoskot case (1978), Hussainara case (1979) have been discussed. Chapter 4 discusses the survey, analysing the responses collected from the field work which was conducted in order to assess the extent of change brought about by the reform movement. It

provides a first hand account of the practical functioning of the legal system and problems faced by poor litigants while dealing with the legal machinery. It highlights the defects identified by activist lawyers as also the alternative measures suggested by them. The concluding chapter 5 discusses the relevance of the traditional judicial model in India in the present day context. It examines the extent to which the legal aid movement has or has not advanced the primary goal of equal access to justice. It attempts to suggest mechanisms which might enable the underprivileged sections to use the legal system in a better manner to claim their rights and demand their share of justice. It explores ways in which the access to justice movement may be enhanced, whether through legal aid or other means.

CHAPTER TWO

ACCESS TO JUSTICE: CONCEPT AND EVOLUTION

"To no one will we sell, to no one will we refuse or delay, right or justice". Magna Carta, chap 40. How applicable is this vital notion in reality? The following examples[1] will examine this statement:-

1) *A poor man from a village comes to a new city (urban alien land) seeking some job prospects. He is fascinated by huge buildings, monuments, shopping malls, parks, bungalows, smooth roads etc. Next he searches for an affordable residence. He manages to get one but in a very pitiable and unhygienic surrounding. He discovers it to be illegally constructed. Then starts his everyday torture – no proper food, no water, no electricity. He wonders whom to ask for help. Then come elections and all the false promises of reconstruction and other provisions by the candidates. Everything goes to waste after the elections are over. Then enters Municipal bodies to demolish and harass the residents. The man approaches the police where he is*

[1] The narrated examples (1) and (2) are an impressionistic view of the judicial system which was derived by interviewing the Tihar Jail inmates, New Delhi, by our group of students from Centre for Study of Law and Governance in 2005.

threatened and harassed for living in an illegal locality. Where does the man go? He approaches a good lawyer who demands ransom for taking the case to the court without any guarantee of justice. The man approaches an inexperienced lawyer. Finding his fees quite affordable, the man files his case in the court to enforce his basic human right and demanding some space for survival. The case continues to get prolonged month after month – some time the lawyer is absent and some time arguments are not satisfactory due to lawyer's limited experience. Result will be – either the man will lose the case or he will give up due to no resources left for further continuance of the case. ***This is a case of justice denied for mere lack of resources.***

2) *An illiterate woman who works in a small shop is abruptly arrested by police from a crowded market place. She is taken to jail where she is informed of being accused for committing theft. The woman finds no way of informing her family and counts on days to move out of the prison. She is promised a lawyer who turns up after a few months. Her case is taken to the court. Date after date delays her case. What probably will happen next is that she will be declared innocent and made to meet her family. But negatively, her job will be lost*

and, as a result, she will be left to suffer domestic violence. Consequently, her condition becomes more miserable. ***Here justice delayed is justice denied.***

Is this true justice? Is the formal legal system efficient enough in providing justice? Is the task of judges limited to just discovering laws and imparting decisions? Doesn't the state have the responsibility of providing justice in everyday life? Is justice equally accessible? Doesn't this show some sort of bias of the judicial system towards the resourceful? The examples suggest that legal norms, that might promote justice, prove incapable of penetrating and changing everyday injustices unless supported by existing cultural norms and supplemented with concerted and persuasive social and political action.[2] It is clear from the examples that such a system would lead to misuse of the legal machinery by one section of the society and a state of unrest and lawlessness by the ones who are denied this right.

Presence of equal justice, for the rich and the poor alike, is essential to the maintenance of rule of law. However, in a society embedded with gross inequalities such a legal system fails to recognize the plight of the poor, socially deprived, disadvantaged and backward classes of the society who lack appropriate resources to approach the machinery of justice. It is in a true democracy that there exists equal "access" to justice which removes

[2] Galanter, Rosenberg and Krygier quoted in Christine, Parker (1999) *Just Lawyers: Regulation and Access to Justice.* Oxford: OUP. p.2.

hurdles through affirmative action and assures adequate provisions for assisting the "handicapped population"[3] to attain justice. However, in practice, this is not the case. Law is like a cobweb, "where small flies are caught and the great break through" {Francis Bacon}[4]. Financially and intellectually poor people have least access to the machinery of justice. Reasons might be varied. To overcome these lacunae, legal aid reforms were initiated in various countries. Though the earliest attempt towards legal reforms in the direction of providing legal aid was made in 1851 in France[5], a systematic movement towards legal aid reforms began with UK(1944), US(1963), India(1976) and China(1990s).

These legal aid reforms sought to provide adequate legal advice and representation to all those threatened as to their life, liberty, property or reputation, and who are not able to pay for it. These reforms were, therefore, aimed at formulating and implementing techniques for safeguarding interests of and securing justice for the weaker sections within the existing legal framework, without restructuring of the legal system which seemed a difficult task. It is almost five decades since the reforms have been in the process of action and implementation and this calls for an assessment of

[3] 'Handicapped Population' phrase used by B.P. Pande (1977) "Institution of Legal Aid in India", Vol. *JCPS*, pp.76-77. He used the phrase 'handicapped population' to denote 'legally incompetent populace to access justice'.

[4] Manas, Chakrabarty (2000). "Legal Aid to the Poor", *AIR*, Vol.87, Nov. p.191.

[5] In France legal aid had been available to people without resources since 1851; the Law of 3 January 1972 introduced the idea of " legal aid " (from assistance to social solidarity); the Law of 10 July 1991 went further with the establishment of an expanded notion of "legal aid " designed to give wider access to the law. Explained in Encyclopaedia, Vol.9.

whether the goals of the legal aid movement have been achieved or not and if achieved, then to what extent.

The Idea of Justice

The end of all legal institutions[6] and judicial structure is to secure justice. Securing justice means making decisions to allocate what is legally due to parties before the court.[7] Justice can prevail only in a system which is based on the predetermined rules of law and where an equal distribution of rights and responsibilities, benefits and burdens takes place among citizens. It is a system where the state is impartial, laws are applied fairly and administrators of justice (police, courts, officials) perform their duties honestly without any personal interests. It is, in Mill's terminology, "something which is not only right to do, and wrong not to do, but which some individual persons can claim form us as their moral right."[8]

Administration of justice is, therefore, inseparably connected with rule of law. Rule of Law is based on three important conditions:[9]

- Protection from theft, violence, and other acts of predation.
- Protection from arbitrary action of the government.

[6] Explained in Encyclopaedia. Vol.9. pp.47-48. A legal institution is one by means of which the people of a society settle disputes that arise between one another and counteract any gross and flagrant abuses or rules of the other institutions of society.

[7] A.A.S, Zuckerman ed., (1999) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*. NewYork: OUP. pp.3.

[8] Anirudh, Prasad (1977) "Legal Aid as a Part of Social Justice", *Kurukshetra Law Journal*. Vol.3. pp.63.

[9] World Development Report (World Bank 1997: 41)1997, quoted in Michael, Anderson (2003) "Access to Justice and Legal Process: making Legal Institutions responsive to Poor People in LDCs", *IDS Working Paper 178*. Feb. Sussex: Brighton. p.2.

- A reasonably fair and predictable judiciary.

Evolution of Rule of Law:

The evolution of law and legal systems is intricately linked with the evolution of society and its practices. The work of August Comte proves significant in studying the development of legal systems till modern societies. In his 'law of three stages', Comte explained that human development progressed from the theological stage wherein man sought the explanation of natural phenomena from supernatural beings. It passed through metaphysical stage in which nature was conceived of as a result of obscure forces and man sought the explanation of natural phenomena from them until the final positive stage in which all abstract and obscure forces were discarded and reliance shifted to human mind and increased application of thought, reason and logic to the understanding of the world. Similar was the development of law in three stages. The idea was taken up by theorists such as Maine(1863), Radcliffe-Brown(1933) who threw light on the evolution of law from primitive to advanced societies, that is from customary law to law determined by 'free agreement' or 'contract'.[10]

Starting with primitive societies, natural law was understood as being closely associated with intentions of God. Natural law, as explained by Plato, Aristotle and other natural law theorists, was universal, divine,

[10] R.D, Bendall (1982) *Towards an Integrative Approach to the Study of Law*. Dissertation submitted to University of Kent. p.2.

unwritten, immutable, and in accordance with nature.[11] It was taken as a guide to the lawmaking by the state. In the primitive societies, law was, therefore, defined and determined by religion and religious institutions. Natural law typically claimed that 'an unjust law was no law at all' and some natural law theorists believed that any injustice would be rectified by the 'higher powers'.[12] Only those laws which were morally just and conformed to the nature were considered valid. Thus, before the occurrence of law in the form of permanently established legal institutions, there were societal norms having religious or supernatural sanctions.

Due to the emergence of much more complex forces, such as the changing culture of society, and with the expansion of economic activities, an effective machinery of enforcement was required. Thus, law became associated with the concept of authority - power that extracted obedience. This concept found its presence in the theories of early legal positivists such as, Bentham and Austin. Bentham repudiated the traditional law theories and extended that law in itself was evil as it restricted individual's liberty and freedom. He recognized law as being necessary to social order and good laws as being essential to good government. Thus, law came to be known as a coercive institution, enforcing its practical demands on its subjects by means of threats and violence. Similarly, Austin maintained that coercion was an *essential* feature of law, distinguishing it

[11] Charles G. Haines (1930) *The Revival of Natural Law Concepts*. Cambridge: Harvard University Press.
[12] http://en.wikipedia.org/wiki/Jurisprudence.

from other normative domains. Law was, in the Austinian sense, the command of the sovereign. It followed the 'Separation Thesis' which maintained a conceptual separation between validity of law and morality. Thus, a law that commanded morally questionable or morally evil actions, or that was not based on consent, was still "law."[13] It implied that legal validity had no essential connection with morality or justice.

Though the ancient societies used law as a coercive instrument, they were nevertheless elastic and flexible.[14] Changes were brought about, more particularly after the French Revolution of 1789 through 'The Declaration of the Rights of Man and of the Citizen'. It established the base for set judicial codes, especially in the criminal justice system, and judicial institutions for guaranteeing individual liberty and freedom. Rigidity and excessive formalism were more prevalent in middle ages. As explained by Ehlrich[15], rigid forms of art, religion or law etc. were originally soft and flexible, during the primitive era. Thereon, set codes (consolidation of scattered legislation) replaced the oral tradition in order to reduce complications emerging in socially, politically and economically ever-widening societies. Thus, law was placed at a position of reverence and was strictly abided and inflexible during middle ages. This is not to say that rules and procedures did not exist in primitive times, just that their character was

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[13] Jeremy Bentham in Internet Encyclopedia of Philosophy , http://www.iep.utm.edu/b/bentham.htm

[14] G.W, Paton (2004) *A Textbook of Jurisprudence.* (1st Indian edition). New Delhi: OUP. pp.53.

[15] *Fundamental Principles of Sociology of Law*,259, quoted in Ibid.pp.54.

different. In fact, the early codes (Hammurabi, Assyrians) were more secular in character.[16]

Thereafter, the emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and law acquired normative character rather than coercive backing. Legal positivism was, therefore given a new turn by jurist Hans Kelsen (1881-1973) who emphasised on the normative foundations of legal systems. Thus, gradually definite institutions, in the form of courts, evolved for the settlement of disputes. Their presence made rules more precise and law more acceptable.[17] Also important in this direction was the analytic legal philosophy of H.L.A. Hart (1907-92) for whom the authority of law was social, that is, ultimate legal rules were social norms derived out of how law was practiced through official customs.

With the emergence of the industrial revolution and with the expansion of economic activities, changes in the social structure began. Marxists linked social structure to legal system. They highlighted how law became a hand maid of those owning the means of production and state an instrument in the hands of the capitalist class. Gradually, the realization came that, "law exists for man and not man for law and that rules must be so adopted that injustice is avoided".[18] That is supremacy of law was not to be

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[16] A.S, Diamond (1950) *Primitive Law.* (2nd edition). pp.85, quoted in Ibid. pp.55.
[17] Ibid. pp.50. Paton explained that, "if private violence is to be overcome, then the law must be enforced; but if law is to remain acceptable, then there must be a machinery for its reform".
[18] Op.cit., G.W. Paton. pp.60.

upheld at the cost of injustice and inconvenience. It was only with the classical period that the move towards more responsive law, in the direction of justice, was made. A special mention of Durkheim can be made here as he presented an altogether different notion of law by linking justice with appropriate order of punishment. He established that in repressive sanctions 'the punishment matches the severity of the crime as exactly as possible'[19]. This implied that true justice could be secured when appropriate punishment, for any offence, was awarded on an equal basis to all, irrespective of class, creed, sex, religion etc.

Though the era could not stabilize this reformed system, but certainly provided general principles for modification of law to suit new conditions. This paved way for what could be called as post-classical law. For example, post-classical Roman law aimed at achieving equity at the expense of legal principles and sought to protect the weak at the cost of the strong. Thus, the concept of justice found its first practical imprints during this era.

One can, therefore, observe that the present system has borrowed heavily from the post-classical law. Initially, there was concentration on the concept of law. Nowhere did the question of justice come into picture. Theoretically, the question of morality and adjudication came up with

[19] Durkheim, "Rules of Sociological Method and The Division of Labour in Society", quoted in Ken, Morrison (1995). *Marx, Durkheim, Weber : Formations of Modern Social Thought*, London: Sage Publications, pp.133-141.

Dworkin's theory of naturalism where in he explained how judges should decide hard cases through his concept of 'The Chain Novel' and what should be their justification for the decision taken. A more extensive view of justice gained prominence in the 1930s-40s with the emergence of the concept of legal realism which focused on the functions of the courts (Chipman Gray). Thus, one can observe that early reforms in the legal system were centered around changing substantive laws and replacing them with new laws. However, it was Fuller and Jerome Frank who shifted focus from determined law and set legal practices to actual implementation of law[20]. This gave way to the modern notion of practical functioning of rule of law coupled with 'equal justice under law'. With this, new dimensions for measuring justice emerged. As explained by Zuckerman[21], they are:

1. Moral uprightness of a decision: Justice requires that laws should be applied and decisions should be arrived at through a proper collection of true facts.[22] A just procedure should be followed though it does not necessarily guarantee justice or correct decision. A just procedure requires an impartial judiciary and an equal treatment of litigants without any discrimination.

This principle, stated by Zuckerman, however fails to recognize prevalent inequalities which act as stumbling block in reaching out to the

[20] HLA, Hart (*2nd edition.* 2002) *The Concept of Law.* New Delhi: Oxford University Press. pp.275-282.
[21] Op.cit., Zuckerman. pp.3-10.
[22] Bowring (ed), "Principles of Judicial Procedure", in *Collected Works of Jeremy Bentham*, quoted in Ibid.,pp.4.

institution of justice. It requires the presence of positive discrimination to assist the needy in their attainment of justice.

2. *Timely Justice:* Correct and speedy process for decision making is essential to justice. Delays may result in disappearance of proofs, witnesses etc. and may exhaust the party involved (with less resources), forcing it to quit the case. On the other hand, hurried judgments can equally distort truth. Thus, correct application of justice requires that judgments should come in a time period in which it can remedy the wrong or, if the wrong has not yet taken place, at a time when the wrong may still be prevented.

3. *Cost Dimension:* It is an important dimension in the sense that justice depends on how much can be invested in the system to secure a just procedure and that how much resources are available with the parties involved to fight their cause. Thus, cost affects the quality of the procedure adopted. It, therefore, requires a state to provide ample opportunity to individual and institutions to realize the goal of justice.

It was understood that a system which failed to apply these three dimensions deprived its citizens of their right to equal justice. These dimensions provided a broad framework for the concept of access to justice. Access to justice, therefore, became most fundamental to any legal system.

It was essential for not just protecting and effectuating constitutionally guaranteed rights of the citizens but also for addressing the broader goals of development and poverty reduction, more specifically in societies where ability to access legal institutions was unevenly distributed.[23]

However, such administration of justice seemed ineffective till 'equal' access to justice, i.e., legal assistance and legal representation, for everyone was secured. Equal access to justice aimed at the availability of suitable arrangements or processes for people to claim justice, not just use law. The need for arrangement of such provisions transformed state from its laissez-faire/police state[24] status to a modern state.

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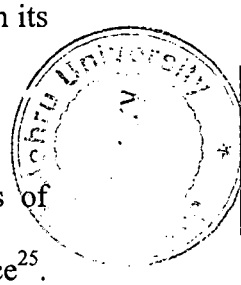

The state has been evolving along with changing notions of justice- from absolute justice to distributive to the modern social justice[25]. At the time of absolute state, based on the principle of unity, judicial powers for resolving disputes rested in the hands of one sovereign.[26] In the nineteenth century 'liberal state', the judicial functions were transformed to separate and independent legal system of organs (courts) and persons (judiciary). The powers of the state expanded further with the emergence of

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[23] Michael, Anderson (2003) "Access to Justice and Legal Process: Making Legal Institutions responsive to Poor People in LDCs", *IDS Working Paper 178*. Feb. Sussex: Brighton., p.1.

[24] In a laissez-faire state, the functions of the government are limited to those of protecting the community against external attacks, maintaining internal law and order and guaranteeing contracts. It does tasks which private enterprises are unable to do. For example, provision of relief to the destitute or the undertaking of public works.

[25] Social justice seeks to provide everyone what is due to him. In limited sense, it implies ratification of injustice in the personal relations of the people. In the wider sense, it seeks to remove all imbalances in social, economic and political life of the people.

[26] Mauro, Cappelletti (1989) *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press. pp.218.

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the welfare state.[27] The welfare state came to be understood as an institutional form of social protection. This notion suggested that social policy was mainly a governmental responsibility. The welfare state aimed at securing social justice through equal distribution of burdens and benefits. It became the duty of this welfare state to promote justice by providing everyone what was due to him. Today, it is no longer a spectator of happenings in the society.[28] Though there are limitations to what a state can provide with the resources available at its discretion, however, right to equal access to justice has to be allocated against resource constraints without any exception. Hence, legal reforms of equal access to justice are primarily based on the premise of a welfare state.

Access to Justice:

Judiciary is one of the principal institutions to establish rule of law and justice that are the only guarantee of protection to a person. To realize the goals of true democracy, equality in administration of justice is indispensable. Substantive law, however fair and equitable itself, remains impotent to provide the necessary safeguards unless the administration of justice giving effect and force to substantive law is, in the highest sense,

[27] The term welfare state was first used by Archbishop William Temple in his pamphlet 'Citizen and Churchmen' published in 1941. It became a part of general usage since 1945 when everyone recognized government's responsibility of social services – state as a positive agent for the promotion of social welfare.
[28] Op.cit., Anirudh, Prasad. pp.63.

impartial.[29] However, even where courts are highly sacrosanct, judicial system independent and substantive laws absolutely fair, legal system is still less able to protect and benefit the poor. Historically, ideals of freedom have been so demanding that only a socio-economic elite could attain them. Since the judicial process remains costly, so naturally it goes out of the reach of the poorest sections of the society. "This is unacceptable in modern democracy because justice cannot depend on the ability to pay".[30] This issue was addressed by theorists like Cappelletti and Garth who highlighted that courts were often slow and expensive, thus, reducing poor man's access to judicial justice.[31]

The access to justice movement formally started during the 1960s. It came about with the realization that the poor, in particular, have little access and are infrequent users of the legal system. The question of 'who has the access to the system of justice' became central to this movement. It pointed to various impediments, like court fees, delays, lawyer's fee, lack of awareness, legal language etc., faced by the poor, women, under trials, and other disadvantaged sections of the society in accessing justice. Broadly speaking, it highlighted two factors which determined the accessibility of justice by people, namely[32]:

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[29] E, Johnson (1974) "Freedom and Equality of Justice-The Ideal", in *Justice and Reform.* New York: Russell Sage Foundation. pp.5.
[30] Madl, Ferene, (President of Republic of Hungary), Forum Report on 'Access to Justice in Central ans Eastern Europe', http://www.pili.org/publications/ForumReport/Keynote.html
[31] Cappelletti and Garth(ed), "Access to Justice: *A World Survey*", Vol.1, book1, Milan:Dott. A. Guiffre Editore, 1978.
[32] Op.cit., Michael, Anderson. p.16.

- financial resources available to hire lawyers and use legal institutions etc.; and
- the level of institutional skill, that is the ability to understand and use the legal system.

Most generally, access to justice has traditionally referred to a range of institutional arrangements to assure that people who lack the resources or other capacities to protect their legal rights and to solve their law-related problems have access to the justice system.

Thus, the Access to Justice Movement addressed the issue that mere existence of formal right to access to justice for every citizen was not sufficient in itself. Possession of rights without effective mechanisms for their vindication was meaningless. The access to justice movement was, therefore, aimed to[33]:

- Ensure that every person is able to invoke the legal processes for redressal, irrespective of social or economic status or other incapacity.
- That every person should receive a just and fair treatment within the legal system.

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[33] S, Murlidhar (2004) *Law, Poverty and Legal Aid: Access to Criminal Justice.* New Delhi: Lexis Nexis Butterworths. pp.1.

The reform movement was classified into three waves by Cappelletti (1978)[34]:

1. Legal Aid – Legal Aid movement (1960-80) was focused to increase availability of formal legal institutions and peoples' access to justice. It sought to increase state's role in making justice accessible to all equally.

2. Public Interest Law – It implied justice for groups, i.e., Legal representation for diffuse interests, esp. areas of consumer, environmental protection etc.

3. Alternative Dispute Resolution – It was precisely the 'access-to-justice' approach aimed at removing barriers in the attainment of access to justice, without abandoning the first two reform waves. It went beyond legal representation and towards creating new court structures, use of lay persons or para professionals (both on Bench and Bar), modifications in substantive law and use of informal and formal dispute resolution mechanisms. Cappelletti and Garth refer to the third wave as the emergence of a fully developed access to justice approach.

The realization of the fact that there are grave defects in the administration of justice came, but slowly. To realize true justice ample provisions were required for the poor, in particular, to make justice more accessible to them. With the initiation of the legal aid reforms, the doors of

[34] Christine, Parke (1999) *Just Lawyers: Regulation and Access to Justice.* Oxford: Oxford University Press pp.57-58.

the courts have moved closer to the poor. These reforms are an attempt to provide the poor with the opportunity to assert their individual and property rights and to enforce those rights. Increasing accessibility to courts is expected to lessen and overcome the economic, psychological, informational and physical barriers faced by women, indigenous populations, and other individuals who need its services. Social justice, thus, formed the basis of legal reforms.

Legal Aid Movement:

Freedom and equality of justice for the poor, undoubtedly, depend on an impartial substantive law. But does the work of law end at this juncture? Is the task of judges just limited to discovering laws and imparting decisions? An even handed administration of justice is equally important. However, establishing equality in administration of justice is not an end in itself, esp. in a world full of social disparities in terms of wealth, social status, educational level, awareness etc.

The formal legal system goes by certain classical assumptions like treating all persons subject to law as equals and legal system working as a neutral third party. It assumes that the consumers of law are conscious about their rights and interests and are capable of seeking appropriate

remedies offered by the legal system. Such a system fails to recognize the legal incompetence of the "handicapped population"[35]

The present day world presents a very dismal picture where cases between two parties, be it labourer versus master or tenant versus landlord, are fought but on unequal terms. The affected party is generally weaker than the claimant and has lesser resources at its disposal. Similar is the condition in criminal cases where the victim does not even get an opportunity to appropriate justice and enforce his constitutional rights. The fact is apparent in the case of under trials, women, poor, children etc.[36] In order to ensure equality of Justice, it is not only sufficient that a law treats rich and poor equally, but is also necessary that the poor must be in a position to get their rights enforced. A true democracy includes not just establishment of equality before law but also making adequate provisions for assisting the disadvantaged to have equal access to justice. This required a thorough restructuring of the legal system which was a difficult task or provision of techniques for safeguarding interests of the weaker sections within the existing legal framework. It is with the latter that the notion of legal aid emerged.

Michael Anderson highlights various impediments in the attainment of justice by the poor which were addressed by the Legal Aid

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[35] Carlin Howard and Messinger (1967) "Civil Justice and the Poor: Issues for Sociological Research", *Law and SocietyReview*. pp.69-71.
[36] A.P, Reddy (1989) "Right to Free Legal Aid: Judicial Activism", *Supreme Court Journal*. Vol.1. p.4.

reforms.[37] He threw light on the fat that there is the entire section of refugees, urban poor migrants, vegetable sellers etc who live under severe conditions of illegality due to no available alternative. These communities, who live under constant threat of harassment or arrest by police, fear getting noticed and so avoid getting voluntarily entangled with the legal machinery to enforce their basic human rights. Moreover, due to the increased incidents of victory of big land owners and wealthy section of the society owing to the resources available with them, the poor section generally assumes that law is a tool which can be used efficiently only by the affluent category.

There are certain other barriers such as, official (in case of India, English) and legal language (very formal and not easily comprehendible) which require great amount of clarity in the usage of the terms. Due to excessive formalism in the language and procedure, the need of a legal professional becomes inevitable which acts as an additional burden due the high fees that is charged by them. These factors act as major stumbling blocks in poor man's access to justice and thus, make them reluctant to approach the legal system altogether.

With little guarantee of justice, the situation becomes all the more critical. Where on the one hand the poor are reluctant in using judicial system for their defense, on the other hand even the legal system is unable to provide adequate justice if at all it is approached. Anderson points at the lack of academic resources and current legal materials with lawyers and

[37] op.cit., Michael, Anderson. pp.16-20.

judges that are very essential for the application of legal rights of the citizens. This acts as an impediment in the procedure for the attainment of justice which is as such heavily commercialised by the lawyers to amass huge wealth. Where there is dearth of legal material, lawyers charging high fees and lack of awareness among the poor sections, justice is bound to be delayed which is in itself a big stigma for the entire legal system.

Thus, recognizing the limitations of the formal legal system, the courts began to 'democratise legal remedies' to counter injustice and the role of the state extended to providing legal assistance to the indigent persons towards increasing accessibility to justice.[38] It generated as a systemic necessity and sought to establish socio-economic legal justice by reducing the impossibilities in the legal system with respect to the poor through the creation of awareness about the legal rights and processes, rendering legal advice, helping the enforcement of court verdicts etc.

The main aim of the legal aid scheme, therefore, is to enable the oppressed and disadvantaged community to enforce their rights and corner justice against their influential opponents who have all the necessary resources to approach the legal machinery and fight the case.[39]

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[38] Ibid.,p.4.

[39] Sudhakar, Reddy (1989) "Legal Aid to the Poor", *SCJ*, Vol.1. p.47.

Legal aid is also understood in terms of social service which a welfare state owes to its citizens. E.J Cohn explained this aspect of legal aid as,

> *"It is part of that protection of the citizen's individuality which in modern conception of the relation between the citizen and the state can be claimed by those citizens who are too weak to protect themselves. Just as the modern state tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression etc., so it should protect those when legal difficulties arise. Indeed the case for such protection is stronger than the case for other forms of protection. The state is not responsible for the out break of epidemics, old age, or economic crisis. But the state is responsible for law. That law again is made for the protection of all citizens, poor and rich alike. It is, therefore, the duty of the state to make the machinery work alike for the rich and the poor"*

Hence, legal aid formed an important tool for realizing the goal of social justice. The idea was picked up by the Indian state and got crystallized with the 42nd Amendment and got enacted through the Article 39-A of the Directive Principles of State Policy in 1976. It stated 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."

Legal Aid in India

Though the establishment of a more responsive judicial administration was done in 1976, attempts towards it have been in progress for years earlier. The Preamble of the Indian Constitution promised to secure justice, liberty, equality and fraternity for all its citizens. Moreover, the Article 14 enshrined in the Constitution, declared all persons as being equal before the law and to be equally protected by the law. Equal protection of the laws implied at equality of access to Courts, i.e., to receive assistance of the Courts for protection of their rights. However, various historical, social, cultural and economic factors coupled with bureaucratic and political corruption, affected the noble purpose of legal justice which was one of the chief concerns of the Constitutional framers. These factors resulted in total neglect of the poor and the beneficiaries turned out to be those having money power and lately muscle and contact power.[40] Even

[40] C.M, Jariwala (1999) "Poorman's Access to Judicial Justice: A Reality or Myth", *IJPA* vol.45. p.331.

Article 22(1)[41] was restricted in terms of providing equal access to justice as even it did not guarantee any right to legal assistance from the state. Similarly, Art.32 which confers right to move the court was limited as only those who could afford expensive justice could reach the courts, which again resulted in unaffordable judicial justice for the poor masses. Learning the inadequacies inherent in the Constitutional Provisions, the Government of India took a step ahead in legal reforms and included the concept of legal aid in the form of Directive Principles of State Policy.

The ground work for establishment of legal aid, however, had already been done by various commissions, such as Justice N.H. Bhagwati Committee 1950; 14th Law Commission 1958; Justice P.N.Bhagwati 1971; Justice V.R Krishna Iyer Committee 1973 etc. The legal aid scheme was also floated in different states, like Madhya Pradesh Legal Aid and Legal Advice Act, 1976, Uttar Pradesh Legal Aid to the Poor Scheme, 1975 etc. The efforts, however, remained dormant until the 42nd Amendment Act,1976. Legal aid then came to be recognized as a constitutional imperative arising from Articles 14, 21, 22[42], 32 and Article 39-A. As a result, legal aid to the poor acquired the status of a fundamental right.

Thereafter, the reform drive proceeded with the appointment of the Committee on Implementing Legal Aid Schemes (CILAS) in 1980 under

[41] Article 22(1) guarantees to an arrested person the right to consult and to be defended by a legal practitioner of his own choice. With the Hussainara Khatoon case, 1979, it became the duty of the state to provide lawyer to an accused unable to afford counsel.

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the Chairmanship of P.N.Bhagwati. It was only in 1987 that the Legal Services Authorities Act got enacted with the primary objective of providing free and competent legal services to the weaker sections of the society and to organize Lok Adalats for the purpose of achieving the said goal. The Act was brought into effect as late as 1995 and prescribed the eligibility criteria for legal aid. For example, Section 12- to a member of SC/ST, to mentally ill or otherwise disabled person, sufferer of mass disaster, flood, ethnic violence, in custody etc.[43] It worked at various levels – National Legal Services Authority under Justice A.S Anand (1998), State Legal Services Authority, District and Taluk Legal Services Committees. All had similar functions of providing legal aid and organizing Lok Adalats.

After the constitution of Central Authority and establishment of the NALSA, few more schemes and measures came up by the central authority, such as:[44]

- Accreditation of NGOs for Legal Literacy and Legal Awareness campaign;
- Legal Aid facilities in jails;
- Publication of 'Nyaya Deep', the official newsletter of NALSA;
- Making rules for refunding court fees;

[43] http://causelists.nic.in/nalsa/l1.htm, "Legal Aid Movement in India – its Development and Present Status".
[44] Ibid.

➢ Appointment of 'Legal Aid Counsel' and Free Legal Aid Centers.

Also, the 15th Law Commission Report which deals with judicial reforms concerning law and poverty and the enhancement of judicial administration towards a making it more responsive to reasonable demands and the 16th Law Commission Report on "Reforming the Law for Maximising Justice in Society and Promoting Good Governance under the Rule of Law" are still under process.

Though continuous attempts have been made in the direction of making justice more accessible to the needy, the reforms have been extremely slow and tardy with huge intervals of 8-10 years in framing and implementing the proposals. There has been a fragmented and piecemeal approach which has hardly had any significant impact. Since 'people experience justice (and injustice) not only (or usually) in forums sponsored by the state, but also at the primary institutional locations of their activity-home, neighbourhood, workplace, business setting and so on[45], it is there that justice must be improved.

The dissertation seeks to enlist the problems faced by the disadvantaged communities in the legal justice system and analyses various reforms with regard to increasing poorman's access to justice through the

[45] Galanter,M (1974) "Why the Lawyers have come out ahead: Speculation on the Limits of Legal Change", *Law and Society Review.* Vol.9. p.162.

means of legal aid. It inquires into the genuineness of the entire reform process and accordingly highlights the problems and contradictions inherent in the programme. It proposes a model of justice that is more than law. It recognizes the fact that there is a need to revitalize the entire legal machinery to the advantage and protection of the poor. The attempt is to discover different strategies and suggest more suitable measures and techniques to counter the negative forces which block the effective attainment of justice by the poor and to explore ways in which access to justice could be enhanced, whether through legal aid or other additional means.

CHAPTER THREE

LIMITATIONS OF THE INDIAN LEGAL SYSTEM: PROBLEMS FACED BY THE POOR IN ACCESSING JUSTICE

"Law should not sit limply, while those who defy it go free and those who seek its protection lose hope." – Jennison V Barker, 1972, 1AllEvr 997, quoted in Committee Report 2000.

The fact that constant progress has been made in legal reforms in the direction of making the legal structure more compatible with changing conditions and more responsive to the needs of the poor is indisputable. Societies have moved from the rule of patriarchs to that of sovereigns to customary law and most importantly to legal codes. This was followed by the emergence of the liberal notion of law, which involved individuals rather than patriarchs. The concern for justice has arguably prevailed ever since the period of classical Roman law when jurists offered legal opinions and advice on the request of private parties.[1] However, it was in 1748 that Montesquieu put forth the doctrine of

[1] Pang, Emily mentioned classical Roman Law in her essay *The Evolution of "Justice"*, http://www2.arts.ubc.ca/essay/2000essays/2000_third(tie)_Emily_Pang.pdf

separation of powers[2] on the basis of which the entire edifice of the judiciary came into existence.

Thus, the democratic and more secular ideals of justice and individualism emerged as late as 1700s in the form of law courts in England followed by the US federal system of courts. An important feature of the court system was that of 'stare decisis', that is, judgments were made on the basis of past similar cases which added predictability to the judgments, making the guarantee of justice more certain. This pattern was followed more rigorously in the West where the development of society was directly related to that of justice system. Such legal development however, did not penetrate so effectively in other colonized nations.

The economies of the colonized nations suffered greatly during the phase of industrial revolution. This phase was marked by lop-sided development as the colonial powers drained the subject nations of their resources and wealth which were used for the industrial growth in the West. This created disparities between the colonial powers and the dominated nations. The industrial revolution also created class distinctions – haves and have-nots. With the dominance of the elite sections, the conditions of the poor proletariat class further deteriorated and resulted in

[2] Mamta, Rao (2002) *Public Interest Litigation in India: A Renaissance in Social Justice.* Lucknow: Eastern Book Company.p.2. "As per the doctrine, Legislature, Executive and Judiciary are to be separated in contrast to their earlier concentration in the hands of the Monarch". That is, the concentration of powers in the Monarch was divided and was to be functionally performed by three organs – Legislature, Executive and Judiciary. Earlier all the three powers were usurped by the Monarch from the Church.

generation of immense poverty in the colonized nations. The condition of the colonies worsened in the aftermath of the two World Wars (1914-1918 and 1939-1945). The newly independent nations, after the end of the Second World War, were more focused on the tasks of economic development. The problems of the poor and deprived masses, of the war torn countries, were given little importance and most of the resources were utilized to cope up with the development of the advanced nations and in resolving internal disputes. Thus, the industrial revolution and the two World Wars created disparities among nations and people within nations.

It was only with the emergence of the United Nations that the protection of individuals and their rights became a matter of concern for the legal machinery. Until the emergence of the UNO, the problems of the poor and disadvantaged were overlooked as the state concentrated solely on economic development. Radical change towards accommodation of the needs of the deprived was expected to come with the formulation of the UN Charter which established "universal respect for, and observance of Human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".[3] However, the Charter did not define the contents of Human Rights. The task was accomplished through the UN Universal Declaration of Human Rights[4], 1948, wherein the severe brutality and marginalization of the poor was checked to a great extent,

[3]Ibid, p.8.

[4] UNDHR, 10 Dec.1948, declared that human beings are born free and have equal dignity and rights without distinction of any kind such as race, religion, colour, creed, sex, language, political or other opinion, national or social origin, property, birth or states.

fundamentals of human rights and freedoms were institutionalized and the judiciary became a crucial instrument in this direction.[5] Earlier, the functions of the courts were limited to law making, imparting decisions and settling disputes. But with the UNDHR, the judiciary became more sensitive to the issues of social justice.

The Indian Constitution embraced the goals of UNDHR aiming to secure rights, liberty, equality and social justice to its citizens. It included freedom from arbitrary arrest, fair criminal trial, equal pay for equal work, provisions for securing adequate livelihood, education etc. Though the idea of human rights in terms of social justice was borrowed from the UNDHR, the concern for securing justice for the poor and needy prevailed much before that. During the pre-British era, there existed special judicial assemblies and attempts towards fair trials were made through the 'conscience of the local community'.[6] It made justice easily accessible and inexpensive. However, the prevalence of one such fair ruler was not a guarantee that the future rulers would be equally just or non-tyrannical. Some sort of favouritism always existed in the royal courts.

It was with the introduction of British pattern of courts that some predictability and possibility of justice was added to the Indian legal system. The introduction of the rule of law and universality added some

[5] Kual, J. L (1995) "Human Rights in Developing Countries: Some Policy and Legal Considerations", in B.P. Sehgal (1995) *Human Rights in India.* New Delhi: Deep and Deep Publications.pp.621-632.
[6] Mukhopadhyay, Asok (1999) "India's Grassroots Judiciary", *Indian Journal of Public Administration.* Vol.45. July-Sep.

certainty of fairness and justice.[7] All the same, with the coming of British colonial rule, and the rise of law courts and lawyers, the traditional Indian judicial system got transformed into a more complex pattern. The court system was characterized by lengthy judicial procedures and excessive formalism in terms of language, etiquettes and outfits which made it imperative to hire a lawyer. This made the judicial system complicated and expensive. These features distanced the poor from the legal machinery and the possibility of attainment of justice, specifically for them, was eluded. Also individual rights were never a concern for the British courts. The only right to be protected was the right to property [8] and the fight for justice was largely covered by the Indian Reform Movements, such as those against Sati, and for the education for girls, removal of untouchability etc. Only those cases involving higher officials were dealt with in the British courts.

The Indian judicial superstructure descended from the British model and to an extent from the Government of India Act, 1935[9], with only slight modifications. For example, from the Government of India Act 1935, we borrowed a federal system of courts with an expanded appellate jurisdiction which later gave way to the emergence of the

[7] Vasudha, Dhagamvar (1998) "Rule of Law: Squaring the Circle", in S. Saberwal and H. Sieverss eds. *Rule, Laws, Constitution.* New Delhi: Sage Publication. She explained Rule of Law as against rule by personal whimsy and where no one is above law, be it state or sovereign. Also, certainty of law means everyone should know or should be able to ascertain the consequences of their actions in advance. Universality of law means that it applies to everyone regardless of who they are. Equality of law means that all are treated as equals before the law.

[8] Court Fees Act, 1870, Act No. VII of 1870.

[9] Government of India Act, 1935, introduced a federal constitution to India, involving distribution of powers between the Centre and the constituent units. The Federal Court of India began functioning from October 1, 1937 with a very limited original jurisdiction.

Supreme Court of India in 1950. However, independent India inherited a system which was always averse to the claims of the weak and deprived. Attempts were made to counter the defects of the inherited legal system. Various indicators for the effective functioning of the legal system were prescribed, such as speedy justice, low cost, moral uprightness of the decision, impartiality, probity etc. Though the judicial structure continued to follow the British pattern of judiciary, the Constitution tried to make justice readily available for the citizens.

Keeping the standards of human rights in mind, the Indian Constitution laid certain provisions for the protection of and guarantee of rights to the citizens. The Preamble of the Indian Constitution set the aim to secure for all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring dignity of the individual and unity of the nation. The Constitution enlisted various articles such as article 14, 22, 32 etc. which sought to secure legal equality and enhance equal access to judicial institutions. These articles were included to ensure a just and egalitarian social order. The Constitution also provided for distributive and corrective justice. [10] Under the Constitution, it became the duty of the Supreme Court to enforce the Fundamental Rights of the citizens and the provisions of the Constitution. The Indian

[10] Distributive justice implies securing balance of benefits and burdens. Corrective justice is understood in terms of restoring the status quo through redressal of imbalances between benefits and burdens.

judiciary attempted to establish an egalitarian legal system where all were equal in the eyes of law.

However, with gross inequalities embedded in society, such a legal system proved inefficient in addressing the plight of the poor, socially deprived, disadvantaged and backward classes of the society who lack appropriate resources to approach the machinery of justice.

CRITIQUE OF THE INDIAN JUDICIAL SYSTEM

Despite the concerns of the national political leadership for the poor, the administration of justice has tended to neglect the needs of poor citizens[11] and its main beneficiaries have been persons with money, political and bureaucratic influence, and even lately, connections with musclemen. This has nullified the aim of Article 14[12] of the Indian Constitution as the legal system has unintentionally turned in favour of the affluent sections and hampered the notion of legal equality. Even Article 22[13] was restricted in terms of providing equal access to justice as even it did not guarantee any right to legal assistance from the state. Similarly, Article 32, which confers a right to move the court is limited as only those who can afford expensive justice can reach the courts, thus making justice unaffordable for the poor.

[11] The usage of the term 'Poor men' implies those who are socio-economically deprived, mentally ill, old age, women, children, weak, disabled, under trials etc.
[12] Article 14 provides that state will not deny to any person equality before law or equal protection of laws.
[13] Article 22 provides right to consult and to be defended by a legal practitioner of one's choice by a person who has been accused and detained in custody.

The biggest paradox lies in the fact that the judiciary, which is the protector of the people against arbitrary state action, is itself a state organ. When the court is an umpire between two parties, one of which is the state, its neutrality is vulnerable to erosion. The courts were created to protect people from 'arbitrary government actions – ranging from unpredictable, ad hoc regulations and taxes to outright corruption.'[World Bank Report, World Bank, 1997:41]. They were needed for protection from unchecked political and administrative action which could lead to extreme Human Rights abuses (killings, abduction, tortures by paramilitary forces, or denial of basic services such as rehabilitation, unhygienic surroundings as in slums), problems of water and electricity etc. The logic of courts was to have a neutral third party for resolving disputes and imparting impartial and just judgments. But the court does not remain a neutral party when one of the contending parties is the state itself. This limitation was highlighted in cases such as Narmada Bachao Andolan where the concerns of the poor have been neglected and unattended by government, and there is little evidence that strictures are being placed on arbitrary state action. The poor are most likely to lose their property or land arbitrarily seized or confiscated by the government for its developmental purposes and projects, e.g., the Land Acquisition Act which granted to the state the power to expropriate property or land from farmers for housing by providing only minimal compensation. The

squatters and other poor people living in conditions of illegality are often the consequence of such government acts.[14]

The conditions for obtaining justice have been so demanding that only a socio-economic elite could gain access to them. Thus, the mere existence of law and legal institutions is not a sufficient condition for the preservation of freedom and liberty, and for guaranteeing equal protection to all sections of the society.

LIMITATIONS OF THE INDIAN LEGAL SYSTEM

The poor condition of the weaker sections is itself a result of a flawed legal system. Their condition is further worsened due to the constant neglect of their miseries by the state machinery. Being deprived of the necessary skills and resources to turn the justice system in their favour, the poor are most likely to be victimized and ill-treated by the police and thereafter, by the legal machinery than the rich.[15]

In terms of providing access to justice to the weak, the Indian judicial system manifests severe shortcomings. The major impediments in the path of equal access to justice by the poor, socially, financially and intellectually, are:-

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[14] Michael, Anderson (2003) "Access to Justice and Legal Process: making Legal Institutions responsive to Poor People in LDCs", *IDS Working Paper 178*. Feb. Sussex: Brighton. p.16.
[15] ibid., pp 2-3.

1. Lack of awareness regarding legal claims:

The poor are generally unaware whether the problems they are facing could be challenged. For example, the free riders of environmental pollution are unaware of the fact that they can claim compensation for health hazards due to industrial pollution. Similar is the condition of the slums, squatters and also the migrant labourers who are unaware of the provisions enlisted for them in various acts such as Inter state Migrant Worker Act, 1979, Contract Labour Act, 1970, and the Minimum Wages Act, 1948. These Acts included provisions for drinking water, toilet facilities, blankets in winters, proper accommodation, crèches etc. to the workers by the contractors.[16] While the minimum wages range from Rs125 to Rs 132 per day, the contract labourers are given only Rs17 to Rs100 per day from their contractors.[17] Though a number of provisions for securing social justice are provided for in the Acts, the purpose is nullified due to a lack of awareness among the poor. They are incompetent in constructing their legal claims. Moreover, they are under fear of losing their jobs if they raise their voices against these contractors. Thus, the ignorance about identifying their problem, in the first instance, and thereafter questioning it on legal terms, is the starting point of the denial of social justice.

[16] Inter state Migrant Worker Act, 1979. Contract Labour (Regulation and Abolition) Act, 1970. Minimum Wages Act, 1948.
[17] Survey conducted by Venkat, "Living Under Bondage", 2006.

There are hardly any effective mechanisms to spread legal education to the poor masses, except for limited participation of the non-governmental organisations and some minor policy programmes of the Government such as setting up of law clinics and appointing legal luminaries to impart legal education to poor people. The dearth of legal empowerment programmes for the poor, who are, in reality, in most urgent need of such schemes, has further rendered the goals of Constitution and judiciary ineffective. Once entered in and involved with the machinery of justice, the poor are faced with problems of a more serious kind.

2. Police misconduct:

Approaching the law enforcement agency for protection is the first step from where the citizens enter the doors of the judicial system. It also forms the first step from which the distance between the poor and the system of justice is increased. The bias in the treatment, by the police, of the rich and the poor, is quite evidently tilted towards the rich and influential. The poor are most likely to suffer harassment and arbitrary treatment by the government officials as they have no money to bribe or influence the system. As such, the poor, who are often victimized by the police, are reluctant to approach it. All they see outside the police station - various atrocities and injuries inflicted upon the poor by the government officials through torture, arbitrary seizure of their land and confiscation of their goods etc. Moreover, in most places, it is the poor who are pressurized to pay for basic services and necessities for livelihood, such as

access to water, health care facilities, education, electricity etc., despite fact that it is clearly beyond their capacity to pay for these. Moreover, these are still not adequately provided to them.[18] Again nothing is done to protect the sufferers of massive developmental projects, e.g. the Piparwar Case.[19] These examples display how the violation of social justice and human rights goes unnoticed and unchecked by the entire legal system. Despite all the torture and fear, if they do approach the police to file their complaint, their case is treated with little attention and more often than not they are put to harassment and humiliation by the police officials. Attached to this is the problem of living in conditions of illegality. Due to Acts such as Land Acquisition Act, 1894,(amended in 1984) the lands of small farmers and rural poor have been expropriated by the state without providing any compensation or alternative arrangement to them When the government fails to provide living space to the poor and immigrants they set up illegal residences or 'Jhuggis'[20]. Thus, they are reluctant in raising their voice for the protection of their rights as they are likely to get defeated for being violators of law themselves. This also generates fear among the poor that raising voice to claim their rights would debar them from the welfare programmes on which their survival is based. Their position is more vulnerable to getting subjected to police misconduct.

[18] Ibid. p.3.

[19] In Piparwar Case the displaced tribal community was thrashed by the police brutally on demanding their rights for rehabilitation granted by the court of law in Bihar.

[20] The term jhuggis is used to denote squatter settlements where basic human rights for decent living are violated in terms of dilapidated households, unsafe drinking water, unhygienic living conditions, food scarcity etc. and where they live under constant threat of losing their livelihood means and atrocity of police.

Institutionalised tolerance of such deviant behaviour of officers aggravates the problem. In such a circumstance, police behave as tools for oppression rather than protectors of rights of citizens. Most of the poor people fear approaching the police due to past experiences of torture and a fear of further harassment and humiliation. Factors which restrict the poor from reaching out to the enforcement agencies include brutality, harassment, improper investigation, corruption, bribery and ill treatment etc. Even the women undergo physical violence by male police officers.[21] Thus, for the poor this pattern of approaching the machinery of justice through police and the complicated process of filing FIRs discourages the use of government services.

3. Financial Obstacles:

"Everybody is equal in the eyes of law but not in the courts of law."[22] The establishment of the fixed court fee criteria has failed the purpose for which the Indian Judicial Structure was founded. The practice had been continuing since the British period. Through the Court Fees Act, 1870, a number of measures to extract money out of the pockets of Indian plaints were provided. For instance, in cases of land revenue: the fees payable in such suits extended to fifteen times the net profit arisen form the land before the date of presenting of the plaint.[23] Also the Courts Fee

[21] Conclusion derived out of the interview conducted with poor litigants in various courts in Delhi, 2006.
[22] Shivraj, Patil (2003) "The Litigation and Performances of the Judiciary", in Kashyap (ed) *The Citizen and Judicial Reforms: Under Indian Polity.* Delhi: Universal Law Publishing Company Pvt. Ltd.p.86.
[23] Court Fees Act, 1870, Act No. VII of 1870, chapter 3.

Act 1870 required that any person filing suit for money damages was to pay in advance a non-refundable court fee amounting to 7-11% of the damages sought.[24] This Act was designed to restrict the use of judicial benefits by the poor and to discourage litigation, in general. Even today, court fees is to be paid by the party concerned who seeks to get assistance from the judicial departments and for the redressal of its grievances. The court fee starts with Rs250/-. Though it says that no court fee is payable in matters filed by Supreme Court Legal Aid Committee, it was inferred from the survey that almost all the indigent population who are unaware of the Legal Aid Provision itself, end up paying the court fee.[25] This included even the educated poor. Nor were the lawyers responsible enough in making them aware of this right. Thus, in a civil suit the poor man finds it difficult to approach the judicial system due to incapacity to afford the expensive court system.

On similar lines was the Legal Practitioners Act, 1846, which gave the lawyers the freedom to charge any fees for the professional services rendered by them, regardless of the nature of the client, be it rich or poor. Even the Advocates Act, 1961, (of independent India) concentrated only on professional quality and discipline, totally ignoring this crucial aspect of making available to all, the opportunity of obtaining justice. With such freedoms, lawyers are often found furthering their own social status and market advantage. Moreover in legal systems, such as

[24] Op.cit., Michael, Anderson. p.16.
[25] Conclusion derived out of the interview conducted with poor litigants in various courts in Delhi, 2006.

that of India, private citizens are not even allowed to appear in court to present their case, which makes the need for lawyers unavoidable.[26] The Supreme Court Rules explicitly mention that *all plaints, petitions, applications and other documents are required to be presented by the plaintiff, petitioner, applicant, appellant, defendant or respondent in person, by his duly authorized agent or by an Advocate-on-Record duly appointed by him for the purpose, at the Filing Counter of the Court*[27], which proves that the need for a lawyer is imperative.

Lawyers exploit the helplessness of the people and charge exorbitant amount from clients to amass wealth. As quoted by Carlin in his study of the ethics of New York City bar [1966],

> *"The best trained, most technically skilled, and ethically most responsible lawyers are reserves to the upper reaches of business and society. This leaves the least competent, least well-trained, and least ethical lawyers to the smaller business concerns and lower-income individuals. As a result, the most helpless clients who most need protection are less likely to get it."*[28] *These lawyers [were] are looked down upon as pests; but they [were] are constantly employed because they [were] are the only available guides in the new legal labyrinth.*[29]

Not only this, even the Code of Criminal Procedure shows its inherent anti-poor bias by providing that after depositing the security

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[26] Ibid.p.19
[27] Supreme Court Journal, 2006
[28] Christine, Parker (1999) *Just Lawyers: Regulation and Access to Justice.* Oxford: Oxford University Press. p.25.
[29] Metcalfe and Elphinstone, *Indian Bar Review*, p.320.

amount, the accused can be released on bail. This establishes inequality as the price of the bond is usually beyond the capacity of the poor.[30] Thus, one can see that there is an anti-poor bias not just in legal structure but in the law itself. Due to such limitations the legal machinery remains underused by that section of the society which is in most need of it.

4. Excessive formalism:

The use of official (in the case of India, English) and legal (very formal and not easily comprehendible) language, which requires great amount of clarity, has made the employing of lawyers inevitable for parties involved. Lawyers tend to exploit the situation charging high fees from their clients. These formal procedures relating to language, discipline, promotions, suspensions etc. were established during the British period to establish their control over the Indian administration and the people. The post-independent legal system retained these colonial formal rules including addressing judges as 'your honour' or 'the honourable court' which symbolized the 'colonial hangover'.[31] Nor did the bar omit such procedures and practices to continue their domination over the legally incompetent population. This feature was easily depicted through the survey, discussed in Chapter Four of the dissertation, as none of the lawyers blamed the use of formal legal language or dress code as a

[30] op.cit., Michael, Anderson. p.19.
[31] Jyotsna, Singh, BBC News, Delhi, http://news.bbc.co.uk/1/hi/world/south_asia/923930.stm. The phrase denotes the obsession with the British style judicial practice which was considered as more advanced and modern.

factor significant in making the judicial system more user-friendly.[32] Along with the use of specialist language and such formal practices, the elitism of the justice system is also displayed by the fact that courts are located in urban areas which further isolates the poor who are in any case hesitant to approach the judiciary. Distance from the court has proved to be a crucial factor causing discomfort in approaching the legal system.[33]

The use of foreign language, formal procedures and practices, prescribed dress code etc. create a feeling of cultural alienation among the poor as they are not able to identify with the system. The Bar Council Rules under the Advocates Act, 1961, lay that "*An advocate shall appear in court at all times only in the prescribed dress code and his appearance shall always be presentable.*" Such practices create an aura which intimidates ordinary people. The poor people lack the confidence to face such a huge and formal machinery. There needs to be an emphasis on increasing the efficiency of the lawyers and clients in presenting their case and not on how they should appear.

There are certain other formal rules which hinder the process of obtaining justice. For example, Chapter II of the Bar Councils Act states that, "*An advocate shall use his best efforts to restrain and prevent his client from resorting to any misconduct in relation to court,*

[32] Conclusion derived out of the interview conducted with poor litigants in various courts in Delhi, 2006.

[33] Conclusion derived out of the interview conducted with poor litigants in various courts in Delhi, 2006.
90% of the poor litigants expressed their discomfort in approaching the legal set up due to the distance from the court.

counsel or parties. He shall refuse to represent such a client. He shall not consider himself a mere mouthpiece of the client."[34] Excessive restrictions in the usage of language in the courts and the delicate terms for contempt of court creates fear among the litigants of mistaken misconduct restricting them from expressing their problems or fears freely. They undergo a constant fear where they might be abandoned by their lawyer or held under the contempt of court. This limits and affects the justice seeking capacity of the judges as the witnesses, who are permitted to speak as much asked, might not be able to give valuable inputs for the case. Thus, at times, correct judgments or decisions are not reached at.

It increases user's discomfort in using the legal machinery. Due to such legal formalities, the poor and ignorant people prefer to solve their problems outside the courts and through informal mechanisms of dispute resolution. Such informal mechanism might be beneficial from the point of view of the court system but might not grant appropriate justice to the poor person.

5. Delays:

"*It is common knowledge that the two major problems besieging the Criminal Justice System are huge pendency of criminal cases and the inordinate delay in disposal of criminal cases on the one hand and the very low rate of conviction in cases involving serious crimes*

[34] Bar Councils Act, Chapter II, *Rules under the Section 49(1)(c)*.

on the other."[35] The research work of Maja B. Micevska and Arnab K.Hazra[36] shows that about 20 million cases are pending in lower courts and another 3.2 million in High courts. Its analysis expressed the need of employing over 2724 additional judgeships if all Criminal and Civil cases were to be disposed within 5years. Such huge pendency and congestion of cases is the outcome of infinite delays in the trial process due to financial constraints for establishing more legal structures, huge unfilled vacancies of judges, delay tactics used by lawyers and litigants on irrational grounds etc.[37] From the survey discussed in Chapter Four of the dissertation, it can be inferred that the most prominent factor causing delays in courts is the presence of excessive legal formalities along with delay tactics used by the lawyers to some extent.[38] Due to the prevalence of long system of hearings and provisions of adjournment of the court, the lawyers are found to be using delay tactics such as absenteeism, to stretch a case for long period. This may exhaust the resources of the opposite party forcing it to withdraw the case. This, in turn, increases the case pendency and results in increased case congestion in courts.

Moreover, the number of holidays per year are another cause for huge pendency of cases. In terms of working days per year, the

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[35] Malimath, V.S (chairperson), Report of the Committee on *Reforms of Criminal Justice System* Vol.1. March 2003. Government of India. Ministry of Home Affairs.

[36] Hazra and Micevska, "The problem of court congestion: Evidence from Indian lower courts", 2004.

[37] Venkatesan (2004). "For Judicial Transparency". *Frontline.* Vol.21 (17). Aug.14-27.

[38] Conclusion derived out of the interview conducted with poor litigants in various courts in Delhi, 2006.

Supreme Court of India is operational for only 180 days, the High Courts for 200-210 and the lower courts for 240-270 days.[39] Despite more working days in the lower courts, the situation is in no way better as they do not comply on speedy justice aids, such as computer, dictaphones etc.

The actual sufferers of delays are obviously not the affluent and resourceful but the poor for whom each day spent in court affects adversely their daily livelihood and wages. For the poor person, every hour that he spends in the court matters as it means time away from his income-generating activity and a cut in his income. "Their fundamental components of livelihood are at stake." For property and business cases, unending court hearings and delays in judgments are a matter of profit and loss. However, for the poor it's a matter of their means of survival.[40] It is most commonly observed that it is the poor and ignorant who linger within the boundaries of jail for several years for petty crimes while the influential move about freely owing to sufficient means to get bail.[41]

Thus, it is the poor and disadvantaged people who are in desperate need of an approachable and comprehensive legal system. Of course, such a system is the requirement of all, but unfortunately the poor are the ones who are deprived of access to the machinery of justice. The influential, rich and empowered sections of society are in a better position to claim their rights, even if this involves time spent in visiting courts and

[39] Op.cit.,Hazra. pp27-29.
[40] Op.cit., Michael, Anderson. p.20.
[41] Observation of the survey conducted with Tihar Jail women inmates, 2004, Delhi.

hearings. The condition of the poor is more pitiable, especially in those cases which require protection against a dominant opponent, such as those between women and their husband or in-laws, between citizens and the state etc. They are worst affected by such a system which works "haltingly, partially and occasionally."[42]

Other than such difficulties faced by the poor, delays also provide ample time and opportunity to the accused to win over the victim, tamper with evidences, compromise investigating agencies and the police, cause documents to be misplaced etc. Additionally, due to there being little guarantee of justice, even the educated masses prefer to stay away from judiciary for it imposes unnecessary costs and by the end of a long case even the judge is left with little potential for a detailed examination. An important repercussion of such a long process is the reduction in guarantee of justice and increased congestion due to pendency of cases in courts of law. It affects fairness and efficiency in imparting appropriate justice to the poor. Such a pattern points at the insufficient attention given to the legal needs of the poor.

6. Professional malpractice:

The Constitution of India accorded the Indian judiciary a place of pride and honour and entrusted its guardians (legal officials) with

[42] Galanter, M and Krishnan, J.K, paper on "Debarred Informalism: Lok Adalats and Legal Rights in Modern India", in First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 13Nov, 2002, p.6.

the duty of securing social justice in the society.[43] However, what has emerged over the years does not present a very heartening picture. On the one hand police adopt an anti-poor attitude[44] in the first instance by harassing them, then by extorting money for registering complaints, showing indifference to the poor in the follow-up action after registration of the case[45], ill-treating them and violating human rights norms against them. On the other hand, the attitude of lawyer is no less harmful for the justice delivery system with regard to the poor and deprived.

The lawyers are more concerned about the financial returns while taking up a case rather than professional values, thus becoming unresponsive and indifferent to the needs of the poor. The degree of the lawyers' attention received by the poor is much less than that claimed by the rich. The maximum concession offered by a lawyer to the indigent is around 25%. This was proven by the survey. Approximately half of the lawyers fix their fees in accordance with the nature of the case, without regard to the financial condition of the litigant who could often be the single earning member of his/her family.[46] It is at this very instance that the process of denial of justice to the poor begins. The rationale for the

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[43] "Lawyers are seen as guardians of law" expressed in Pollock, J (4th edition. 2004) *Ethics in Crime and Justice: Dilemmas and Divisions.* USA: Wadsworth/ Thomson Learning.p.232. Also Justice K.Iyer expressed "lawyers are vehicles of social justice" in judgment of Bar Council of Maharashtra V M.V.Dabholkar, mentioned in Jariwala, C. M (1999) "Poorman's Access to Judicial Justice: A Reality or Myth", *Indian Journal of Public Administration.* Vol. 45. pp.330-347.

[44]Rakesh, Bhatnagar (1997) "Judicial Reforms Brook No Delay", *Times of India.* Delhi. 29 July.

[45] Arvind, Verma (1998) "Police Accountability- Lessons from Other Countries", *IJPA.* Vol.45 (4). Oct-Dec. p.789.

[46] Conclusion derived out of the interview conducted with poor litigants in various courts in Delhi, 2006.

emergence of this profession was to assist the incompetent person in presenting his case before the courts of law where the use of formal procedures tends to go beyond the understanding of the layman. However, the service is generally provided more to those who posses wealth and social status.[47] The offices of lawyers have virtually become commercial shops.[48] Some of the most common unethical practices in this profession include delay tactics, absenteeism, misplacing documents, tampering with evidence (to turn the case in one's favour), constructing false evidences, overcharging, harassing the opponent and discourtesy.[49] "For a price a lawyer will use every trick in the book to help a client."[50]

The scope of such professional misconduct has oddly been further widened by the rules established by law. Rules under the Bar Council Act allow the witness or client to answer only as much asked. This leaves lawyers with enough scope to play around with words and hide facts significant to the case, which obstructs the attainment of rightful justice. Moreover, the lawyers are required to refuse representation of such a client who resorts to misconduct in relation to court, counsel or parties. This is very well exploited by the shrewd lawyers who use provocative tactics against victims or witnesses or the accused to make him fall prey to the judicial misconduct, thus distracting the legal process. Moreover, influential lawyers and regulars have a network of settings which enables

[47] Op.cit., Parker. p.20.
[48] op.cit., C.M, Jariwala. pp.330-347.
[49] Op.cit., Parker. pp.10-14.
[50] Cass and Sackville, 1975, quoted in Ibid., p.25.

them to push a case up on the daily listing of cases, leaving the poor completely unattended and ignored. Such a system perpetuates injustice such that the fate of the matter is decided not on the merits of the case but by the shrewdness (or lack of it) of the lawyer a party has engaged.

There allegations of malpractices, such as corruption, against the judges as well, though this cannot be substantiated.

7. Accused-friendly system:

From the books of law it is clear that our criminal justice system is more concerned with the accused rather than the victims. "The victim remains much in oblivion more so if he/she is poor in our Criminal jurisprudence."[51] It is true in quite a few senses. Though justice seeks to protect the victim, the victim finds no place or participation except in the court room and that too only when called as witness. Moreover, it places the burden of proof on the victim who is required to furnish evidences to prove the claim. It becomes troublesome for a victim, who has already suffered the misery. The problem is doubled if the victim is poor or weak. Cases such as Bhanwari Devi are burning examples of our severely flawed legal system where the accused are left free and the inflicted persons are burdened to collect evidences to prove their charges of the atrocity caused.

[51] J.G, Roy, and Yatish, Mishra "Criminal Justice Administration in India: Emerging Trends and Futuristic Introspection", *IJPA.* Vol.43. p.495.

CONCLUSION

It is popularly believed that the judiciary is the bulwark for protecting the interests of the poor and the weak. The efficiency of a system is dependent on the extent to which it can make provisions to assist the needy to approach the judiciary and obtain justice. However, in the context of immense ignorance, illiteracy and poverty among the population, coupled with the absence of an effective and accessible machinery of justice, the problems of the protection of rights and attainment of justice are doubled.[52] The system tends to overlook such difficulties. Thus, with such a system, the poor and deprived would prefer to undergo minor inconvenience or some affordable financial loss rather than approaching the courts for justice.

Such a system is clearly not efficient in fulfilling the goal for which it was established. The presence of law does not prevent crime or wrongful acts. Contrarily, it increases criminalization of the society as the wrong-doers and offenders are well aware of the complications and judicial loopholes and the effect on the victim of the long drawn out process. Such a system discourages the poor from claiming their rights and leaves the rich and powerful to continue with their illegal acts by defying

[52] Joshi, K. C (1977) "Legal Aid: A Segment of Social Justice", *Kurukshetra Law Journal*. Vol.31.pp.48-49.

law. Such a system confirms the notion that, "Laws grind the poor and rich men rule."[53]

In order to overcome the lacunae in the justice dispensing system and to fulfil the requirements of true justice, reforms in the direction of *access to justice* for the poor were initiated in India, in the 1960s by the Government of India. These reforms were based on the premise of the welfare state to rescue the underprivileged and sensitize the judicial system to their needs. Without adequate mechanisms for access to justice, the Constitutional principles guaranteeing social justice were just words on papers and meant nothing for the poor.[54]

Access to justice is in a very limited sense understood as access to justice in courts of law. However, it involves a wider paradigm which implies an improvement in the usage of every legal mechanism which would enable citizens to protect their rights and attain appropriate legal justice. The access to justice reforms started in the backdrop of the need to improve the judicial pattern, check delays, develop mechanisms for the speedy disposal of justice, overcome financial constraints, simplify rules and procedures, create awareness among the disadvantaged and assist them in claiming their rights and accessing justice. Recognizing the inadequacies in the implementation of the set goals, the Government of India started exploring ways of providing legal aid to the poor. The efforts

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[53] Prasad, A (1977) "Legal Aid as a Part of Social Justice", *Kurukshetra Law Journal*. Vol. 3. p.64.

[54] A.S, Anand (1999) "Indian Judiciary and Challenges of 21st Century", *IJPA*. Vol.45(3). p.294.

began as early as 1952, through various conferences of the Law Ministers and Law Commission and through various committees such as the N.H Bhagwati Committee 1949, Trevor Harries Committee on Legal Aid and Legal Advice 1949, 14th Report on Reforms of Judicial Administration of first Law Commission etc. The break through in this direction was the incorporation of Article 39(A) through 42nd Amendment, 1976 which prescribed the responsibility of the state for providing free legal aid and hence, justice to all citizens. The judiciary also became active in its attempt to overcome the hurdles in the path of access to justice for the poor and disabled. As expressed by Justice Krishna Iyer, "*The Constitutional core of legal aid movement is the provision of equal service as much to the weak and in want as to the strong and affluent and the dispensation of social justice through the legal order....victims [must have] free passage into the portals of tribunals.*"[55] With this, reforms in the legal system began to make the judicial process more user-friendly in general and to assure access to justice for the weaker segments of society, in particular.

[55] Iyer, Krishna (1984) *Indian Justice: Problems and Perspectives*, Indore:Vedpal. Pp.4-45.

CHATER FOUR

ACCESS TO JUSTICE MOVEMENT IN INDIA

As discussed in Chapter Two of the dissertation on "Limitations of the Indian Legal System: Problems faced by the Poor in Accessing Justice", the Judicial system inherited from the British resulted in severe complications. It is explained earlier that the formal and expensive court system was implanted to keep the rate of litigation low and restrict the poor masses from raising their voices for the redressal of their sufferings. In the first instance, the law itself was inadequate to deal with the problems of the backward sections of society as it lay no special provision to assist the underprivileged in approaching the costly and lengthy litigation process. Secondly, the judiciary was not given sufficient autonomy to undo the wrongs of the legal system in terms of devising adequate provisions of justice for the poor or framing new laws to cater to the needs of the poor and disadvantaged. The Constitution of independent India made serious attempts to counter the defects of the inherited British Judicial System and create provisions to check denial of justice to the deprived people through various articles. However, despite the concerns of the framers of the Constitution to allow equal opportunity of justice for all, the Constitution could not fully serve the purpose of establishing legal equality (that is equality in the eyes of law and equal protection by law) as it lacked adequate provisions for the

implementation of its goals. It was thus, inefficient in devising adequate mechanisms for assisting the poor and needy to claim their rights.

The major impediment in this direction was the limited accessibility to institutions of justice for the disabled population who were not efficient enough to use the judicial system to their advantage, such as economically weaker sections. The deprived sections continued to suffer at the hands of the law enforcement agencies, the judicial system remained expensive and time consuming, the affluent sections continued to exploit the legal system to their advantage, thus, preventing the poor and illiterate masses from equal access to justice. Thus, the Constitutional provisions proved insufficient and ineffective in providing justice to the weaker sections. For example, Directive Principles of State Policy, a safeguard for the interests of the poor, were non-justiciable.

HISTORY OF THE INDIAN JUDICIAL SYSTEM

Judiciary, under the Mughals, enjoyed a good reputation. The judges were generally highly qualified and of good moral character.[1] Even the concern for poor litigants prevailed as government advocates, known as vakils, were sometimes appointed to assist them with free legal advice.[2] This was one aspect of the legal system under the Mughals.

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[1] Sir J. Sarkar observed, "men of high scholarship and reputed sanctity of character, wherever available, were chosen" in Mughal Administration, 1935, p.29, quoted in (7th Edition, 1995) *Landmarks in Indian Legal and Constitutional History*. Lucknow: Eastern Book Company. 1995. pp.22-23.

[2] Ibid. pp.24-25.

The quality of justice took a barbarous shape, more specifically, after Akbar's reign and the conditions further deteriorated with the interference of the British in Indian Judicial System.[3] They introduced the concept of court fees. For instance, for filing an appeal a fee of Rs.5 was to be paid. Though in 1793 Cornwallis abolished court fees, however in 1795, due to a great increase in litigation which increased the burden of the courts, it was reintroduced. Thus, steps towards speedy administration of justice were taken and the number of courts was increased along with a further increase in the court fees which was imposed not only in new cases but also on pending cases. The procedure became more formal, complicated and technical, thus, making the need of lawyers inevitable. By Regulation VII of 1793, the profession of law was created and organized in India. It was a necessity in order to assist the illiterate litigants who were unaware of the technical procedures of the courts and also the technicalities of the law. Through the Act, the fee of the lawyers was fixed very high. A Report in 1823 revealed that though Regulation of VII had attempted to limit the fees of the lawyers, it was still "7 times as high as that received in England".[4]

However, one of the contributions of the British to the Indian Judicial system was of codification of law.[5] For instance, the Indian Penal Code (1860), Civil Procedure Code (1859) etc. The attempt was to make the

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[3] R, Jois (1984) *Legal and Constitutional History of India.* Vol.II. p.108, quoted in ibid. pp.45-46.

[4] Samuel, Schmittheener, (1986) "A Sketch of the Development of the Legal Profession in India", *Indian Bar Review.* Vol.13 (3&4). pp.314-315.

[5] Codification envisages the reduction of various branches of law to a clear, compact and scientific form M.P Jain (5th edition, 1990) *Outlines of Indian Legal History.* Bombay: Alpana Publications. p.463.

system comprehensive and just. It provided certainty to the Indian Judicial tradition.

The underlying aim was to bring the entire Indian administration under the unified control of the British and to remove structural barriers to the smooth functioning of the British administration in India. This could be inferred from the fact that some of the provisions in the Macaulay's Penal Code, 1860, were more draconian in terms of prescribing punishment for some offences than the post-Akbar era.[6] The so-called reforms brought about by the British in the Indian Judicial System were just to strengthen the British control mechanisms over Indian administration, economy and populace rather than to assist the desperate seekers of justice. The British also did not resolve the problem of slow and expensive justice nor did they make sufficient provision to enable the poor to approach the machinery of justice. Conversely, the implanted legal system further empowered the legal professionals and authorized them to control and manage the system in a way suitable and advantageous to them.

The only bright spot, for the concern of the problems of the deprived sections, throughout the history of the British Rule in India was the formation of Bombay Legal Aid Society (BLAS) in 1924 by the India advocates. The Society was formed with an objective to assist the poor and disadvantaged litigants with free legal help through volunteered lawyers. There were some more similar societies formed in other states, such as Poona,

[6] *Ibid.*, M.P. Jain. p.521.

Ahmedabad and Nasik.[7] The BLAS, however, lacked in making adequate provisions to overcome the problem of expensive justice as the government did not participate in providing any monetary assistance. Thus, the Society could not continue for long as it lacked sufficient funds and resources due to the non-involvement of the state. However, the BLAS contributed to the emergence of the idea of free legal aid at the expense of government by highlighting the report of the Rushcliffe Committee, 1944, in England.[8] The Rushcliffe Committee sought to overcome the obstacles in the path of acquiring justice on an equal basis which emerged due to lack of means and resources. The Act was focused on guaranteeing equal protection to all by the English Courts.[9] The report gave way to the emergence of the Legal Aid and Advice Act, 1949, in India.

LEGAL AID MOVEMENT IN POST-INDEPENDENT INDIA

Initial legislative moves

Inspired by the BLAS and the Rushcliffe Committee Report, the Government of India appointed various committees year after year to study and analyse the problems of the poor and hindrances caused due to poverty in the attainment of justice. First among them was the Bombay Committee formed by the Bombay government in March 1949 under the chairmanship of N.H. Bhagwati. The committee made the state responsible for

[7] Murlidhar (2004) *Law, Poverty and Legal Aid: Access to Criminal Justice.* New Delhi: Lexis Nexis Butterworths. p.36.
[8] Anirudh, Prasad (1977) "Legal Aid as a Part of Social Justice", *Kurukshetra Law Journal.* Vol. 3. p.64.
[9] P.C, Juneja (1993) *Equal Access to Justice.* Rohtak: The Bright Law House. p.137.

providing legal aid and proposed compulsory involvement of all lawyers in at least 6 legal aid cases per year. It suggested a hierarchical system of legal aid committees for Taluk, District, Greater Bombay and State level. Similarly, committees in various other states, such as Trevor Harries in West Bengal (1949), Committee for Legal Aid Scheme in Madhya Pradesh, Gujarat Committee etc. were formed. However, the reports of these committees could not be implemented due to the financial constraints of the state, despite constant appeals from the Centre to urge the states to provide legal assistance to the poor and indigent litigants in Civil and Criminal matters.[10]

It was only in 1957 that the state of Kerala took some initiatives to assist the underprivileged population through its Kerala Legal Aid Rules. It provided Legal Aid to the Schedule Caste and Schedule Tribes and the poor and included the provision of free counsel to any person with a maximum monthly income of Rs.100. While the SCs and STs were entitled to legal aid in both criminal and civil matters, the economically weaker sections were provided legal aid only in criminal cases. Thus, the effort was limited in the sense of making justice available to all sections without any differentiation or discrimination.

Despite the reiteration by various committees, of the imperative of financial assistance by the state for legal aid schemes, by and large the states showed reluctance in implementing the state-sponsored legal aid schemes owing to the paucity of financial resources available at hand. This

[10] The Government of India appealed thrice, first in 1946, then in 1952 and in 1956 to the states to consider the question of providing legal aid at the expense of state in atleast criminal cases.

was summarized in the, 14th Law Commission Report on Reform of Judicial Administration (1958) as, "*...the governments of the states have not in general been very enthusiastic about the proposals calculated to enlarge the scope of legal aid.*"[11]

Judicial initiatives

Alongside these legislative actions, the judiciary also made attempts to address the problems due to indigence of the underprivileged section while approaching the courts. The judiciary challenged the norms which created inequalities in the attainment of justice. The issue was first raised in the Janardhan Reddy V State of Hyderabad, 1951. It assigned, to the court, the duty of providing a counsel at the state expense to the ignorant and illiterate defendant, only when requested. The case kick-started the process of thinking about the responsibility of judiciary for the 'legally incompetent'[12] population. The idea was picked up from the American case Powell V Alabama in which the USA Supreme Court laid that:

"*in a capital punishment case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defence because of ignorance, feeblemindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign a counsel for him as a necessary requisite of due process of law.*"[13]

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[11] Op.cit., Anirudh, Prasad. p.64.
[12] Phrase used by Howard, Carlin and Messinger (1967) "Civil Justice and the Poor", *Law and Society Review.* Vol.2. pp.69-71.
[13] Op.cit., P.C, p.173.

However, the matter was again restricted to Criminal cases in Indian court. The law courts ignored the fact that a poor and illiterate defendant is generally unaware of the legal provisions and so it was the duty of the court to inform him about the prevalence of the provision of free counsel. Till date, poor people, even when educated, are alien to this provision which has now become a Fundamental right. The survey in Chapter 4 proved this limitation. Even in the Tara Singh v the State case (1951)[14], it was stated that, "....it is the duty of the accused to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the magistrate is to afford him necessary opportunity." The case was, therefore, severely limited in providing legal assistance in the true sense where the incompetence and indigence of the accused was not recognized.

Till 1974, the judiciary made only partial attempts towards the implementation of genuine legal reforms[15] to empower the poor and disabled to use and enforce their rights and claims. The above mentioned cases made no note of the implementation aspect and thus, were severely limited in the sense of making a serious effort to solve the problems of the indigent. The attempt to overcome the shortcoming was made in the Maneka Gandhi v Union of India case[16] which established that non-provision of the counsel

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[14] AIR 1951, SC 441.

[15] By genuine legal reforms it is meant that the reforms which aim at securing justice to all sections of the society by making adequate provisions to assist the deprived in approaching the machinery of justice and in all cases, Criminal and Civil, where the underprivileged people suffer injustice.

[16] Maneka Gandhi V Union of India case, AIR 1978, SC 597, quoted in Juneja, P.C, "Equal Access to Justice",The Bright Law House, Rohtak, 1993, p.174.

could vitiate the court's decision. The judgment marked a turning point in the reform movement as for the first time the judiciary started thinking seriously and independently on the issue of implementing social justice. Significant changes in the direction of reforms were observed after the concerns raised by Justice Krishna Iyer.

Emergence Of The Concept Of 'Free' Legal Aid

The issue of providing free legal aid, as opposed to merely arranging a defence lawyer on the request of the accused, gained prominence after landmark decisions in cases such as R.M. Wasawa v State of Gujarat (1974), the Maneka case(1978) and the M.H Hoskot v State of Gujarat(1978). These cases proved crucial in transferring the Indian Judicial System from the 'procedure established by law' to one of 'due process' as mentioned in the US Constitution. The Hoskot case strongly advocated the provision of making legal counsel available for the underprivileged defendant who is unable to engage one for himself. This case was more significant in establishing free legal aid as a Constitutional Fundamental Right. The decision was taken in conformity with the Article 142, Article 21 and Article 39(a) which states:

> *"The state shall secure that operation of the legal system promotes justice, on the basis of equal opportunity and shall, in particular, provide free legal aid by suitable legislation or scheme, or in any other way to ensure that opportunities for securing*

justice are not denied to any citizen by reasons of economic or other disabilities."

The idea of free legal aid was strongly supported by the 14th Law Commission in the past in 1958. The Commission expressed the view that the equal administration of justice is the basis of our Constitution wherein all parties should have an equal access to the courts and the opportunity to present their cases before the courts. Thus, unless some provision is made to "assist the poor man for the payment of court fees and lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice."[17] However, fears were raised that the establishment of free legal aid would increase litigation and make people more litigious; the Commission explained that with sufficient eligibility tests such a problem could easily be checked. Though the Commission recognized the limitations of the state to afford free legal services to the litigants owing to financial constraints, however, it made it imperative for the state and members of the legal profession to make minimum provisions to provide legal aid at state expense and to implement it like other state-run welfare schemes. Though the report made important suggestions to initiate free legal aid at the expense of the state, it however, was too optimistic to believe that lawyers would take up the responsibility for free legal services voluntarily.

The issue of legal aid at the cost of state was also highlighted by the Third All India Lawyer's Conference, 1962, which held that free

[17] The Fourteenth Law Commission Report on "Reforms in Indian Judiciary", Vol.1, 1958, p.587.

counsel should be provided and provisions should be made to assist the indigent with 'remission of court fee, authentication and copying fee.'[18] It was followed by a nation wide appeal from the National Conference on Legal Aid in 1970 in New Delhi which called for active participation by the courts, bar, law faculties and voluntary organisations to devise mechanisms for the attainment of a just and egalitarian social order, keeping in mind the needs of the deprived, through the means of free legal aid.

The legal reforms acquired a new dimension with the emergence of an understanding of the relationship between justice and the poor, and more specifically between law and poverty. The Gujarat Committee, 1970, under Justice P.N Bhagwati was set up to consider:

'the question of grant of legal aid in civil, criminal, revenue, labour and other proceedings to poor persons, to persons of limited means and to persons belonging to backward classes....and to make such recommendations more easily available and make justice more easily accessible to such person, including recommendation on the question of encouragement and financial assistance to institutions engaged in the work of such legal aid.'[19]

Justice P.N Bhagwati pointed that the problems of the poor were not just confined to approaching the courts or dealing with the court procedures. Thus, a broader view of the problems faced by them in dealing with legal luminaries was undertaken by the Committee. The Committee stressed that the indigent suffer injustice not just due to limitations in law and

[18] op.cit., P.C, Juneja. p.183.
[19] Notification of the Government of Gujarat under the Government Resolution Legal Department No LAC-1070-D dated 22 June 1970, quoted op.cit., Murlidhar. p.48.

lengthy, incomprehensible court procedures, but more specifically due to poverty. It was realized that illiteracy, lack of awareness, lack of resources etc. were the outcome of poverty which restricted the economically and socially weaker sections from using the legal services devised for their benefits. It analysed the problem of injustice from a wider perspective of poverty. Thus, it suggested preventive services along with legal aid and legal advice. The Committee assigned lawyers the duty of spreading legal awareness and imparting legal education among the poor and ignorant, thus, making them self-reliant.

While the Gujarat Committee proved significant in devising mechanisms for preventive legal services to the underprivileged, the Krishna Iyer Committee Report titled 'Processual Justice to the People' played a crucial role in devising provisions to assist the disadvantaged sections while dealing with courts and legal procedures. It recommended the extension of legal aid to matters relating to criminal and civil cases, thus, including a vast expanse of needy sections of the society. The criteria for obtaining legal aid were set along the lines of the 14th Law Commission Report which stressed on the representation by lawyers of those persons, accused or applicants, without means. The terms of eligibility were prescribed on the lines of the Gujarat Committee which established three tests to grant legal aid, namely the means test, the prima facie and the reasonableness test. However, the report overlooked the complications that could have arisen out of the reasonableness test, as it is not possible to check the reasonableness of the needs of the

disadvantaged. For instance, some cases are filed for claiming a month's wages and some for involvement in a murder case. It is difficult to set the criteria in accordance with the reasonableness of the demand for legal aid as for an extremely poor person even a single day wage is important. Social justice through legal aid should not be limited to such tests. Also, the report made no mention of the categories of mentally and physically challenged and old age people, as eligible for legal aid services.[20] Moreover, it is not always necessary that the case of an indigent would always serve some social purpose for a larger community. The defendant should be given equal opportunity to fight for his individual rights.

Alongside various states took up the responsibility of checking lacunae in judicial functioning with regard to the concern for the urban and rural poor and the disadvantaged sections of the society. For instance the Madhya Pradesh Committee Report recommended the establishment of a 3-tier administrative system with State Legal Aid and Advice Board, District legal aid committees and Tehsil legal aid committees[21] which gave way to the MP Legal Aid and Advice Act, 1976 with a state wide legal aid scheme in Madhya Pradesh; the Rajasthan Committee Report, 1975 which created a Legal Aid and Advice Board in 1975 etc. in Rajasthan.

DEVELOPMENTS AFTER 1977

[20] The Expert Committee 1973, identified 'legal aid's clients' as the geographically deprived, villagers, agricultural labour, industrial workers, women, children, harijans, minorities and prisoners. In op.cit., Murlidhar. p.53.

[21] Report of the Preparatory Committee for Legal Aid scheme, Government of Madhya Pradesh, 1975, p.210.

It was as late as 1977, with the report of the Central Committee on "National Juridicare: Equal Justice-Social Justice" under the chairmanship of P.N Bhagwati, that the entire reform process was reconsidered from a different perspective where, for the first time, the law itself was challenged.[22] It was realized by the Krishna Iyer report that radical reforms were required to correct the deficiencies and distortions of the legal system and the right time had already passed by. It expressed that:

> *"Law and Justice can no longer remain distant neighbours if the increasing deficiencies and distortions of the legal system and the challenge to the credibility of the judicature are to be adequately met. The lawlessness of the old original law, judged by the new dharma, can be corrected either by radical reform or by surrender to direct action. The choice is obvious and the hour is too late. Let us begin."*[23]

The report broadly focused on the problems of the poor due to poverty and recommended a check on various injustices in everyday life. It laid emphasis on 'poverty jurisprudence' by taking poverty as the root cause of injustice, rather than the other way round, and promoted a participatory approach by involving all sections – poor, social workers, legal professionals, lawyers etc. – in legal aid schemes. It inherited the idea from the Report of the Task Force on Legal Aid, Canada, headed by Mr. Justice John Osler, 1974, pleading that

> *"Legal Aid plans should be administered by a statutory, non-profit organisation in which both members of the public, who*

[22] Central Committee Report on *National Juridicare: Equal Justice-Social Justice.* 1977, p.3.
[23] Ibid., p.4.

have an obvious interest in the successful operation of the plan, and the members of the Law Society, who have a demonstrative commitment to its efficiency, will play a controlling role."[24]

Thus, the foundation stone for National Legal Aid Services Authority (NALSA) was laid. With the stress on the participation of consumers of legal services, the establishment of Nyay Panchayats and Lok Adalats, with a view to bringing cheap and timely justice to the doorsteps of the underprivileged and backward sections, was recommended on the lines of traditional Indian pre-British pattern.[25] The report expressed the view that, "Poverty will not be stopped by people who are not poor people. And poor people can stop poverty only if they worked at it together." Thus, preaching a participatory approach, the report sought to eradicate poverty and eventually unjust institutions and hence, injustice.[26] It focused on Preventive Legal Aid Services on the lines of the Gujarat Committee Report, 1971. Though the report laid the responsibility to bring about social justice and aid the legal programme on the state, however it was limited in its own way as it could not favour the abolishing of the unhealthy practice of court fee and fees collected for legal advice, though it greatly recommended their reduction.

Though the various reports of the committee and Supreme Court decisions and most important cases like the Hoskot case[27] established legal aid as a Fundamental right, these could not bring any significant change

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[24] Report of Task Force on Legal Aid, Ontario, Canada, headed by Mr. Justice John Osler, 1974, quoted in Central Committee Report on "National Juridicare: Equal Justice-Social Justice", 1977, p.8.

[25] Central Committee Report on *National Juridicare: Equal Justice-Social Justice.* 1977, pp.27-42.

[26] Ibid., pp.82-83.

[27] The Supreme Court laid the law on Legal aid through this case. AIR 1978 SC 1543.

in the direction of making the justice system and justice available to the deprived. This was proven in the Hussainara Case[28] where a number of men, women and children were kept imprisoned for petty crimes without trial for many years. Most of them were unaware of the bail system, while the others were too poor to furnish their bail.

Thus, while the need of active and dynamic legal services was felt throughout, and reflected in various committee reports, most of the legal reforms remained on paper until the establishment of Committee for Implementation of Legal Services in 1980(CILAS). Despite various central and state government efforts and judgments of the Supreme Court, defective implementation was the most prominent reason for the failure of legal aid reforms in terms of enhancing access to justice for the poor. Even though the Judiciary acted sensitively at various points, however, the Bhagalpur blindings, also known as the Khatri case,[29] showed reluctance in implementation of court's decisions. In this case the blinded prisoners were not represented by any lawyer as they themselves did not ask for one. The Supreme Court, therefore, held that legal aid would become a mockery if legal aid was offered only on the request of the unaware, illiterate and helpless poor litigants

[28] Hussainara Khatoon V State of Bihar AIR 1979 SC 1369.

[29] In this case the blinded prisoners were not represented by any lawyer as they themselves did not ask for one. Khatri V State of Bihar AIR 1981 SC 9288. The Supreme Court, therefore, held that legal aid would become a mockery if legal aid was offered only on the request of the unaware, illiterate and helpless poor litigants.

Committee for Implementation of Legal Aid Schemes(CILAS)

Constituted by the Central government, under the chairmanship of Justice Bhagwati, CILAS aimed at evolving a scheme for the implementation of "a massive, dynamic and multi-pronged programme of legal aid for weaker sections organized by the state and society."[30] It acquired a Constitutional mandate and was entrusted with the responsibility of formulating comprehensive legal aid schemes and devising mechanisms to enable their timely implementation in order to avoid any further delay in securing social justice.[31] It served as a significant move in a new direction of realizing the goal long envisaged by the reform initiatives. Not only did it devise the structure and functions of Legal Aid Departments for the Centre, but did so also for the states, districts and taluk level, with State Legal Aid Board as an apex body. [32] In a move to establish a preventive legal aid programme, CILAS initiated programmes of Legal Aid and Awareness Camps and training of paralegals etc. The CILAS has, to its merit, provided legal aid and advice to the victims of riots that followed the assassination of Mrs. Indira Gandhi in 1984, November. It also assisted the environmental victims of the Bhopal Gas Tragedy.[33]

Adhering to the scheme designed by CILAS, various states incorporated measures and means for implementing the legal aid and advice mechanisms. States such as Delhi (through the Delhi Legal Aid and Advice

[30] Legal Aid Newsletter, Aug., 1981, p.1,op.cit., Juneja p.196.
[31] op.cit.,Murlidhar. p.107.
[32] Ibid. pp.107-108.
[33] Op.cit., Juneja. p.197. See report 1984-85, Government of India, Ministry of Law and Justice.

Board, 1981), Haryana (1982), Madhya Pradesh and Maharashtra were among the prominent ones to exhibit serious concern for the implementation of the scheme circulated by the CILAS to the states.

However, there were certain limitations in the provisions designed by the CILAS especially when it came for fixing the fees of the lawyers and decodifying the norms of their participation in the legal aid boards. Moreover, despite the practice initiated by a few judges and the Bhagwati National Juridicare Report recommendation, the issue of visits to jail to hold courts for the hearing of the long pending cases was left untouched. The CILAS overlooked this important mechanism which could have provided justice to the illiterate, underprivileged under trials who were unaware of their case status or whose jail tenure had extended the period of punishment that would have been otherwise awarded. Although CILAS concentrated heavily on preventive legal aid, it could not do much to promote university law clinics which could penetrate legal education and awareness in the remote areas.[34] Though the attempt was made at the national level, the functioning of the scheme was limited to a few states while for others it merely remained on paper.[35]

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[34] Op.cit., Murlidhar, p.109.

[35] Murlidhar, "Law, Poverty and Legal Aid: Access to Criminal Justice", Lexis Nexis Butterworths, New Delhi, 2004, p.111. Mehta (1987) "Free Legal Aid Movement: A theory and Practice in Himachal Pradesh", *Indian Socio-Legal Journal.* 1977. Mehta argued that though the scheme was adopted for more than a decade the poor people were still ignorant about it. It was also displayed through the survey where 99% indigents were unaware of provisions of legal aid. Also see Rajeev Dhavan quoted in op.cit., Murlidhar. p.110.

Legal Services Authority Act (LSAA)

Despite these limitations, CILAS has, to its credit, given way to the establishment of a statutory legal service authority at national level, the Legal Services Authority Act, 1987 which was considered as the first substantive success of the long driven reform initiatives. The Act became fully operational in 1998 after the passing of the Legal Services Authority (Amendment) Bill which was concentrated mainly on the issue of the distribution of power between the judiciary and the executive. It was the first instance of bringing the recommendations of past committee reports into practice. Conforming to the Constitutional provisions for legal aid in Article 39(a), the LSAA aimed at providing legal aid and assistance to the legally incompetent, disabled and disadvantaged sections of the society, including SC/ST, mentally ill or otherwise disabled person, sufferer of mass disaster, flood, ethnic violence etc., at the expense of the state in order to secure justice by providing them with ample opportunities to approach the legal machinery. This was provided through the Lok Adalats which were 'deemed to be a decree of a civil court and enforceable as such'.[36]

The National Legal Services Authority (NALSA) was assigned the responsibility of formulating policies and other schemes as necessary to give effect to the legal aid movement in India. It was expected to organize Legal Aid Camps, especially, in rural areas, slums or labour colonies and also to spread legal awareness and legal literacy among those sections to inform them about their rights and privileges. It sought to secure social justice

[36] op.cit., Murlidhar. p.113.

through litigation in cases related to consumer protection and environmental protection where the weaker sections were involved.

The State Legal Services Authority consolidated the implementation role without which NALSA stood ineffective. For instance, it performed the function of conducting Lok Adalats for speedy justice and Legal Literacy camps as a measure for preventive legal aid services. It engaged various governmental agencies, Non-governmental organisations, universities, law students etc. for spreading legal literacy and legal awareness among the illiterate (rural and urban) population. Similarly, the District and Taluk Legal Services Authorities were constituted to implement legal aid programmes and schemes at the district and taluk/mandal level.

The LSAA included in its purview all those sections which qualified the means test and prima facie criterion. It included Scheduled Caste, Scheduled Tribes, women and children. Following the establishment of NALSA, a series of measures were implemented by the Central Authority:-

1. Establishing Permanent and Continuous Lok Adalats in all the districts in the country and government departments, statutory authorities and public sector undertakings for the disposal of pending matters as well as disputes at pre-litigative stage. In Delhi, Permanent Lok Adalats have been established in Delhi Vidyut Board, Delhi Development Authority, Municipal Corporation of Delhi, MTNL and General Insurance Corporation.

2. Accreditation of NGOs for legal literacy and legal awareness campaign. The practice is prevalent in Rajasthan where NGOs have established their offices in police stations to assist the indigents in framing their legal claims and further counseling.[37]
3. Appointment of "legal aid counsel" in all the courts of magistrates in the country to provide immediate legal assistance to those prisoners who are unable to engage a counsel for themselves.
4. Disposal of cases through Lok Adalats on the old pattern.
5. Publicity to legal aid schemes and programmes to make people aware about legal aid facilities.
6. Emphasis on competent and quality legal services to the aided persons. The concern for quality of legal aid which was to be given by the legal aid advocates was raised by Hon. Mr. Justice S.P Bharucha, executive chairman NALSA.[38] The suggestion was to revise the payment schedule for legal aid panel advocates and to provide them with better remuneration from legal services authorities to encourage them to render effective legal assistance to aided persons.

[37] Inferred from information provided by Anuvinda Varkey, in Survey in Chapter 5.
[38] "Legal Aid Movement in India: Its Development and Present Status", http://causelists.nic.in/NALSA/l1.htm

7. Legal aid facilities in jails. Magistrates should hold their courts in jails. In many states, the suggestion has already been implemented and the prisoners involved in petty and minor offences are getting substantial relief.
8. Setting up of Counseling and Conciliation centers in all the districts in the country.
9. Sensitisation of judicial officers in regard to legal services schemes and programmes.
10. Publication of 'Nyay Deep', the official newsletter of NALSA.
11. Enhancement of income ceiling to Rs 50,000/- per annum for legal aid before the Supreme Court of India and to Rs 25,000/- per annum up to the High Courts.
12. Steps for framing rules for refund of court fees in execution of Awards passed by Lok Adalats.

The major concern of the LSAA has been that of conducting Lok Adalats in order to deal with the problems of huge pendency of cases in order to reduce the burden of the courts. Various mediation and conciliation centers have been evolved to explore pre- litigative schemes, although not much has been done in the field of sensitizing universities and law students. Nor has any step been taken to make justice less expensive as the legal aid authorities are not granted any income tax exemption or separate funding to

enable them to provide better legal aid services. It also did not make any provision for performance audit of legal aid schemes.[39] Coming to the eligibility criteria, the persons who have been included within the category of poor people by the apex court, such as the bonded labourers, inmates of protective homes, victims of rape etc. have found no place in the eligibility criteria of legal aid in the LSAA.

It is clear from the working of the LSAA that the attempt has been more towards reducing the burden of the courts rather than a concern for solving the problems of the underprivileged. This is evident from the fact that though it is the obligation of the LSAA, under section 4(d) to conduct social justice litigation with regard to consumer protection, environment protection and other weaker sections that are unable to raise their voice against such injustice, no Public Interest Litigation has been filed by NALSA in the past five years.[40] Not many initiatives have been taken to revitalize the reforms to keep apace with changing needs of the changing times. However, recently in 2005, new forms of legal aid for new categories of deprived sections have emerged. These are[41]:

- Crime Against Labour Cell: to protect rights of workers. The NALSA aims at securing the safety of women workers and to stop child trafficking, implementation of labour laws and equal Remuneration

[39] Murlidhar, "Law, Poverty and Legal Aid: Access to Criminal Justice", Lexis Nexis Butterworths, New Delhi, 2004, p.115.
[40] Ibid., p.125-126.
[41] The Hindu, May 1, 2005, p.7.

Act. It introduces the idea of providing direct access to authorities to the exploited labourers, thus enabling them to take 'direct recourse to law even if authorities (such as the police and labour law enforcement department) refuse to register their complaints'. The aggrieved party could also refer its case to the Labour Courts or specialized Lok Adalats for the purpose.

- Legal Aid Resource Centre for Workers: was established to spread awareness through the means of e-governance. It was designed to hold E-Lok Adalats, E-Justice Forums etc. and enable the workers to register their grievances online with the help of trained trainers and legal aid counsels carrying laptops and computers in mobile vans. The Resource Centre was based on the principle of 'E-Justice at one's doorsteps'.
- Jal Adhikar Abhiyan: The significance of the programme lay in its concern for social justice for the marginalized sections as it addressed the needs of the farmers belonging to the most drought and flood affected areas. For example, it addressed:
  i. The victims of starvation and water poisoning such as arsenic.

ii. The displacement of villagers caused by the Bhangan (river changing its course). Non-availability of water to rural/drought affected areas.

iii. To check the non-implementation of welfare schemes pertaining to food and water security.

- Jal Lok Adalats for farmers: These Lok Adalats serve as Dispute Management Institutions without any court fees demand. These are presided over by a sitting or retired judicial officer as the chairman with two other members, usually a lawyer and a social worker. These Lok Adalats were designed to redress the problems and secure the rights of the farmers.

Thus, after a long period of dormancy, NALSA came up with new initiatives to expand the Legal Aid Programme. However, the credibility and effectiveness of the reforms is yet to be seen.

CONCLUSION

One cannot doubt the sincerity of the reform initiatives and the concern shown for the poor and deprived by the various committee reports and the judiciary. However, the success of the reform attempts is questionable as even after five decades the impact has not been very effective. The entire reform process has been slow and tardy with huge intervals of 8-10 years in

framing and implementing the proposals. The reforms also lacked the aspect of preventive legal aid as the lawyers, law students, universities etc. have still not been sufficiently sensitised towards the needs of the marginalized sections. It can be inferred from the survey (in chapter 4) that many indigents are still unaware of their rights and the free legal aid services available for them. The reforms have mainly concentrated on the reorganization and restructuring of legal institutions and practices. The reform process has acquired a top-down approach and the "poverty jurisprudence" preached by the National Juridicare Report, 1977 has gone neglected. Even though many Lok Adalats have been formed, most of the cases dealt in these Adalats are related to motor accident claims. Though the experiment with Lok Adalats was a positive move, Lok Adalat officials could only determine and arrive at compromises or settlements. Moreover, a number of Lok Adalats were set up but they had no fixed place. There are days fixed for particular cases in Lok Adalats, for instance, one day for electricity, one day for motor accident cases etc. It makes it difficult to keep track of which case is held on which day, thus, raising the level of inconvenience. The Lok Adalats are equally overcrowded and do not serve as a solution towards speedy trial.

The Legal Aid Lawyers' panels have also shown little interest towards serving the goal for which they were established. One possible reason could be the low fees paid to the panel of lawyers in legal aid cells. The legal aid lawyers are paid Rs.2000-3000 per case per day of effective hearing and Rs.500 per case per day of non-effective hearings after the revision of their

pay scales in the year 2000. Due to this, the Legal Aid Cells do not attract highly-skilled or senior advocates which affects the quality of service provided to the poor ignorant litigant.[42] Thus, there is evidence of unwillingness on the part of legal bodies to give effect to the reports of the committees and enhance the speedy disposal of justice to the weaker sections of society. There is a dearth of accountability-check and performance-audit mechanisms as well. Although legal aid schemes have significantly improved people's access to justice, however, they have only marginally changed the ways in which legal services are provided and the legal system works.

[42] op.cit., Murlidhar. pp.130-131.

CHAPTER FIVE

RESULTS OF THE FIELD SURVEY ON ACCESS TO JUSTICE

INTRODUCTION

The concept of rule of law was established in order to provide stability to society to protect everyone, especially the weak, against the arbitrary will of rulers. The legal codes were given a universal status in order to promote equality to secure justice to all sections of the society. Various arrangements, such as courts, tribunals, institutions etc. were established to realize the goals of law and promote justice. However, the mere existence of legal institutions was not a sufficient guarantee of justice for all. The Constitution of independent India, through its Preamble and various articles enlisted in it, promised to secure justice, liberty and equality for all its citizens and attempted to establish a just and egalitarian social order where everyone is equal in the eyes of law.

However, the phrase 'equal protection of law and equality in the eyes law' has remained heavily restricted in terms of providing justice to the poor and underprivileged. The judicial system has proved to be more advantageous to the rich and affluent sections that are able to exploit it system to their advantage, by virtue of their control over social and economic resources. The deprived, by contrast, have limited accessibility, not least because judicial procedures are inexpensive and prolonged. This can be summarized in the words of Lord Chancellor Viscount Buckmaster, "...*that*

scales of justice are heavily weighed against the poor litigant is not an accurate statement, but nobody can deny the fact that the rich litigant by being able to get help of the best men has an advantage..."[1] The Constitution and the legal system have remained ineffective in providing equal opportunity to all to have an equal access to the machinery of justice.

In order to overcome these shortcomings the access to justice movement emerged in India in 1949. Various judgments were passed and several committee reports prepared, already discussed in the previous chapter. The Legal Aid reforms were aimed at making provisions to:

a. Assist the naturally disadvantaged; and

b. Treat the factors resulting in the creation of unnatural inequalities.

One understanding of the difference between natural and unnatural inequality was presented by the political philosopher Rousseau.[2] According to him, natural inequality was more related to physical inequalities as a result of age, mental and physical disabilities etc., whereas unnatural inequalities arise out of biased systems and privileges, created by man, which result in disparities of wealth, opportunity, social status, etc. These inequalities have been prevalent since time immemorial. In Indian society, however, these could be said to have been concretized during British rule along with the introduction of modern legal system. Although the Constitution

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[1] Lord Chancellor, Viscount Buckmaster, address delivered to the Canadian Bar Association on 27th Aug, 1925, quoted in 14th Law Commission Report on *Reforms in the Administration of Justice*, 1958.Vol.1, 1958.

[2] Rousseau (1950) "The Social Contract and Discourses", Dutton and Co. p.196, quoted in Juneja (1993) *Equal Access to Justice.* Rohtak: The Bright Law House, p.1.

of independent India incorporated provisions to safeguard the interests of the weaker sections through the principles of legal justice[3], it could not provide adequate mechanisms to realize the goals of social justice. Thus, the legal aid reforms raised questions about the limited aim of legal institutions and practices. The legal aid reforms, keeping in line with the access to justice movement, concentrated on both aspects of justice – social and legal.

Initially, the concept of access to justice focused on the limited idea of justice as having equal access to courts of law. In the words of H.Jacob,

> *"The functioning of government in a civilized society was to provide and maintain an adequate and effective machinery, both within or outside the formal judicial process, to which all citizens acting individually or as a group, can have an access on an equal basis for the impartial resolution of their legal or quasi-legal disputes and complaints, of whatever nature or character, however large or small."*[4]

However, of late, taking note of rising disparities due to socio-economic inequalities, the legal reforms broadened their focus and designed new mechanisms for free legal aid – Legal Aid Cells, Public Interest Litigation, Lok Adalats, and the Legal Services Authority Act etc.

Though the reforms started with the genuine intention of bringing 'justice to one's doorstep', they have arguably been less than successful. The poor remain unable to access the machinery of justice on an

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[3] Social justice, as defined by Justice Subbarao, attempts at providing necessary means to enable the underprivileged to have equal opportunity to protect their interests and claim their rights. Whereas Legal justice, according to David Miller, is concerned more with enforcement of legal rules in conformity with the principles of fair trial and rights of appeal. Explained in K.Subbarao (1974)Social Justice and Law. Delhi: National. p.2.

[4] Jacob, "Access to Justice in England", an essay contributed to 'Access to Justice' Cappelletti and Garth, SIJTHOF.

equal basis due to multiple factors including lack of awareness, fear of the police, court fees, lawyer's fees, complex adversary proceedings, reluctance on the part of legal bodies to bring about effective changes and so on.

The legal aid movement was thus, premised on the assumption that the poor do not have equal access to justice, and we have argued that the actual functioning of the legal aid system has not significantly improved such access. The problem is not so much with the laws and institutions designed to enhance access to justice for the poor and deprived. The problem lies rather with the inadequate implementation of the provisions to provide opportunity of obtaining justice to all on an equal basis.

FIELD SURVEY

In order to explore the problems faced by poor and assess the extent to which the reforms have been successful in empowering the poor and marginalized to use the legal system to their advantage, a limited field survey was undertaken in the city of Delhi. This survey ascertained the views of lawyers, litigants as also some prominent activist lawyers in order to explore ways to enhance the access to justice movement, not limited merely to access to the courts of law, through legal aid or other means.

One month of rigorous field work provided valuable insights into the practical functioning of the judicial system and its deficiencies. The socio-legal study was of a qualitative nature wherein approximately 60 lawyers of various courts situated in Delhi were interviewed, along with

approximately 20 poor litigants. Owing to the time constraint, the field work was confined to Delhi. Nevertheless, the views of lawyers from three different field areas – Supreme Court, High Court, and District Court at the Patiala House and Karkarduma – were collected. It also gave a good opportunity to interact with a few eminent activist lawyers in the field of legal aid. The questionnaire for lawyers was designed to ascertain the extent to which the judicial system in general, and legal professionals in particular, were sensitised to the needs of the poor and deprived sections. The aim was also to understand the limitations of the judicial procedure from the point of view of the lawyer who is after all a part of the system. A questionnaire was also prepared for the poor litigants to express the difficulties faced by them while dealing with legal bodies and the judicial system as a whole. The insights provided by the activist lawyers proved significant in analysing the roots of the problems, while their experiences served as an important means to analyse the loopholes of the judicial system, from the point of view of bringing justice to the poor and deprived masses.

Starting the survey

The very first day of the field survey in Patiala House turned out to be very difficult even for his research. No prior practical knowledge of the area, and the lack of assistance, acted as a barrier to an easy approach. It became self evident that if a well-educated person can feel uneasy while encountering the judicial structure, these difficulties are certain to be

compounded in the case of a poor, ignorant and troubled litigant. While only eight lawyers could be covered the first day, the work paced up gradually each day. Thereafter, interviews were conducted with High Court lawyers (experienced as well as under training) and Karkarduma court lawyers. Questionnaires were circulated to Supreme Court lawyers. Similarly, interviews were held with poor litigants in the Karkarduma court. The copy of questionnaires for lawyers and poor litigants are to be found in Appendix. The two-hour drive from the campus to Karkarduma indicated the problems faced by the poor, living in slums and remote areas, who are required to travel such long distances notwithstanding their financial constraints.

The important factors identified by earlier studies as being responsible for obstructing the opportunity to access justice on an equal basis include:

- The high cost of engaging lawyers
- Delays in courts
- Lack of legal awareness
- Financial burdens such as court fees, process fees, etc.
- Formal legal language

In response to the identification, by the access to justice movement, of these defects in the functioning of law, various mechanisms were evolved such as free legal aid, Public Interest Litigation, Lok Adalats, Nyay Panchayats etc. The survey was, therefore, conducted to both highlight

main obstacles in accessing courts of law by the poor as well as with analyzing the success of the measures adopted to deal with these limitations.

FINDINGS OF THE SURVEY

Through the narration of selective interviews in the field, one can easily identify the real problem areas in the legal system, which inflict suffering on poor litigants. The comments of the poor litigants on the working of the judicial system are helpful in analysing the factors behind the inefficient administration of justice. Most shocking was the response of the poor to the question about whether they were aware of the availability of free legal aid services. While most of them presented a blank expression in response to the question, the remaining few simply nodded their heads. Some of the straightforward vocal responses that were received were, "*ye kya cheez hai!*", "*humein nahi pata*".[5]

Such responses show the limited role of the legal aid reforms in bringing about justice to the poor. These poor people, despite standing in the premises of the court, had no knowledge about the provisions specifically meant for their benefit. Such a state of affairs is quite ironical for a state like Delhi where some of the pioneering legal institutions, such as the NALSA, have been established. If this is the case in a relatively advanced state like Delhi where the literacy and poverty levels are not so low, and where funds are less of a problem, one can imagine the plight of the poor in states which are comparatively less developed such as the BIMARU states such as Bihar,

[5] English translation: what is this? We have no idea ....

Madhya Pradesh, Rajasthan, and Uttar Pradesh. While a comparative analysis to substantiate this comparison could not be undertaken by this research due to time constraints, the survey conducted in various courts of Delhi was helpful in highlighting some of the hurdles in the access to justice for poor people.

Problem areas

Case 1: The ignorance of the accused was highlighted in a criminal suit where a woman was a guilty party to a murder case. The accused seemed less confident and more uncomfortable with the environment of court. The fear of the police, which stood surrounding her, was quite visible from her submissive attitude. The questions were answered on her behalf by the police and her lawyer. She was not even capable of speaking for herself leave alone raising her voice for demanding justice in the court room.

In such cases, one cannot expect indigents to plead for themselves and express their state of mind. The atmosphere of the court, filled with trained lawyers and police officials, creates fear and nervousness in the minds of the poor and ignorant litigants, who are, already scared and reluctant in dealing with legal structures.

Case 2: Another case demonstrated the incidence of misconduct of the police officials while handling the weaker sections. This was a case in which a woman of approximately 40 yrs of age was charged with prostitution. After an hour's observation of the behaviour of the police towards the accused, it became obvious that the police take advantage of their power and treat the

victims or accused in a very humiliating and insulting manner. The lady was treated quite roughly by the police while she was taken to the court room. All this while, the lawyer remained a silent observer to this misbehaviour. After a conversation with her, it became evident that she was a victim of the unethical behaviour of the police officials, although her innocence could not be vouchsafed. She expressed her agony about police tortures on women in custody, the practice of "*gents hitting females in thanas*". A bribe of Rs.40,000 was demanded by the police to close the case and the failure to submit the amount brought her to the court. She explained that though some 5% of the police officials are good, even paying the bail amount from their own pocket; all the rest are highly corrupt.

Thus, this case highlighted the violation of basic respect of individuals by the police and the levels of corruption that prevail in the primary step for reaching the institutions of justice. The police can, thus, be seen as exploiting their position of authority against the weak and poor population.

Case 3: Coming to the question of lawyers most of the litigants expressed their satisfaction over the performance of their lawyers. The ignorance of these litigants was clearly being exploited by lawyers who charged them fees somewhat beyond their capacity to pay. For instance, the driver in a motor accident case was charged Rs.12000 while his monthly income was only Rs10,000. Unaware of the provision of free legal aid services, he assumed that his lawyer was kind enough in granting such concession.

It was realized from one of the cases that the accused had to pay a huge price for a petty crime – a brawl in his neighbourhood. He sobbed and said that everyone right from police to lawyers want money, while court procedures and lengthy cases involve other hidden expenses. The accused was left jobless due to which he and his family suffered the additional burden of repaying the money borrowed for the case.

Important inputs

Fees of the lawyers and legal aid services: Asked to identify the biggest impediment in accessing justice for the poor, the response of lawyers was to highlight the problem of limited awareness and financial obstacles.[6] Though more than 50% of the lawyers claimed 'social status of the clients' as the criterion for charging fees, this was not so much proven by the statements of the ignorant litigants. Though lawyers offered concession to the deprived, however, their fee was still difficult to afford. Out of the 60 lawyers interviewed, only one lawyer claimed bearing the expenses for fighting a case, for a poor client, from his own pocket, "*...at times we have to pay from our own pocket.*" This confirmed the presence of 5% (in our sample) of ethical legal professionals who are genuinely interested in assisting poor clients. At the other extreme there were lawyers who bluntly said, "*I don't take up cases for poor people. They don't come to me because they cannot afford my fees.*

[6] Court fees is to be paid by the party concerned which seeks to get assiatcne from the judicial departments and for redressal of its grienvances. Lawyer's fees is paid to the lawyer to take up the case and lawyers are free to charge any amount form their clients. Process fess covers copying, Xeroxing, investigation expenses and other hidden costs.

For them legal aid cells are there." Despite the fact that it is mandatory for every lawyer to take up at least six free legal cases for the poor, there is a clear lack of sensitivity of the lawyers to the legal needs of the poor people who are unable to afford such high priced lawyers. This is evidence of the improper implementation of schemes devised by the government which renders the entire purpose of reforms ineffective. One of the lawyers confessed that the legal aid lawyers are not very efficient or skilled. "*They are paid peanuts.....lawyers prefer to work for free on an independent basis without becoming formally a part of legal aid cell as it spoils the image of the lawyers.*" This is an escapist statement as there are not many lawyers who work independently towards providing free legal services to poor litigants, though some certainly offer minor concessions. The reason for such reluctance was explained by Mr. Videh Upadhyay who said that, "*lawyers save no money from this....its a thankless job*".[7]

Police misconduct: In the opinion of the poor litigants, the fear of the police while registering their complaints rated high as an initial obstacle. It became evident from the interviews that constant fear of torture, humiliation and harassment by the police official discourages the victims from raising a voice to claim their rights. It was also observed that the poor litigants are unable to register complaints due to lack of influence. This can also be inferred from the

[7] Supreme Court Lawyer and activist, Mr. Viday Upadhyay, was interviewed on 17th June, 2006.

Arvinder Singh Bagga V State of UP and Others[8] where the fear of the police, became evident. The case highlighted the blatant abuse of law and power by the police by inflicting severe torture on a married female where she was forced to record false statements against her husband and other family members. Even her husband and family members were tortured by the police to vent out their revenge.

The poor litigants pointed to financial constraints as the most important reason which serves as a deciding factor for any legal proceeding.

Delays and special mechanisms: The judicial system is also expensive due to delays caused by excessive legal formalities (65% lawyers were of this opinion). According to poor litigants, absenteeism among the lawyers and the witnesses acted as an important reason for the long pendency of their cases. The reason behind the pendency and delays, as pointed out by lawyers, were lack of sufficient courts, "centuries old procedures" and the disinterest or reluctance shown by judges to finish cases and the frequent grant of adjournments.

Pendency of Litigation as on 30/6/2004

Name of Court	**Cases Pending**	**Avg. Institution**	**Avg. Disposal**
Supreme Court	29,315	42,200	40,400

[8] Supreme Court Cases 565, (1994)6 SCC.

High Courts	32,24,144	12,41,000	11,23,500
Subordinate Courts	2,53,50,370	1,42,43,500	1,32,29,000

Source: CJI R C Lahoti highlighted this on Law Day, 2004, in Haryana state legal services authority report.)

Since the courts suffer from the problem of delays and huge pendency, alternative mechanisms such as Lok Adalats, Nyaya Panchayats were established. An example of huge pendency was cited by a lawyer as follows - "*In 138 Act (cheque bouncing case) it took almost one year for the first hearing after summoning the other party.*" A lawyer explained that if a person is falsely implicated, justice is denied to him at least till the time period of the trial which generally extends for many years. Most of them estimated the time period for the completion of a case as extending beyond 5 years and sometimes with no end in sight. In such a situation the poor litigant is denied justice for so many years that it imposes more serious complications for him and his family.

According to a few lawyers, the Lok Adalats offer somewhat regular hearings which is a positive move. Though they work with the underlying aim of reducing the burden of the courts, some relief and compensation is also provided to the poor litigants. In the view of a few other lawyers, these tribunals, such as Nyaya Panchayats are nothing but mechanisms devised for, "*yatimon ko roti denen ke liye...if judges are retired from here, it means they are no longer capable of serving the legal machinery. Then why employ them for poor villagers...they will be equally inefficient there also.*"

Colonial judicial system: One of the lawyers interviewed provided an in-depth analysis of the problem inherent in our judicial system. He accused the British of making the judicial process so complicated and difficult.

> "*Firstly the police, then the lawyers, investigative agencies coupled with a system of long hearings, huge pendency....all these factors combined make the judicial process a real foot-dragging exercise. Moreover, concepts like 'contempt of court', were established by the British to employ them as pressure tactics...we are a democracy where the right to speak and express should be accepted*".

He made a case for liberalizing the norms to the most practical extent possible.

Clearly people with better resources and/or influence at their disposal certainly have an advantage over the poor illiterate masses when it comes to dealing with the machinery of justice. Hence, one can observe that, "everybody is equal in the eyes of law but not in the courts of law".[9]

CONCLUSION

"*Access to justice means access to all remedies as per law without any discrimination regarding status or what so ever.*" [Supreme Court Lawyer]. The access to justice drive, as we have seen, began in the 1950s in India. The problem of expensive justice, favourable to the affluent sections

[9] Shivraj, Patil (2003) "The Litigation and Performances of the Judiciary", in Kashyap (ed) *The Citizen and Judicial Reforms: Under Indian Polity*. Delhi: Universal Law Publishing Company Pvt. Ltd. p.86.

only, was also covered by the legal aid movement since the 1960s. Several legal structures and mechanisms such as Nyay Panchayats, Lok Adalats, PIL and Legal Aid Cells have been instituted in order to enhance poor people's access to justice.

Though the reforms have been in existence for the past five decades, the distance between the legal system and the indigent has not yet been bridged. Reforms so far have been an eyewash. Both the agencies, the lawyers and the police, are exploitative in nature. They largely lack sensitivity to the problems of the underprivileged and aim at furthering their own advantage at the cost of the poor and ignorant masses. Hence, there is a need for the Bench and the Bar to establish supervisory mechanisms, to monitor the conduct of lawyers and police officials. One of the litigants argued that poor should be provided with good and responsible lawyers. He complained that, *"we keep running after them even after paying money"*. Moreover, there is no initiative for free legal services. They keep shifting the onus of responsibility on the legal aid bodies. Thus, law students should also be sensitised and trained in the direction of making the judicial system work better for the deprived masses.

The most important reason, emphasized by various advocates which limits equal access to justice, is that of neglect by the Bar of the preventive legal aid scheme, and by the government. Our survey shows that most indigents are unaware of the provision of free legal aid. Not one of the poor litigants (including the educated ones), who were interviewed were

aware of the provisions of free legal aid. In fact, they could not even comprehend the meaning and sense of the provision.

Though, in the perception of lawyers, the efficacy of legal aid services was high, the response of the poor litigants to the existence of such a provision makes evident made the failure of the scheme to empower the poor. The survey suggests that, though reforms have attempted to bring justice to the doorsteps of the people, they are severely limited in terms of fulfilling their goals despite the efforts made by the poor themselves to gain access to the judicial machinery. The aims and ambitions of the reforms have been frustrated by the reluctant attitude of the legal bodies towards the proper implementation of the schemes.

Though statistics indicate that, with some involvement of NGOs, the legal aid has significantly improved people's access to justice, it has actually been successful to a very limited extent as it has only marginally changed the ways in which legal services are provided and the legal system works. Even today lawyers do not comply with their duties towards the poor and most of the funds allocated for the purpose remain underutilized. Mr. Videh Upadhyay pointed out that, "*there is no lack of resources...it is the constituency of the Bar that should be blamed for not taking up the reforms seriously*".

A similar view has been expressed by G.O. Koppell who stresses that "changes needed to improve the administration and implementation of legal aid programs must come both in the organisation of

the Bar and in the content of legal education."[10] Hence, there is a need for the Bench and the Bar to establish supervisory mechanisms, to monitor the conduct of lawyers and police officials. One of the litigants argued that poor should be provided with good and responsible lawyers. He complained that, *"we keep running after them even after paying money"*. If the reforms are implemented with seriousness, along with an emphasis on mediation and conciliation schemes, greater opportunity can be made available to enable the poor to claim their rights. The state of Rajasthan is a classic example of efforts by NGOs to set up desks in police stations to legally assist poor people in the handling of their case and other relevant counseling.[11]

Such practices help to overcome some of the serious shortcomings of the legal reform movement that have heavily neglected the problems faced by the poor at the hands of police officials. Moreover, new mechanisms such as decentralizing the courts; encouraging NGO participation; more legal aid; and awareness camps in the rural areas, slums and labour colonies; sensitization of law students towards the needs of the deprived and underprivileged masses; are required to make the judicial system work towards these goals. As suggested by Anuvinda Varkey, among the measures that could be adopted to spread awareness among people are such as, pasting posters on bus stops and other such public places, providing information about the service of legal aid and advice. *"Even a little tinge of*

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[10] Koppell (2000) "Indian Lawyer as a Social Innovator: Legal Aid in India", *Law and Society Review*. Vol.3(23), p.300.

[11] Quoted by Mrs. Anuvinda Varkey, Supreme Court Advocate in an interview on 14th June,2006.

legal knowledge can help them (poor and ignorant masses) a lot."- Mr. Videh Upadhyay. There is little meaning in evolving new laws and institutions, if the poor and deprived are unable to take advantage of these, hence legal literacy should be the most important aim. All these mechanisms combined together are needed to bring equality in the justice delivery system in India. As emphasized by Mr. Viday Upadhyay, "instruments are in place...it is just the question of will."

However, most litigants expressed immense confidence on the office of the judge; "*judge ki nazar toh bhagwan ki nazar hoti hai....wo insaaf toh kar hi denge..unse bhi kabhi galti ho sakti hai, par phir bhi.....* "[12] Thus, the office of the judge is the only body which keeps the litigant hopeful of getting justice. A suggestion made by one of the accused was that judges should study criminal psychology. It was a very important suggestion as it might potentially embolden the investigative capacity of the judge to arrive at correct decisions without getting much affected by the lack or tampering of evidences or such other reasons.

A general consensus prevailed, among the litigants that their chances of winning a case would have been brighter had they possessed more money and greater influence. "*Madam poora system hi kharab hai—kya kya theek karein? Fees, police, vakil....sab ke liye paisa chahiye*".[13] The system works in favour of the rich and influential while ignoring the needs of the poor

[12] Judge is envisioned as God. "They go by instincts and have the insight to do justice. Though at times, the may make some mistakes, but still...."

[13] "Madam the entire system is problematic – how much will one amend it? Fees, police, lawyers....we need money for everything.."

victims of injustice. The legal aid cells are regarded as illusory steps that did not provide any concrete results. Such is the dismal state of affairs in the judicial system despite the progress of reforms since the last fifty years.

CONCLUSION

REVITALISING THE LEGAL AID REFORMS

A legal system is regarded as unjust and biased when, knowingly or unknowingly, it creates a socio-economic distinction between different sections of the society by creating one law for affluent section and another for the weak and deprived. That is, an unjust system is one which grants protection to one section of society and denies the same to the other. On the contrary, a just system is one in which there is equal recourse to law available to all sections of the society and where justice is done to rich and poor alike.[1]

The purpose of this study is to trace and highlight the limitations inherent in the working of Indian Judicial System which makes it difficult for the poor to have equal access to justice as the affluent sections. That is, the study is aimed at highlighting those defects which obstruct the path of the poor from accessing the judiciary and using law to preserve their basic rights. Various factors that hamper the attainment of justice by the poor and underprivileged have been researched. It is found that though the reforms have been in progress for five decades now, the opportunity to access justice remains limited for the poor. The poor continue to be deprived from taking advantage of the judicial system to preserve their rights while those who

[1] Smith, Heber (1972) *Justice and the Poor*. U.S: Patterson Smith Publishing Corporation .p.3. The idea is borrowed from Pound, "Causes of Popular Dissatisfaction with the Administration of Justice", 29 American Bar Association Review, 1906, p.395 quoted in ibid., p.3.

possess money, connection and muscle power find it easier to access the legal system.

LEGAL AID REFORMS : A BRIEF HISTORY

The present inequalities and defects in the administration of justice are not the result of any deliberate intention. Though the Constitution was drafted during the rather turbulent period of 1947-49, the framers of the Constitution envisaged establishing a social order where principles of justice and equality were to be preserved with utmost sincerity. The state was assigned the task of social welfare through the Directive Principles of State Policy, by guaranteeing basic human rights and basic human needs such as food, clothing, shelter, employment, education and such others. However, due to the limited resources available with the government, it was realized that the country was too poor to enshrine these rights as enforceable rights.[2] Although the Supreme Court was established to champion the rights and protection of the citizens on an equal basis, it could not, in practical terms, entirely fulfil this aim. Problems were inherent in the nature and practices of judicial system inherited from the British Judicial administration, such as the practice of collecting court fees, excessive legal formalities, formal legal language, and freedom of lawyers to charge excessive fees and so on.

[2] Setalvad, Atul.M, "The Supreme Court on Human Rights and Social Justice: Changing Perspectives", in "Supreme But not Infallible...."

The Constitution of India aimed at an 'even-handed administration of law'[3] but the judicial system could not make adequate arrangements for the purpose. It was realized by the Government of India that the provisions regarding legal aid made in the codes of Civil and Criminal Procedure were insufficient in promoting equal justice as envisaged in the Constitution.

To deal with these shortcomings, legal aid reforms were initiated to mitigate the limitations of the judicial system vis-à-vis the demands and aspirations of the poor and deprived. The legal aid reform initiatives have been discussed in Chapter 3, of this dissertation. The primary goal of the Legal Aid Reforms is to provide free and competent legal services to the weaker sections of the society. These reforms aimed at making the system informal and more effective in devising new mechanisms for the speedy disposal of cases, such as through negotiation, arbitration, conciliation, mediation, and so forth. It is over five decades since the reforms were initiated and this calls for an assessment of the performance of the reform process.

WEAKNESSES OF THE REFORM PROCESS

The legal reforms have been stringent and sensitive to the needs of the poor and legally incompetent people to enable them to attain equal access to justice. A transformation towards activism is also evident in the role of judiciary. The task which the courts have now undertaken is to make the rule of law a reality for the poor. However, the results have, so far, been less than satisfactory. There are certain serious structural and procedural weaknesses

[3] Op.cit., Heber, Smith. p.13.

within the reforms and additionally issues which the reform drives have failed to address, apart from some which they have not even considered or failed to recognize. These may be identified as follows:

1. The Lok Adalats were designed to provide some relief to the aggrieved claimant whose case would have been otherwise hanging for long in regular courts. A number of Lok Adalats have been set up, such as General Lok Adalat for motor accident cases and family law disputes, Electricity Lok Adalat, a government Pension Lok Adalat, High Court Lok Adalat, and Women's Lok Adalat; and so on. However, they have no fixed place. For instance, a General Lok Adalat was once conducted in a separate hall near the district court, while the next was held in a district court building. Moreover, there are days fixed for particular cases in Lok Adalats, for instance one day for electricity, one for motor accidents and so on.[4]

These features increase complications and confusion and make it difficult for the poor litigant to keep track of which case is to be held on which place and on what date. It, in fact, raises the level of inconvenience. These adalats are equally overcrowded and postponement and pendency of cases is a common scenario. Though the High Court Lok Adalat seeks to dispose of thousands of cases that are part of the backlog in the High Court, delays remain a constant feature as they are the result of absenteeism and irregular attendance of lawyers. Another limitation of the justice delivery

[4] Galanter, M and Krishnan K. J (2004) "Bread for the Poor: Access to Justice and the Rights of the Needy in India", *Hastings Law Journal*. Vol. 55. March. p.810.

pattern of these adalats is that Lok Adalat officials are authorized only to determine and arrive at a compromise or settlement.

2. The Nyaya Panchayats were established with the aim of making the justice machinery more accessible to the rural poor without any court-fees. However, even the Nyay Panchayats lack enforcement machineries and adequate legal authority. These Panchayats derive their revenue mainly from Village Panchayats which themselves fall short of adequate funding. In fact, the reluctance on the Nyaya Panchas to hold these regularly, is partly due to financial constraints faced by them in carrying out the day to day work of the Panchayats. The election of the Nyay Panchas involves politics and patronage.[5] The decisions of the indirectly elected Sarpanches in Nyay Panchayats are mostly in favour of landlords and high pressure groups belonging to a caste, leaving little space for the poor villagers to claim their rights. It was concluded by the Rajasthan Committee that Nyay Panchayats "neither are functioning properly nor they have been able to inspire confidence in the people".[6] The report indeed recommended the abolition of the Nyaya Panchayats altogether. Both the Lok Adalats and the Nyay Panchayats have been limited in their concern for the urban poor and slums.

3. A number of Sessions courts have emerged and proved quite beneficial in increasing the speed of case clearance. Moreover, even these are

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[5] Galanter and Baxi, in Cappelletti and Garth (ed) (1979) *Access to Justice: Emerging Issues and Perspectives,* Vol.III, Sijthoff and Noordhoff –Alphen Aan Den Rijn Ditt. A. Giuffre Editore – Milan, p.363.

[6] Government of Rajasthan, Report of the High Powered Committee on Panchayati Raj 43, 1973 quoted in Upendra, Baxi (1996) "Access, Development and Distributive Justice: Access Problems of the Rural Population", *Journal of Indian Law Institute.* Vol. 18(3). July-Sept. pp.373-429.

expensive, at least for the poor. For the educated youth, they are time consuming. Moreover, the underlying aim for setting up sessions courts was to reduce the burden of courts and not to solve the problem of the poor or guarantee justice to them.

4. The Magistrate or the Sessions Judge is under an obligation to inform the accused about his entitlement to the free legal assistance at the cost of the state.[7] It was established in the Hussainara Khatoon case that the judge should inform the parties about the existence of legal aid and such services for the financially incompetent population. However, the survey, discussed in Chapter Four, suggests that judges have been inefficient in performing this task. Recently, some informal interventions have been seen, as when Justice Bhagwati visited a jail to hold court within the premises of the jail to clear up long pending cases. No move has been made to regularize such practices and to clear up minor cases such as theft, etc.

5. Our criminal justice system is heavily burdened with serious shortcomings. Though, through the Criminal legal aid services, attempts were made to provide counsel to the under trials at state expense, the prisoners are restricted in terms of exercising their choice. They have no freedom to choose or refuse the legal aid lawyer selected for their case. The situation becomes worse as they have to communicate with their lawyer from within the boundaries of the jails as against those who are involved in civil litigation where the litigants are free to move and choose their lawyer or settle disputes

[7] Reddy, Raghnadha A (1989) "Right to Free Legal Aid: Judicial Activism", *Supreme Court Journal.* Vol. 1. p.8.

outside courts. There is no direct contact of the under trial with the lawyer as the mediator is another counsel. Thus, the reforms have been ineffective in providing a solution to such legal formalities. They are still concentrated on norms and institutions.

More problematic is the issue of court appointed lawyers whose number is adequate but the performance is average.[8] The membership in the legal aid cells is on a voluntary basis and the prescribed counsel fee per effective hearing is very low, between Rs.250-Rs.1200 (approximately). There is a clear reluctance on the part of the senior lawyers to become a part of the legal aid project as it affects their social status. Thus, these legal aid cells are most often joined by untrained practitioners with a view to gaining experience. This affects the quality of the legal services provided to the weak and incompetent, and renders the entire purpose of legal aid ineffective. It is these practitioners who carry the fate of the poor and helpless. There is also a lack of enthusiasm among the lawyers in taking initiatives to educate poor masses about their rights and services available to them. The Bar is equally responsible for such a situation.

6. Although Public Interest Litigation helped in increasing public awareness and government accountability, and enhanced the legitimacy of the judiciary, it is limited to only securing group rights. Access again remains limited as this route may be used only by empowered groups.

[8] Mr. Justice B.S. Reddy in Madhav, K.V.S (2001) "Whither Free Legal Aid", *The Hindu.* Sunday, April 01.

7. Concerning the role of the enforcement agencies, the issue of safeguarding the rights of the arrested persons was taken up in the case of Joginder Kumar v State of UP[9] where it was expressed that it was the duty of the police to inform a relative or friend of the detained person about the arrest. The magistrate was also given the responsibility to satisfy himself about the compliance of this duty by the police officials.

The interview conducted by Centre for Study of Law and Governance students, Shipra Bhatia, Pallavi Bahar and Maitri, with the Tihar jail inmates, in 2004, made it evident that this duty is not properly discharged. There has been no reform initiative in this direction. Moreover, the reforms have completely overlooked the problems faced by the poor in filing First Information Reports (FIRs) and registering their complaints with the Police.

The issue has been highlighted in depth by the survey discussed in Chapter Four in the section on "Field Report".

8. The legal aid movement has also shown some limitations in setting the eligibility criteria for legal aid for the poor and deprived people. It was established by Section 12 of the Legal Services Authority Act, 1995, that the eligibility for using legal aid was granted to the following categories of persons- a member of SC/ST; mentally ill or otherwise disabled persons; sufferers of a mass disaster, flood, ethnic violence etc.; individuals in custody and a few others. This criterion has kept middle income individuals, widows and old age pensioners out of and disqualified to use these services. It fails to recognize that, for them, legal assistance is equally expensive and

[9] 1994 4 SCC 260.

inconvenient. Also, persons who have been included within the fold of poor people by the apex court, such as, the bonded labourers, exploited poor women and children, inmates of protective homes, victims of rape and environmental pollution etc., have found no place in the provisions of legal aid.

The reforms have largely concentrated on reforming the legal institutions and practices and have overlooked the implementation of new schemes. The reasons for disappointment among the citizenry which has become disinterested and alienated from the judicial bodies lies in the shortcomings of the legal system and the delay in implementation of the reform process. The ineffective functioning of the judicial system has irretrievably eroded the confidence of the people in the system.[10] To restore the faith of the people in the judicial system some more systematic measures and policy reforms are required.

SUGGESTED MEASURES

There is need to decentralize the judiciary. Firstly, at the operational level, there should be a revolving bench of the Supreme Court. It is very difficult and nearly impossible for people settled in remote areas and long distance to approach the supreme legal authority. It is also important to decentralize courts to make them more accessible. More local adjudicatory

[10] Venkatachhalia (1999) "Rule of Law: Contemporary Challenges", *Indian Journal of Public Administration*. Vol. 45 (3). July-Sept. p.327.

bodies need to be set up in every nook and corner of the country to enable justice to reach citizens. A number of special courts, such as consumer courts, have been set up. Similar specialized courts, like the consumer courts, are required (for rape victims, property feuds etc.). Paralegal machineries should be set up, such as legal aid cells, specialized courts (e.g. consumer courts), apart from minor courts (e.g. High Court Lok Adalats and pension courts) at the local level, to handle at least minor local disputes and small cases.

Nyay Panchayats need to be revitalized at the village level. The membership should be on the basis of qualification and not through indirect elections. Then they can serve to be the best means of enhancing poor man's or layman's participation in the administration of justice. They are inexpensive, accessible and time saving. They should consist of judicial officers of the area, educated social workers, law college teachers and retired judicial officers. The Lok Adalats should have jurisdiction over any matter guided by legal principles. The compromise adjudged should be final and binding. With regard to the criminal legal aid system, there is a case for legal aid cells for the under trials in jails who are unable to engage counsel.[11]

Secondly, to overcome structural complications, more actors need to be involved. Reforms have followed a top-down approach. There should be a people-centric approach with more involvement of people in legal awareness programmes. Thus, Legal aid cells should be set up in every village and town with specialized members in respective fields. They should be given the responsibility to impart legal training to laypersons. Local communities

[11] Veerina, Sai (2000) "Legal Aid to Poor", *Andhra Law Times*. Vol. cv. Sep. p.32.

should be encouraged to help in bringing out the truth. Innovations at the level of Law Schools to practice informal dispute resolution mechanisms and impart legal education in rural and urban areas, and the engagement of paralegals in these areas, should be done with the dual purpose of educating the weaker sections of the society about their rights and for encouraging settlement of disputes through Lok Adalats.

There is also a case for setting up legal aid cells in jails for the undertrials who are unable to engage an advocate. Experts should be appointed to study the reasons for delays and suggest palliative measures. There is also a need to appoint specialised investigative agencies so that the burden is not only on the police.

Thirdly, Judges should be more proactive. They should be more vocal while presiding over cases and should render legal advice to the litigants as and when required. They must ask questions to clear up any point that has been overlooked or left obscure. Also, if required, they should conduct some personal investigation and not just rely on the evidences which could be easily tampered with. They should also scrutinize lawyers which would, in turn, increase the lawyers' efficiency and should also assist inexperienced lawyers during cross examination in a trial process. It is the judge's duty to check that each case brought before him is thoroughly investigated. At times, crucial questions are not asked and witnesses are deliberately kept out. Thus, a deeper involvement on the part of judges is important in order to make the judiciary

more sensitive to the needs and aspirations of the user. Therefore, not only the lawyers but also the number of judges needs to be increased.

Fourthly, the lawyers should themselves question delays in courts. They are required to be attentive towards the loopholes of the system and active in delivering informal legal advice to people other than their clients. Not just legal advice, but quality legal advice and services are equally important for access to rightful justice. It is essential for initiating proceedings in the court to advise clients of possible Alternate Dispute Resolution mechanisms; to check if the law is relevant to the claim and defense. Most times people are unaware if their problem can be legally claimed, e.g. problems of sanitation, safe drinking water etc. and what would be the repercussions of claiming them in the courts of law. For this, the parties should be approached by legal aid teams which should discuss the pros and cons of the case in advance.

More importantly, accountability mechanisms should be devised. Institutions to check the accountability of judges should be established. The performance of the judiciary should be checked and measured through public means – public meetings, media, public opinion etc. Active public opinion, media and public pressure is very essential. Reputation is a powerful tool for accountability.[12] The media and NGOs should be mobilized to monitor the implementation of the judicial decisions. This can be seen from the recent example of the Marine Drive rape case in which the judgment was passed in

[12] Anderson, Michael (2003) "Access to Justice and Legal Process: making Legal Institutions responsive to Poor People in LDCs", *IDS Working Paper 178*. Feb. Sussex: Brighton. p.23.

less than a year's time. Strong grassroots people's movements are required. If the system worked properly, there would be no need for arbitration or Alternative Dispute Resolution systems.

With regard to the inefficiency and malpractices of the legal professionals, their salary should be fixed, just like that of the judges, so that everyone is able to access potential lawyers. Their salary should be fixed in accordance to the nature of the case. More so, there should be performance-based promotions rather than time-bound ones to avoid lawyers getting disinterested in performing their duties.

Checking delays is an important measure to make the legal system more efficient. It is one of the most serious flaws which has constrained people's access to justice. Approximate time-period should be fixed for long pending cases along with sanctions on absentee lawyers and parties or witnesses involved. Hearings should be reduced and the number of judges and courts increased. Delay in resolving disputes is not entirely a shortcoming of the judicial process. It can also be a consequence of a case-load overload situation which can be dealt with by employing more judges or at least filling the vacant seats.

The introduction of 'Legal Education' as a subject in the syllabus of High Schools, Colleges, and Universities, and as part of the regular curriculum is a crucial move. It is surely an effective way of sensitizing law students for spreading legal awareness among masses.

Mechanisms to preserve important documents in court files should be devised. They sometimes disappear from the files. Computer technology can prove beneficial in this direction. The introduction of Information Technology (IT) has been a significant step. More officials and clerks should be appointed for record-keeping and to update the case status on websites.

Mechanisms to protect victims and witnesses vulnerable to threat should be properly laid down. State assistance should be provided to the victim on whom falls the burden of proof collection. Monetary compensation for victims should exist. In order to assist middle income people, schemes like the Litigation insurance schemes in UK, should be employed with some modifications to suit Indian conditions..

Investigating officers and police do not put in much effort to collect proofs and witnesses. More incentives should be introduced to assist legal officers and agencies to perform professionally.

Through the Centre of Legal Research v State of Kerala case[13] it was observed that the voluntary organisations and social action groups should be encouraged by the state to serve the poor with legal aid programmes. The state was expected to not exercise any direct control over these bodies but rather it to encourage public participation. The case advocated the involvement of voluntary organisations in implementing legal aid programmes aiming at the establishment of social justice. These NGOs can prove highly beneficial in spreading legal awareness among the rural and disadvantaged population. Other than free legal aid provisions, legal literacy campaigns should be

[13] Centre of Legal Research v State of Kerala, AIR 1986 SC 2195.

organized in villages and other such remote places to educate people about their rights and the availability of legal aid and advice services. The state alone cannot perform the free legal aid and advice functions. It needs active public participation.

CONCLUDING REMARKS

Poverty, illiteracy, ignorance and fear should not be a factor in debarring the poor from availing their basic human rights.[14] Thus, initiatives for empowering the poor by spreading legal awareness through legal aid clinics and legal literacy camps should be given top priority. It is also imperative for the law schools to disseminate legal knowledge to the ignorant and unaware public. Experiments like Lok Adalats and Nyaya Panchayats should be encouraged as these have the potential to take law closer to the people and convert the law in the statute book into reality. It is the duty of the learned members of the Bar to maintain high standards of professional conduct and take their responsibilities seriously by making provisions for bringing legal services to the doorsteps of the poor through means of legal literacy, etc. The Bench, the Bar, Social Service Organisations and Civil Liberties Associations all have to work in unison for the successful implementation of the schemes devised for the protection and justice of the underprivileged masses.

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[14] Iyer, K (1983) *Indian Social Justice in Crisis.* New Delhi: Affiliated East West Press. p.111.

The measures suggested in this dissertation might impose additional financial burden on the state. An easy solution lies in the partnership of state legal boards with NGOs and other paralegal agencies. These should be involved to spread legal literacy and hold legal aid camps for the assistance of those who are incapable of approaching the justice machinery to exercise their rights. This would solve the problem of expensive and slow legal processes and control the excess expenditure required for the implementation of various schemes.

Even in relatively developed state like Delhi, where major institutions like NALSA have been established, there is not much awareness of the prevalence of legal aid provisions. Taking note of the situation in Delhi, the condition of the states which fall under the category of the not so developed, such as the BIMARU states[15], can be easily judged. However, a more in-depth study of other states is required to assess the performance of the legal aid schemes in India as a whole. The study of the experiments of other countries with legal aid might also prove helpful in devising better strategies, in accordance with the needs of the Indian masses, to enhance access to justice by poor people.

[15] The BIMARU states include Bihar, Madhya Pradesh, Rajasthan and Uttar Pradesh.

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APPENDIX –I

Nalsa

Chapter I

Preliminary

1. Short title, extent and commencement.-

(1) This Act may be called the Legal Services Authorities Act, 1987.

(2) It extends to the whole of India, except the State of Jammu & Kashmir.

(3) It shall come into force on such date as the Central Government may by notification, appoint and different dates may be appointed for different provisions of this Act and for different States and any reference to commencement in any provision of this Act in relation to any State shall be construed as a reference to the commencement of that provision in that State.

2. Definitions.-

(1) In this Act, unless the context otherwise requires,-
(a) 'case' includes a suit or any proceeding before a court;
(aa) 'Central Authority' means the National Legal Services Authority constituted under Section 3;

(aaa) 'court' means a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force to exercise judicial or quasi-judicial functions;

(b) 'District Authority' means a District Legal Services Authority constituted under Section 9;

(bb) 'High Court Legal Services Committee' means a High Court Legal Services Committee constituted under Section 8A;

(c) 'legal service' includes the rendering of any service in the conduct any

case or other legal proceeding before any court or other Authority or tribunal and the giving of advice on any legal matter;

(d) 'Lok Adalat' means a Lok Adalat organised under Chapter VI;

(e) 'notification' means a notification published in the Official Gazette;

(f) 'prescribed' means prescribed by rules made under this Act;

(ff) 'regulations' means regulations made under this Act;

(g) 'scheme' means any scheme framed by the Central Authority, a State Authority or a District Authority for the purpose of giving effect to any of the provisions of this Act;

(h) 'State Authority' means a State Legal Services Authority constituted under Section 6;

(i) 'State Government' includes the administrator of a Union territory appointed by the President under article 239 of the Constitution;

(j) 'Supreme Court Legal Services Committee' means the Supreme Court Legal Services Committee constituted under Section 3A;

(k) 'Taluk Legal Services Committee' means a Taluk Legal Services Committee constituted under Section 11A.

(2) Any reference in this Act to any other enactment or any provision thereof shall, in relation to an area in which such enactment or provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

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Chapter II

THE NATIONAL LEGAL SERVICES AUTHORITY

3. Constitution of the National Legal Services Authority. - (1) The Central Government shall constitute a body to be called the National Legal Services Authority to exercise the powers and perform the functions conferred on, or assigned to the Central Authority under this Act.

(2) The Central Authority shall consist of -

(a) the Chief Justice of India who shall be the Patron-in-Chief;
(b) a serving or retired Judge of the Supreme Court to be nominated by the President, in consultation with the Chief Justice of India, who shall be the Executive Chairman; and
(c) such number of other members, possessing such experience and qualifications, as may be prescribed by the Central Government, to be nominated by that government in consultation with the Chief Justice of India.

(3) The Central Government shall in consultation with the Chief Justice of India, appoint a person to be the Member-Secretary of the Central Authority, possessing such experience and qualifications as may be prescribed by that Government, to exercise such powers and perform such duties under the Executive Chairman of the Central Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority.

(4) The terms of office and other conditions relating thereto, of Members and the Member-Secretary of the Central Authority shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(5) The Central Authority may appoint such number of officers and other employees as may be prescribed by the Central Government in consultation with the Chief Justice of India, for the efficient discharge of its functions under this Act.

(6) The officers and other employees of the Central Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(7) The administrative expenses of the Central Authority, including the salaries, allowances and pensions payable to the Member-Secretary, officers and other employees of the Central Authority, shall be defrayed out of the Consolidated Fund of India.

(8) All orders and decisions of the Central Authority shall be authenticated by the Member Secretary or any other officer of the Central Authority duly authorised by the Executive Chairman of that Authority.

(9) No act or proceeding of the Central Authority shall be invalid merely on the ground of the existence of any vacancy in or any defect in the constitution of the Central Authority.

3A. Supreme Court Legal Services Committee.- (1) The Central Authority shall constitute a Committee to be called the Supreme Court Legal Services Committee for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the Central Authority.

(2) The Committee shall consist of -
(a) a sitting judge of the Supreme Court who shall be the Chairman; and

(b) such number of other members possessing such experience and qualifications as may be prescribed by the Central Government to be nominated by the Chief Justice of India.

(3) The Chief Justice of India shall appoint a person to be the Secretary to the Committee, possessing such experience and qualifications as may be prescribed by the Central Government.

(4) The terms of office and other conditions relating thereto, of the Members and Secretary of the Committee shall be such as may be determined by regulations made by the Central Authority.

(5) The Committee may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions.

(6) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.

4. Functions of the Central Authority.- The Central Authority shall perform all or any of the following functions, namely:-

(a) lay down policies and principles for making legal services available under the provisions of this Act;

(b) frame the most effective and economical schemes for the purpose of making legal services available under the provisions of this Act;
(c) utilise the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities;
(d) take necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections of the society and for this purpose, give training to social workers in legal skills;
(e) organise legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of

disputes through Lok Adalats;
(f) encourage the settlement of disputes by way of negotiations, arbitration and conciliation;
(g) undertake and promote research in the filed of legal services with special reference to the need for such services among the poor;
(h) to do all things necessary for the purpose of ensuring commitment to the fundamental duties of citizens under Part IVA of the Constitution;
(i) monitor and evaluate implementation of the legal aid programmes at periodic intervals and provide for independent evaluation of programmes and schemes implemented in whole or in part by funds provided under this Act;
(j) provide grants-in-aid for specific schemes to various voluntary social service institutions and the State and District Authorities, from out of the amounts placed at its disposal for the implementation of legal services schemes under the provisions of this Act;

(k) develop, in consultation with the Bar Council of India, programmes for clinical legal education and promote guidance and supervise the establishment and working of legal services clinics in universities, law colleges and other institutions;

(l) take appropriate measures for spreading legal literacy and legal awareness amongst the people and, in particular, to educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures;

(m) make special efforts to enlist the support of voluntary social welfare institutions working at the grass-root level, particularly among the Scheduled Castes and the Scheduled Tribes, women and rural and urban labour; and

(n) Coordinate and monitor the functioning of State Authorities, District Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees and voluntary social service institutions and other legal services organisations and given general directions for the proper

implementation of the Legal Services programmes.

5. Central Authroity to work in coordination with other agencies .- In the discharge of its functions under this act, the Central Authority shall, wherever appropriate, act in coordinatin with other governmental and non-governmental agencies, universities and others engaged in the work of promoting the cause of legal services to the poor.

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Chapter IV

ENTITLEMENT TO LEGAL SERVICES

12. Criteria for giving Legal Services. - Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is -

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or begar as referred to in Article 23 of the Constitution;

(c) a woman or a child;

(d) a mentally ill or otherwise disabled person;

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial workman; or

(g) in custody, including custody in a protective home within the meaning of clause (g) of Section 2 of the Immoral Traffic (Prevention) Act, 1956(104 of 1956); or in a juvenile home within the meaning of clause(j) of Section 2 of the Juvenile Justice Act, 1986 (53 of 1986); or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of Section 2 of the Mental Health Act, 1987(14 of 1987);or

(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than

rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.

13. Entitlement to Legal Services.- (1) Persons who satisfy all or any of the criteria specified in Section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend.

(2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.

APPENDIX –II

QUESTIONNAIRE for LAWYERS

(Your response is valuable for my research)

1. What is the nature of cases most received from poor clients?
    a. Property claims and land disputes.
    b. Socio-economic claims from government such as water and sanitation facilities, subsidy claims and other state funded facilities such as pensions, living space etc.
    c. Migrant labourers' rights and issues of displaced communities.
    d. Harassment cases – sexual abuses, mistreatment of women in family, exploitation by employers etc.
    e. Heinous crimes such as murder, drugs, human trafficking etc.
    f. Small crimes such as theft, pick pocketing etc.
    g. Accident cases and claims.

2. How much fee do you charge for the below listed cases:
    a. Property claims and land disputes :_____
    b. Socio-economic claims from government such as water and sanitation facilities, subsidy claims and other state funded facilities etc. :_____
    c. Migrant labourers' rights and issues of displaced communities :_____
    d. Harassment cases such as rape, exploitation at work place etc. :_____
    e. Heinous crimes such as murder, drugs, human trafficking etc :_____
    f. Small crimes such as theft, pick pocketing etc. :_____

3. What is the criterion for charging fee for a particular case :
    a. Number of hearings.
    b. Nature of the case.
    c. Social status of the client.

4. If 100% is what you charge from a client who can easily afford your fee, how much minimum percent of concession would you offer to a litigant who comes from lower strata of the society? _____

5. Do you charge differently from different clients – rich and poor?

   [Yes]

   [No]

6. Do you offer any concession to those who are not able to afford fee? (If yes, specify approximately how much.)

   [Yes]

   [No]

7. Do you offer free legal services for poor people? **[Yes]**

   [No]

   If yes, are you paid by the government/state? **[Yes]**

   [No]

   If paid, then specify how much for one case? _____

8. What is the approximate time period for completion of a case? _____

9. In your opinion, which of the following is the most important reason for the huge pendency and delays in courts :

   a. Lack of funds with the court.
   b. Lack of income of clients.
   c. Excessive legal formalities.
   d. Delay tactics used by lawyers.
   e. Absenteeism of the lawyers.
   f. Absenteeism of the witness.

10. What do you think is the biggest impediment while accessing justice for the poor? Tick one/two which is/are most applicable.
    a. Registering complaint.
    b. Fear of Police – abuses, harassment and misconduct.
    c. Delay in courts and long driven process.
    d. Limited or no awareness.
    e. Financial obstacles – court fee, lawyer's fees, process fee.
    f. Indifference in the attitude of lawyers.
    g. The formal outlook and atmosphere of the court creates an air of discomfort among them.
    h. Professional malpractices.
    i. Burden of proof on victim.
    j. Distance from the court – increases inconvenience.

11. Which of the following unimportant practices do you believe hinder the attainment of justice and as such must be done away with:
    a. Dress code.
    b. Formal Legal Language.
    c. Discipline.
    d. System of Long Hearings.

12. Is it true that judges have no right to interfere the proceedings in order to show impartiality?

[Yes]

[No]

If yes, do you think judges should have the right to speak in court to assist inexperienced lawyers during cross-examination or to clarify some fact related to the case?

[Yes]

[No]

13. Which of the following is the most significant measure adopted by the government to enhance availability of justice for the poor :
    a. Setting up of Nyay Panchayats.
    b. Establishment of Lok Adalats.
    c. Legal Aid Services.
    d. Public Interest Litigation.
14. What, according to you, is the meaning of 'access to justice'? Do you think that after a series of legal reforms during past decades there is an equal access to justice for the rich and poor alike?

QUESTIONNAIRE for POOR LITIGANTS

6. What is the nature of your case?
    a. Land disputes and property claims.
    b. Accident cases and claims.
    c. Small crimes such as theft, pick pocketing etc.
    d. Husband-wife or women-relative issues.
    e. Mistreatment of women – wife beating, sexual abuse at home or work place, dowry etc.
    f. Exploitation by the employers.
    g. Lack of adequate living facilities and basic amenities.
    h. Issues of displacement.
    i. Violation of human rights by law enforcement agencies.
    j. Heinous crimes such as murder, drugs, human trafficking etc.
7. Are the courts easily accessible? **[Yes]**

    [No]

    If no, then what are the problems faced while approaching them:
    a. Fear of Police.
    b. Attitude of lawyers.
    c. Cost dimensions.
    d. Excessive formalism.

8. How much are you charged for it by the lawyer:_____

    How much is the court fee:_____

9. Why did you choose your lawyer :
    a. Low fee of the lawyer - Easy to afford.
    b. Efficiency of the lawyer.
    c. Experience of the lawyer.
    d. Faith of winning the case with the lawyer.
    e. Feeling of identification – same caste, locality, relative etc.

10. When did you file your case with the police? (approximate date or month)

_____.

11. Since how long your case has been continuing in the court? (months or years)

_____.

12. What are the possible reasons for the delay :
    a. Lawyer's fee and other cost considerations.
    b. Excessive legal formalism.
    c. Delay tactics used by lawyers.
    d. Absenteeism of the lawyers.
    e. Absenteeism of the witness.

13. What fears did you have before approaching the police?
    a. Past experience of torture and humiliation.
    b. Fear of harassment in police stations.
    c. Formalities in registering complaints.
    d. Lack of influence to make your voice heard.
    e. Specify if any other _____

14. How far were these fears valid? What was the biggest problem while facing the police?

15. Were you informed about the free legal aid services?

    [Yes]

    [No]

16. How did you get know about the availability of the legal aid services?
17. Were you offered free legal aid?

    [Yes]

    [No]

18. Are you satisfied by the performance of the lawyer provided?

[Yes]

[No]

19. Do you think your case would have been better fought and dealt with had you possessed sufficient money and influence?

[Yes]

[No]

20. What do you suggest to make the legal system more user-friendly?