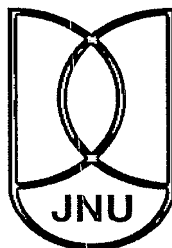
THE POLITICS OF JUDICIAL REFORM

A CASE STUDY OF 'SPECIAL COURTS' IN DELHI

Dissertation submitted to Jawaharlal Nehru University in partial fulfillment of the requirement for the award of the degree of

MASTER OF PHILOSOPHY

ANU SHARMA



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Declaration

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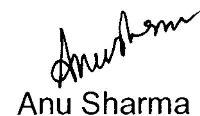

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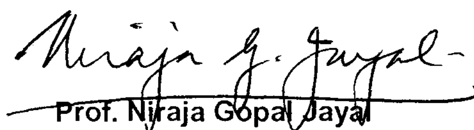

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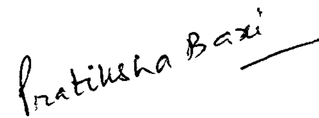

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Abbreviation and Glossary

ADR	Alternative Dispute Resolution
CILAS	Committee for implementing Legal Aid Scheme
CJI	Chief Justice of India
ICCPR	International Convention on Civil and Political Rights
DLSA	Delhi Legal Services Authority
JO	Jail Official
LSAA	Legal Services Authority Act
MM	Metropolitan Magistrate
NGOs	Non-Governmental Organisations
PIL	Public Interest Litigation
PP	Public Prosecutor
UT	Undertrial
Lok Adalats	People's Court
Hawaldars	Constables
Mulahiza ward	Ward meant for first-time offenders

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Chapter 1

Introduction

> And if one works out the amount of money which is spent on undertrials all over the country, it will be around 360 crore. So we thought special courts will not only help the undertrials get speedy justice, but also help control their numbers in jails.

Arun Jaitely,

Union Minister of Law, Justice and Company Affairs,

July 29th, 2001[1]

The above-stated opinion of Mr. Arun Jaitely, the then minster of Law, Justice and Company Affairs, seems to resonate the sentiments of many as far as judicial reforms are concerned. It presents a complex picture whereby reforms are not just thought of to reduce the suffering of those who are coming in contact with the criminal justice system but are perceived as necessary for the economy. Mr. Arun Jaitely made above remarks while attending a function at Tihar jail where 'Special Courts' are held once a month to dispose off petty criminal cases. Former Chief Justice of India, A. S. Anand had conceptualized the formation of these courts. The special courts are now perceived as reform measure for speedy disposal of petty criminal cases and effective means of reducing population of undertrials[2] in jails. They are also thought of as effective means of

[1]Daily Excelsior. 2001. "Special Courts come to rescue of Undertrials". New Delhi. Downloaded from http://www.dailyexcelsior.com/01july30/national.htm#5. Accessed on 29th January 2009.

[2] The term undertrial refers to "a person whose case is yet to be tried at the first level of the court" (Murlidhar 2004: 12).

improving access to justice and combating judicial delay. These courts at Tihar jail are the focus of this thesis. I intend to locate the formation of these courts within the wider ambit of judicial reforms. This thesis aims to critically analyze the "current wave" of judicial reforms—move towards special courts/fast-track courts—in disposing off criminal cases.

Special courts are also referred to as fast-track courts. In fact, during the course of my fieldwork I observed that different categories of people refer to them differently. For instance practicing lawyers in various district courts in Delhi usually call them *lok adalat* cases, while jail officials and legal aid counselors term them, mostly, special courts or fast-track courts.[3] This presents a very complicated picture of special courts and gives them a very ambiguous status.

These days it is not uncommon to find news related to all kinds of cases being decided by fast-track courts.[4] Off late 'fast-track court' seems to have emerged as a key word in the legal scenario. In India, Eleventh Finance Commission had recommended formation of fast-track courts in the country. It had given a grant of

[3] Though these courts are different from lok adalats and fast-track courts in the manner in which they function and the way they are organized, yet these courts are looked as '*lok adalats*' and 'fast-track courts', I believe, by these lawyers and jail officials, in terms of their physical location outside regular courts and the way they function to dispose off cases.

[4] See Venkatesan, J. (2009). Fast-track Courts to try Godhra riot cases. *The Hindu*, Saturday, May 02; Prakash, Satya (2009). SC ruling: Fast-track courts for Gujarat riot cases. *Hindustan Times*, May 01, New Delhi; Express News Service (2008). Panel Recommends 13 judges for fast-track courts. Expressindia.com, January 18, Chandigarh; BBC News (2006). India to set up Fast Track Courts. Saturday, July 29; Thomas, Melvyn (2009). Surat fallout: Gujarat to fast-track all rape cases. *The Times of India*. Though the fast track court's judgment in Best Bakery trial was criticized severely by the former Chief Justice of India, Justice A. S. Anand, who called it "miscarriage of justice" as the judge in fast-tracking the case overlooked many vital aspects related to the case and hence, the judgment decided in favour of the accused and led to their acquittal.

Rs. 509 crore for building 1,734 fast track courts. Following the recommendations of the Commission, the Central Commission has sanctioned huge amount of grants to the states to build such courts. Various guidelines have been passed related to these courts as well. In 2005 when Congress led coalition came to power, these courts were on the brink of disappearance. However, the Supreme Court extended their life. Consequently, the Government had accorded its approval for the continuation of 1562 fast track courts. Currently, the Department of Justice is monitoring the scheme.

Thus, this research is a small step towards gaining knowledge about the working of special courts—its relevance in combating judicial delay, increasing efficiency, reducing costs and enhancing access to justice. The work seeks to situate the context of judicial reforms in India in the discourse around 'good governance' which emphasize on the 'rule of law' for the development of any nation. The next section then seeks to surface the socially embedded character of law and politics which lead to the debates around judicial reforms.

1.1 Background of the Study

Since 1990s, the World Bank has propagated "good governance" for successful development. The term 'governance' emerged for the first time in the World Bank literature in 1989 in the report on Sub-Saharan Africa. The report suggested that the structural adjustment programs (SAP) of World Bank were being rendered ineffective as there was a crisis of governance in the area. The Bank recognized

that "good governance" is essential for the development of any nation. The World Bank has thus increased its flow of funds to promote good governance, a major part of these flows, since 1990s, goes to legal and judicial reforms. In the arena of governance, legal and judicial reforms occur as one of the main six themes carried forward by the Bank. The other five components being: anti-corruption, civil services reform, decentralization, public financial management and tax-policy administration.

As stated above one of the key elements of good governance, according to the Bank, is the rule of law. The Bank in *Initiatives in Legal and Judicial Reforms* (2004) stressed on the adherence to the rule of law for economic and social development. The Bank started the publication of this document in 1998 and it updates it annually to give the information regarding the involvement of the Bank in legal and judicial reform across the world. In *Legal and Judicial Reform: Observations, Experiences and Approach of the Legal Vice Presidency* (2002), the Bank states its intentions clearly:

> The World Bank's mission is to promote economic growth and reduce poverty in its member states. One of the critical lessons from the East Asian financial crisis and the collapse of some of the Eastern European transition economies in the 1990s was that, without the rule of law, economic growth and poverty reduction can be neither sustainable nor equitable. (2002: 1)

It states that the rule of law furthers economic growth and lessens poverty by giving, "opportunity, empowerment and security through laws and legal institutions". These 'laws' and 'legal institutions', as per the Bank, include

following elements—'meaningful and enforceable laws'; 'enforceable contracts'; 'basic security'; and 'access to justice'. It is held in the Report that:

> These elements of a well-functioning law and justice system allow the state to regulate the economy and empower private individuals to contribute to economic development by confidently engaging in business, investments and other transactions. This in turn fosters domestic and foreign investment and the creation of jobs and reduction of poverty. (2002:2)

The same chain of thought runs through World Bank's *Initiatives in Legal and Judicial Reforms (2004)* report too. In this document the World Bank maintains that to achieve sustainable development, the entire development process should be comprehensive and the Bank realizes that legal reforms are very crucial component of this process. The report claims that judicial reforms are one of the main pillars of the Comprehensive Development Framework. This Framework also serves to fight poverty as the Bank has come to believe that without the effective and equitable legal system poverty cannot be fought and the gains cannot be sustained. And like earlier reports, this document also reiterates those factors that have contributed to its emphasis on judicial reforms in development projects. It stated political and economic changes in Eastern Europe and the former Soviet Union in the late 1980s and early 1990s that led to many significant changes in the countries, requiring institutional reforms and legal and institutional infrastructure to support, implement and enforce the emerging legal system.

The Report refers to the Asian financial crisis faced in 1990s that evidently marked out that without the strong foundation of effective laws and legal institutions, economic growth is always vulnerable and unsustainable. The third point which led to stress on legal and judicial reform was the development experience that not only showed that the rule of law not only promotes effective and sustainable development but also good governance. The report also claims that lack of rule of law curtails economic growth and corruption adversely affects the poor.

The report also tries to point out that the movement of developing countries towards market economies necessitated such strategies which could attract foreign investors and this goal could not have been possible without introducing effective changes in legal and institutional frameworks which can firmly establish rule of law and ensure stability and predictability of legal rules. Apart from highlighting environmental factors the report also claims that effects of globalization are uneven, moreover, if it is coupled with arbitrary laws then poor are most deprived section of the society.

The Report claims:

> These experiences have led development institutions to focus on the role of law in economic development and have prompted many countries to promote the rule of law as a sine qua non of development. The rule of law prevails where (1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy. Legal and judicial reform is a means to promote the rule of law. (2004: 3)

It is evident from the above-mentioned that what the Bank wants to do is to ensure stable and predictable laws that could give some assurance to facilitate market transactions and that could ensure property rights and contracts. These are the crucial elements for the globalised world market whereby, both domestic and foreign investors are thought of as requiring such legal reforms to invest their capital. The stress of the Bank is more on enforcement and thus, it demands 'efficient' and 'competent' judiciary. The Bank does not believe that 'successful' legal reforms can be those which are restricted to making new laws and revising existing ones. It holds that reforms should address those measures which are required to establish appropriate processes to not only ensure proper functioning of institutions but also to improve *access to justice.*

Almost similar stand has been taken by other donor agencies. UNDP, OECD, ADB, IADB, USAID have given loans over million dollars for judicial reforms to various countries. [5] Richard E. Messick in *Judicial Reform and Economic Development: A Survey of the Issues* (1999) has maintained that loans worth more than $500 million are either approved or initiated by the World Bank, the Inter-American Development Bank (IADB), and the Asian Development Bank (ADB) in 26 countries. The U.S. Agency for International Development (USAID) has spent over $200 million on law programmes. In fact, the USAID maintains that the recent surge towards the rule of law reforms is the fourth generation of

[5] For this thesis I have focused primarily on the World Bank and its lending projects in the sector of judicial reforms. However, this brief overview of the work of other donor agencies is done to highlight the focus of these agencies in legal sector reforms and the politics involved in it.

reforms. In *USAID Program and Operations Assessment Report No. 7, Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs* (1994), the USAID traces historical development of rule of law (ROL) programmes. As per the report the first generation of ROL programmes was initiated by the law and development programmes. They began in 1960s when along with the Ford Foundation, the USAID helped various Asian, African and Latin American countries develop faculties of law. It was succeeded by the New Directions Mandate in mid-1970s. It concentrated on legal aid projects for making legal services accessible to the poor. In mid-1980s came the third generation of legal reforms with the Administration of Justice programmes. It focused on court reforms in Central America. In early 1990s, as per the report, the USAID 'broadened the geographic and analytic perspectives' of the legal reform programmes. Like the World Bank, the USAID is also directing its resources for support of democracy through focus on 'institution building within the formal judicial system.'

Thus, it is evident from the discussion above, there is a surge towards legal and judicial reform programmes across the globe. And it is done under the garb of 'good governance'. Scholars like Niraja Gopal Jayal have severely criticized the World Bank's definition of good governance. Jayal (1997) claims that the definition is "impoverished" one and holds that, in the context of the Third World, the notion of governance as a "technical facilitator of development" divorced from the notions of democracy and welfare does not hold good. Many legal academicians including Baxi (2007), Narrain (2007), and Batra (2007) have very

succinctly pointed it out that in the name of good governance, the World Bank is promoting such legal and judicial reforms that facilitate its own economic and strategic needs. Many scholars have pointed out that the World Bank focuses on the limitations of the existing legal systems world over so as to facilitate market transactions by defining property rights, maintenance of law and order, and to guarantee the enforcement of contracts (Harris, 2007; Morita and Zaelke, 2005). Upendra Baxi (2007) believes that "international financial institutions" seek "judicial globalization" in the name of good governance. They seek to entrench free market fundamentalism.

Victoria Harris (2007), in her paper, "Consolidating Ideology in Law? Legal and Judicial Reform Programmes at the World Bank", argues that the six main themes pursued by the Bank are the key elements of the post-Washington Consensus which perceives that stable and predictable market transactions are necessary for economic development. She writes:

> The necessity of legal and judicial reform to facilitate market-led development has been widely promoted by the World Bank since the early 1990s. Despite its articles of agreement prohibiting it from becoming involved in the political affairs of states, the Bank's foray into governance reforms - to which legal and judicial reforms have been central - tells a different story.
> Generally citizens are protected from the potential excesses of the state and market by the judiciary so an independent judiciary is therefore a cornerstone for the protection of civil and political rights. In contrast, Bank-led reforms are market-focused, including training for lawyers and judges and the formulation of contract and property rights laws. Additionally, legal reforms have been executed by circumventing democratic processes and undermining accountability, setting a worrying precedent.[6]

[6] Downloaded from http://www.brettonwoodsproject.org/topic/goodgov/index.shtml

She claims that despite the Bank's emphasis that rule of law promotion is for poor and it is its contribution in the field of human rights, its pro-poor attitude and furtherance of human rights is nothing more than a rhetoric as the reforms put forth by the Bank focus on market transactions. They serve to define property rights, guaranteeing enforcement of contracts and maintaining law and order. She cited Graham Harrison of the University of Sheffield who noted that the Bank would stop lending to those member states that violate the property rights of a transnational corporation. She also notes:

> Worldwide there are 23 freestanding active and upcoming projects for the reform of a state's legal system. From 2001 to 2006 worldwide lending for law & justice and public administration, the Bank's classification for this work, increased from $3.9 billion to $5.9 billion, dwarfing lending in all other sectors and accounting for nearly one quarter of total sector lending. Law & justice and public administration is the top sector for both IBRD and IDA lending. Worldwide thematic lending for "rule of law" projects also rose, from $410 million to $757 million, in the same period.

Thus, increasingly the Bank is directing its funds to promote legal and judicial reforms to further the interests of markets. Many scholars have also argued that the Bank's foray into judicial reforms is due to the influence of the New Institutional Economics on the policies of the Bank. Siddharth Narrain (2007) has noted that the initiatives taken by the Bank in the area of legal and judicial reforms are linked to its 'discovery' of "Rule of Law Reforms". He writes:

> In keeping with the body of theory called New Institutional Economics (NIE) that underpins to a large extent the Bank's work in 'good governance', the Bank sought to translate the Rule of Law from a philosophical idea into tangible institutions that could be reformed. NIE explicitly identifies Rule of Law as a factor contributing to economic growth and stresses the importance of positive law and legal institutions for protecting property rights and enforcing contracts, two important constituents of the Bank's understanding of the Rule of Law. (2007: 1)

Thus, one can understand the objective behind the interests of the donor agencies in judicial reforms. In fact, the World Bank alone has spent $2.9 billion on some 330 projects between 1993 to 2003 in its agenda of rule of law.[7] Narrain notes that initially the focus of the Bank was to assist countries through reform of laws, so that they could develop legal environment that is conducive to attract local and foreign investors. It included stable and predictable systems to protect property rights and contracts. However, the Bank has begun to realize that enacting legislations alone could not do anything without adequate infrastructure to support the implementation, enforcement and modification of law. Thus, the focus of the Bank shifted to building and reforming institutions needed for dispute settlement.

What is pointed out by Narrain is very crucial as we are not only witnessing change in the legal rules but also realizing that certain kinds of institutions are being built up for the settlement of disputes. For example in India, there is increasing emphasis on taking the recourse in the alternative dispute settlement mechanisms and setting up of special commercial division benches in courts to attract foreign investors. Similarly in Bangladesh, where the Legal and Judicial Capacity Building Project is being carried out by the Bank, not only economic laws are revised and reformed but a center to settle commercial disputes and an Ombudsman's office are also established set up as part of legal and judicial reforms.

[7] Barron, G. (2005). "The World Bank and Rule of Law Reforms", Working Paper Series, no 5-70, Development Studies Institute, London School of Economics and Political Science. Also available at www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf

1.2 Judicial reforms in India

As pointed out in the preceding paragraph that in India there is increasing emphasis on evolving and using alternative dispute resolution mechanisms for settlement of various kinds of disputes. In this thesis I have attempted to highlight the politics of judicial reform in India by reading the reforms which are introduced to attract foreign investors along with steps taken for speedy justice. In other words, in this thesis, it is argued that the agenda of the donor agencies is being carried forward by the Indian Government—whereby the dockets of the regular courts are being cleared for the commercial disputes by directing civil disputes (often by individuals and petty businessmen) and criminal disputes to other forums. For doing so the numerical narratives are created with the help of alternative forums to boast about efficiency, reduced costs and access to justice.

The attention of the Indian government, it is argued here, is focused on those reforms that can highlight its credibility in the world market.[8] This is evident from the *One Hundred and Eighty Eighth Report* of the Law Commission of India (2003). This report highlights the urgency to reform our judicial system so that we can attract foreign investors in India need can reap the benefits of globalization in

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[8] Most of the recent reports recommends fast-tracking various kinds of commercial disputes; curbing frivolous litigation; and move towards Alternative Dispute Resolution for both civil and criminal cases:- Law Commission of India (2009). *Need for Justice-dispensation through ADR etc.* Report no.222, April 20th; Law Commission of India (2009) *Need for Speedy Justice-Some Suggestions.* Report no. 221, April 30th; Law Commission of India (2008). *Fast Track Magisterial Court for Dishonored Cheque Cases.* Report no. 213, November 24th; Law Commission of India (2005). *Prevention of Vexatious Litigation.* Report no. 192, June 05; Law Commission of India (2004). *Revision of Court Fees Structure.* Report no. 189; Law Commission of India (2003). *Hi-tech Fast-Track Commercial Divisions in High Courts.* Repot no. 188.

better manner. It proposes the constitution of *Hi-tech Fast-Track Commercial Divisions in High Courts* (2003: 1). This report claims that since stakes are so high that unless a speedy and effective mechanism to solve the commercial dispute is evolved we cannot solve commercial disputes expeditiously. It is important to assure foreign investors that like any other developed country we have no delays in judicial process. The Report suggests that we have fast-track commercial divisions in High Courts like U.K. and U.S. Thus, the official discourse on judicial reforms in the country seems to be tilted towards the commercial interests. What seems to emerge is the "two-tier system" of justice wherein the formal courts are being cleared for the commercial purposes and common people or to use Galanter and Krishnan's term, 'little people' "remain trapped in an under-capitalised gridlocked system" (Galanter and Krishnan, 2002: 38).

The aforesaid report came out in December 2003, and in February 2004, the Law Commission of India took out another report. The title of One Hundred and Eighty Ninth Report of the Law Commission of India (2004) is *Revision of Court Fees Structure*. This report if read along with the Malimath Committee recommendations and donor institutions memoirs uncovers politics of judicial reforms. The report talks of available measures to curb *frivolous or vexatious litigation*.[9] It suggests enactment of central act along the lines of Madras Act VIII of 1949 and raising of court fees as measures to curb frivolous litigation. In fact, in 2005 the Law Commission came with a full report on prevention of vexatious

[9] Oliver Mendelsohn (2005) has argued that vexatious litigation is a colonial construct which was/is used to perceive Indians as extremely litigious and thereby clogging the dockets of the courts.

Galanter. This is further perpetuated by the donor institutions. For instance the "ADB's Administration of Justice Project in India" also suggests ways to curtail "frivolous litigation". Siddharth Narrain (2007) says that more often the focus of donor agencies is to reduce the cost and delays and also stress on making the judicial process more efficient and competent. One of the ways to achieve this is to curtail "frivolous litigation" (see chapter 2).

Marc Galanter and Jayanth K. Krishnan's work on *lok adalats* in India is very illuminating. They[10] have provided remarkable insights on the work of *lok adalats* as an alternative to regular courts. Their work exemplifies the gap between the official discourses of judicial reform as versus the practice of such reforms. Taking the theoretical paradigm put forth by them on the functioning of lok adalats in India, I attempt to explore the purpose served by special courts; the manner in which these courts function; kinds of cases which come up before such courts; and the role played by such courts in expediting the Fundamental right of speedy justice enshrined in the Constitution of India.

1.3 Special courts

Many prison *adalats* are working currently across India. In Gujarat, the District jail in Gandhinagar has a functional prison *adalat* which disposes off 'petty' cases

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10 Galanter, Marc and Jayanth Krishn (2004). "Bread for the Poor: Access to Justice and the Rights of the Needy in India", *Hastings Law Journal*, Vol. 55, No. 4, pp. 789-833.

time to time[11]. In Jharkhand, Giridih District Jail (in Hazaribagh district) organizes *jail adalat.*[12] In Southern India Tamil Nadu seems to be way ahead in introducing this kind of reform in its jails. The central prisons in Chennai, Madurai, Tiruchi, Vellore, Cuddalore and Salem are organizing *jail adalats*. In 2005 some 603 undertrials were released from Tiruchi Central Prison only.[13] It is considered next to Chennai Central Prison in terms of releasing the undertrials though such adalats.[14] In 2003, the number of disposals at *jail adalats* functioning in prisons of Chennai, Madurai, Tiruchi, Vellore, Cuddalore and Salem was around 3,500. In fact, the Chennai central prison alone had 1,947 disposals; the Madurai jail also accounted for 1,076 disposals.[15] One such jail is also organized by Tihar Prison Headquarters in Delhi. It is held once in a month to dispose off 'petty criminal cases' as per the directions of former Chief Justice of India, Mr. A. S. Anand. The special court in Tihar is the field for this thesis.

1.4 The Field:

1.4.1 A Brief Note on Tihar

Delhi jail was situated at Delhi Gate prior to 1958. Later it was shifted to Tihar village. Presently, there are nine Central jails in Tihar and one District jail at Rohini. Till 1966 the Governor General of Punjab exercised administrative control

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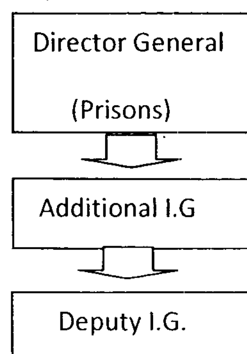
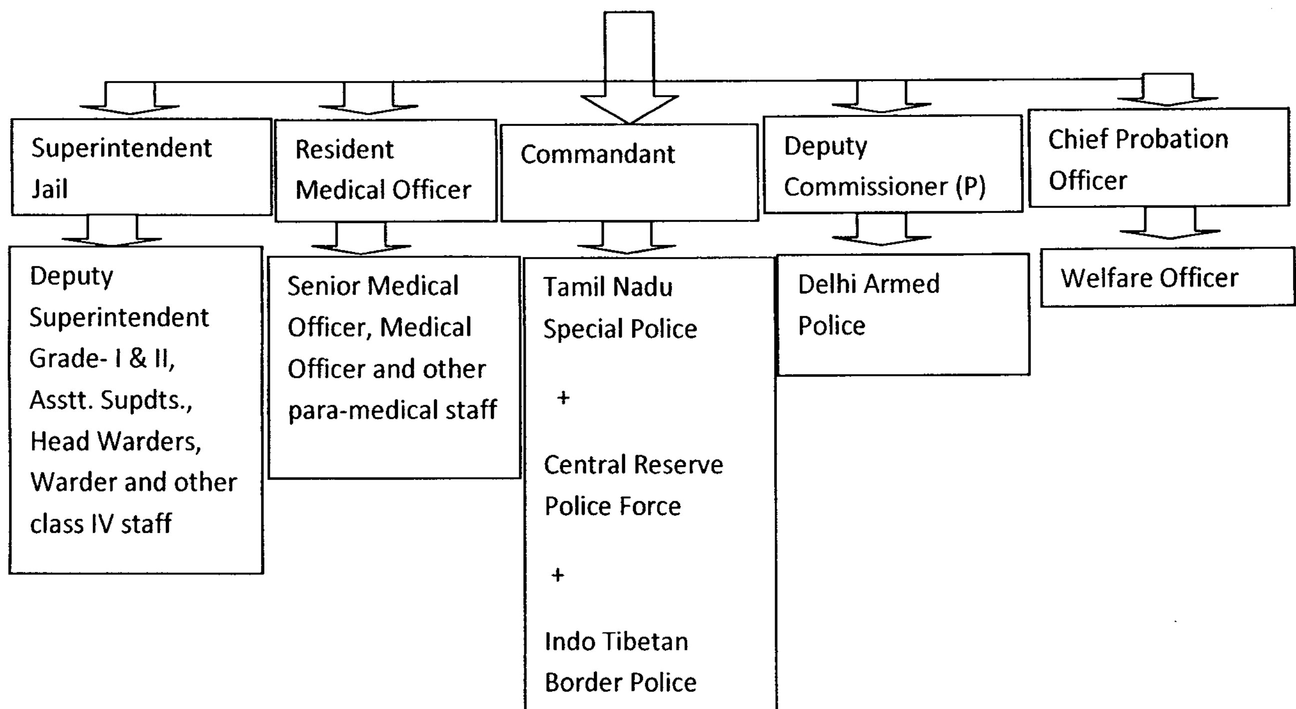
[11] The Times of India (2002). *Proposal to shift district jail hangs fire,* October 03.
[12] The Telegraph (2005). Jail Adalat, December 09, Giridih.
[13] Saqaf, Syed Muthahar (2006). *Prison Adalat a godsend for undertrials,* The Hindu, Saturday, January 07.
[14] Ibid.
[15] Subramani. A.(2004). *Strides in legal literacy, Lok Adalat movement,* The Hindu, Wednesday, January 21.

over the jail. In fact, the staff of the jail was also recruited from Punjab. In 1966, the administrative control of the jail was transferred to the state government of Delhi. The Director General of Prisons heads the Prison Department in Delhi. He/she is often very senior IPS officer of AGMU (Arunachal Pradesh, Goa and Mizoram) cadre. He is assisted by Additional Inspector General of Prisons; who is taken from IAS cadre and by Deputy Inspector General of Prisons; from UT cadre. The latter supervises the work of Jail Superintendent who is responsible for the overall superintendence and control of the jails under him. Jail Superintendent is assisted by Deputy Superintendents, Assistant Superintendents, Head Warders and Warders. Officials up to the Deputy Superintendent level are chosen from the personnel of the prison cadre. Jail staff looks after the custodial duties while external security and searches, etc. are performed by Central Reserve Police Force (CRPF), Indo-Tibetan Border Police (ITBP), and Tamil Nadu Special Police (TSP). Delhi Armed Police carries out the duties related to escorting of prisoners to courts and hospitals. Medical services are looked after by Resident Medical Officer; he/she is the nodal head of medical administration inside the prison. Senior Medical Officer, Medical Officer and para-medical staff assist him. The following flow chart clearly depicts the organisational set up of Tihar jail:





Source: *Annual Press Review* (2006). Delhi Prisons, 20th January, p. 4.

1.4.2 What are Special Courts?

Tihar prison is one of the prisons all over the world where reform programmes are run by the state. It claims to be in accordance with the correctional programmes which are going on in all the parts of the world. Tihar prison boasts of, among other facilities, holding of special courts for the "confessing undertrials"[16]. Prison administration also highlights this as one of the reformation practice as well. The prison population has almost 82 per cent undertrials, for which special courts are arranged on third Saturday of every month. Till the end of 2007, 85 special courts were held in which 4216 cases of petty offenders were

[16] See Appendix.

disposed off[17]. This figure seems to reassert the dichotomy between *access* to justice and access to *justice*. The total population of Tihar as on 30th April 2009 is 11,738—way beyond its total capacity of 6250. As mentioned above the undertrials comprise of more than 80% of the entire population. This number is alarmingly high and this population is the primary target of this study.

Special courts are held for those undertrials who '*voluntarily*' wish to confess their crimes before a metropolitan magistrate. These courts, however, are only for the first time offenders. These courts were started at the initiative of former Chief Justice of India, A. S. Anand. He conceptualized formation of such courts for the first time offenders who are languishing in jails for petty offences and who are ready to confess their crimes. In an interview he held, "distressed by the plight of the undertrial prisoners, I asked all the Chief Justices of the High Courts to depute Chief Metropolitan Magistrates of their states to hold special courts in jail and dispose of cases as soon as possible."[18]

During my study I found out that jail officials highlight these special courts as one of the major achievements of Tihar reformation programmes and perceived them as an important tool for reducing the alarmingly high population of undertrial prisoners. They also claim that such courts are essential for speedy disposal of petty offence cases which otherwise keep on going for years in regular courts. One of my key informants among the jail officials informed me that special courts are based on the format of *lok adalats* and that such courts facilitate direct

[17] As per the information provided by official website of Tihar prisons— http://www.tiharprisons.nic.in
[18] While attending a function in Tihar, Justice A. S. Anand made above quoted statement- http://www.dailyexcelsior.com/01july30/national.htm#5

interaction of inmates with the judge--thus, the process becomes easier and simpler.[19]

Before I proceed further let us have a look at the overall population statistics related to Tihar:

Table 1.1

Total Capacity of Tihar

Male	Female	Total
5850	400	6250

Table 1.2

Current population of Tihar

as on April 30, 2009

Male	Female	Total
11259	479	11738

Let us also have a look at the classification of prisoners—the population of undertrials is very high as compared to other categories of prisoners:

Table 1.3

Classification of Prisoners

[19] Based on informal interaction with the assistant superintendent and probationary officer in Tihar.

	Male	Female
Convicts	2023	71
Undertrials	9212	408
Detenues	19	--
Others	5	--
Total	11259	479
Grand total	11738	

The table above shows the total population of undertrials to be 9620. Special courts cater to these undertrials. Most of the undertrials are in the jail because of their involvement in petty criminal cases. Free legal aid is provided, claims jail staff, to the prisoners. Delhi legal services authority has deputed 23 advocates. These jail visiting advocates advise prisoners and help them draft, type and furnish their applications. In 2007, a legal aid and counseling centre was opened at Tihar Court Complex. I was told that prior to 20th July 2007, special courts were held in one of the nine central jails. Now, special courts are held at Tihar Court Complex, which is constructed near the prison headquarters. The legal aid cell is also situated in the court complex. The court room where special courts are held looks like the following:

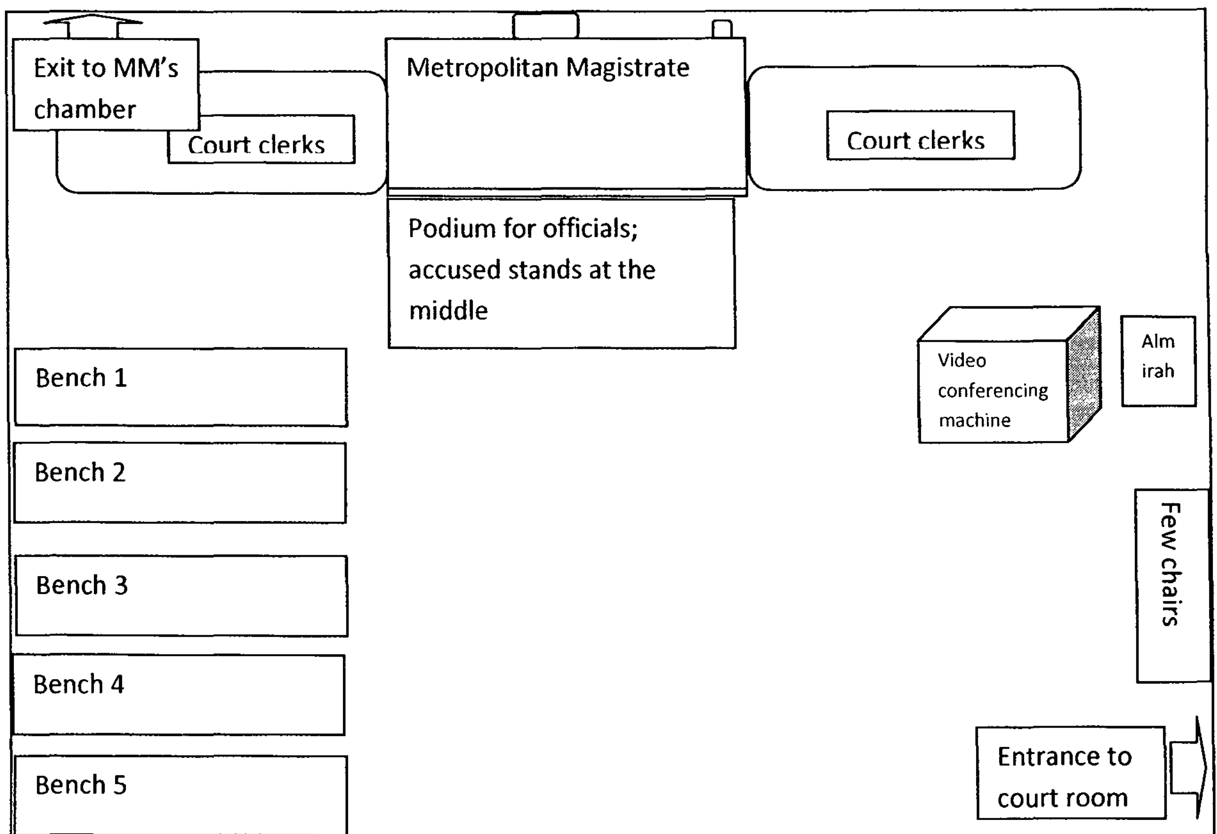


Figure.1.1-- The Courtroom

The court room itself defines its difference from regular criminal courts.

During my study I found out that applications of undertrials are sent to prison headquarters by the legal aid counselors/advocates who visit different jails. Most of the undertrials face sections 356,379, 380, 406,408, 411, 454 of IPC; section 25 of Arms Act; sections 27/61/85 of NDPS Act. On an average these courts settle 49.6 cases in one sitting (considering that in 85 special courts, 4216 cases were settled). The manner in which these courts function raises many pertinent questions regarding access to justice, speedy disposal of cases and protection of poor. Though these courts are for those who wish to confess their crime

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voluntarily, however, in most of the cases a kind of trade off takes place whereby undertrials are promised to be released from the jail if they admit their guilt before the metropolitan magistrate. During my fieldwork I observed that very few metropolitan magistrates were keen to inquire from the undertrials about the 'voluntary' nature of their applications. Very few metropolitan magistrates went beyond asking the names of the prisoners. Amidst this scenario, questions related to access to justice, reducing delays, increasing efficiency are bound to surface. There seems to be the emergence of shifting notions of criminality. This thesis aims to highlight the nature of legal representation provided to the undertrials, procedure or lack of it in such courts. I will argue that a trade off seems to take place—whereby prisoners are promised to be freed if they accept their guilt.

This thesis is premised on the following propositions:

(i) The category of confessing prisoners is created by the official discourse of judicial reforms; and

(ii) The special courts do not serve to deliver access to justice, with stress on both access and justice.

I now turn to the methods used to conduct this study.

1.5 Methodology

The research is based on the field study of the special courts in Tihar. I attended five such courts from September 2008 to February 2009.[20] Tihar was chosen as the field for the study as apart from being the largest prison in South Asia it is

[20] I missed the court in November 2008.

also touted to be the 'model prison' which serves as the laboratory of large number of reform programmes. My field work began in August 2008 when I first went to Tihar to seek formal permission to attend the courts. I was guided by the lawyers in Patiala House. Criminal lawyer, Yasmeen Malik provided the cue to approach Tihar. I met few jail visiting advocates, whose contract with the Delhi Legal Services Authority had ended. Their reflections served as an important vantage point to study the nature of legal services provided in the jail. In order to understand the procedure of the special courts method of participant observation was made use of. I observed the proceedings of the court and noted down the details. I did not make use of Dictaphone or tape recorder as I was not allowed to use it. Though as a citizen of India all the citizens have the right to attend open court, however, official permission seemed necessary for pursuing trouble-less research. In one of the courts I was made to show the official permission letter as the presiding Metropolitan Magistrate felt ill-informed about the court when he got to know that the prison authorities had not informed about the presence of a researcher in his court. Though the matter was between the prison officials and the MM however I was asked to call the concerned official from the headquarters.

The study has included both the primary data and secondary data. The primary data was collected with the means of non-participant observation method and with few interviews with the jail officials, assistant public prosecutors, and legal aid advocates. Secondary data includes various reports of the Law Commission of India, reports of the work done on legal sector reforms by the World Bank.

One of the major drawbacks of this study is its silence on the fate of female undertrials/ first time offenders. Unfortunately, during the period of my fieldwork I did not come across a single case of a female prisoner. Female prisoners are lodged in jail number 6. I did not come across even a single application from this particular jail. Though I was told that in the past many female prisoners had availed the 'facility' of this court. However, in the absence of any written record it is difficult to even assume the number of women whose cases came before the court and the nature of their crime.

Due to limited access inside various jails I could not get first-hand narrative of the accused who sought refuge in special courts. The narratives would have served to embed the court procedure that I observed in specific biographies and interrupted both the scripts of the activist, warders and reformers. However I was not given permission to record how the prisoners perceive the *jail adalats*—and hence, this ethnography remains bereft of the voices of the incarcerated.

1.6 Chapter Plan

The chapters that follow the introductory chapter are an attempt to provide a fair picture of politics of judicial reforms and its promise to provide access to justice. In chapter two a detailed account of constitutional provisions related to legal aid and other services is discussed. With the help of judgment in the case of *Hussainara Khatoon*, the chapter traces the genesis of the enlargement of Article 21 to include the right to speedy trial. It then turns towards discussing debates around access to justice and alternate dispute resolution. The chapter analyses

the scope of legal aid as enacted by the Legal Services Authorities Act 1987. It also analyses the jurisdiction and powers of *lok adalats* as given in the Act before looking at them as one of the means of alternate dispute resolution. The third chapter is the ethnographic study of Tihar jail and seeks to provide a brief history of the jail along with the organizational structure so as to provide clear picture of the population of the jail and the lodging structure. The section on reforms in Tihar seeks to trace the transformation of prisoners into disciplined docile bodies. With the help of reading of various judgments the following section of the Third chapter analyse the role prisoners through PIL have played in introducing reforms in Tihar. Discussion on one of the basic right of prisoners, i.e., provision of legal aid follows the section on judgments. The last section of the chapter analyse the functioning of special courts. Now I turn to a reading of the politics that inflects state discourse on judicial reform.

Chapter 2

Politics of Judicial Reform and Access to Justice

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 21, Constitution of India

2.1 Introduction

Article 21 is one of the fundamental rights guaranteed by the Constitution of India to its citizens. This particular article bestows on every person one of the most important right to life and personal liberty. The Supreme Court of India has widened the scope of this article by interpreting it to include rights of prisoners,[21] the right to speedy trial,[22] the right to legal aid,[23] and the right to claim compensation for the violations of rights under Article21.[24] In this chapter an attempt has been made to understand the discourses around Article 21 *vis a vis* the rights of the prisoners. In the next section the chapter focuses on the right to

[21] See *State of A.P. v. Challa Ramkrishna Reddy,* (2000) 5SCC 712—it is held that a prisoner is entitled to all fundamental rights unless his liberty is curtailed by the Constitution.

[22] *Hussainara Khatoon v. Home Secretary, Bihar*, (1979) 1SCR (3) 1276, 1277.

[23] *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544.

[24] *Rudal Sah v. State of Bihar*, (1983) 4 SCC 141.

speedy justice as spelt out in the landmark judgment on *Hussainara Khatoon* and links it to the provision of legal aid in the following section before moving on to analyse debates revolving around alternate dispute resolution and *lok adalats* as the new *avatar* of state's machinery to provide access to justice.

2.2 Right to Speedy Trial

Right to speedy trial has received recognition in International law as well. The International Convention on Civil and Political Rights (ICCPR) has explicitly endorsed the right to speedy trial. Its Article 9 (1) expresses that "everyone has the right to liberty and security of person [and that] no one shall be subject to arbitrary arrest or detention." Its Article 9 (3) talks about arrest and detention. It says:

> Any one arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that the persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial at any stage of the judicial proceedings and, should occasion arise, for execution of the judgment.

Further ICCPR's Article 10 (1) ensures humane treatment to the prisoners. It declares that:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

India ratified ICCPR on 10 April 1979 and, thus, is under obligation by its Article 2 (2) to enact legislation which guarantees rights contained in the ICCPR. Article 3 also urges states to ensure that the rights guaranteed by the ICCPR should be

given to all the citizens. In India, the Supreme Court has been instrumental in enforcing such international conventions. In *People's Union of India versus Union of India*[25] , the Court has observed that "the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law."

In *People's Union of India versus Union of India*[26], the Supreme Court has directly referred to the ICCPR and declared that:

> The provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such.[27]

However, it must be kept in mind that the ratification of any treaty by the government does not mean that its laws have become part of the domestic law. The parliament or a state legislature is required to enact legislation in this regard. And despite the Supreme Court's activism to bestow human rights to prisoners, there is no specific law or statue that talks of right to speedy trial of the accused. No timeframe has been set so far for the trial—within which it should be concluded.[28]

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[25] 1997 1SCC 301

[26] 1997 3SCC 433

[27] Also see *Vishaka and Others versus State of Rajasthan and Others* (1997 (6) SCC 241) and *Nilabati Behera versus State of Orissa* (1993 (2) SCC 746), the Court maintained similar stand.

[28] Although we must note that the CrPC (1973) has a statutory time limit to complete an investigation. Its Section 167 states that the failure to finish investigation within the statutory time limit would lead to release of the accused on bail.

The landmark judgment with regard to prisoners/ undertrials came in 1979 when the Supreme Court came to the rescue of the undertrials languishing in the jail in Bihar awaiting trial. This landmark judgment recognized for the first time the right to speedy trial. It gave a new interpretation of Article 21 (right to life and liberty) to include right to speedy trial in it.

Before the judgment is discussed, it is important to understand how the case came up. Let us look at the genesis of the case first.[29]

2.3 History of Hussainara Khatoon

In January 1979, K.F. Rustamji, a member of the National Police Commission, visited district jails in Patna and Muzaffarpur. Subsequently he published his Tour Note no.10 in *The Indian Express* (Delhi edition), citing the plight of 19 prisoners awaiting trial. His note explicitly held their poverty to be the reason for them languishing in jails. Hussainara Khatoon was one such person whose plight Rustamji mentioned in his note. His note observed that in 1975 Hussainara Khatoon ran away from Dhaka with her family to save themselves from the crackdown by the forces of the then president of Pakistan, Yahya Khan. She was arrested and sent into 'protective custody'. Rustamji noted that she was carrying with her a tattered paper, i.e., a "disintegrating jail ticket", which ultimately served to protect her from total rejection by the system. She had spent four years in the

[29] The history related to Hussainara Khatoon is largely based on Pushpa Kapila Hingorani's article, "The Problem of Undertrials –I: Hussainara Khatoon and Public Interest Litigation" in Shankardass, Rani Dhavan ed. (2000). *Punishment and the Prison—Indian and International Perspectives,* Sage Publications.

jail despite the instructions of the authorities releasing all those who were arrested under the Foreigners Act coming from Bangladesh on the bond.

A Supreme Court lawyer, Nirmal Hingorani took note of the article published in the *Indian Express* and filed a *habeas corpus* petition in the Supreme Court under the Article 32 along with Kapila Hingorani. Kapila Hingorani writes that:

> ...neither Nirmal Hingorani nor the author had a power of attorney to approach the Court, nor were they the close relations or 'next of kin' of the undertrials. Though Supreme Court rules do not permit the filing of a habeas corpus petition based on newspaper reports, the author, as a citizen of the country and officer of the Court, filed the petition on 11 January 1979, prepared by Nirmal Hingorani, on behalf of 19 undertrial prisoners mentioned in the articles. The Registar's Office, duty bound, took objection, but were requested to list the petition before the Court with an office report. (2000:188)

Though both Nirmal and Kapila Hingorani were unsure about the fate of the petition, the Bench comprising Justices V.D. Tulzapurkar and R.S. Pathak took up the case on 22 January 1979. In the judgment, which pronounced on 12 February 1979, the apex court observed that:

> A procedure which keeps large number of people behind bars without trial for long, cannot possibly be regarded as 'reasonable, just or fair' so as to be in conformity with the requirement of Art. 21. It is necessary, therefore, that the law as enacted by the Legislatures and as administered by the courts must radically change its approach to pre-trial detention and ensure 'reasonable, just and fair' procedure which has a creative connotation after the decision of the Supreme Court in Maneka Gandhi's case.

Thus, the court questioned the procedure by which people are kept behind the bars and went on to interpret Article 21 to include right to speedy trial:

> Speedy trial is of the essence of criminal justice and, therefore, delay in trial by itself constitutes denial of justice. Though speedy trial is not specifically

enumerated as a fundamental right, it is implicit in the broad sweep and content of Art. 21.

...Art. 21 confers fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be 'reasonable, fair and just.' If a person is deprived of his liberty under a procedure which is not 'reasonable, fair or just', such deprivation would be violative of his fundamental right under Art. 21 and he would be entitled to enforce such fundamental right and secure his release. Any procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair and just' unless that procedure ensures a speedy trial for determination of the guilt of such person.

...Expeditious trial and freedom from detention are part of human rights and basic freedoms. The judicial system which permits incarceration of men and women for long periods of time without trial is denying human rights to such undertrials and withholding basic freedoms from them. *Law has become for them an instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system.* (emphasis added)

The judgment lamented the rudimentary bail system which negatively affects the undertrials' right to speedy trial and ensures their detention for long periods of time inside the jail. It rejected the monetary aspect of furnishing of bail. It called bail system based on sureties "antiquated" and called for the reformation of the system of bail. It stated that:

This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the Court is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences, namely, (1) though presumed innocent, they are subjected to psychological and physical deprivations of jail life, (2) they are prevented from contributing to the preparation of their defence and (3) they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result

> that the burden of their detention almost invariably falls heavily on the innocent members of the family.

In the judgment delivered by Justice Bhagwati on behalf of Justices Bhagwati and Koshal, the former expressed shock on the state of affairs in the jails and talked of the human rights of those who are incarcerated in prisons for long awaiting trial. He urged for revamping and restructuring of the legal and judicial system so that injustices do not happen. He stated that:

> This petition for a writ of habeas corpus discloses a shocking state of affairs in regard to administration of justice in the State of Bihar. An alarmingly large number of men and women, children including, are behind prison bars for years awaiting trial in courts of law. The offences with which some of them are charged are trivial, which, even if proved, would not warrant punishment for more than a few months, perhaps for a year or two, and yet these unfortunate forgotten specimens of humanity are in jail, deprived of their freedom, for periods ranging from three to ten years without even as much as their trial having commenced. It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial. We are shouting from house tops about the protection and enforcement of human rights. We are taking passionately and eloquently about the maintenance and preservation of basic freedoms. But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed ? Are we not withholding basic freedoms from these neglected and helpless human beings who have been condemned to a life of imprisonment and degradation for years on end? Are expeditious trial and freedom from detention not part of human rights and basic freedoms? Many of these unfortunate men and women must not even be remembering when they entered the jail and for what offence. They have over the years ceased to be human beings they are mere ticket-numbers. It is high time that the public conscience is awakened and the Government as well as the judiciary begin to realise that in the dark cells of our prisons there are large numbers of men and women who are waiting patiently, impatiently perhaps, but in vain, for justice-a commodity which is tragically beyond their reach and grasp. Law has become for the man instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system. The time has come when the legal and judicial system has to be revamped and restructured so that such injustices do not occur and disfigures the fair and otherwise luminous face of our nascent democracy.

In *Hussainara Khatoon & Ors. v. Home Secretary, State Of Bihar, Patna*[30], Justices P.N. Bhagwati and D.A. Desai highlighted the need for free legal services to those who are poor and needy and held that free legal services to such people is an important element of 'reasonable, fair and just' procedure'. Thus, they emphasized free legal aid for the poor who are engulfed in legal battle. They maintained that:

> Article 39A also emphasizes that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal service is therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of, an offence and it must be held implicit in the guarantee of Art. 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services, on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused persons does not object to the provision of such lawyer.
>
> ...The urgent necessity of introducing a dynamic and comprehensive legal services programme impressed upon the Government of India as also the State Governments. That is not only a mandate of equal justice implicit in Art. 14 and right to life and liberty conferred by Art. 21 but also the compulsion of the constitutional directive embodies in Art. 39A.
>
> ...The state cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The state is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done bt the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people as sentinel on the qui-vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, appointment of additional judges and other measures calculated to ensure speedy trial.

The Court later ordered for the release of those undertrials charged with bailable offences and those who have already spent half of the maximum sentence that

[30] (1979) AIR 1369

could have been enforced on them if they would have been convicted.[31] This landmark judgment is of great importance for the criminal legal system and the poor who come in contact with it. This particular case not only led to the recognition of one of the important right of speedy trial but it also surfaced the sorry state of affairs of prisons and legal aid in the country. This judgment is of significant importance for this research as the judgment highlighted the poor conditions that prevail in our jails and violation of human rights of the prisoners, especially those who land up in the jail for committing petty offences. Due to the interpretation of the apex court of Article 21 to include right of speedy trial, now it is recognized as one of the fundamental rights guaranteed by the Constitution. However, as we will see, there is still a long way to cover to fully realize the right to speedy trial. To date it is not uncommon to find prisoners either awaiting trial or undertrials involved in petty offences languishing in jails for much longer

[31]Later in 1992 a five-judge Constitution Bench of the Supreme Court repeated the same stand for the right of speedy justice. In *Abdul Rehman and Others v. R.S. Nayak and Another* (1992) (1) SCC 225, the Court also talked about propositions of law related to speedy justice. The Court laid emphasis on section 309 of CrPC which holds for expeditious proceedings. In 1994 the Supreme Court also laid down specific conditions for the release of undertrial prisoners on bail if the trial is not completed within the specified period of time. The Court also held that the benefit of its directions in this particular case would not be applied to those who are likely to interfere further proceedings by influencing witnesses or evidence.

In another landmark judgment—*Common Cause v Union of India and Others* (1996) (4) SCC 33—the Supreme Court passed exhaustive guidelines for freeing the undertrial and for putting an end to the proceedings. As per the judgment the undertrial is to be released on the bail in cases where the offence comes under IPC if the offences demand imprisonment not exceeding:-3 years with or without fine and if such a trial is pending for a year or more and the accused in the case has spent six months or more in jail; 5 years, with or without fine and if such a trial is pending for 2 years or more and the accused in the case has spent six months or more in jail; 7 years, with or without fine, and if such a trial is pending for 2 years or more and the accused in the case has spent a year or more in jail. The Court also directed to calculate the period of pendency of the case in the court from the date on which the accused is summoned to appear before the court. However, in second judgment related to Common Cause (*Common Cause Judgment* [1996 (6) SCC 775, 199]), the apex court cautioned that the time limit mentioned in the first judgment related to the pendency of cases shall not be applicable on those cases where delay in proceedings of the court is related either partly or completely to the tactics adopted by the accused.

durations.[32] The Indian Government, time and again, has tried to enlarge to scope of legal and judicial remedies to its citizens and has initiated access to justice programmes. In fact, the quest for this goal had started right after the independence.[33] Lately there seems to be a shift towards alternative dispute resolution forums to provide access to justice to the large population of this country towards which I now turn my focus.

2.4 Legal Services[34]

The right to legal aid is enshrined in the Constitution of India due to the presence of Article 39 A in it.

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.

Article 39-A, Constitution of India

[32] In 2005, www.countercurrents.org reported the plight of Machang Lalung who spent more than 50 years behind the bars in Guwahati Central Jail awaiting trial. His story is not the only one. During my fieldwork in Tihar jail, officials themselves pointed out many times that they have a significant population of prisoners whose case is yet to reach the dockets of the courts. These people are invariably those who are at the lowest rung of socio-economic hierarchy. Here it can be understood in the light of what Baxi (1982) pointed out—that the neglect of human rights of the prisoners/ undertrials reflects the "class-character" of the Indian state. Part of the reason is non furnishing of bails due to lack of sureties. Even though the apex court has ordered against monetary system of bails yet nothing has been worked out effectively. In Tihar also jail officials agreed that a significant number of undertrials are forced to stay behind the bars as they do not even have Rs. 50 for the bond. Further most of these people do not have relatives in Delhi as well. They are released on personal bonds—but only after spending a good amount in jail.

[33] As we shall see later in our discussion on *panchayats* in India.

[34] I am restricting the discussion on legal services to the Legal Services Authorities Act 1987, and not going into the history of legal aid in India since the colonial period.

In *Hussainara Khatoon v. Home Secretary, Bihar* (1979) the apex court insisted on the importance of legal aid for the access to justice by the poor and needy. Its insistence on the state led legal services gave way to the constitution of a committee to implement the Legal Aid Scheme in 1980.[35] It was funded by the Government of India. Later the Legal Services Authority Act was enacted in 1987 for providing legal services to the needy and poor.[36] And in 1995, the National Legal Services Authority was constituted.

In 1981, the Court again reiterated the same stand on legal aid in *Khatri (II) v. State of Bihar*[37] and held that the state cannot avoid its constitutional obligation to provide legal aid by pleading either financial or administrative inability. The case came up when few blind prisoners were not given "legal presentation", from their first appearance before the judicial magistrate. The records of the latter pointed out that the legal aid was not provided to these prisoners as they did not ask for it. The records also indicated that these prisoners were not asked or informed about the legal services at the expense of the state by the judicial magistrates. The Supreme Court while deciding the case held that:

> It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatoon's case. This court has pointed out that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused in an offence and it must be held implicit in the guarantee of Article 21 and the State is under the Constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs to justice so require. It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an

[35] As a result, the Committee for implementing Legal Aid Scheme (CILAS) was set up.

[36] The right to legal aid is also enshrined in ICCPR.

[37] 1981(1) SCC 627

accused person, by a process of judicial construction of Article 21, most of the states have not taken note of this decision.

The court in its judgment not only directed the government of Bihar to provide free legal services to the poor and indigent accused but also directed the Magistrates and Session Judges to tell the accused of their right to legal representation by the state. Thus, this decision of the apex court has bounded the judges to inform the accused the provision related to legal representation right at the time of first appearance. In another judgment, *Suk Das v. Union Territory of Arunanchal Pradesh (AIR 1986 SC 991),* the Court held that the right to legal aid is a fundamental right and it should not be conditional on the application of the accused seeking legal aid. Apart from the Constitutional mandate, the Parliament has passed the Legal Services Authorities Act 1987 for providing free legal services to those who need it.[38]

The Legal Services Authorities Act 1987 defines legal services as "the rendering of any service in the conduct any case or other legal proceedings before any court or other Authority or tribunal and the giving of advice on any legal matter."[39] The chapter IV of the Act specifies the "entitlement to legal services." As per the

[38] Highlighting the important role played by the judiciary in the evolution of legal aid, Justice Mr. A. S. Anand (former CJI) held that: "*the high cost of litigation is a challenge, which judiciary has made attempts to meet though without any spectacular success. Even after decades of independence the poor, backward and weaker sections of the society feel that they do not have equal opportunities for securing justice because of their socio-economic conditions. The judiciary evolved schemes for providing legal aid to the poor. A Committee for Implementation of Legal Aid Scheme (CILAS) was set up by the judiciary to further the Directive Principles and assure 'equal protection of law' to the citizens.*" In *Nyaya Deep* (April-June 2000), *Fifty years of Indian Judiciary—its achievements n failure,* p. 19.

The right to legal aid is also a part of CrPC 1973—section 304 talks of providing statutory procedural right to legal representation of an accused in trials before the Court of Sessions.

[39] Galanter (1983) rightly calls legal aid in India as lying at the service end of the spectrum as opposed to strategic end, i.e., revolving around court room services and thus, being episodic in nature.

Act, the undertrials are also entitled for the free legal services by the Authority if they are poor and needy.

According to the official website of the National Legal Services Authority the number of persons in custody benefited through legal aid and advice in law courts up to 31 December 1999 were 8,399. The Act also talks of setting up of State Legal Services Authorities. Accordingly, the Delhi government has set up Delhi Legal Services Authority (DLSA) which provides legal services to those who are entitled for it. DLSA in order to provide legal services to the undertrials has appointed 22 'jail visiting advocates'.[40] The official website claims that these advocates visit jails regularly to help the unrepresented inmates under the Section 12 (g) of the Legal Services Authority Act, 1987. Inmates in the jail can seek "aid and advice; file any bail/parole application; appeal(s)" etc. with the help of these advocates.[41] On 20 July 2007, DLSA opened the Legal Aid and Counselling Centre at Tihar Jail Courts Complex. It is situated near the Prisons

[40] DLSA works mainly in three fields, i.e., *lok adalat*, legal aid, and legal awareness. The official website asserts that:

The Legal Services Authorities Act, 1987, was enacted to effectuate the constitutional mandate enshrined under Articles 14 and 39-A of the Constitution of India. The object is to provide 'access to justice for all' so that justice is not denied to citizens by reason of economic or other disabilities. However in order to enable the citizens to avail the opportunities under the Act in respect of grant of free legal aid etc. It is necessary that they are made aware of their rights. Legal aid is an essential part of the Administration of Justice. "Access to Justice for all" is the motto of the Authority. The goal is to secure justice to the weaker sections of the society, particularly to the poor, downtrodden, socially backward, women, children and handicapped etc. Such steps are needed to be taken to ensure that nobody is deprived of an opportunity to seek justice merely for want of funds or lack of knowledge.

Thus, legal aid is understood as an essential part of access to justice.

[41] These advocates also represent those undertrials who opt for the Special Courts. During the period of my fieldwork only one legal aid counselor appeared month after month to represent them. Most of the time when he was to 'represent' the stand of the undertrial he kept quiet—hence the role performed by these advocates requires critical scrutiny.

Headquarters.[42] This centre was opened to enhance the access to justice by the prisoners. Its main purpose is to make them aware of their legal rights.

The Legal Services Authorities Act (LSAA) 1987 also gave recognition to *lok adalats* as a mechanism for imparting legal aid. The Chapter VI of the Act is devoted to provisions regarding *Lok Adalats*. Conducting *lok adalats* is specified as one of the functions to be performed by the state legal service authority in Chapter III of the act. It is seen as one of the important measure to provide access to justice to all, especially poor because it is perceived to provide speedy, inexpensive justice. Initially, *lok adalat* did not have the statutory backing, however in a Bill for the statue of LSAA (cited in Khan 2006) states that:

> for some time now, lok adalats are being constituted at various places in the country for the disposal, in a summary way and through the process of arbitration and settlement, between the parties, of a large number of cases, expeditiously and with lesser courts. The institution of lok adalat is at present functioning as a voluntary and conciliatory agency without any statutory backing for its decisions...In view of its growing popularity, there has been a demand for providing a statutory backing to this institutions and awards given by lok adalats. It is felt that such a statutory support would not only reduce the burden of arrears of work in regular courts, but with also take justice to the doorsteps of the poor and needy and make justice quicker and less expensive. (2006: 43)

Thus, the chapter on *lok adalat* was added in Legal Service Authorities Act 1987 stating its organization, award, and powers. In 2002 the Act was amended to

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[42] Now applications, appeals of the prisoners are routed to courts through the Centre. However, the Centre does not maintain any data related to the Special Courts though the legal aid counselor for these courts is provided by the Centre. In a personal conversation with Usha Ramanathan, who has also studied these courts, I got to know that a file was maintained by the Legal Aid Centre situated in the Patiala House Court. However, when I enquired from Centre at Patiala House they informed me that they used to maintain the file related to undertrials who opted for special courts. However, none of the centres across Delhi maintain the data related to them now.

insert provisions regarding constitution of permanent *lok adalat* for the resolution of conflicts related to public utility service.[43]

Thus, *lok adalats* are now perceived as those judicial bodies which are established for facilitating settlement and compromise between litigating parties. They are bestowed with the powers of an ordinary civil court—summoning, examination of evidence and so on. The litigating parties cannot appeal against the orders of the *lok adalat*.

Lok adalats can also hear non-compoundable criminal cases. For this to happen either one or both the parties involved in the litigation need to write an application to the court for transfer of the case to a *lok adalat*. If no settlement or compromise is reached in such a case then it can again be transferred to a regular court and the court would take the litigation from a stage where the *lok adalat* reached. Highlighting the importance of *lok adalats,* Justice Muralidhar (2004) called *lok adalat* a "core activity" of Legal Services Authority.[44] It is

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[43] In fact, in *Abul Hassan and N.L.S.A. v. Delhi Vidyut Board and Others*, AIR 1999 Delhi 88,Delhi High Court emphasized on the setting up of permanent lok adalats for Delhi Vidyut Board, Municipal Corporation of Delhi, Delhi Development Authority, New Delhi Municipal Corporation, Mahanagar Telephone Nigam Limited and the like for the resolution of disputes between the citizens of India and the Government of India and the latter and its employees. The Court also stressed on the objectives of the Legal Services Authorities Act and held that:

One of the aims of the Act is to organize Lok Adalats to secure that the operation of the legal system promotes justice on the basis of equal opportunity. The Act gives statutory recognition to the resolution of disputes by compromise and settlement by the lok adalat. The concept has been gathered from the system of Panchayat, which has root in the history, and culture of this country. It has a native flavor known to the people.

[44] Muralidhar, S. (2004) has questioned its feasibility and performance in resolving criminal cases. He has pointed out the misuse of this forum whereby, among other things, already settled cases are also directed to lok adalat. He held:

Encouraged by the 'settlement' of a large number of cases, the government has proposed to 'strengthen' the LSAA by permitting the lok adalats to dispose of a case on merits if no settlement is reached. On the one hand the holding of lok adalats is encouraged by the judiciary to settle accident claims cases, insurance claims and claims by banks against defaulters, on the other hand, it is unclear what is happening to the litigant in individual cases on account of the mass 'settling' of cases. The organisation of lok adalats and legal aid camps has not necessarily been a success either because of the manner in which they were conducted, or because they were a farce with the cases being

thought of as crucial in disposing off huge arrears and backlogs of the courts and providing inexpensive justice to people. The pendency in the courts in India is a reason of worry for effective and speedy dispensation of justice.[45] Many scholars have argued that one of the chief reasons for such pendency is often put forth as poor judge-population ratio. It has also been pointed out that though the annual disposal has risen substantially but it has been outnumbered by the rate of institution of the cases. The Hon'ble CJI, K.G. Balakrishnan in his address at the Joint Conference of Chief Ministers and Chief Justice—Efficient Functioning of India's Justice Delivery System (2007) noted that the annual disposal of the High Courts in India has cumulatively increased at 48% in seven years—from 9, 80, 474 cases in 1999 to 14, 50, 602, cases in 2006 without any proportionate increase in the strength of judges. He also pointed out the remarkable hike in the institution of cases—from 11, 22, 430 cases in 1999 to 15, 89, 979 in 2006. This led to swelling of pendency from 27, 57, 806 cases (on 31 December 1999) to 36, 54, 853 cases till the end of 2006. The story of subordinate courts is same. They disposed off 1, 58, 42, 438 cases in 2006 while in 1999 the figures were over a crore at 1, 23, 94, 760. This implies that in subordinate courts the rate of disposal has increased by 28% without corresponding increasing in the number of judges. The institution, here, also has increased—from 1, 27, 31, 275 in 1999 to 1, 56, 42, 129 in 2006. Resulting in increase in pendency from 2, 04, 98, 400 cases to 2, 48,

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referred to the lok adalat even after a settlement had already been arrived at. In criminal cases too, such exercises raise more questions than they resolve. (p.122)

[45] According to Delhi district court statistics 22, 829 cases are pending in sessions court in Delhi; 43, 024 cases are pending with district/ additional district judges; 9, 65,337 are pending in Metropolitan magistrates and special magistrates; 16, 948 cases are pending in motor accident tribunals; 1, 43,364 cases are pending in civil judges; some 939 cases are pending in industrial tribunals; and 9. 689 cases are pending in labour courts as on 01 February 2009. See www.delhidistrictscourts.nic.in

72, 198 cases till the end of 2006. It is pertinent here to highlight the helplessness of the judiciary as pointed out by former Chief Justice of India, Y.K. Sabharwal in Justice Sobhag Mal Jain Memorial Lecture on Delayed Justice (2006). He held that:

> It is true that the pendency of cases is always highlighted whereas the increase in institution on account of a number of factors and the increase in disposal despite the constraints faced by the system, is not always appreciated, but still we cannot deny the responsibility of the system and its functionaries to deliver an efficient and economical justice to our people. (p. 6)

The judge-population ratio, it has been pointed out, needs to be improved for wiping out the backlog as well as speedy disposal of justice. The CJI, Justice K.G. Balakrishnan, also referred to inadequate number of judges as the reason for backlog. He stated:

> The average disposal per judge comes to 2, 374 cases in the High Courts and 1, 346 cases in subordinate courts, if calculated on the basis of disposal in the year 2006 and working strength of judges as on 31-12-2006. Applying this average, we require 1, 539 High Court judges and 18, 479 subordinate judges to clear the backlog in one year. The requirement would come down to 770 more High Court judges and 9, 239 more subordinate judges if the arrears alone have to be cleared in the next two years. The existing strength being inadequate, even to dispose of the actual institution, the backlog cannot be wiped out without additional strength, particularly, when the institution is likely to increase and not come down in the coming years. (p.35)

Thus, pointing towards the lack of adequate number of judges, he suggested setting up of additional courts, and appointment of more judges for clearing the backlog. Even former CJI also suggested the same and asked for appointment of ad hoc judges under Article 224A of the Constitution in the High Courts for the term of five years to get rid of the arrears. The 120th Report of the Law Commission on Manpower Planning in Judiciary: A Blueprint (July 1987) analyzed the problem of lack of adequate number of judges and recommended

that there should be 50 judges per million population instead of 10.5. The Report cited the judge population ratio of Australia (41.6 judges per million population); Canada (75.2 judges per million population); England (50.9 judges per million population); USA (107 judges per million population) and recommended the "optimum number" of judicial officers according to the population:

> The Commission recommends that by the year 2,000 India should command at least the ratio that the U.S commanded in 1981, i.e., 107 Judges per million of India n population. The inter se distribution would ordinarily proceed on the basis of population in each State and the institution of cases. (p.3)
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> ...As to the possible accusation that the working out of the ration of judges strength per million of Indian population is a gross measure, the Commission wishes to say that this is one clear criterion of manpower planning. If, legislative representation can be worked out...on the basis of population and if other services of the State—bureaucracy, police, etc.—can also be similarly planned, there is no reason at all for the non-extension of this principle to the judicial services. It must also be frankly stated that while population may be a demographic unit, it is also a democratic unit. In other words, we are talking of citizens with democratic rights including the right to access to justice which it is the duty of the State to provide. (p.4)

However, the government has not accepted the recommendations of the Commission despite the need felt by the Commission, and those who are in legal profession. Justice K.G. Balakrishnan (2007) asserted that for the timely delivery of justice and to avoid pendency of cases more judges are required. He also pointed at the helplessness faced by the judiciary as the power to increase the strength of courts or to appoint more judges does not lie with the judiciary but with the central government—its sanction and budgetary support. To curb the caseload and expediting justice he recommended, apart from increase in the number of judges, increasing the infrastructure—increasing the number of courtrooms; establishment of evening courts; establishment of fast-track courts;

introduction of case management and court management; and upgrading information and technology. He also talked about alternative dispute resolution mechanisms and held that court led litigation is one of the many methods through which disputes can be resolved. This method leads to win-lose situation as it is an adversarial system. However there are other methods of resolving disputes—mediation, conciliation, and negotiation—i. e., alternative dispute resolution.

Justice Sabharwal has put it effectively:

> Litigation through the Courts and Tribunals established by the State is one way of resolving the disputes. The Courts and Tribunals adjudicate and resolve the dispute through adversarial method of dispute resolution. Litigation as a method of dispute resolution leads to a win-lose situation. Associated with this win-lose situation is growth of animosity between the parties, which is not congenial for a peaceful society. One party wins and other party is a loser in litigation, whereas in Alternative Dispute Resolution, we try to achieve a win-win situation for both the parties. There is nobody who is loser and both parties feel satisfied at the end of the day. If the ADR method is successful, it brings about a satisfactory solution to the dispute and the parties will not only be satisfied, the ill-will that would have existed between them will also end. ADR methods especially Mediation and Conciliation not only address the dispute, they also address the emotions underlying the dispute. In fact, for ADR to be successful, first the emotions and ego existing between the parties will have to be addressed. Once the emotions and ego are effectively addressed, resolving the dispute becomes very easy. This requires wisdom and skill of counseling on the part of the Mediator or Conciliator. (pp. 13-14)

Thus, he also reiterated the stand of CJI Balakrishnan. However, he did not include *lok adalats* in ADR. He maintains that the two processes are different from each other as *lok adalats* encourage the disputing parties to come to compromise or settlement while ADR mechanism may help parties solve their disputes through number of alternatives. He explains: “instead of obtaining a judgment or decision, the parties through ADR might agree for a totally new arrangement, not initially agreed or documented.” (p. 13) For him, *lok adalats* are

another "alternative to judicial justice"—a strategy which delivers informal, cheap and expeditious justice by "adopting persuasive, common sense and human approach to the problems of the disputes. However, Justice S. B. Sinha feels that *lok adalat* is one of the mechanisms of ADR. He holds that apart from Arbitration and Conciliation Act, 1996, the National Legal Service Authority is also empowered to promote settlement—resulting in the use of ADR in family courts and other forums. He argues that ADR mechanisms have been used by several nations like Australia, Canada, Germany, Holland, Hong Kong, New Zealand, South Africa, Switzerland, United States of America, and United Kingdom as it pushes the litigating parties to achieve "negotiated settlement". Its main goal is to avoid vexation, delay, cost and it promotes "access to justice" for all.

Justice Madan B. Lokur (2003) has also included *lok adalats* in the wider realm of ADR. He has linked it to reducing the "adversarial role" of litigants. He states, "for the last about a decade or so, the emphasis seems to have shifted from tribunalizing justice to reducing the adversarial role that litigants play. It is for this reason that greater interest has been shown in alternative dispute resolution systems including the Lok Adalat, and now the Permanent Lok Adalat."

Thus, there seems to be a deliberate shift towards avoiding "adversarial" system and ADR is put forth as non-adversarial system with "win-win" outcome. In order to understand this belief in ADR mechanisms and their "win-win" outcome we need to trace the origin of this belief. In this context we need to move towards American civil rights movement of the 1960s, as according to Laura Nader, the

"harmony law model" was introduced in America in the form of ADR.[46] She holds that the move towards mediation—which is often portrayed as free from the formal procedural rules, inexpensive, consensual, and participatory—transcend national boundaries. She has put her views regarding alternative dispute resolution very crisply in the *Life of the Law: Anthropological Projects*. She maintains:

> ADR has become part of a major overhaul of the U.S. judicial system in the direction of delegalization. We now discern clearer links between colonialism and the political economy of dispute processing in the modern world. Both use disputing models for purposes of control. As ADR (sometimes referred to as peacemaking or anger management) moves into the international scene of river disputing, as in the case of the Danube, and the trade organizations, the settling of international disputes moves from purview of the International Court of Justice at the Hague to that of nongovernmental or supragovernmental groups. The atrophying of law at the international level parallels that at the national level. *The movement is from adversarial to negotiation or harmony law models.* (2002: 14, emphasis added)

Nader also analysed how the ADR has ushered in the "coercive harmony" model and its hegemonic diffusion worldwide and noted the shift which has come about in the analysis of law. She held that because of the Pound Conference, "the public became immersed in the rhetoric of ADR" (2002: 52). She asserted

[46] It was launched at the Pound Conference in 1976.

that chief justice Warren Burger set the language for "the selling of ADR." She wrote:

> Because of his authoritative position as chief justice, Warren Burger set the tone for the language that characterized the speeches and writings of others, the tone for selling of ADR. He warned that adversarial modes of conflict resolution were tearing the society apart. He claimed that Americans were inherently litigious, that alternative forums were more civilized than the courts; and the cold figures of the federal courts led him to conclude that we are the most litigious people on the globe. The framework of what I call coercive harmony began to take hold. Parallel were drawn between lawsuits and war, between arbitration and peace, parallels that invoked danger and suggested that litigation is not healthy. (2002:52)

Thus, she called ADR framework "coercive harmony" model and felt that harmony law model was expanding to include transnational entities. Talking about America, she said that the rise in the emphasis on mediation among American Indians paralleled the ADR movement in mainstream society of America. She held that both white judiciary and native Americans promoted the Indian justice as "informal" and "consensual". In addition, it was felt that to be more "civilized", Americans needed to abandon the adversary model. At the heart of ADR, thus, lies relationships, not root causes, and interpersonal conflict resolution. In ADR, as Nader put it, plaintiffs are treated as "patients" who need treatment. Therefore, policy was not formulated to empower citizens but to treat "patients". If we analyse, Sally Engle Merry's book, *Getting Justice and Getting Even: Legal Consciousness among Working-class Americans* (1990), we find that, though she was not talking about harmony ideology per se, nonetheless during her study she realized that interpersonal cases which were brought by people to the lower courts were considered to be those belonging to the mediation programmes. The court officials called such cases "garbage cases."

The following quote from her book would give valuable insight into the matter as she wrote:

> Thus, as these working-class courts seek to assert their sense of entitlement to legal relief for these problems, they find that it is denied by the courts. The court does not reject their requests out of hand but subjects them to periods of monitoring, to probationary supervision, to social services. The problems are denied as legal cases but receive continuing supervision and management as moral or therapeutic problems. The plaintiffs do not find their rights protected, but they do receive lectures, advice about how to organize their lives, encouragement to come back for mediation, and promises that something will be done to the defendant if the problem recurs. (1990: 180)

It is evident, thus, from the above quote that interpersonal conflicts were not given due recognition and were considered to be lying outside the purview of formal courts. We can relate to this as increasingly there is a move towards finding adequate forums for such disputes and doing away from the need of regular courts. To use Galanter's phrase cases are dealt with in the "shadow of law" outside regular courts.

Coming back to Nader and her arguments regarding ADR, it then is clear that her claim was right: that quick expansion of ADR seeped the intolerance of conflict into the culture and the goal was not to prevent the cause of such discords, rather to prevent the "expression" of it. ADR "industry" tried various means to reach at consensus, homogeneity, agreement, and so on. She argued that harmony ideology model has emerged as a very powerful mode of control, which presumably avert adversarial relations and showcase reconciliatory posturing. This conciliatory model based on "harmony ideology" perceived civil plaintiffs as patients who were not supposed to need courts but who needed medical

treatment. She says that justice motive was replaced with harmony. This ADR movement was exported abroad as well and it was to pave way for smooth market transactions. She writes:

> It began to look very much as if ADR were a pacification scheme, an attempt on the part of powerful interests in law and in economies to stem litigation by the masses, disguised by the rhetoric of an imaginary litigation explosion. (2002: 144)

Nader seems to be successful in surfacing the 'hegemonic' move of ADR and its export worldwide for easing market transactions. It helps us contextualize the surge of judicial reforms towards dispute resolution mechanisms other than the courts. The "imaginary litigation explosion", which Nader flagged, has served as useful explanation for those who wish to direct litigation by common people to ADR mechanisms. It also serves as a substantial reason for the curtailment of "frivolous litigation". Litigation explosion has been used as one of the reasons to introduce various sites of justice outside regular courts to dispense justice to litigating population—as is evident from the worries of justices discussed previously. The 'myth' of litigation explosion not only led to numerous writings on the topic in America but is also affecting the direction of legal and judicial reforms in India. The current wave of reforms, in India, aiming to achieve 'access-to-justice'[47], then can also be looked as the part of the global nexus of the ADR 'industry' Nader talked about wherein various forums and mechanisms are being devised for resolving the litigation by common people—thus, curtailing their right

[47] This being the motto of our Legal Services Authority as well.

to seek redress from the courts. The irony is that all of this is presented in the package of access to justice programmes worldwide wherein not only individual governments are trying to provide access to legal remedies to masses but donor institutions are also providing funds for the same.

2.5 Access to Justice

Let us very briefly examine how this engagement with access to justice came about.

Most of the writings on the topic, almost unanimously, claim that it was the work of Mario Cappelleti and Braynt Garth on the civil justice system, known as Florence-Access-to-Justice-Project which talked of the right to access to justice as "the most basic human right". They believed that it simultaneously took place with the emergence of the welfare state in the twentieth century. The right to access to justice was called as the most basic right because of the realization that the rights would be rendered meaningless if there is no effective mechanism for their vindication. Citing Cappelleti and Garth's work, S. Muralidhar writes:

> It was not enough that the state proclaimed a *formal* right of equal access to justice. The state was required to guarantee, by affirmative action, *effective* access to justice. Beginning about 1965, in the U.S.A, the U.K. and certain European countries, there were three practical approaches to the notion of access to justice. The 'first wave' in this new movement was legal aid; the second concerned the reforms aimed at providing legal representation for 'diffuse' interests, especially in the areas of consumer and environmental protection; and the third, "the 'access–to–justice approach,' which includes, but goes much beyond, the earlier approaches, thus representing an attempt to attack access barriers in a more articulate and comprehensive manner". The last mentioned approach "encourages the exploration of a wide variety of reforms, including changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private and informal

> dispute resolution mechanisms. This approach, in short, is not afraid of comprehensive, radical innovations, which go beyond the sphere of legal representation" (2003)

Thus, it can be said that, the first wave is about providing legal aid; the second wave is concerned with providing representation of "diffuse, collective interests"; and the third enlarges the scope to include variety of dispute processing mechanisms. The third approach includes the thrust of the first two waves as well. Though their work revolved around civil justice system, however, we can note the emergence of these waves as part of access to justice in criminal justice system as well. If we analyse Indian scenario vis-à-vis the waves Cappelleti and Garth (1978) put forth, we find that these three waves have been part of initiatives that have taken place to provide access to justice for all. Right to legal aid is enshrined in our Constitution, the emergence of PIL, SAL correspond to the second wave propounded by Cappelleti and Garth (cited in Muralidhar 2004: 4). The setting up of nyaya *panchayat*s, gram *nayayalayas*, *lok adalats*, permanent lok adalats, evening courts, consumer courts, matrimonial *lok adalats*, and various tribunals etc. then can be looked as widening of dispute resolution institutions that characterize the third wave of access to justice programme. In India, thus, we can observe variety of forums and institutions mushrooming under the banner of alternate dispute resolution. Let us examine how it has been dealt with in the academic literature on dispute resolution.

2.6 Special Courts and the Reform Discourses

Other than Usha Ramanathan's (2007) work on Special Courts in Tihar Prisons, there is no other empirical study on such courts. She writes:

> The criminal law was amended in 2005, and plea bargaining has been provided as an option since January 2006. But, pre-dating this amendment by a few years, on orders from the Delhi High Court, undertrial prisoners accused of petty crimes' (which includes being picked up while 'lurking in the vicinity of the railway station with the intent to commit theft', bootlegging, being found in the possession of a knife) who had spent two months or more in prison were given the option of 'confessing' to the crime of which they had been accused and being let off in finite time, or professing innocence, and staying in the prison till the case is decided in the 'regular course'. One who has watched how this procedure works would not be sanguine about validating plea bargaining. But this is true: that such processes are likely to improve the statistics on conviction rate, and to act as a valve to let off unimportant undertrials from an overcrowded prison.(2007: 22)

Thus, she presents her argument against the introduction of 'formal' plea bargaining as the 'pre-dating' system ceases to consider 'unimportant undertrials' legal subject worthy of procedural and substantive law. She observes that such a process improves the statistics related to rate of conviction at the stake of poor.

S. Muralidhar in his book *Law, Poverty and Legal Aid: Access to Criminal Justice* (2004) has also briefly mentioned about such courts. Referring to a newspaper article which appeared in *The Hindu* he highlighted the nature of "irony" which seems to have ingrained in such courts as on the one hand these courts were organized by the NALSA (initially now it is looked after by DLSA), however, there were no counsels who represented the accused. He noted that the accused were, in fact, denied the choice of defending herself/himself as the legal officer just read out the charges and if the accused accepted the charges then the metropolitan magistrate passed the judgment. Linking it to recommendation of establishing fast track courts across the country of the Eleventh Finance Commission to effectively handle the mounting backlog which has established itself as a plague eating the judicial system of the country, he succinctly pointed

out the recommendation for fast track courts were directed at providing speedy disposal of pending cases, however it did not take into account, while allocating the budgetary requirements, the necessity of costs in providing legal aid to the unrepresented needy accused. He wrote:

> The Central Government has, in April 2001, accepted the recommendations of the Eleventh Finance Commission and commenced the establishment of fast track courts throughout the country to tackle the mounting arrears of civil and criminal cases. This was essentially aimed at speedier disposal of pending cases and the costs budgeted for included the salaries payable to the judge and court personnel, and infrastructural facilities like building and transport. It did not account for either the need or the costs involved in providing legal aid to indigent accused, if any, in the cases assigned to these courts. (p. 123-24)

In this light it is pertinent for us to ask that why alternate dispute resolution is touted to be the panacea for the problems that judiciary suffers from? Does it reflect something more than the commitment to provide access to justice to common people? Does it really help people achieve justice? What is it that lies beneath the spate of judicial reforms? It, then, becomes important here to discuss and analyse legal and judicial reforms in India in academic literature so as to gain better understanding of the discourses of judicial reforms in India—to situate what has been mentioned above in the wider context of reforms.

2.6.1 Legal Reforms in India

The manner in which access to justice comes to be used in judicial reforms has changed over the years. And the existing literature which talks of the debates around *lok adalats* as a way to assure the poor access to justice, throws up

contrary pictures of law. This literature shows the gap between official discourses of judicial reform as against the practice of such reforms. This is best exemplified in the work of Marc Galanter and Jayanth K. Krishnan's work on *lok adalats* in India (2002, 2004). They have appreciated the efforts of India for sustaining the regime of constitutional liberty, and judicial protection of human rights to a very diverse population. With limited resources available Indians have adapted the structure of colonial law to altogether different conditions. They write that despite its flaws it can be called "one of the epic legal accomplishments of our time." A flourishing legal system requires as much responsive participation of the citizenry as much as it requires judges and mediation of lawyers. They feel that one of the positive points about Indian legal system is that citizens can access higher judiciary directly.

However, for most of the citizens, the site which they can access is lower courts. These courts seem to have been locked into "a spiral of tightening gridlock and ineffectiveness." By using ADB's data sets collected from countries like Taiwan, Malaysia, Germany, Ethiopia, they try to disprove the myth of seeing Indians as extremely litigious. With the help of the data, they prove that Indians use courts infrequently when compared to the citizens of other nations. Nevertheless, we cannot deny that Indian courts are poorly equipped and insufficient. They still use outdated procedural laws which give ample scope for delaying tactics: interlocutory appeals and stay orders. Judges are powerless in controlling the

behavior of lawyers and lack available tools which help in expediting the proceedings. [48]

In his essay on "*Indian Litigiousness and the Litigation Explosion: Challenging the Legend*" (1993), Robert Moog has also challenged the widespread myth regarding litigiousness of Indians. He holds that litigation explosion has been put forth as the main reason for the pleas behind the "creation of more judgeships, ministerial staff, and an upgraded infrastructure." He chose the site of District court in Uttar Pradesh to highlight facts related to litigation in India. His research was primarily concerned with civil litigation; however inferences can be drawn for the low rate of criminal litigation as well. He holds that the rate of litigation for U.P in the year 1976 was 88 per 1, 00, 000 population—when compared to the American figures for the same year, it turned out to be "dramatically less". He maintains that the data collected during his research shows that contrary to the popular belief about the historical roots of high litigation in India, the idea of litigiousness litigant does not hold good in the light of evidence. He writes, "at least from 1948-76, the rate of litigation and the caseload burdens on judges were comparatively low and generally dropping." He claims that what India is experiencing is not litigation explosion rather it is litigation implosion whereby the

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[48] Bibek Debroy (2002) describes that when Parliament passed amendments to Civil Procedure Code, which intended to reduce delay, lawyers agitated to such an extent that government had to withdraw the proposed reform. Citizens look at lower courts disdainfully. Their expectations are very low when it comes to law, lawyers and courts. This discontent dates back to colonial rule itself. People do not go to courts not because they lack legal literacy or because courts are overloaded or congested; they do not use courts because courts have not been able to deliver much in terms of remedy, protection and vindication. Moreover, courts prove to be safe haven for those who desire to delay payments of taxes or debts or those who are avoiding eviction and other such legal actions. Even when tribunals and arbitration enable people to bypass courts, they face similar shortcomings: crowding, delay, excessive formalism, expense. Delays turn off people. Delays are a part of tactics employed by the litigants and lawyers. Therefore, no reform can be successful as long as it focuses only on courts; it should address all the relevant legal players.

courts are clogged with those cases which have already reached the courts. He writes in this regard that:

> ...what appears to have happened (at least through 1976) and based upon the observations and interviews at the two district courts studied and continuing today, was not a "litigation explosion" in the sense of a wave of new filings involving litigants and disputes new to the courts but rather a form of "implosion" with a large numbers of emanating from those cases already under consideration by the courts. The data suggests that it has been a relatively small number of litigants and original filings that have occupied these courts with, at times, seemingly endless numbers of appearances, e.g., adjournments, applications (i.e., motions), pleadings, framing of issues, presenting evidence, formal arguments, judgment, revision, reviews or appeals. (1993: 1146)

Thus, instead of explosion in litigation, implosion is taking place. So if we are to introduce reforms in the system they should address litigation implosion. Moog also made a very strong argument regarding the direction of reforms based on false notions of litigation explosion. He raised a valid point highlighting that such wrong assumptions are likely to direct the efforts of policymakers towards "misguided solutions". He, in this context, wrote that:

> On the one hand, the misconception encourages a search for ways to discourage litigation or redirect it to alternative forums. This comes at a time when a persuasive argument can be made that what is needed most in India is a lowering of barriers to access the court system and more filings, at least in certain areas (e.g., civil liberties and malfeasance or nonfeasance by public officials). These types of disputes are ones for which there is often no functional alternative to the courts among the more traditional (e.g., village *panchayats*) or "hybrid" (e.g., lok adalats, or people's courts) dispute resolution forums. (1993: 1150)

He, therefore, presented the concern regarding the spate of reforms which introduce new forums for addressing disputes. It is believed by various scholars including Galanter, Moog, Marshall, and others that the efforts of the legal community is not towards addressing the problems that plague regular court

system and remedy them, rather the "energies" are shifted towards creating alternatives—"bypassing strategy" as Galanter called it. Galanter (2002) holds that in India, the evidence does not support the perception of high litigiousness among Indians. On the contrary there is a tendency of low use of courts for the resolution of conflicts. Courts serve the purposes of those "who wish to postpone payment of taxes or debts and those who wish to forestall eviction or other legal action...for those who require vindication and prompt implementation of remedies and protection against dominant parties, women from husbands or relatives, laborers from landowners, injured from injurers, the system works only haltingly, partially and occasionally" (2002: 180) Thus, for the common people other avenues are opened so that the real problems are never really addressed. Marshall (1998) has put it effectively when he says that, "the justice system is in trouble and the response from the legal community was not to fix the mess that they had helped to create, but to look for an alternative." The alternatives are presented as "transformative, egalitarian, and restorative". In India, too, alternate institutions are contextualized as the indigenous mode of dispute resolution. Let us examine the emergence of *lok adalats* in this light.

2.6.2 Emergence of *Lok Adalats*

Marc Galanter and Jayanth K. Krishnan, in their article: "Bread for the Poor: Access to Justice and the rights of the Needy in India", claim that there is an agreement that access to justice in India requires reform which could enable ordinary citizens to invoke courts for remedies and protection. They hold that *lok adalats* are a new arrival on the "Access to Justice" scenario. A movement to re-

establish indigenous justice was started immediately after the Independence. The British Legal System was perceived to be unsuitable for independent India. There was a tinge of faction and conflict which was bred by colonial oppression in their legal system. Therefore, it was decided that it would be replaced by harmony and conciliation. This replacement of courts was to be done by traditional *panchayat*s. Both the lawyers and judges met this proposal with disdain. As part of *Panchayati* Raj policy of late 1950s, judicial or nyaya *panchayat*s were introduced. They were established with jurisdiction over specific categories of petty cases. Though these nyaya *panchayat*s derived sentimental and symbolic support from the appeal to the virtues of the indigenous system, they were very different from traditional *panchayat*s. They relied on statutory laws rather than indigenous norms; they did not arrive at decisions unanimously but by the majority rule. Their membership was on the basis of elections. Thus, this stress on the "village" *panchayat*s represented an attempt to create an ideal version of traditional society, which laid emphasis on democratic fellowship and overlooked caste basis of the justice institutions of traditional society.

Nyaya *panchayat*s met the same fate as their traditional counterparts. They were not independent of personal ties with the parties, enforcing their decrees and acting expeditiously. And, therefore they never got that support from the villagers, under whose name it was established. Their caseloads kept declining and those of courts continued to rise. After a decade or so these *panchayat*s became moribund. After Justice Krishna Iyer's committee recommendations, following which nyaya *panchayat*s were set up, came Bhagwati Committee which came up

with severe measures to secure access to justice for the poor and it endorsed the system of law and justice at the level of *panchayat* with a conciliatory methodology. The proposed *panchayat* was also not a departure from the established notions of law.

The catalyst in the formulation of *lok adalats* was the influential article by Upendra Baxi, written in 1976. In this article he described *lok adalat* run by Gandhian social worker, Harivallabh Parikh, in the tribal area of Gujarat. This *panchayat* was independent of the official law. As in the Krishna Iyer and Bhagwati reports, the imagery of indigenous justice system was coupled with conciliation and responsiveness. These developments along with post-Emergency period laid the foundations for further development. [49] Public Interests litigation also paves the way for the development of *lok adalats* in India. Galanter and Krishnan write:

> In the early 1980s a small number of judges and lawyers, seeking ways to actualize the Constitution's promises of justice—promise that were so starkly unrealized in practices—embarked on a series of unprecedented and electrifying initiatives. These included relaxation of requirements of standing, appointment of investigative commissions, appointment of lawyers as representatives of client groups, and a so-called 'epistolary jurisdiction' in which judges took the initiative to respond proactively to grievances brought to their attention by third parties, letters, or newspaper accounts. Public interest, or social action, litigation, as these initiatives are now called, have sought to use judicial power to protect excluded and powerless groups and to secure entitlements that were going unredeemed. (2002: 15)

[49] In fact Galanter (1983) asserts that it was during the Emergency period that the Union Government initiated new commitments towards legal aid, "presumably to increase access to and use of the legal system."

However, even such litigations aroused considerable amount of resistance, both from those who were against its programme but also from those who were uncomfortable with the re-casting of the role of judiciary. Also, there were problems regarding its implementation. Amidst this scenario, Justice Bhagwati, who was the first and foremost judicial proponent of PIL, proposed the concept of one-day *lok adalats* to settles pending cases. Thus, energies were channeled towards *lok adalats*. The dominant theme, similar to the case in America, was a move towards informalism, conciliation, and alternative institutions rather than on the adversarial model of justice. Here, we can recollect Laura Nader and her talk related to internationalization of harmony ideology model. It was happening in India too.

The most important expression of new formalism and judicial reform in India was the proliferation of judicially-sponsored *lok adalat*s. This literally meant that the state appropriated the language of people's court—presenting itself as indigenous and traditional. Galanter and Krishnan write that the promoters of *nyaya panchayat* had presented it as the continuation of historical *panchayat* institution and the promoters of *lok adalat* highlighted its indigenous character. They described *lok adalats* which are held on Sundays, as one-day camps where judges and other officials hear cases. The cases are called before panel of mediators or a mediator. Analyzing the data on the number of cases *lok adalat*s have been handling, since 1982—when it was held for the first time—they found that by November 30, 2001 there were 110,600 *lok adalat*s that had settled

13,141,938 cases. They also found that there were regional variations as well. For instance, in Gujarat from 1982 to 2000, 14,766 *lok adalat*s were held and 90% of the cases were settled. While in Kerala, in the first quarter of 2001, 651 *lok adalat*s were held which settled 39% of cases. This shows that there is much inconsistency within the regions and without proper examination we cannot arrive at any conclusion.

The kinds of cases which come to *lok adalat*s present a hazy picture. Some commentators claim that cases are just limited to family matters and auto accidents while dockets from vary from ordinance violations and minor criminal cases. Galanter and Krishnan say that many proponents represent it as for "poor" and a form of "legal aid". However, it is quite evident that *lok adalat*s have not been able to attract those cases which require mass settlement. Despite the claims made by the proponents, it is found that the *lok adalat*s act as "guidance for the poor." They found that the *lok adalat*s were perceived as arriving at settlement than governed by the substantive notions of law. Writing critically on the Legal Services Authorities Act of 1987, they maintain:

> The Legal Services Authorities Act of 1987 (amended 1994) visualizes regime of *Lok adalat*s with jurisdiction over 'any matter' composed of judicial officers and other qualified members, authorized to proceed according to its own procedures, which need not be uniform and to be 'guided by the principles of justice, equity, fair play and other legal principles.' Rather than an award in accordance with the law the *Lok adalat* is instructed to 'arrive at a compromise or settlement.' The 1994 amendments to the Act mandate that the compromise 'shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.'(2002: 25)

Hence, *lok adalat*s differ from *nyaya panchayat*s, as the latter was confined to the specific categories of minor matters but the former can extend to any matter. Moreover, panelists of *lok adalat*s can only "determine and arrive at a compromise or settlement", while in the case of *nyaya panchayat*s, *panchas* could issue decisions. *Lok adalat*s were looked at as the continuation of nyaya *panchayat*s and were looked at as a forum to provide official process to the claimants to get their due entitlement without the aggravation, expense, delay and uncertainty which is often attached with courts.

Before we proceed with our investigation further, it is crucial to highlight two points regarding *lok adalat*s. First, the manner in which *lok adalat*s are presented, it can be held that they are the blend of arbitration, mediation and conciliation. Shackelford, in his essay "*In the Name of Efficiency: The Role of Permanent Lok adalats in the Indian Justice System and Power Structure*", using Moog's study has written: "they use conciliation, with elements of arbitration given that decisions are typically binding, and are an illustration of legal decentralization as conflicts are returned to communities from whence they originated for local settlement" (2007: 7). Thus, the settlement of auto accident cases use conciliation and use of mediation in family disputes. The second important insight is related to the fascination with numbers in *lok adalat*s. This is evident from Galanter and Krishnan (2004), Moog (1991) and Shackelford's (2007) work. *Lok adalat*s deal with huge number of cases and their success or failure is determine by the number of cases they settled. The goal of achieving greater numbers then

tends to undermine the primary objective of setting up *lok adalat*s and similar forums. In this regard, Shackelford writes that "these exuberant exhortations underscore the public need and pride in resolving the greatest number of disputes as quickly as possible. Efficiency is now commonly seen as the goal, rather than as a means to greater justice."

Then what are *lok adalat*s for? Are they mere "case management tool" which serve to lessen the burden of the judiciary than being a "instrument of justice" for the litigants?[50] Or as Moog pointed out with regard to *lok adalat*s in Varanasi that huge numbers signify that "little or no conciliation takes place." They fulfill two different purposes: (i) they function in "an administrative fashion, processing...large number of guilty pleas and *ex parte* revenue matters"; (ii) *lok adalat*s give mediation services to a very small number of cases related to civil matters. The numbers involved in *lok adalat*s, according to Moog, serve as standards for measuring the success of other *lok adalat*s and the performance of other district and sessions judges. If these claims are true then what repercussions it has for access to justice programmes? What does *lok adalat* signify?

Galanter and Krishnan seem to answer these questions. They maintain that the establishment of *lok adalat*s represents the use of scarce reform energies in order to create alternative dispute processing units than the courts, however, it is

[50] See S. Muralidhar (2003).

not necessary that they are better than the existing judicial system. They write that:

> The establishment of *lok adalat*s represents the use of scarce reform energies to create alternatives that are "better" than the courts; but it is not necessary to be very good to be better than the ordinary judicial system. The flaws of the system serve not as a stimulus to reform it, but as a reason for setting up institutions to bypass it. Reformers take pride in delivering needed compensation more expeditiously to some of the victims. But the feature of the system that make this discounted result appear to be an advance go unexamined and unattacked. *Lok adalat*s are then an instance of a debased informalism—debased because it is commended not by the virtues of the alternative process but by avoidance of the torments of the formal institutional process. (2004: 809)

They further maintain that *lok adalat*s cannot be looked at as "homogeneous institution". There are many variants available and their numbers and varieties are increasing. On the basis of their research they assert that the quality of justice dispensed through the means of *lok adalat*s "falls seriously short of the aspirations of 'access to justice' proponents" (2004). They argue that some of the permanent *lok adalat*s might address those cases which have not reached any court and tribunal, however, majority of the cases that make up the dockets of *lok adalat*s are those referred to by other forums. Moog's study of *lok adalat*s in Varanasi also pointed towards the organizational politics that play a major role in *lok adalat*s. For "attorneys" these were the sites to further their claims in the legal profession and for the "judiciary" *lok adalat*s present the opportunity to show the efficiency. The debasement seems to prevail as the settled cases also got routed in the *lok adalat*s for increasing the number of cases settled by them as a mark of their efficiency and performance.

Debased informalism which has seeped into the system can also be highlighted by citing the instance of electricity *lok adalat* attended by Krishnan in 2001. Of the twenty five cases that were to be 'settled' by the *adalat*, twenty two cases were related to excessive billing and the remaining three were put forth by the company against individuals for theft. Krishnan notes that the police assisted the electricity company in presenting itself before the judicial panel of the *lok adalat*. The police official acted as the "lead advocate of the company". He not only explained the case to the panel but also questioned the defendant and make penalty recommendations. However, none of the defendants had any legal counsel to represent them and were not "able to present adequate responses to the satisfaction of the judicial panel or to the police." Police was also involved in excessive billing cases as well. It was noted that:

In at least a half dozen billing disputes the police representative argued on the behalf of the company against the consumer. In the last case of the day, one that happened to be the most heated dispute of all those on the docket, the police official directly denounced the consumer for wasting the panel's time and urged him to pay the bill once and for all, which the consumer ultimately did. Thus, the police officer acted as a "regulator" (Baxi 2008) who had "the power to bring criminal charges against the consumer, if s/he does not settle the case."

*Lok adalat*s, then seem to, show "falling faith" in the efficiency and virtues of reformed legal processes. *Lok adalat*s and judicial promotion of settlements raise

a serious doubts regarding evaluation. Galanter and Krishnan claim that informalist impulse has two major problems. Firstly, it creates a romantic illusion that effective informal justice is an alternate and not the by-product of formal judicial system. It can be availed without reforming the formal system. In such a scenario it can just deliver a diluted version of what courts deliver. Secondly, there is a widespread perception of high number of cases going to the courts. It is not true when compared to other countries. However, if courts become effective then public confidence in them will increase and potential users will use them more.

Galanter and Krishnan also feel that the "new informalism" has intensified the stratification into a two-tier system of civil justice. The cases of "little people" are diverted to *lok adalat*s, higher courts now will not deal with the problems of ordinary citizens on a regular basis; and can take cases from government and business sector easily. They further assert that with the advent of *lok adalat*s in India, the state seems to have shunned the attempt to supply remedies and protection to people by the means of accessible and effective lower courts. The nadir of it can be seen in the criminal *lok adalat*s which according to Galanter and Krishnan are the dispute settlement forum merely in the name. They write that, "in reality all this forum does is to sign off on pre-arranged settlements reached between the state and the charged defendant" (2004: 826). They further write that, "as an institution, the criminal *lok adalat* acts more as an administrative rubberstamp than as a dispute resolution forum" (ibid.). The only procedure

which is followed is of handling of the defendant's file to the judge by the clerk and explaining him the agreed settlement, after which the judge sign on the necessary forms and the case then is reported to be settled. Amidst this scenario we can ask—where is the justice? How have substantive issues been dealt with? How to determine whether the plea for guilt was voluntary or forced? Is it not leading to criminalization of poor as they are always at the receiving end, especially, of criminal justice system? Or what is achieved through the means of such *adalats* is really desirable?

2.7 Conclusion

Laura Nader's views on ADR serve to comprehend this situation. It seems, then, to be the fabrication of "coercive ideology", discouraging critical assessment of what is gained by these forums and what they intend to do originally. Eric Yamamoto has raised the similar concerns when he asserts that for the people on the "margins", alternate dispute resolution put forth problems of great magnitude.(cited in Marshall 1998). Talking about ADR Marshall has written:

> The irony is that with the co-optation and legalization of ADR, the public has landed very close to where it began. The alternative looks a lot like a first cousin rather than an unrelated stranger. (1998: 780)

In this backdrop this dissertation will move to examine and analyse special courts. Few questions that have arisen from this discussion will be kept in mind while studying the special courts. One of the important questions is related to access to justice—do special courts help in access to justice? If so, then for which category

of prisoners/undertrials do they increase the access? Are these courts able to address both 'access" and 'justice' while deciding the cases of undertrials? What kind of legal aid does the undertrial get? Do they get 'effective' legal presentation? Do the prisoners come to special courts on their own, i.e., voluntarily or "tacit" pressures are used? What is the social profile of those whose cases are settled by these courts?

Chapter 3

Tihar: A Case Study

3.1 Introduction

As I ventured to do research on special courts in Tihar I recalled my first visit to Tihar. The memory took me back to post-graduation days at Delhi School of Economics when as a part of the course on *Organisation and Society*, our course teacher Dr. Mahuya Bandopadhayay took my batch to Tihar Jail in 2003. I was excited as the visit meant crossing the threshold of invisibility and secrecy which usually surround prison. Firstly, we went to the Prison Headquarters to meet the Director General (Prisons) who addressed us in the conference room and tried to orient his remarks regarding *jail* as an organizational unit. Thereafter we were sent to visit various parts of the Tihar prison complex with one of the welfare officers who "showed us around". In order to get inside the jail we were asked to keep our bags outside, in the custody of guards, and were also instructed to not to take money or any other precious thing inside the jail. Jail economy depends on coupons with which prisoners can buy things they need from the canteen situated inside the jail premises. Our wrists were marked by the jail stamp for visitors and it was conveyed to us jokingly to protect the stamp from sweat as if the stamp disappeared from our wrists then we would be considered part of the prison population.

We were shown the Jail factory situated in jail number 2[51] where prisoners who have been convicted work for eight hours a day. Jail factory consists of carpentry, weaving, tailoring, oil extraction, paper making and pottery unit. This factory also has a baking school. It not only supplies confectionery items to jails but also to government institutions and schools. On reaching the bakery school we were offered delicious cookies and *namak-paras*. We were told by the convicts working in the school that entire range of TJ's (Tihar Jails) products are available for sale at Tihar Emporium located at the Jail Road near Gate number 1. The walls of the central jail 2 had graffiti-like paintings on the walls by the convicts. We were told it was done under the part of jail reforms initiated during the tenure of Kiran Bedi. The beautification of the walls was encouraged so as to tap the potential of prisoners having understanding of art and aesthetics, and subsequently for their rehabilitation after the incarceration. One of the remarkable things which I noticed was the presence of white lines along the corners of the roads inside jail. When asked about the lines, the officer told us that the white lines running along the corners are meant for demarcating the walking space for the prisoners—as a part of discipline inside the jail the prisoners are not allowed to walk in the middle of the road. In one of the central jails we happened to see the barracks where prisoners are lodged. We saw an overcrowded barrack bringing the memories of numerous newspaper articles highlighting the overpopulated status and inhuman conditions of jails in our country. Tihar is touted as "the model prison" and if this is the situation of the model prison then probably inhuman conditions prevail in most of the jails in the country. Through

[51] Jail number 2 is exclusively for the convicts.

the iron bars we could see number of prisoners lying closely to each other in the middle of the barrack keeping their belongings (which comprised of blankets, buckets, mugs, some utensils and clothes among other things) near their heads while few of them were sitting along the walls of the barrack. Wet clothes could also be seen hanging on the grills of the windows. The barrack looked dark and damp. There was remarkable absence of discomfort on the part of prisoners when we were taken closer to their barrack. It seemed as if they were used to such visits which had literally reduced their barrack to a cage in the zoo where their lives were on the display. After this 'regular barrack' we were shown the *Mulahiza* ward. This ward is meant for the first time offenders. The idea behind introducing *mulahiza* ward was to introduce segregation of first-time offenders from the hardened criminals so that the former do not get transferred into 'habitual criminals' in the company of the latter. Vipassana Research Centre, located in jail number 4, was also shown to us where both the prisoners and jail staff are taught meditation. Lastly we were taken to jail number 6 which lodges only women prisoners. We were surprised to see a board—"Beauty Parlour", hanging outside one of the rooms in jail number 6. Though we were just shown the crèche and parlour but few female prisoners were also made to sit in the crèche to interact with us. Most of the women were serving the sentence for their involvement in the burning of their daughter-in-laws. They told us about the weaving and *aggarbati* (incense) making activities they were involved in. It was due to the presence of various non-governmental organizations (NGOs) who provided them with the trained professionals for teaching the art of weaving and

other activities. After the brief interaction we were again taken back to the headquarters for having lunch prepared by the prisoners. With this kind of premeditated visit it was difficult to ascertain how much we had understood about the life inside the prison, though we got to know a lot about formal official practices of daily routine in Tihar. On reflection after this research, this student tour exemplified the idea of the model prison as a museum with bodies, spaces and objects arranged in a specific sequence to make visible "reform", thereby making the everyday life of the prison invisible.

The idea of Tihar as a "living museum" of reform, motivated me to research special courts in Tihar. My second visit to Tihar was restricted to Prison Headquarters and it did not include the official welcome received previously. However, the formal entry in the guestbook kept at the main gate of the headquarters marked my journey to explore special courts which have inalienable links to *mulahiza* wards as these courts are meant for first time offenders involved in petty criminal cases lodged primarily in these wards. This visit also brought to my notice the presence of a building separated from the main complex of headquarters. The portico, painted in blue, declares it to be the Legal Aid and Counselling Centre, Delhi Legal Services Authority, Tihar Court Complex. I tried recollecting its presence during my first visit, but in vain. Later I got to know that it was built around 2005-06.

In order to seek permission to attend these courts I wrote an application to the Law Officer as told by his staff in the second week of August 2008. The

application was to be accompanied by the letter written by my supervisor attesting that I was her student. The letter granting permission was sent to her after a fortnight or so. Though as a citizen of India we are allowed to hear proceedings of any open court in the country, however, my supervisor and I thought to go via official route so as to minimize the chances of inviting troubles from the jail staff and alike. It proved to be a wise decision as I was not only provided the cause-lists of the special courts but was also given free access to annual reviews which are not yet available on the official website. I attended five special courts, beginning from September 2008. Participant observation method was used to understand the proceedings and practices of special courts. Interviews were conducted with assistant public prosecutors who were assigned the task to appear in these courts by the Chief Metropolitan Magistrate's (CMM) office located in Tis Hazari over the lunch after the proceedings of the court were over. For interviewing the jail staff I had to visit headquarters time and again as they usually have a tight schedule because of various official visits. I relied heavily on the staff of Law Officer for providing me information regarding Tihar and Special courts. Apart from annual reviews I was also given various issues of '*Helping Hand*', an annual publication which provides information regarding the work of NGOs inside the jail.

The presence of NGOs in Tihar invariably makes one think about the tenure of Kiran Bedi who opened the gates of the jail to various NGOs, Indira Gandhi National Open University, National Open School, press and media. Keeping this in mind this chapter, then, is going to trace the origin and work of number of

reforms introduced in Tihar in the first section. In the second section, I discuss legal aid in Tihar, with special reference to Public Interest Litigation (hereafter referred to as PIL) moved by the prisoners. The next section focuses on the introduction of special courts for the 'confessing' first time offenders who have allegedly committed petty offences. Following the debates around legal reforms in the preceding chapter, this chapter is, thus, an attempt to locate Galanter and Krishnan's notion of debased informalism in the case of reforms in Tihar.

3.2 Tihar: Organisation and Structure

Tihar Jail is the largest prison in South Asia. It is located in the western part of Delhi. Before 1958 it was situated at Delhi Gate. Later it was shifted to Tihar village. The jails are under the administrative control of Delhi Government. Presently, the Chief Minister of Delhi is the Minster in-charge of prisons. The population of jails in Delhi is around 12,000; however, the sanctioned capacity is just 6,250.[52] Tihar Prison has 1,746 sanctioned posts.[53] As stated in the first chapter that the Director General (Prisons) heads the Prison Department. Additional Inspector General (Prisons) and Deputy Inspector General (Prisons) assist him/her. The external security is taken care of by the Tamil Nadu Special Police, Indo-Tibetan Border Police and Central Reserve Police Force while a battalion of Delhi Armed Police is deployed for the purpose of escorting the

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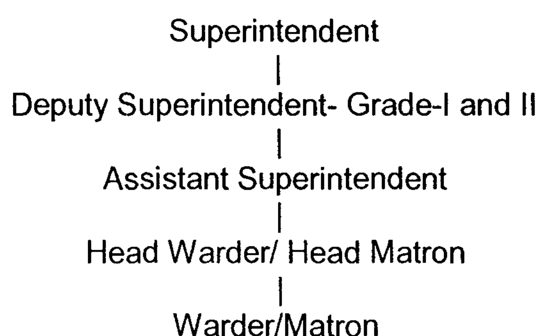
[52] The Government of National Capital Territory plans to construct new jails at Baprola, Mandoli, and Narela for decongesting the existing prisons.

[53] As per the official website.

prisoners to the courts and hospitals. A Resident Medical Officer is over-all in-charge of Medical Administration of all the central jails. At the level of each jail Senior Medical Officers head the medical administration and they are assisted by the Medical Officers and para-medical staff. The jail staff responsible for carrying out custodial duties includes the following ranks:



Currently the lodging of prisoners is done in the following manner:

Jail No.1	All Tis Hazari Courts prisoners bearing alphabet 'M' to 'Z' (except alphabet 'V' & 'W').
Jail No.2:	All Convicts.
Jail No.3:	(i) Tis Hazari Courts of alphabets 'A' to 'L', 'V' & 'W' Prisoners lodged in IGNOU ward + Hospital.
Jail No.4:	All Patiala House Court Prisoners
Jail No.5:	Male Adolescent Prisoners
Jail No.6:	Female Prisoners
Jail No.7:	All Dwarka Courts Prisoners except 'S' alphabets)
Jail No.8/9:	All Karkardooma Court Prisoners + 'S' alphabet of Dwarka Courts

Rohini:	All Rohini Courts Prisoners The Prisoners facing multiple cases of Rohini Courts and other Courts will be shifted to the concerned jail other than Rohini.

Source: http://www.tiharprisons.nic.in

Till 1958 the sanctioned capacity of Central Jail at Tihar was 1, 273. After almost 22 years a district jail was constructed in the Tihar jail complex with the sanctioned capacity of lodging 740 prisoners. During 1984-85 the Central Jail was trifurcated with the sanctioned capacity of 565, 465 and 740 in Central jail number 1, 2 and 3 respectively. After five years, i.e., in 1990 the district jail constructed in 1980 was elevated to the status of Central jail and came to be designated as Central jail number 4. In 1996 another central jail was commissioned, with the sanctioned capacity of 750, exclusively for keeping adolescents. The exclusive jail for female prisoners was commissioned at the turn of the millennium. Central jail number 7 was commissioned in 2003 for lodging 350 prisoners and the following year District Jail at Rohini was commissioned for lodging 1, 050 prisoners. And in 2005 the Central jail number 8 and 9 were commissioned. Till 2006 Central Jail number seven was used to lodging undertrials booked under CrpC offences. However minor changes in the lodging pattern were introduced in 2007. Despite this all the jails are overpopulated way beyond their sanctioned capacity. The table below reveals the shocking state of affairs of overcrowding in the jails:

Table 3.1

Sanctioned Capacity of Jails and actual Population lodged as on 31st December 2007

Jail	Sanctioned Capacity	Actual Population
Central Jail No. 1	565	1330
Central Jail No. 2	455	1192
Central Jail No. 3	740	1795
Central Jail No. 4	740	1802
Central Jail No. 5	750	1429
Central Jail No. 6	400	485
Central Jail No. 7	350	459
Central Jail No. 8 & 9	1200	1516
District Jail Rohini	1050	1597
Total	6250	11605

Source: *Annual Review 2008,* Tihar Prisons.

Thus, the table above reveals that the overcrowding is a major problem faced by the jails and that the older jails are housing more than double their sanctioned capacity. Sarangi (2000) has pointed out the negative impact of overcrowding on the prisoners. She writes that overcrowding, "dilutes the impact of many correctional programmes carried out amongst the inmates of Tihar jail", as it not only leads to physical illness but also induce socially disruptive behavior and emotional imbalances (2000: 104). However, the reforms in the prison can be understood as technique of producing disciplinary power which regulates the movement of prisoners through continuous surveillance and regulation of bodies by drawing tables, prescribing movements, imposing exercises and arranging tactics so as to get the combination of forces.

3.2.1 Reformation Activities

Apart from being the largest prison in South Asia, Tihar Jail is not an ordinary space in the landscape of judicial reform. It is the laboratory par excellence of judicial reform. It is the jail which sees the labour of the maximum number of NGOs, which put on display the work of reform for funders, researchers and eminent judiciary. It is a living museum as a correctional facility where, to use Foucault's term, 'docile bodies' of the prisoners are transformed into 'productive bodies'. This is the space where welfare and correction do the work of technique through the use of 'disciplinary power' which Foucault (1995) discussed in his *Discipline and Punish*. It serves to regulate the irregularities of the prisoners by habits and time-table. It controls prisoners through the power of norm. The disciplinary power, regulates bodies of the prisoners through standards and values that exercise control through normalization. The presence of various 'judges of normality' inside Tihar in the form of jail staff, social workers, meditation *gurus,* doctors can be then also seen as producing manipulated and managed docile bodies whose labour is used for the production of various items of utility that fetch whopping six crore rupees for Tihar.

How then do prison officials perceive the prison population? A telling comment by one of the assistant superintendent of the Tihar said it all:

> *It is a dustbin of society where garbage of the entire society is dumped and we try to reform—if not all at least to few of them.*

The metaphor of "garbage" pictures the incarcerated as social waste which has to be *recycled* into productivity through the techniques of reform or correction. The technique of discipline is applied on the prisoners to transform them into subjects who are submissive and productive and who conform to the widely accepted norms.

What then is the picture of reform? Tihar prisons undertake a number of reformation programmes based on "correctional philosophy". [54] Various educational, meditational, cultural, and vocational programmes are carried out as part of reformation and rehabilitation policy of the prison administration. In carrying out these activities, non-governmental organizations (NGOs) help the prison administration. Presently some 52 NGOs are working in Tihar. The reformation process in Tihar revolves around—help of NGOs in reforming the prisoners; the involvement of prisoners in the management of prisons; and peaceful co-existence and tolerance. The NGOs run two crèches for the children of prisoners, hold educational classes for spreading literacy among the prisoners, and impart vocational training wherein prisoners are taught computers, typewriting, baking, and art of making handmade papers among other things. Various NGOs also run meditation programmes and provide counseling to the prisoners. The study centres of Indira Gandhi National Open University (IGNOU) and National Institute of Open Schooling (NIOS) are also running in Tihar jail complex.

[54] This section is largely based on annual reviews of Tihar prisons.

Prisoners are also involved in the management of the welfare activities undertaken for them. This is done to inculcate a sense of responsibility in the prisoners so that on their release they can integrate themselves in the wider society. We find that these reform programs appropriate the language of local governance, especially notions of participation and dispute resolution through collective fora such as *panchayats.* Prisoners maintain various *panchayats* to look after different activities effectively. *Panchas* are selected and they ensure active participation of prisoners in the field of education, recreation, public work, canteen and kitchen management, sports, cleanliness and hygiene, and cultural activities, etc. A *Mahapanchayat*[55] is also organized once in a year wherein all the members of *panchayat* participate to discuss problems of prisoners. It is organized in all the central jails on rotational basis. As per the prison administration such *mahapanchayat* provides the opportunity for airing the grievances of the prisoners directly to the DG Prisons who is the '*sarpanch*' of such *mahapanchayat.* Thus, prisons are pictured as representing "a self-contained Indian village" wherein the prisoners manage their affairs and activities under the guidance of the officials of the prisons. The prison administration along with NGOs is seeking to inculcate tolerance among the prisoners whereby they are taught to respect each other's emotions, respect for elders, and intermixing with people belonging to different faith and castes etc. The provision of gratuity to

[55] In 2006 the prisoners demanded that the power to permit the prisoners to go on parole should rest with DG (P) so as to save time in the processing of applications. That time the power was vested with Lt. Governor of Delhi. However, in 2007 the Delhi Government delegated the grant of custody parole to convicts in case of emergency to the Superintendents of the Jails. (*Annual Review* 2008, Tihar Prisons)

prisoners who were put to labour and measures for post-release rehabilitation is also an important component of rehabilitation policy of the prison administration.

While I did not access within the prisons to observe the work of these *panchayats*, the official pictures of reform provided in the documentation published by Tihar suggests that the *panchayat* system is used both as an effective mechanism of surveillance and control; as well as a technique to convert what is perceived as the "waste" of society into productive albeit docile bodies.[56] This suggests to us how reform is embedded in categories of legal pluralism with a specific effect of power.

3.2.2 Legal Aid in Tihar

Apart from these reformation activities, the prison administration has also emphasized on providing free legal aid to the prisoners. However, the move towards provision of rights to the prisoners, including right to legal aid, can be best understood as a post-Emergency phenomenon as the "constitutional *karuna*" , to use Justice Krishna Iyer's phrase (cited in Baxi 1980), was bestowed

[56] Since I do not have first hand narratives of the inmates so I cannot comment on how they perceive the reform activities going on in Tihar. But Mahuya Bandopadhyay's (2007) study of central jail in Kolkata pointed out that reform was seen as "negotiated space that enables them to manipulate the system for personal gains" (408) both by the prisoners and the staff. She argued that there is a disjunction between reform as an idea and as a practice. As an idea reforms as seen as making a prisoner a normal citizen, but in practice they become "strategies of control". However, prisoners accept the living conditions and forego their rights in lieu of gaining access to forbidden materials and services. Thus, even prisoners work the system for their personal aims.
It is pertinent to flag here that during winters the population of Tihar swells as new migrants to the city prefer to stay as prisoners to save themselves from the chilling cold weather. See Dhillon, Amrit. 2004. "Is this the Best Jail in the World". In *Timesonline*, April 12. Available at http://www.timesonline.co.uk/toi/life-and-style/health/feature/article822526.ece.

on the prisoners who approached the apex court through public interest litigations. It is an understated fact that a number of prison reforms have come about due to the prisoners. In the history of PILs, prisoners like Charles Sobhraj and Sunil Batra inaugurated what Baxi has called epistolary jurisprudence, which led the courts to issue several guidelines on the conditions of prisons and the access to justice by undertrials. According to Baxi (1980) *Sunil Batra v. Delhi Administration*[57] is not only a "fundamental decision" for the administration of criminal justice system but also signifies the "maturity of judicial concern for conditions of detention" (1980: 238). This case marks a new epoch in the history of the rights of prisoners as to ascertain the prevailing conditions in Tihar, the then CJI, Chief Justice Beg along with Justices Krishna Iyer and Kailasam visited Tihar and the memorandum written by the Chief Justice served as the basis for reasoning by the Court. The solitary confinement of Sunil Batra was not only impugned but the Section 30 (2) of the Prisons Act which mandated it was challenged as it was perceived as violating Article 21 of the Indian Constitution.

In *Sanjay Suri and Ors. v. Delhi Administration and Ors*, the Court issued directions for the segregation of juvenile and undertrial prisoners from the hardened criminals and appreciated the efforts of the petitioners for bringing the mal-administration of Tihar to its notice. The District Judge was sent to Tihar to make an inquiry regarding the conditions of juvenile prisoners lodged in Tihar. The Judge found out that these prisoners were subjected to sexual assault by the adult prisoners and that they were victimized by them. The court then ordered to

[57] 1978 4 SCC 494

release undertrial juvenile prisoners on the personal bond of Rs. 500 and ordered suspension of the warder involved in the case. The court also emphasized that segregation be followed even at the place of work for juvenile delinquents as chances of contact between hardened criminals and juvenile prisoners are high at the workplace. The Court also ordered the constitution of a visitor's board consisting "people with good backgrounds", people related to media, female social workers, jurists and retired government officials. Justice Ranganath Misra also held the Sessions Judge must be provided an "acknowledge position as a visitor". And that his visits to the jails should not be routine in order to get the real and true picture of the 'defects' of the prison administration and conditions of the prisoners and undertrials.

In another judgment, *Sheela Barse and Ors v Union of India and Ors* the apex court issued the directions to appoint duty counsels for ensuring the provision of legal protection for children (up to the age of 16 years) involved in criminal cases to the State Legal Aid Boards across country.

The aforesaid judgment is significant for the emphasis it provided to the availability of legal aid to the undertrial adolescents. The provision of legal aid inside prisons has come to be recognized as of utmost importance as majority of the prisoners hail from the lower economic strata. It has been pointed out by many scholars of Indian legal system including Baxi (1982) that population of prison primarily belongs to the "low-income groups, with little or no education and with occupations attended by low status ranking" and thus their "illiteracy,

destitution, economic and social bondages, cultural inhibitions, and bureaucratic and political corruption" (Menon 1988) add to their inability to access the judicial system. Thus, they come in contact with the legal system only when they are dragged into it as either accused or defendants. Muralidhar (2004) notes that the Expert Committee on Legal Aid recognized the relation between crime and poverty and acknowledged that mostly poor are on the receiving end in the criminal justice system where they mostly appear as accused. It was also recognized by the All India Committee on Jail Reforms, popularly known as Mulla Committee. The Report of the committee claimed that the majority of incarcerated belong to the underprivileged sections of the Indian society and that "there is no one to help or guide prison inmates on legal matters affecting their criminal cases in law courts. A number of inmates just cannot afford a lawyer" (cited in Muralidhar 2004: 257). This inability of the destitute prisoners was overcome by the use of PIL/SAL which facilitated access to justice to the prisoners and resulted in cases mentioned above.

In Tihar the prisoners belonging to underprivileged sections are helped by the advocates of Delhi Legal Services Authority (DLSA). The administration of Tihar has collaborated with DLSA and various NGOs which help the DLSA in rendering legal aid to prisoners through advocates. In 2007, a Legal Aid and Counselling Centre was also opened to dispense legal aid services to the prisoners. This Centre takes care of the applications and petitions of the inmates of Tihar. Now all the applications of the inmates are processed through this Centre. Before this Centre came into being each jail had a legal aid cell which provides services like

drafting, typing bail applications, appeals, revisions and other miscellaneous applications. A system of Legal *Panchayat* has also been evolved whereby educated and legal professionals inside the jail cater to the legal requirements of their fellow inmates in drafting petitions, appeal and revision applications. It has been observed that with the steep rise in population of the prisoners the demand and need for the legal aid had increased tremendously. It also reflects the fact that the majority of the prisoners belongs to the lower economic strata of the society, and thus, cannot afford to avail the services of a lawyer. The Table below depicting the income wise classification of the population of prison throws light on the matter:

Table 3.2

Income-wise Population of the Inmates as on 31st December 2007

Annual Income (in Rs.)	Male	Female	Male (%)	Female (%)
Grade A (up to 10, 000)	2996	71	26.94	14.64
Grade B (10, 001-30,000)	3391	105	30.49	21.65
Grade C (30, 001-	3132	154	28.17	31.75

50,000)				
Grade D (50, 001- 1,00,000)	1172	90	10.54	18.56
Grade E (1,00 001- 2,00,000)	335	51	3.01	10.52
Grade F (2,00 001- 4,00,000)	59	14	0.53	2.89
Grade G (above 4,00,000)	35	0	0.31	0.00
Total	11,120	485	100.00	100.00

Source: *Annual Review* 2008, Tihar Prisons, p 18.

As per the table the majority of male prisoners (around 85%) come from lower income group while 68.04 per cent female prisoners belong to the low-income group. This population needs the legal help by the State as this population also lacks quality education. The details are given below:

Table 3.3

Level of Education amongst the Prisoners

Level of Education	Male (%)	Female (%)
Illiterate	32.54	53.56
Below Class X	42.29	14.85
Class X and Undergraduates	19.26	21.55
Graduates	4.71	7.32
Post Graduates	0.87	2.72
Degree/Diploma Holders and Professionals	0.33	--

The details of educational background of the prisoners show that more than half the female prisoners are illiterate. As I have mentioned in chapter 1, during the period of this research no cases involving women in petty offences came up before the special court. The percentage of the female undertrial prisoners involved in N.D.P.S cases, known as *panni-pipe* cases in the jail. Around 10.68 percent women are booked under the act while 7.57 percent of male prisoners are facing trial or the act. But the cases of men involved in such 'smack' cases came up on regular basis before the special courts. Pallavi Bahar, Ph.D Research Scholar[58], threw some light on the matter. She conducted research on the state of legal aid provided to the female inmates of Tihar. She conducted personal interviews with over 50 female inmates in 2006 and concluded that

[58] Bahar, Pallavi. 2006. *Access to Justice: Analysis of the Legal Aid Reforms in India.* Centre for the Study of Law and Governance, Jawaharlal Nehru University, M. Phil Dissertation.

most of them were poor with little or no education and that they were not given any kind of legal help. The legal aid cell was almost non-functional in jail number 6. She also revealed that most of the interviewed women even did not know the reason of their confinement in jail. Most of them were randomly picked up from the streets across the city and were booked under theft. Her research put question mark on the functioning and quality of legal aid services inside the jail.

Presently, DLSA has deputed 23 advocates for providing legal aid to the prisoners. The legal aid counselors have been assigned different jails which they visit 'regularly'; usually they visit jails assigned to them between 3 p. m to 6 p. m on weekdays. As per the Annual Press Review (2006) of Tihar Prisons, these legal aid counselors, as they are called in prisons, have drafted 1, 624 petitions. The Review also claims to have provided legal aid to some 14, 425 prisoners out of which 14, 135 were male prisoners and the remaining 290 were female prisoners till the end of 2005. Five advocates have also been nominated at the High Court of Delhi to plead on the behalf of prisoners. These advocates, claims the Review, also visit prisons to meet the incarcerated. The legal aid counselors also 'represent' the incarcerated in the "special courts". These courts are also perceived as one of the important reformation programmes whereby the poor and indigent first time offenders are released if they admit their guilt. It is the duty of the legal aid counselors to educate the prisoners regarding the availability of

such a provision.[59] However, often it is the constables, who are posted inside various jails, who perform the duty of making prisoners aware about such courts. These constables along with the counselors also spread awareness about the Plea Bargaining Courts,[60] which were started by the DLSA in association with the Delhi High Court.

3.2.3 Special Courts[61]

As I have mentioned earlier, special courts came into being due to the concern of the former CJI and former Chairman, National Commission of Human Rights, Mr. A. S. Anand, who expressed great concern over the plight of increasing number of undertrials languishing in various jails of the country awaiting trial. He wrote letter to all the Chief Justices of High Courts across the country suggesting them to make arrangements for the establishment of Special Courts in their respective states through Chief Metropolitan Magistrate or Chief Judicial Magistrate of the area in which a district falls. He had urged to hold such courts at least once a month. He also advised to take up the cases of those undertrial prisoners who were involved in petty offences and were keen to admit their guilt. He had further urged to take up such cases on the basis of priority. In the context of his letter, the Delhi High Court defined the purview of "petty offences". Thus, the petty

[59] It is based on the fieldwork done inside Tihar Jail and Delhi Legal Services Authority central Office at Patiala House and Head Office at Gole Market in Central Delhi.

[60] 2007 marks the beginning of the Plea Bargaining courts in Indian jails. On 21st July 2007 first ever plea bargaining court was organized in Tihar where 425 cases were settled.

[61] This section is largely based on the information provided by the staff of law officer of the Tihar Prisons Headquarter, and documents provided by them (given in Appendix) and various newspaper articles covering special courts.

offences were defined as the "(i) minor offences where the gravity of the offence is less and the punishment is not going to be very severe; or (ii) the offences in which the prisoners are involved being first offenders may be entitled to benefit of probation; or (iii) may be let off by the courts on payment of fine only; (iv) the maximum sentence do not exceed three years; (v) he has already undergone two months of incarceration."[62] Thus, the special courts take up the cases of those undertrials who are first time offenders and who have already spent two months inside the jail. These undertrials should be involved only in the cases of minor offences. Previous convicts are not allowed to plead their guilt before such courts. On the insistence of Mr. Justice A. S. Anand, the High Court of Delhi directed the Chief Metropolitan Magistrate of Delhi to hold special courts in the Tihar Prisons. The first such court in Tihar was held on 13th May 2000.

Nowadays, such courts are held on every third Saturday of the month in Tihar. They are organized by the jail authorities in close association with DLSA and Chief Metropolitan Magistrate (CMM) office at Tis Hazari Court, Delhi. The CMM office deputes the Metropolitan Magistrate who is to preside over the hearing of the cases at Tihar and also deputes assistant public prosecutor. The office also assigns a legal aid counselor to represent the prisoners.

The documents related to such courts of the prison authorities claim that the concept of having such courts have been "immensely popular" amongst the undertrials in Tihar as large number of these undertrials are coming forward to confess their guilt in lieu of early release. It has been asserted by the jail

[62] As per the document provided to me by the welfare officer of the prison headquarter.

authorities that the special courts work on the pattern of *lok adalats* (see appendix).

According to the prison administration, the jail authorities play a significant role in conducting such courts as they prepare the list of those prisoners who wish to confess their guilt before the metropolitan magistrate. The list of such prisoners is then submitted to the Law Officer who scrutinizes the list and forwards it to the DCP (Crime) Branch. This Branch is responsible for the verification of the records of the accused applying for the special courts. To ascertain that the accused is not having any previous record of involvement in criminal activities, fingerprints are taken by the *hawaldars.* For this purpose, bio-metric identification system was also introduced in Tihar in 2007, whereby the photographs and biometric fingerprints of all the inmates are recorded in computers to identify and to separate habitual offenders from the first time offenders. When the names of prisoners are cleared by the fingerprint bureau/crime branch then the report is sent to the office of CMM Tis Hazari, Delhi. This office of CMM then summons the concerned case files from those courts where the trials are pending. Thereafter a Metropolitan Magistrate is deputed to hold the court at Tihar Court Complex. Accordingly other arrangements are made by the jail staff.

3.3 Tihar Court Complex

Tihar Court Complex is situated in the Legal Aid and Counseling Centre which is situated near the main gate of Tihar Prisons Headquarters, near Lajwanti Chowk. This centre was opened on 20th July 2007. An iron gate demarcates and

separates the Legal Aid Centre from the courtroom. Usually a *hawaldar* sits near the gate so as to keep vigil on those entering the court compound. The courtroom lies on the left hand side of the compound if one enters from the iron gate. On the right hand side lays a small *veranda*. There is a cell on the right hand side, across the *veranda*, where prisoners whose cases are to be heard are kept till the court sitting is over. At some distance from this cell a rectangular table is placed with few chairs around it. On my first visit I saw jail officials sorting the files of the accused there. The Metropolitan Magistrate's chamber is adjacent to the courtroom. Next to it is a small room where food is served after the court is over to the jail staff and court clerks.[63] The courtroom where Special Courts are held is devoid of the usual hustle bustle of the regular courts. Its appearance is also different from a regular criminal court. The difference can be marked more sharply if we look at the figures showing courtroom of special courts and a regular criminal court below:

[63] On few occasions I also ate the food cooked by the prisoners.

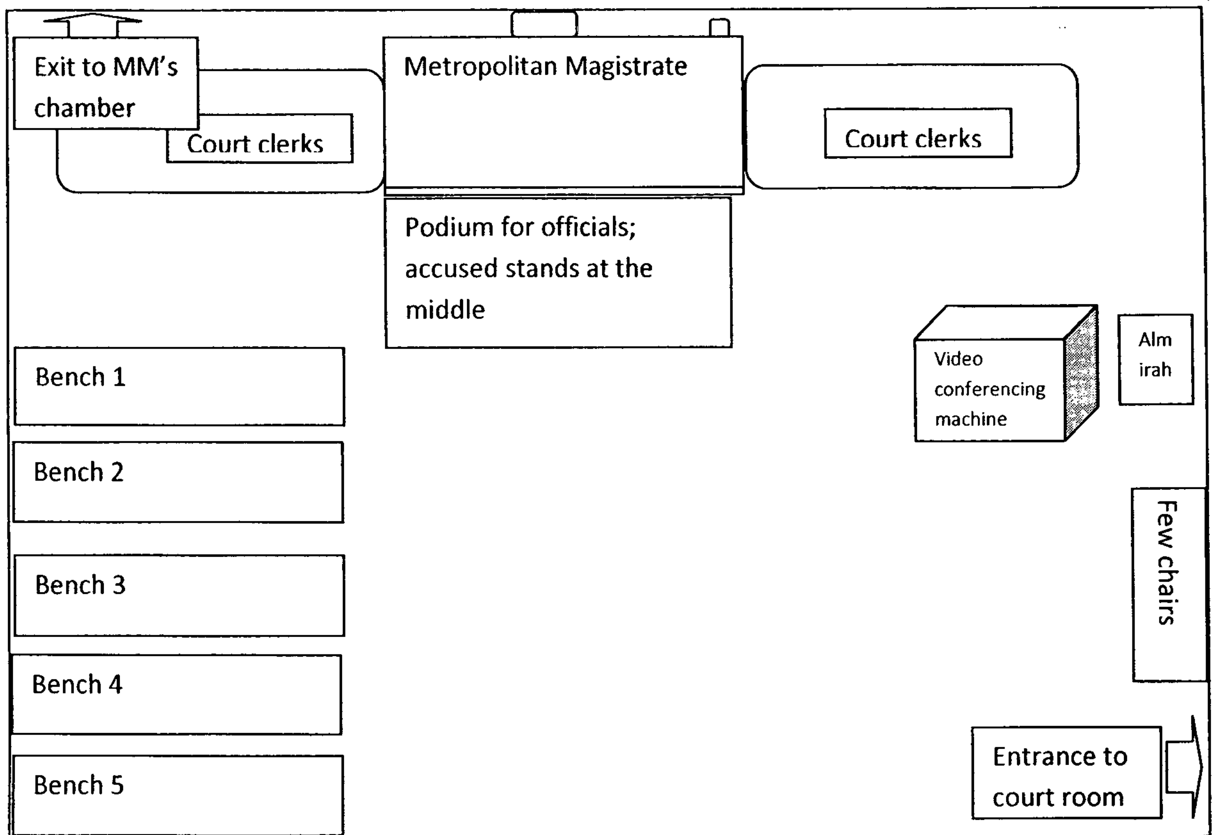


Figure 3.1-- The Courtroom of Special Court

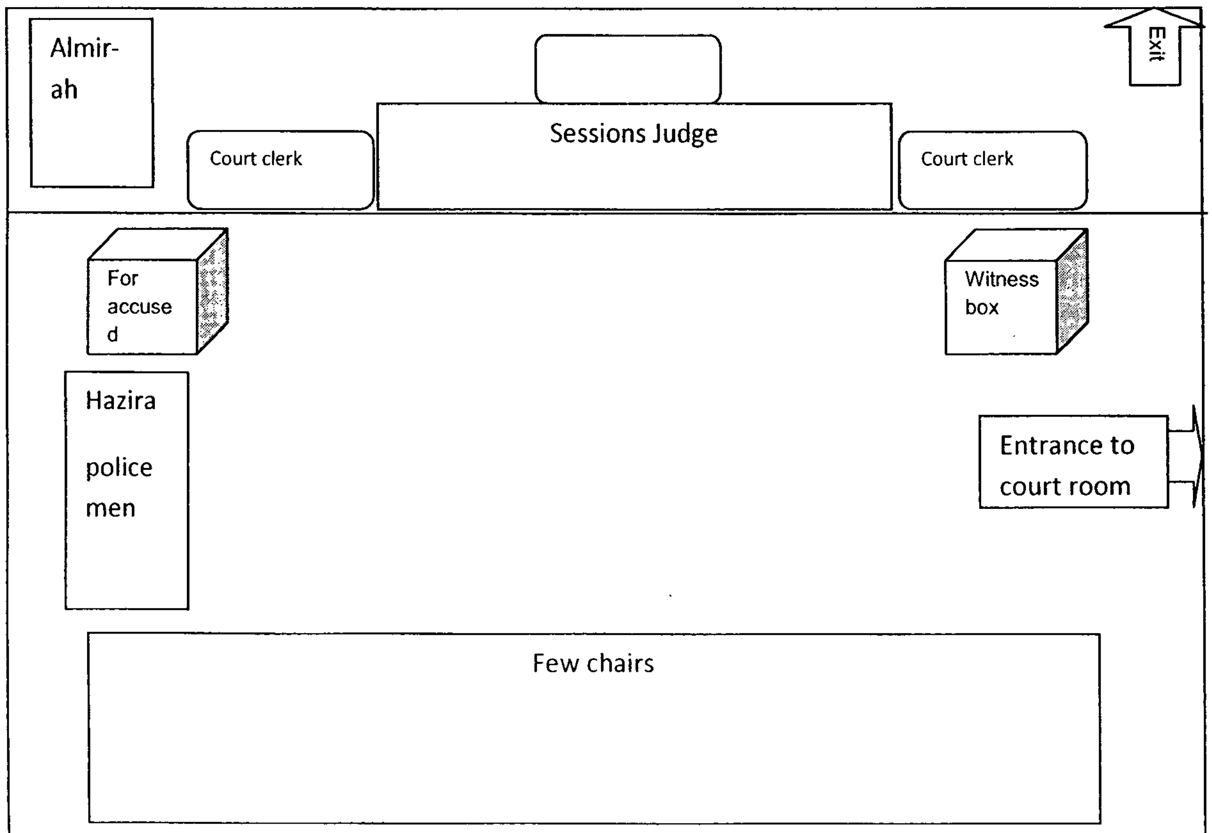


Figure 3. 2—A Regular Criminal Court

Both the courtrooms separate the area belonging to the judge from the rest of the courtroom and place the presiding officer on a higher platform whereby he can have a look at the entire courtroom clearly. His space also leads to his chamber as well. However, as we can see that unlike a regular criminal court there is no witness box present in the courtroom at Tihar. There is no box for the accused either. *Hazira* policemen are also absent in Tihar court complex. Moreover, unlike regular courts these courts are never crowded. Families are never present in such courts—it could be because they do not know about the date of such court or could be because that even the prisoners do not know exactly when their case is to come up before the special court. Files related to the accused are kept in order of the cause-list prepared by the staff of metropolitan magistrate and undertrials are brought to the court in that order. A *hawaldar* fetches two prisoners at a time holding their hands in his hands. Usually, four to five *hawaldars* are assigned the task of fetching the prisoners from the cell in Tihar Court Complex. On an average some 30-35 cases are taken up in the court.

According to the untitled document related to special courts, the undertrials are produced before a metropolitan magistrate in the presence of a public prosecutor and the legal aid counselor. The latter serves to 'represent' the undertrials. It is claimed by the document that the undertrials are given the 'liberty' to confess their crimes and no pressure is exerted on them to admit their guilt. Further, they

are given the 'liberty' to retract from their confession if they feel that the sentence proposed against them is excessive. During my fieldwork I was also told by the jail staff that the undertrials are made to understand the repercussions of the judicial conviction. Even the legal aid counselor who represented the prisoners during the course of my fieldwork in Tihar also claimed that he make the undertrials aware about the "opportunity" of availing the facility of special courts and its pros and cons. However, reality seems to be different. The manner in which the jail document describes the special courts and its functioning differs remarkably in the actual hearing of such courts. Recently, Tihar held 100th Special Court taking the number of cases disposed off though such courts to 4, 570. Thus, on an average 45.7 cases have been disposed off in one sitting.

3.3.1 Functioning of Special Courts

The court starts functioning around 11a. m. on the third Saturday of the month. As these courts are held under the aegis of CMM office, Tis Hazari, courts are not held during the summer vacations. I attended five such courts during 2008-09. Most of the time it is difficult to understand what is happening near the podium as it depends on the loudness of the voice of the presiding metropolitan magistrate and one's position in the courtroom. I was not assigned any particular seat or chair and most of the time it depended on the convenience of the assistant superintendent who used to provide me the cause list for the day.

This is not a court—it is just meant for disposing off cases and increasing the numerical strength of disposed cases.[64]

The above mentioned quote reflects that the special courts are a 'bypassing strategy" which works for increasing the rate of disposal by the judiciary and hence presents a picture of official efforts to reform the judicial system. It is also touted as increasing the access to justice to the poor. However, the manner in which the courts function raise doubts regarding the *access* and *justice* for the poor. The court is designed for the "confessing prisoners", but even though confessions are recorded in the official documents, they are hardly heard. Tacit ways are used to create the official category of "confessing prisoners" ready to confess their crime before the metropolitan magistrate. Most of the undertrials are drawn to the fabric of special courts on the promise of early release. In a way they are "educated" by the jail staff and the visiting legal aid advocates to apply for the courts and they are expected not to be "too educated" so as to reveal the truth behind their confessions. Their voices then are aberration than a norm.

Typically, thus, the Metropolitan Magistrate would be given a file of the accused as per the cause list for the day by his staff. He would announce the name on which the undertrial already waiting for his turn would be made to stand before him. The MM would ask from the jail officials about the time period for which the accused has been in the jail. Jail officials usually ask the prisoners about his period of incarceration and tally it with the jail warrant. Legal aid counselor also has the copy of the period of incarceration so at times he confirms the time

[64] As maintained by an assistant public prosecutor.

period of the incarceration. If it is over two months and the case is related to theft or bootlegging, then generally the accused is set free on the period undergone. The "*chakku*" cases, i.e., cases related to section 25/54/59 of arms act are also disposed off in the similar manner.

The proceeding of the Special court is similar to the description by Galanter and Krishnan (2004). They maintain that the criminal *lok adalats* are "dispute settlement" bodies in name only as they just facilitate signing off on "pre-arranged settlements" agreed upon by the state and the accused. Even in the manner in which the "disposing off" cases take place is also similar. Krishnan had noted in his fieldwork on criminal *lok adalat* that the accused is escorted by the police officer to the judge's office. A clerk then provides the judge the file of the accused. This file contains the plea agreement reached between the state and the accused. The judge then "signs off on the matter" and the case is "settled". In special courts also it depends on the metropolitan magistrate whether to ascertain from the undertrials about the "voluntary" nature of their applications for the confession of crime or not. Out of five courts which I attended only one metropolitan magistrate took time to ask most of the undertrials about their cases and the charges for which they were inside the jail. Otherwise the court proceedings look more like mere signing off the metropolitan magistrate who usually consult public prosecutor, for the day, to decide the quantum of punishment. The bar of two months is upheld for applying to the special courts, and hence, most of the prisoners are freed on the basis of period undergone. One of the assistant public prosecutors told me that these courts work for the

"*niptara*" of such cases. This *niptara* is to help the jail authorities to decongest the jails and to boast about reforms in administrative and judicial circles by showing the greater number of disposal by the means of special courts. The judiciary also applauds the 'success' of these courts as a means to not only decongesting overcrowded jails but also decreasing the case loads of the regular courts and thereby easing some of the overflowing dockets. It relates to the issues related to the official discourse of reforms and bureaucratic practices. It is pertinent here to flag the study of Lester Coutinho, Suman Bisht and Gauri Raje wherein they show that, "the documentary practices of target-setting, reporting, evaluation and supervision at the level of the district and the primary health centres are built around a bureaucratic organisation of information and allow for the production of 'numerical narratives' to fulfil the needs of the bureaucratic imagination of a successful public health programme wherein the record gains primacy over the event" (2000: 656). Writing further about the production of documents producing numerical narratives of the official targets they hold that "at the state and the national level, the report of achieved targets is statement about an interaction between a state represented by its technologies and a body population of citizens whose bodies have to acted upon by the state. The report at these levels reflects the success of the state in making disease-free bodies that are socially and economically productive. The reports as narratives are no longer about the interaction between the health administration and people, but about state's ability to deliver welfare services that are a measure of the degree of development. Lower rates of infant mortality and occurrence of disease are narratives of the

state's health, and not of particular body of populations" (p. 665). Thus, the numerical narratives in the case of special courts can be viewed as creating a picture of successful reform measure to decongest regular courts and to impart speedy justice.

3.3.2 Role played by the Jail Staff

The role played by the jail staff seems to be more proactive as far as disposal of cases is concerned. In my interviews with the welfare officer and the assistant superintendent of Tihar, I was informed about their intention of decongesting the jails through the medium of special courts. It is also related to the pride of these officials as well. The number of cases disposed off by these courts is perceived by them as the example of their good performance. As I had managed to establish good rapport with them, they also talked openly about the "informal target setting" whereby they expect a particular "magic" number of those undertrials who wish to come forward for such courts. Since the hundredth court was nearing,[65] during the period of my fieldwork, so it was thought of to take the number of cases disposed by the special courts to hundred; though they could not achieve this target. The official calendar is also kept in mind while conducting such courts as during the months of November and December, those accused whose sentence was to be increased even by the special courts and who were not to be released on the period undergone, were decided to be released on the "occasion" of the Republic Day celebrations. For instance, an accused who was

[65] It was held on 7th March 2009.

charged with stealing a motorcycle pleaded guilty before a metropolitan magistrate in December 2008, the MM extended his period of incarceration to four months. The MM asked the accused if he was ready to accept the punishment by the special court or would like to redirect his case again to a regular court. The legal aid counselor also started exerting pressure on the accused to take the decision soon. However, the accused kept silent. The assistant superintendent then tried to take the matter in his hands and tried to make the accused understand what the MM had asked him. He told him simply and clearly that if he accepts the decision on the MM then he would be freed within the four months otherwise his case would go on in a regular court for several more months at least. The accused agreed to the term of four more months inside the jail. Then the jail official tried to put forth the case of the accused before the MM by telling him the "poor background" of the accused and that he was a tailor prior to the theft case in which he got involved and pleaded that he be released on the 26th January. The MM agreed and ordered his release on the 26th January.

In another case on the same day, the jail officials came to the "rescue" of the accused. The legal aid representative did not simplify court orders to the accused and did not make him understand the consequences of the sentence of the special court and the meaning of "redirecting" the case to the court where it was going on earlier.[66] The accused had already completed three and a half months

[66] I believe most of the time the undertrials do not understand the proceedings of the court. Apart from the legal nuances the language also plays a vital role. As when an accused is standing before the judge, the latter discusses the matter with the PP and other officials in English and changes the language to Hindi

in the jail and the MM extended his period of incarceration to one more month. The jail official informed the accused about the decision of the court on which the accused told the MM that he was caught while sleeping on the bus stop by the police. And that he was in for false charges and that in between his grandfather had expired. On the insistence of the prison officials it was decided that he would be released on 26th January as well.

3.3.3 Role Played by the Legal Aid Counselor

During the duration of my fieldwork on special courts in Tihar, the legal aid counselor who came to represent the undertrials/prisoners did not change. The same counselor appeared continuously for over five months. Though his role in the special courts is of significant importance as he is supposed to represent and advise the prisoners, however, this particular counselor did not help the accused. On few occasions he even sternly asked the accused to speak up their decision. In one of the theft cases, where the accused was caught red-handed, the MM asked the accused that if he was ready to spend three more months in the jail then he would sign on his file otherwise he would redirect the case to the concerned court. On hearing the MM, the accused seemed lost, and kept quiet. The legal aid advocate who was standing next to the accused looked closely at his face and asked him to speak up soon as the judge "*saab*" was waiting and had other tasks at hand. The jail official, then, dissect the meaning of the

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when spoken to the accused leaving the undertrial confused. The prisoners also expressed their concern over language in one of the *mahapanchayats* organized in jail whereby they demanded that their trials should be conducted in Hindi so that they can also be active participant in their own cases. (source: "Conduct Our Trials in Hindi: Tihar Inmates", March 12, 2006, Express India. com)

sentence to the accused. Later, the accused asked to redirect his case to the concerned court. The legal aid advocate whose job is to aid the undertrials and simplify the judgment of the court did not even bother to inform the accused about their sentences. The scene near the podium is very chaotic as the public prosecutor, legal aid advocate, jail staff, and accused stand over there. Moreover signing on papers also takes place at the podium. Most of the time without pronouncing the sentence the MM asks the PP to get the sign or thump print of the accused, leaving the accused confused. Thus, the undertrials, I believe rely heavily on the jail staff, especially the constables who fetch them from the cell situated in the court complex. There have been instances wherein even the constables missed out the decision of the court,[67] however, when asked by the prisoners they did not hesitate to ask about the decision of the court from the jail staff present near the podium and inform the same to the concerned undertrial.

The attitude of the legal aid advocate was more paternalistic in nature as whenever he informed the undertrials about their fate he would maintain a very assertive posture and would tell them—"*maine kaha tha—choot jaoge*" (I had told you, you will be freed). Usually the undertrials would thank him by folding their hands and bowing their heads before him. When I interviewed this particular legal aid advocate, he told me that he tried to help the undertrials by convincing them to apply for special courts. He felt that such courts provide good opportunity to those who are languishing in the jails for petty offences. He also held that he informs the undertrials that if they wait for the case to be decided by the regular

[67] As they are busy fetching other undertrials from the cell.

court then they would end up spending substantial period of their lifetime incarcerated. He assures them that if they opt for special courts they would be freed either on the same day or after two-three months. He held that the prisoners, nowadays, are more aware about their rights and they opt for these courts as they know it "benefits" them immensely. He further maintained that even if they get freedom at the cost of being criminalized, it is acceptable to them as they have no "future", they work in unorganized sector and that their chances of committing crime further are high. Similar explanation was provided by the jail staff, most of whom feel that the majority of first-time offenders would soon be transforming themselves into habitual offenders—"*kyunki unke muh khoon lag gaya hai*" is the reason put forth by them.

The prison officials and the legal aid advocates are in consonance with each other as far as the number of cases disposed through the means of special courts is concerned. They are disappointed when any case is redirected to the regular court and they blame undertrials for it. The "*niptara*" attitude seems to have seeped in the very system of the special courts as they have come to be seen as a mere mechanism of disposing off cases. The substantive aspect of law does not seem to find any place in this scheme then. The success of these courts is rated with the number of cases they settle. The undertrials whose applications are sent for special courts invariably hail from the poor socio-economic strata of our society. Many of them are migrants from Uttar Pradesh and Bihar and they do not have anyone known in Delhi for furnishing of the bails. Amidst this scenario it seems that poor are being targeted for the so-called

judicial reforms and the "effective and efficient" performance of judiciary is achieved at the cost of criminalizing the poor and indigent who do not have adequate resources to represent their case.

3.4 Numerical Narratives: "*Niptara*" as a technique

The cases that come up before the special courts in Tihar are expected to be disposed off on the same day without any further delay. This court is believed to be set up to dispose off the cases—"*niptane ke liye*". No evidence are sought, no contestations are done. The *niptara* attitude is prevalent to the extent that once the judge was extending the period of incarceration of the undertrials rather than releasing them on the basis of period undergone, then the legal aid counselor who often remains dormant in the court told the judge that the purpose of the court is to dispose off the cases as this has been happening since the time of its inception. Though nobody was sure about the genesis of the provision of the two months period, nevertheless, it was told to the judge that if the prisoner has already spent two months or more in the jail then it is in the power of the court to dispose off the case as and when it comes before it. On hearing this, presiding MM went to his chamber and called the public prosecutor and the legal aid counselor in to reflect on such courts. Later, the appeal of the legal aid advocate was considered laudable by the jail staff who later commended this effort of his over the lunch.

Often cases which get redirected to the concerned courts become the matter of disappointment for both the jail staff and the legal aid advocate—as their efforts

are always geared towards achieving the higher number possible. In a special court sitting in October 2008, out of 37 cases, 5 cases were again sent to the concerned courts. The MM happened to ask these undertrials the crime for which they were incarcerated. Out of these five cases one was related to Arms Act. The accused was found in possession of a knife. The presiding MM asked him if he admits his crime or not. The accused replied in affirmative. On hearing the accused the MM asked him, "*galati kis cheez ki maan rahe ho?*"; What have you done? What is your crime? The accused could not reply about the crime for which he was ready to confess to avail the "facility" of special court. His case was then sent to the concerned court. In yet another case the accused pick pocket replied that if the MM was ready to release him, he was ready to admit his crime. Another accused told the MM that it was out "*majboori*" that he had agreed to confess his crime. The officials of jail and the legal aid advocate react sharply towards such prisoners. They held that it was due to their own "*bewakoofi*" (foolishness) that they could not avail the "golden opportunity" provided to them. They believe such undertrials are not only troublesome for their own self but also spell danger for these officials. According to them these undertrials are foolish and incapable of understanding their own interest. They spend a lot of their energy in convincing the undertrials about the benefits of availing the route of special courts yet, as one of the assistant superintendent had put it, "they commit blunders before the judge by not admitting their crimes and end up reducing the output of the court." These prisoners are considered "*jyada padha likha*" sarcastically. This point to the way the speech acts are performed inside the

courtroom and the result that such acts produce. Precisely due to this reason it is desired by the staff that the interaction between the presiding MM and prisoners be minimal and because of this it is not hard to find them reiterating and thus, asserting that, "these courts are to dispose off cases and not for hearing them—what good it would serve, rather it is going to take longer time to dispose off if it does so."[68] The entire interaction becomes important and because of this, it is my contention that the jail staff try to control the interaction in the courtroom. For instance in one particular case where a print journalist previously involved with some local Hindi newspaper came before the court. Since the undertrial was not only educated but was a journalist by profession, the MM asked him the details of his case.

MM: What did you do?

UT: (with folded hands) Nothing.

MM: Then why are you here?

On hearing this the undertrial kept mum. MM again observed

MM: your file shows that you stole a laptop from the conference in Ashoka Hotel.

UT: *Saab* I did not steal it, I wanted to return it.

MM: Then why did you not do so?

UT: By the time I came back, the conference got over.

MM: But some staff of the organisers must be there.

UT kept standing with his head bent.

MM: To bolo kya karna hai? Gunah mante ho apna?

[68] Maintained by the welfare officer. The tendency to start watching the clock after 12: 30 p.m also reflects the attitude of the officials—as lunch time begins at 1 p.m and longer time taken by the court would mean delay in having food.

UT promptly replied

UT: *Agar aap aaj chodo to haan manta hun.*

Discomforting gasp followed this sentence of the UT

MM: What is this? Have you come to shop for buying vegetables? *Bhav tol nahin chalega.*

On hearing this UT mellowed his tone and replied pleadingly

UT: *Mere chote chote bache hain saab, galati ho gayi maaf kar do.*

MM: *Bachoon ka khayal chori karte waqt nahin aaya?*

UT: *Saab maff kar do.*

MM: *Acha chal 5 mahiney or saza kaat le, fir choot jayega.*

UT started crying and pleading, then the jail staff got activated again. Usually when a prisoner replies the way this particular UT did, the staff becomes silent and get busy in their own paper work, however, as the UT changed his stand and started pleading guilty again the officials tried to put forth his case albeit for their own purpose.

JO: Sir he is pleading guily, please reduce the sentence.

Then addressing the undertrial, the jail official asked him to stop crying.

MM: So what do you suggest?

JO: Sir do mahiney thik hain.

MM: O.k, two more months.

Had the undertrial in this case not changed his initial stand he would not have been able to utilize the 'golden opportunity' of admitting guilt for reduced sentence. Many undertrials who reply the way he did get their cases reverted back to the concerned courts. His changed stance along with pleading came to his rescue. It illustrates that particular speech acts become important in order to secure release from the court. These speech acts operate like a code which

determines the outcome of the judgment by the court. Here the judicial reforms get transformed into the context of the court. The technique of *niptara* is then based on the use of particular kind of language used in the court. From this narrative, it may be possible to suggest that the undertrial preferred to "confess" his guilt in exchange for his freedom—yet, in the absence of interviews with the legal subject it is hard to make sweeping generalizations other than to observe that the method of bargaining is folded into the way in which prisoner's speech is structured.

3.5 Conclusion

By way of conclusion, what Galanter and Krishnan (2002; 2004) point out regarding the employment of "bypassing strategy" and induction of "debased informalism" seem to be the premise of the reformation agenda of the district judiciary in Delhi as well under which the efforts are directed towards creating such alternative sites of disposal of cases rather than reforming the regular courts for effective and efficient dispensation of justice. However, the concept of debased informalism is not able to provide sufficient explanation for the techniques of power employed in these courts. The irony of such special courts in Delhi is that they are situated in the Legal Aid and Counseling Centre of Delhi Legal Services Authority whose motto is to provide "access to justice for all". However, what is happening is not the dispensation of just and speedy justice rather the way speech and silence is structured in these hearings suggest the

following. The system of informal plea bargaining seems to have established its roots firmly in such courts wherein trade off takes place between the prisoners, *jailors* and the state. This trade off is popularized as providing access to justice to the prisoners through the means of special courts in official discourse. However what is happening in reality is that the poor must admit guilt for an early release. It is indeed a difficult question whether the discourse of "access" of justice can capture the principles that underlay substantive procedural law, from a constitutional viewpoint. The place these courts occupy in the subjectivity of these prisoners remains a future project. However, the methods adopted by the *niptara* courts demonstrate how prisoners are converted into numerical targets, and life histories are replaced by numerical narratives of the state. The relation between poverty and criminalization is well known—what may be theft in law may be survival in life and what may be confession in law, may be freedom in life—in both cases, stigma of criminalization overdetermines the poor. Hence the official discourse on access to justice not only overlooks why the poor are criminalized in the first instance, it creates state mechanisms to ensure that the poor accept the allegation of criminality in order to improve its image of rule-of-law. The Kafkaesque picture of law leads us to question the official picture of access to [justice].

Chapter 4
Conclusion

4.1 Introduction

This dissertation started on an unusual note. It began with a comment by the then minister which helped to situate judicial reforms within the complex web of relationship between law, politics and economy. The comment highlighted the directions of the reforms wherein the speedy dispensation of justice is driven by the economic consideration. It advocated the use of special courts not only to dispense speedy justice to the undertrials but also for decongesting the overcrowded jails. Thus, in the corridors of power these courts are understood to be an effective reform measure capable of reducing the caseload of regular courts and relieving the exchequer of unnecessary expenditure. This lead to the discourse around linkages between 'good governance' and the 'rule of law' as this is important to understand the direction of judicial reforms in countries like India.

4.2 Good Governance and Rule of Law

The concept of good governance, though widely criticized by the scholars, is propagated by the World Bank for successful and effective development. The rule of law is, then, pointed out as an essential element for furthering economic

growth and reducing poverty by the Bank. The *Initiatives in Legal and Judicial Reforms* (2004) is extensively discussed in chapter one as the background of the study to highlight the emphasis of the Bank on 'meaningful and enforceable laws' and 'access to justice'. The Report insisted on the establishment of stable and predictable laws for smooth market transactions and for the enforcement of property rights and contracts. For doing so, it has stressed on the efficient and competent judiciary.

The initiatives of the Bank in the sphere of legal reforms have been criticized by the legal scholars as they have pointed out that the insistence of the Bank on good governance through legal and judicial reforms is nothing more than a tactic of promoting its own economic and strategic needs. In this light the emphasis on the development of legal environment is seen as a strategy to attract local and foreign investors. And if we turn our attention to the judicial reforms in India, we find them embedded in the language and agenda of the World Bank. This led to the discussion around reports of the Law Commission of India which has been pointing out the urgency to introduce judicial reforms which have implications on India reaping the benefits of globalization and free trade. For this purpose it has recommended the establishment of hi-tech fast-track commercial divisions in High Courts while the cases related to the problems of common people are increasingly directed at the alternate dispute resolution forums. Thus, we have a wide variety of forums other than courts in the form of *lok adalats*, matrimonial *lok adalats*, special courts, *gram nyayalays*, *nyaya panchayats*, fast-track courts,

consumer courts, ombudsman, etc. This led to the second chapter which analysed the politics behind the judicial reforms in India.

4.3 Politics of Judicial Reforms

The chapter attempted to understand the right of the undertrials to speedy justice. It traced the history of the right in ICCPR and exhaustive interpretation of Article 21 of the Constitution. The case of *Hussainara Khatoon & Ors.* was discussed to bring forth the stress of the judiciary on the right to speedy justice and 'reasonable, just and fair' procedure for the undertrials the negation of which would mean the curtailment of the fundamental rights. The case of *Hussainara Khatoon* also serves the vantage point for analyzing the state of legal services in India. Thus, the section on legal services followed the section on speedy justice.

Legal Service Authorities Act 1987 was analysed to understand various provisions of the act. The act stresses on the free legal aid to the poor indigent undertrial. Keeping this provision in mind the Delhi Legal Services Authority has established its branch in Tihar jail as well. The Act also has a chapter on *lok adalats* which are touted to be the effective and efficient means of ADR. However, its drawbacks and limitations are succinctly pointed out by Galanter and Krishnan (2002; 2004) whose work revolves around *lok adalats.* Before coming on to the section on *lok adalats* the chapter attempted to demonstrate the debates around ADR world over so as understand the "centrifugal" move out of the courts.

The discussion on ADR also surfaced the politics of the Bank, as Nader highlighted that the export of the ADR around the world was to facilitate market

transactions wherein the 'imaginary litigation explosion' is used as the reason to direct the litigating population to the forums other than the courts. In India litigating people have been shown the way towards *lok adalats* and Galanter and Krishnan's work on *lok adalats* critiqued the move by calling it a move towards 'debased informalism'. They feel that it is not commended on the virtues of the alternate processes but on the avoidance of the formal processes.

Their research highlighted the fact that the *lok adalats* can extend to any matter but they mainly dealt with motor accidents, family matters, minor criminal matters, etc., so 'access to justice' for which they were instituted remain an unfulfilled dream. Their examination of four different kinds of *lok adalats* revealed that often the litigants are forced to settle their cases. For instance they showed how in electricity *lok adalats* the police intervene and act as advocates of the company. Thus, the informalism adopted by the courts, through the institution of *lok adalats* then is debased informalism. Such 'debased informalism' has paved way for such a system where procedures are created to 'bypass' the routine law, meaning they were devoid of the virtues of alternative process of dispute resolution and were commended on the avoidance of the tortures involved in the formal process of the regular courts. To make the official discourse on *lok adalats* a success various practices have been evolved. One such practice is highlighted by the Moog's (1991) study of Varanasi district where the cases already settled by the regular courts were also routed through the *lok adalats* so as to show the higher number of cases settled by them. This surge towards numerical narratives

is also analysed in detail in chapter three in which the special courts held in Tihar are examined.

After a brief discussion on the administrative structure of Tihar, I went on to describe various reformation activities that are going on in Tihar. By invoking Foucault's concept of disciplinary power, I attempted to trace the transformation of 'garbage' into docile productive bodies whose labour is utilized for various activities in Tihar.

The section on legal aid in Tihar tried to explore the origin of reforms in the jail through epistolary jurisprudence, to borrow Baxi's (1980) term, to highlight the emergence of prison reforms by the initiative of the PIL. The chapter uses three tables which provide the clear picture of poor level of education amongst the prisoners and their socio-economic status thereby highlighting the need of effective legal services to them so as to help their engagement with the criminal justice system. I have examined these special courts and their functioning to highlight the presence of debased informalism in such courts. These courts function within Tihar and are touted to be the novel initiative, started on the directions of the former CJI, to decongest the jails and to provide speedy justice to the undertrials. However, as shown that these courts do not consider any substantive notions of law and work as a *niptara* courts wherein petty cases involving first time offenders are taken up to dispose off.

4.4 Conclusion

These courts take up the cases of 'confessing prisoners' and it has been argued in the chapter that this is the official construct. The prisoners are lured to confess so as to save the time which would be taken up by the regular court. A trade off seem to take place where various agents of the state (constables, warders, legal aid advocates, etc.) induce them to confess crime in return of early release. Thus, the prisoners exchange their innocence with the criminal record to get freedom from the torments of imprisonment. The higher number of disposal is then exhibited to mark the success of this reform. Such judicial reforms which work on the silence of the undertrials are an example of debased informalism which neither provides "access" nor "justice" to the poor who invariably happened to be at the receiving end.

This research however is limited to analysis of state discourses since I was unable to interview prisoners. The voices of undertrials may challenge this picture of law since several laws criminalise the poor. In other words, law in the first place is constitutive of regimes of impoverishment. The production of docile and productive body in the prison is supplemented by the production of a confessing body in order to both legalise the criminalization of the poor as well as to regulate prison populations as an index of efficacy of reform discourses which legitimize the state.

Appendix

-- Special Courts --

The then Hon'ble Chief Justice of India Sh.A.S.Anand expressed great concern over the increasing number of undertrial prisoners who were languishing in different prisons in India due to delay in their trials. The then Hon'ble Chief Justice suggested to all the Chief Justices of High Courts to make arrangements for setting up of Special Courts in their respective States through Chief Metropolitan Magistrate or Chief Judicial Magistrate of the area in which a district Jail falls, at least once in a month. These courts were asked to take up the cases of those undertrial prisoners on priority, who were involved in Petty offences and were keen to confess their guilt.

In pursuance to the above directions, the High Court of Delhi directed the then Ld.Chief Metropolitan Magistrate, Delhi to hold such courts at Central Jail, Tihar, New Delhi for trial and disposal of the cases of confessing undertrial prisoners involved in Petty offences. On the basis of directions, the then Ld.CMM, Delhi visited Delhi Prisons on 09.05.2000 wherein the prisoners in Delhi Jails were apprised about the utility of holding such Special Courts. Accordingly, a list comprising of the cases of undertrial prisoners involved in theft, accident, excise, arms act, simple injuries etc. were prepared and placed before the court for hearing. The first court was organised on 13/05/2000.

Hon'ble Delhi High Court in Crl.Writ No.681/99 define the term "Petty Offences" in the context of letter written by the Hon'ble Chief Justice of India to Chief Justices of the High Courts. As per this judgment the term "Petty Offences" means (i) minor offences where gravity of the offence is less and the punishment is not going to be very severe; or (ii) the offences in which the prisoners are involved being first offenders may be entitled to benefit of probation; or (iii) may be let off by the courts on payment of fine only. As per the above judgment the Magistrates while dealing with the cases at Special Court with have to keep in mind that it is a first offence of the prisoner. It is a minor offence where the punishment is not going to be severe or the facts are such that he can also be let off on probation or on payment of fine.

The concept of Special Courts has proved immensely popular amongst the undertrial prisoners in Delhi Jails, since a number of such prisoners are coming forward to admit their guilt instead of waiting for longer period in custody for trial of their individual cases. To rule out that confessing undertrial prisoner is not a previous convict, all such prisoners finger prints are taken by jail authority and sent to the finger print bureau/crime branch, Delhi Police for their confirmation about previous conviction. If any prisoner is found previous convict on the basis of finger print bureau/crime branch report his name is not included in the list.

The then hon'ble Chief Justice of India Sh.A.S.Anand alongwith other judges of hon'ble Supreme Court and High Court visited Delhi Jails on 29/07/2001 and lauded the efforts of Tihar administration in helping the Criminal Justice System by organizing Special Courts.

Till date, Seventy three such Courts have been organized in Tihar Complex on monthly basis and the cases of more than 3800 prisoners have been decided and disposed off.

Special Courts presided by Metropolitan Magistrates are being organised on the third Saturday of every month to dispose off cases of Petty offenders, who are not habitual and are willing to confess their crime. These courts are being organised at Tihar Courts Complex and are working at the pattern of Lok Adalats.

The term Petty offence means (i) minor offences where gravity of the offence is less and the punishment is not going to be very severe; or (ii) the offences in which the prisoners are involved being first offenders may be entitled to benefit of probation; or (iii) may be let off by the courts on payment of fine only. (iv) The maximum sentence do not exceed three years. (v) He has already undergone two months incarceration.

The jail authorities prepare the list of such prisoners and submit the same to the Law Officer, Prisons Headquarters who after scrutinizing the list forward a copy of the same to the DCP(Crime) Branch for its verification as to previous involvement of a prisoner in a crime. On receipt of his report the names so cleared are sent to the Chief Metropolitan Magistrate, Delhi for the purpose of summoning the concerned case files from the courts where trials are pending. Thereafter Metropolitan Magistrates are deputed to hold the Court at Tihar. The prisoners are produced before the Special Courts by Jail authorities and their confession of crime are recorded before the Magistrates in the presence of Public Prosecutor and Legal Aid Advocate representing the prisoner. The prisoner is given liberty that he has to confess his crime on his own volition and no undue pressure is exerted. He is further given liberty to retract his confession statement if he found that sentence proposed against him is excessive. The prisoner is also made to understand the consequences of judicial conviction and his case is disposed off only when it is found that he is really repentent for the crime committed by him and he assured the Court that he will be leading crime free life after his release from the jail. The Judicial Magistrate pronounce the conviction depending upon the facts of each individual case.

These Courts are proving immensely popular with the prisoners and are a milestone in strengthening the Criminal Justice System. Its working has been appreciated by everyone including Judiciary, Press, Executive etc. The then Hon'ble Chief Justice of India Sh.A.S.Anand during his visit to Tihar Jail also spoke very highly about these courts.

Till date, **Ninty Four** such Courts have been held in Tihar Complex on monthly basis and have disposed off **4404** cases.

4.333 / 1084 / - 251C

OFFICE OF THE CHIEF METROPOLITAN MAGISTRATE: DELHI.

ORDER

Pursuant to letter No. CJ1/SC/99/61 dated 29-11-1999 and letter No. 366/Gaz. VI/ E2 (a)/ 2002 dated 15-03-2002 received from the Ld. Registrar General, High Court of Delhi, New Delhi, the next special sitting of the court for trial of Petty Offences is scheduled to be held from 10:00 AM on **17-01-2009** at the Court Complex, Prison Head, Quarters, Central Jail, Tihar, New Delhi. **Sh. Siddharth Mathur**, Metropolitan Magistrate-2, Tis Hazari Courts, Delhi is deputed to preside over the special sitting of court, who will be assisted by his own court staff.

I/C Desk Section, Asstt. Supdt. Central Jail, Tihar, New Delhi.

The prison authorities have submitted a list before the undersigned of such under trial prisoners who are involved in offences of specified nature and are willing to confess their guilt. These cases, as per lists, are made over to and placed before the special court on the aforesaid dated and time for further proceedings, in accordance with law.

The cases which stand disposed off, during the course of hearing on the said date and which remain unsettled will be sent to the court concerned though the office of the undersigned (for consignment, if decided) for further proceedings/ hearing as per law immediately on the next working day.

— Sd/-

(KAVERI BAWEJA)
Chief Metropolitan Magistrate
Delhi

No. 434–38 JS/CMM/RK/2009 Delhi, Dated the 12/1/09

Copy forwarded for information and necessary action to:-

01. The Ld. Registrar General, High Court of Delhi, New Delhi. (Through Ld. District & Sessions Judge. Delhi)
02. The Ld. District & Sessions Judge, Delhi with the request for approval regarding deposit of fine, if any, collected on the aforesaid date with his office on the working day immediately following the date of special sitting.
03. **Sh. Siddharth Mathur**, Metropolitan Magistrate-2, Delhi with case files mentioned as per lists attached for aforesaid purpose with the request that:-
    i) He will send a report to the undersigned on the following day (in format attached) containing complete information of cases disposed off.
    ii) He may coordinate with the Pool Car Section for ensuring availability of transport for aforesaid purpose for himself and his own court staff.
04. The Director General –cum- I. G. Prison, Prison Head Quarter for appropriate necessary action:
05. Sh. Sunil Gupta, Law Officer, Central Jail, Tihar, New Delhi.
06. Office File.

128/Legal 13/01/09

AB 13/1

Kaveri Baweja
CMM/DELHI.

OFFICE OF THE CHIEF METROPOLITAN MAGISTRATE: DELHI.

No...18483.....JS/RK/CMM/2008 **Dated, Delhi the..22/12/08..**

To

The Director General cum- I. G. (Prison)
Central Jail Tihar,
Delhi.

I/C Dak Section
Asstt. Supdt
Central Jail
Tihar, New Delhi

Sub: Holding of courts in jail for trial of cases of under trial prisoners involved *in petty offences.*

Sir,

With reference to this office letter of even data, on the subject captioned above, you are hereby informed that next sitting of court in Central Jail, Tihar is scheduled to be held on 17-01-2009 (IIIrd Saturday of January, 2009).

For this purpose, a list of accused persons who are willing to confess their guilt in Petty Offences cases, in terms of order dated 03-05-2001, passed by Hon'ble Ms. Justice Usha Mehra and Mr. Justice M. A. Khan of Delhi High Court, New Delhi in Crl. Writ No. 681/99 and as per direction given in this office letter No. 9618/CMM/2001 dated 25-08-2001, should be furnished to this office by 03-01-2009.

6403/D.G.(P)
24-12-08

(KAVERI BAWEJA)
Chief Metropolitan Magistrate
Delhi

9896/Legal
24/12/08

24/12/08

Law Off.

SPECIAL COURTS

The problem of increasing undertrials population has posed a great challenge to Prison administration not only in form of congestion, idleness and wastage of human resources but also in ensuring that there is no incursion on their human rights. In capital Tihar Jail against sanctioned capacity to lodge 4000 prisoners there are on average 13000 prisoners housed in the Jails and undertrials constitute around 78% of the population.

Numerous judgments of Hon'ble Supreme Court and High Courts on the subject of incarceration of undertrials have resulted into the establishment of Jail Adalats. The then Chief Justice of India Sh. A.S. Anand, now Chairman, National Human Rights Commission expressed great concern over the increasing number of undertrial prisoners who were languishing in different prisons in India due to delay in their trials. He suggested to all the Chief Justices of High Courts to make arrangements for setting up of Special Courts in their respective States through Chief Metropolitan Magistrate or Chief Judicial Magistrate of the area in which a district Jail falls, at least once in a month. These courts were asked to take up the cases of those undertrial prisoners on priority, who were involved in Petty offences and were keen to confess their guilt.

In pursuance to the above directions, the High Court of Delhi directed the then Ld.Chief Metropolitan Magistrate, Delhi to hold such courts at Central Jail, Tihar, New Delhi for trial and disposal of the cases of confessing undertrial prisoners involved in Petty offences. A list comprising of the cases of undertrial prisoners involved in theft, accident, excise, arms act, simple injuries etc. were prepared and placed before the court for hearing. The first such court was organised on 13/05/2000.

COMEMORATING THE FUNCTIONING OF 100TH SPECIAL COURT

Special Courts are being organized at Tihar Courts Complex for the disposal of petty offences. On 7th March, 2009, 100th such Court was organized and to witness the functioning of this court Hon'ble Chief Justice, Delhi High Court, Mr. Justice Ajit Prakash Shah and Hon'ble Mr. Justice Madan B Lokur, Judge, Delhi High Court were present. These special courts are being organized at jails on the initiative of the then Chief Justice of India Mr. Justice Dr. A.S. Anand who in a letter to Chief Justices of High Courts suggested to make arrangements for setting up of special courts in their respective states through Chief Metropolitan Magistrate or Chief Judicial Magistrate of the area in which a District Jail fall, at least once in a month. These courts were asked to take up the cases of those under trial prisoners on priority who were involved in petty offences and were keen to confess their guilt.

In pursuance to the above directions, the High court of Delhi directed the then Ld. Chief Metropolitan Magistrate, Delhi to hold such courts at Central Jail, Tihar, New Delhi for trial and disposal of the cases of confessing under trial prisoners involved in Petty offences. A list comprising of the cases of under trial prisoners involved in theft, accident, exercise, arms act, simple injuries etc. were prepared and placed before the court for hearing. The first such court was organized on 13.05.2000 and till date one hundred such courts have been organized and 4570 cases of under trials have been settled.

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<u>Photograph</u>

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