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BACKGROUND PAPER

ACCESS TO JUSTICE
BY
DISADVANTAGED GROUPS

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Dr S Muralidhar

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International Environmental Law Research Centre
International Environment House
Chemin de Balexert 7
1219 Châtelaine
Geneva, Switzerland
E-mail: info@ielrc.org

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I. EXECUTIVE SUMMARY

Background Paper for the Expert Seminar on Democracy and the Rule of Law, Office of the High Commissioner for Human Rights, Geneva 28 February-2 March 2005

Access to justice inheres in the notion of justice. Two basic purposes that are intended to be served by providing access to justice are

- to ensure that every person is able to invoke legal processes for redress irrespective of social or economic status or other incapacity, and

- that every person should receive just and fair treatment within the legal system.

The undermining of these purposes constitutes a threat to the legitimacy of a legal system. The guarantee of access to justice is central to its functioning. It also constitutes a legitimate device to check abuse of state power.

This background paper has been prepared from the perspective of a legal practitioner and seeks to provoke discussion both on the conceptual framework as well as the practical aspects of access to justice. While an attempt has been made to state the issues that commonly figure in most jurisdictions, the peculiar features of the systems in many countries cannot possibly be noticed here for want of space. Secondly, the legal systems in different countries are constructed on a non-uniform basis. Some, including countries that were earlier under alien occupation or rule, have inherited common law or civil law traditions depending on who the occupier or colonizer was. There are yet other countries that follow neither of these; they may continue with indigenous justice systems. This paper does not and possibly cannot attempt finding the common thread of acceptable basic minimum standards of access to justice across all these systems. That perhaps is in itself one of the challenges before the world community.

The first part of this paper begins with recapitulating the jurisprudential bases within which the right of access to justice for the disadvantaged ought to be located. It then proceeds to highlight some of the issues that require to be discussed: identification and acknowledgment of disadvantaged groups in a democratic set up; access to justice as a human right and the application of international human rights norms in domestic legal systems. The second part deals with challenges to enforceability of the right of access to justice for disadvantaged groups including the barriers to justice; and the response to the challenge. The third and concluding part seeks to highlight the contexts in which the measures for reform of system of access to justice require to be examined. The concluding part will also seek to suggest action measures to address the issues at the international, regional and national levels.

II. IDENTIFICATION OF DISADVANTADGED GROUPS

1.1 A discussion on access to justice for disadvantaged groups has to be prefaced by an understanding of the jurisprudential bases for positioning this concept as a non-derogable human right. John Rawls' formulation of the two principles of justice offers one possibility:[1]

(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

(b) Social and economic inequalities are to satisfy two conditions; first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of *the least-advantaged members of society* (the difference principle).

1.2 These jurisprudential bases are premised on the acceptance of the non-derogable tenet of equal access to justice for every person. What this translates essentially into is this. We proceed on the footing that society's social and economic inequalities are a given; that although every person does have the same claim to basic liberties as every other person irrespective of their situational disadvantage (for instance on social, economic or political standing), it is more realistic to aim to minimize the disadvantage through laws, programmes and policies rather than seek to bring about equality in every sense of the term. That is how we understand the term "greatest benefit of the least-advantaged members of society".

1.3 The term 'disadvantaged' has to be understood not merely from the point of view of economic, social, educational or political disadvantage. In the context of the interaction of poverty and the criminal justice system, the report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice ('Allen Committee') in the U.S. in 1963 is both instructive and relevant. The Committee rejected the concept of 'indigency' with its notion of total financial destitution and its welfare ideology. It preferred a flexible concept of poverty which it recognized as the "functional incapacity to obtain in adequate measure the representation and services required by issues, whenever and wherever they appear".[2]

1.4 Two of the 'disadvantaged' groups whose denial of access to justice has merited attention by the international bodies have been non-citizens and minorities. The recent report of the Special Rapporteur on the rights of non-citizens, points to the "continued discriminatory treatment of non-citizens demonstrates the need for clear, comprehensive standards governing the rights of non-citizens and their implementation by States, and more effective monitoring of compliance." [3] In the context of measures taken by States and international organizations against terrorism, the report warns that these measures cannot justify discriminatory treatment of non-citizens. It urges that "the principle of non-discrimination must be observed in all matters, in particular those concerning liberty, security and dignity of the person, equality before the courts and due process of law, as well as international cooperation in judicial and police matters. Non-citizens suspected of terrorism should not be expelled without allowing them a legal opportunity to challenge their expulsion."[4]

1.5 The conclusions of the Working Group on Minorities at its ninth session in May 2003 recognised the need for promoting the rights of minorities as provided in the United Nations Declaration of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly of the United Nations on December 18, 1992 (the UN Minorities Declaration). Participants at the meeting expressed the view that "few mechanisms exist for recourse to justice for minorities and that there are no effective mechanisms which allow minorities to demand the accountability of State officials."[5] The meeting recommended the provision of "adequate and easily accessible remedies to address violations of the rights of persons belonging to minorities."[6]

1.6 The working group on the administration of justice, in its recent deliberations discussed the problems faced by victims of sexual assault which would include children and women.[7] There are several categories of specially disadvantaged persons in respect of whom there exists a plethora of declarations, conventions and other international instruments. These include the disabled,[8] the mentally challenged,[9] the elderly[10] and juveniles.[11] Each of these instruments recognize the peculiar needs of these identified groups for access to justice. The question that has to be considered is whether it is possible to have an overarching body of principles of access to justice that can accommodate these peculiar needs.

A. Access to Justice as a Human Right

1.7 A demand for the protection and enforcement of the right of access to justice has to be fore-grounded in an understanding of the nature of such a right. The Universal Declaration of Human Rights (UDHR) recognizes right of access to justice as a human right and a vital ingredient in the protection and enforcement of other human rights.[12] Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides for the basic minimum fair trial standards in the context of criminal proceedings.[13] The right to free legal assistance to persons without the means to engage a competent defence counsel is one of the "minimum guarantees" contained in Article 14 (3) (d).[14] The Human Rights Committee has, in its General Comment 13, clarified that "Article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law."[15] The Committee while adverting to Article 14 (4) which provides for the procedure in case of juvenile persons emphasized that "juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under Article 14."[16]

1.8 The issue of access to justice in the context of the rights guaranteed under the International Covenant on Economic Social and Cultural Rights (ICESCR) is a complex one. The debate on the justiciability of the ESC rights stems from the perception that the ICESCR requires state parties to achieve "progressive realization" of the rights subject to the availability of resources. Nevertheless, the Committee on Economic, Social and Cultural Rights has in General Comment 3 pointed out that apart from the guarantee under Article 2 (1) and Article 2 (3)(a) of the ICCPR that any person whose rights and freedoms (including the right to equality and non-discrimination) are violated "shall have an effective remedy", there are "a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including Articles 3 (non-discrimination), 7(a)(i) (fair and equal wages; equal pay for equal work by men and women), 8 (right to form trade unions and the right to strike), 10 (3) (protection of children from economic and social exploitation), 13 (2)(a) (compulsory primary education), 13 (3) (right of parents to choose for their children schools to ensure religious and moral education) and 13 (4) (right to establish and direct schools), and 15 (3) (freedom for scientific research and creative activity), which would seem to be capable of immediate application by judicial and other organs in many national legal systems."[17]

1.9 Article 2 (c) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires state parties "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination." Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 requires state parties to assure "everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 requires that "each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate

compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."[18]

1.10 The Statute for the creation of the International Criminal Court, 1998 is a concerted effort at combating impunity and is an implicit recognition of the right of access to justice notwithstanding the failure of national jurisdictions to effectively try and punish perpetrators of heinous crimes. Article 67 (1)(d) provides for free legal assistance to every person facing criminal trial and not having sufficient means to engage competent legal counsel. Article 68 provides for protection of victims and witnesses and Article 75 for reparations to victims.

1.11 Among regional conventions, the right of access to justice finds expression in the European Convention, 1950,[19] the American Convention on Human Rights, 1969[20] and the African Charter on Human and Peoples' Rights, 1981.[21] Thus, there is a fairly widespread recognition of a right of access to justice in international human rights instruments.

1.12 The question that then arises is whether such recognition has influenced the shaping of the national/domestic laws in fostering respect for such right. The existence of a wide body of codified international human rights law expressing access to justice as a basic right does raise expectations of increasing compliance by the state parties of their respective obligations. However, the adaptation of international human rights norms in domestic law has, for various reasons, been neither uniform nor consistent. A brief examination of the record of national courts in this regard may help in confirming this hypothesis.

B. Instances of Application of International Human Rights Standards by Domestic Courts

1.13 The use of international human rights law by national courts helps expand the scope and content of comparable provisions of the written constitution or statutes in the countries that are state parties. Three instances of application of international human rights law by domestic courts may be noticed.

1.14 The first example is in the context of the right to shelter recognized under Article 11 (1) of the ICESCR. General Comment 7 of the Committee on Economic Social and Cultural Rights on the right to adequate housing recognizes that "Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction."[22] Further, it has been pointed out that "it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that *all the legal recourses and remedies are available to those affected*."[23]

1.15 The Constitutional Court of South Africa in Government of the Republic of South Africa v. Grootboom,[24] was considering the question of entitlement to adequate housing of a group of adults and children dwelling on a sports field. They had earlier moved into a private land from informal settlements in which they lived under appalling conditions. After being evicted from the private land, they moved to the sports field where they had neither security of tenure nor protection from harsh weather conditions. They applied to the High Court in Cape Town for the enforcement of the right to shelter provided under s.26 of the Constitution. The High Court found that while there was no violation of the obligation of the State under s.26 (2) to take reasonable steps to achieve

progressive realization of the right to shelter within its available resources, there was a violation of the right of children under s.28 (1)(c) to adequate shelter. In an appeal by the state, the Constitutional Court held that there was no violation of s.28 (1) (c) but that the housing programme of the state fell short of the requirement under s.26 (2).[25] In so doing, the Constitutional Court referred to the General Comment 7 and relied on the provisions of the ICESCR to explain the scope of comparable provisions of the South African Constitution. The Constitutional Court observed that the meaning ascribed to the phrase 'progressive realisation' in the relevant General Comment "…is in harmony with the context in which the phrase is used in our Constitution, and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived."[26] The court concluded that the state housing programme failed to meet the constitutional test of reasonableness since it focused only on medium and long-term objectives and "failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations."[27]

1.6 5 The second instance of application of international human rights standard to provide access to justice in domestic courts is the decision rendered by the Indian Supreme Court in Vishaka v. State of Rajasthan.[28] The issue considered was of sexual harassment of women in the workplace. This had been completely ignored by the executive and the legislature. The court referred to Articles 11 and 24 of the CEDAW and the General Comments handed down by the Committee under that Convention. The court proceeded to explain that "the meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse… The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."[29] The court proceeded to evolve mandatory guidelines to deal with the issue and declared that they would "be binding and enforceable in law until suitable legislation is enacted to occupy the field."[30]

1.17 A third instance is the recent judgment of the House of Lords in United Kingdom in the case of A (FC) v. Secretary of State for the Home Department.[31] The House of Lords was considering an appeal by nine persons, each of them foreign nationals, certified for detention by the Home Secretary under s.21 of the Anti-terrorism, Crime and Security Act 2001. The appellants contended that such detention was inconsistent with the obligations binding on the United Kingdom under the European Convention on Human Rights, given domestic effect by the Human Rights Act, 1998. The House of Lords allowed the appeals and declared that s.23 of the Act was "incompatible with articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status".[32] Referring extensively to the provisions of the UDHR, the ICCPR, the European Convention, the International Convention on the Elimination of All Forms of Racial Discrimination as well as the General Recommendations of the Committee established thereunder, the leading judgment of Lord Bingham of Cornhill declared: "What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of Article 14. It was also a violation of Article 26 of the ICCPR and so inconsistent with the United Kingdom's other obligations under international law within the meaning of Article 15 of the European Convention."[33] In a concurring opinion, Lord Hope of Craighead observed: "The discipline which these provisions inject, and which Article 4 (1) of the International Covenant also recognizes, is a vital part of international human rights law. A state is not permitted to discriminate against an unpopular minority for the good of the majority."[34]

1.18 While these instances certainly offer hope for those seeking access to justice in national courts for violation of human rights, the position of the application of international human rights norms in many countries is not satisfactory.[35] An added dimension to this problem is the divergence in the systems of common law and civil law and other systems that at times defy reconciliation with the international norms. There is a resistance in some countries, to the assimilation and adaptation of international human rights norms and practices on conceptual bases as well as on pragmatic considerations. Where the right of access to justice is formally recognized in the Constitution or statutes, there still exists a gap between law and practice, particularly where it concerns the disadvantaged. These require to be addressed in the course of any attempt at evolving international norms and principles on providing access to justice. The next section seeks to highlight some of the major challenges in the endeavour to 'universalise' international human rights law.

II. CHALLENGES TO ENFORCEABILITY OF THE RIGHT OF ACCESS TO JUSTICE

A. The Universality Debate

2.1 The challenges to the enforcement of the right to equal and effective access to justice begins at a conceptual level: the 'universality' of human rights is sought to be undermined by a resort to the concept of 'cultural relativism'. Debates about the universality of human rights have been generated in the context of the divergence among nations in the adoption and application of international human rights standards. This has a perceptible impact on how the right of access to justice is perceived by States. The universalist notion that human rights that are expressed in multilateral treaties ratified by several countries cannot be derogated from has had to contend with the demand that human rights, for wider acceptance, should seek cultural legitimacy.[36] Abdullahi An-Na'im argues that cultural relativism facilitates the formulation of a cross-cultural approach to human rights without undermining the possibility of condemning repressive practices.[37] Another point of view, expressed by Richard Falk sees the need to identify 'intolerable' practices in each culture and attempt cultural reconstruction and renewal in a democratic and participatory manner.[38] Rhoda Howard adds to the debate by pointing to the emphasis that many indigenous groups place on the recognition of their collective or communal rights. She says "when they do so they are not primarily interested in the human rights of the individual members of their collectivities. Rather, they are interested in the recognition of their collective dignity, in the acknowledgment of the value of their collective way of life as opposed to the way of life of the dominant society into which they are unequally 'integrated'…"[39] The impact that the debate on the universality of international human rights norms has on national arrangements to provide effective access to justice requires to be acknowledged and responded to.

Justiciability

2.2 A major challenge to providing effective access to justice lies in the realm of judicial functioning where courts are constantly in a flux as to how far they can review executive decision making in the area of policy.

2.3 The basic needs of the poor to shelter, to food, to health, to access common property resources and basic means of livelihood do not find avenues for redress within the formal legal system since the law as constructed itself constitutes the barrier. To explain, many of the issues of protection and enforcement of economic, social and cultural rights (which can be conveniently termed as survival rights) are caught in the judicially constructed limitations of justiciability, the law and policy divide and the constitutionally drawn lines between

enforceable rights and non-enforceable principles of state policy. These legal barriers pose a serious challenge to realization of basic survival rights of even the most disadvantaged [the 'minimum core' identified by the Committee on Economic, Social and Cultural Rights (CESCR)] at the national level. The debate about the justiciability of ESC rights has centred around two principal concerns: the legitimacy of judicial intervention and the competence of courts to adjudicate issues in the sphere of the enforcement of economic, social and cultural rights.[40] The initial characterisation of ESC rights as 'non-justiciable' has led to later authoritative assertions to the contrary in the form of the Limburg Principles[41] and the General Comments of the CESCR both of which recognise that some of the ESC rights "are capable of immediate application by judicial and other organs in many national legal systems."[42] The variable nature of the concept of justiciability, depending on the nature of the issue sought to be adjudicated upon as well as on the constitutional role envisaged for the court, defies formulation of precise standards to control judicial functioning in the area.[43] On the other hand proponents of ESC rights dismiss the very approach as being lawyer-driven and legalistic, and view the issue of justiciability as "a 'red herring' or distraction from the real issues"[44] which include the "effective protection of the rights in question, be it through courts or other mechanisms."[45]

2.4 The public interest case brought before the Supreme Court of India in 1994 by the Narmada Bachao Andolan (NBA), a mass-based organisation representing those affected by the large-scale project involving the construction of over 3000 large and small dams across the Narmada river flowing through Madhya Pradesh, Maharashtra and Gujarat, provided the situs for contest of what the court perceived as competing public interests: the right of the inhabitants of the water starved regions of Gujarat and Rajasthan to water for drinking and irrigation on the one hand and the rights to shelter and livelihood of over 41,000 families comprising tribals, small farmers, fishing communities facing displacement on the other. In its decision in 2000, the court was unanimous that the Sardar Sarovar Project (SSP) did not require re-examination either on the ground of its cost-effectiveness or in regard to the seismicity aspect. The area of justiciability was confined to the rehabilitation of those displaced by the SSP.[46] By a majority of 2:1,[47] the court negatived the plea that the SSP had violated the fundamental rights of the tribals because it expected that: "At the rehabilitation sites they will have more, and better, amenities than those enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of society will lead to betterment and progress."[48] The court acknowledged that in deciding to construct the dam "conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water."[49] However, "when a decision is taken by the government after due consideration and full application of mind, the court is not to sit in appeal over such decision."[50] Even while it was aware that displacement of the tribal population "would undoubtedly disconnect them from the past, culture, custom and traditions," the court explained it away on the utilitarian logic that such displacement "becomes necessary to harvest a river for the larger good."[51] The majority opinion further highlighted the two principal concerns of the justiciability debate – legitimacy and competence. It declared that "if a considered policy decision has been taken, which is not in conflict with any law or is not malafide, it will not be in public interest to require the court to go into and investigate those areas which are the functions of the executive."[52] Further, "whether to have an infrastructural project or not and what is the type of project to be undertaken and how it is to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken."[53]

2.5 The justiciability issue arises in the sphere of civil and political rights as well. The dilemma that courts encounter in accepting the justification of the executive government in denying access to courts in the event of an internal emergency or external aggression has been evident in the post 9/11 phase. The courts in the United Kingdom found themselves helpless to issue writs to the Home Secretary to elicit information about British citizens detained by the Government of the United States in Guantanamo Bay, an area in Cuba under the control of the Untied States.[54] The U.S. Supreme Court was divided over whether its jurisdiction extended there and by a narrow majority permitted applications of habeas corpus by the detenus.[55] The Human Rights

Committee has in its General Comment No.29 (2001) emphasised that, although, under Article 4 of the ICCPR a state party may, in the event of an emergency, derogate from the right to a fair trial under Article 14, certain peremptory norms of international law cannot be violated. Thus, "States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."[56] The courts then would be justified in determining whether the explanation offered for curtailing the right of access to justice in a state of emergency comports with the imperative for observing the peremptory norms of international law. The perception of national courts of the scope of their jurisdiction in the states of emergency is critical for the protection and enforcement of human rights.

The 'affordability' hurdle

2.6 The assertion that both civil and political rights on the one hand and economic, social and cultural rights on the other are part of one universe of rights stands challenged by states constituting the block of developing and least developed countries which contend that they simply cannot 'afford' to provide these rights to all of their citizens. Consequently, the basic survival needs of the disadvantaged groups – to shelter, food, health, and education – are sought to be postponed or de-prioritised on this questionable basis. The right of access to justice is also invariably clubbed with the bundle of rights that depend on the available resources of the state. For e.g., the Indian Constitution includes the right to free legal aid as a non-enforceable directive principle of state policy.[57]

2.7 The question that is asked is whether costs could be a valid ground for limitation of rights. Linked to this is the point of view that legal services for the poor make no economic sense. As regards the first, there is a growing judicial opinion in many countries that refuses to accept costs as a valid justification for denying access to justice to the disadvantaged groups.[58] They echo the words of Judge Blackmun in Jackson v. Bishop[59] that "Humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations."

2.8 The second question is posed essentially by the law and economics school of which the principal exponent is Richard A. Posner. He argues that the value that people place on legal services is in fact far less than they do on other essentials like food and clothing and that the state would rather not 'waste' the money involved in providing free legal services.[60] This criticism ignores the fact that intangible benefits accrue to an indeterminate class of persons on account of class action litigation brought on their behalf. It drastically reduces the costs of litigation that would be involved if each one of them were to individually litigate the same cause.[61]

2.9 An even more powerful justification, rooted in the very legitimacy of the legal system, was provided in 1963 in the U.S.A by the Allen Committee which studied poverty and the administration of criminal justice. It pointed out that "the survival of our system of criminal justice and the values which it advances depends upon constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system." [62]

2.10 The challenge posed by the affordability argument has a valid defence that requires articulation and expression in the written texts of international law instruments.

Law and Poverty: A problematic relationship

2.11 The problems of the legal system become acute when examined in the context of the needs of the poor. The inability of the poor to access the justice system is attributed to illiteracy, cultural inhibitions, bureaucratic and political corruption. The poor therefore don't in that sense 'access' the legal system. They are drawn into it unwittingly in situations of conflict with the law. Thus it has been observed, "the poor come to use the legal system only when so compelled by being drawn into it as accused and defendants."[63]

2.12 For the urban poor, the criminalisation of their activities – for instance, vagrancy, street dwelling, sex work – results in their being punished for their poverty.[64] Research conducted in the criminal courts in the United States in the early 1950s revealed that the criminalisation of vagrancy was a useful administrative device for dealing with 'unwanted persons,' 'cleaning up' of cities and for abating nuisances.[65] Many legal systems continue to answer the description of the situation in the U.S. during the middle of the previous century, brought out graphically in the following passage:

> *"For the middle class, the police protect property, give directions, and help old ladies. For the urban poor, the police are those who arrest you. In almost any slum there is a vast conspiracy against the forces of law and order. ... [T]he city jail is one of the basic institutions of the other America. Almost everyone whom I encountered in the "tank" was poor: skid-row whites, Negroes, Puerto Ricans. Their poverty was an incitement to arrest in the first place. ... They did not have money for bail or for lawyers. And, perhaps most important, they waited their arraignment with stolidity, in all probably got it. ... To be impoverished is to be an internal alien, to grow up in a culture that is radically different from the one that dominates the society."*[66]

2.13 The need of this sector in terms of access to justice would involve seeking law and institutional reform on a very different scale. The imbalance in the availability of legal services to the urban and rural populations has persisted in many of the countries.

Immunity and Impunity

2.14 In the context of civil and political rights too, the failure of the formal legal systems to ensure effective access to justice to the victims of mass crimes, genocide, sexual offences constitute major challenges. It is not only state actors but non-state actors who enjoy immunity for such crimes. The difficulties faced by victims of the excess committed in regime of General Pinochet in Chile,[67] Pol Pot in Cambodia[68] require a more effective legal regime to deal with such crimes. Even within countries, criminal action against government servants is invariably either delayed or made impossible by 'immunity' clauses.[69] Incidents of crimes against humanity, genocide, war crimes and crimes of aggression have not infrequently in the recent past posed serious difficulties in bringing the offenders to book. The international tribunals set up by the Security Council for trying the crimes committed in Yugoslavia and Rwanda and more recently the constitution of the International Criminal Court are in response to this need. Nevertheless, as will be noticed presently, the effectiveness of these mechanisms is still to be tested.

2.15 In the context of mass disasters, both natural and man-made, the response of the legal systems to redress the grievances of victims has been inadequate. The worst example of the latter has been the Bhopal Gas Disaster in India which demonstrates that the enforcement of liability of multi-national corporations is cumbersome, unsatisfactory and ineffective. (see box below) Corporate impunity has thus far not been seriously questioned in international, regional or national jurisdictions.[70]

THE BHOPAL GAS LEAK DISASTER

When the lethal MIC gas leaked from the factory of Union Carbide India Limited (now Eveready Industries India Limited) on the intervening night of December 2/ 3, 1984, it triggered off not just one mass disaster, but several of them. Twenty years after the event, we have voluminous data that reveals a mind-boggling myriad of multiple disasters on several fronts.

Soon after the disaster, the Indian Parliament in 1985 enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 by which the Union of India would be the sole plaintiff representing all the victims of the disaster who would be potential claimants for compensation in a court of law. This, it was believed, would ensure effective access to justice for the Bhopal gas victims. Armed with this Act, the Union of India filed a suit for compensation against Union Carbide Corporation (UCC) in the Court of Judge Keenan of the Southern District Court, New York. Here UCC erected a preliminary defence. It sought to demonstrate that the proper forum for adjudication of this suit was not the court in New York but the one in India. UCC's expert witness in those proceedings, Nani Palkhivala, glibly asserted on affidavit: "There is no doubt that the Indian judicial system can fairly and satisfactorily handle the Bhopal litigation."[71] Accepting Palkhivala's description of the Indian legal system, Judge Keenan dismissed the suit subject to UCC submitting to the jurisdiction of Indian courts. Thereafter, in September 1986, the Union of India filed its suit against the UCC in the District Court in Bhopal. In February 1989, the Supreme Court of India approved a settlement whereby UCC would pay the victims 470 million US Dollars in full and final settlement of all civil and criminal claims, in present and in future. There was a huge public outcry that the settlement was a sell out. Review petitions were filed challenging it. The Supreme Court justified its acceptance of the settlement on February 14, 1989 on the ground that "this court, considered it a compelling duty, both judicial and humane, to secure immediate relief to the victims."[72]

Twenty years after the settlement, neither has the relief to the victim been adequate nor immediate. The presumptions on which the settlement was worked out, 3,000 dead and 100,000 injured, were under-estimations to the extent of five times the actual figures. In March 2003, the official figures of the awarded death claims stood at 15,180 and awarded injury claims at 5,53,015. The range of compensation which was assumed in the settlement order would be payable was Rs.100,000 to 300,000 for a death claim, Rs.25,000 to Rs.100,000 for temporary disablement and Rs.50,000 to Rs.200,000 for permanent disablement. Each death claim has been awarded not more than Rs.100,000 and on an average an injury claim has been settled for as little as Rs.25,000.

A stark feature of the adjudication of claims of the Bhopal gas victims has been the complete absence of legal aid. On the contrary, every lawyer handling a claim has worked on a contingency fee basis, a practice disallowed by the (Indian) Advocates Act, 1961. There have also been failures in acknowledging the victims of the disaster by the devices of exclusion, arbitrary categorization and arbitrary re-categorisation. Further, the costs and losses arising out of the Bhopal gas leak disaster have had to be borne by the victim. As pointed out by a legal scholar "There is considerable neglect of the costs that are generated in an accident or disaster which, therefore, remains beyond the reckoning that is undertaken in determining compensation. The externalizing of losses and costs, apart from making of compensation an inadequate guide to understanding the cost of the accident or disaster, also reveals the law's expectation that a victim bear a part of the cost. The consequent impoverishment that results is not, it would appear, within the law's ken."[73] Few would now disagree with Marc Galanter that "at its best, the Indian legal system's treatment of civil claims is slow and cumbrous."[74]

Failures of the formal legal system

2.16. A major challenge to providing effective access to justice, particularly to the disadvantaged sections, is the failure of the formal legal systems in many countries, for a variety of reasons: excessive legal formalism; delays and expenses in pursuing litigation in courts; distrust of the legal system including its processes and institutions which are mystifying, alienating and intimidating; distaste of lawyers and courts as they seem imposing and authoritarian and the inability of the legal aid system to reach all sections of the population constitute the major institutional barriers to justice for the socially and economically marginalized sections of the population. Among the disincentives for a person to avail of legal aid offered is the problem of uncompensated costs that have to be incurred. While the legal aid programme may pay for court fees, cost of legal representation, obtaining certified copies and the like, it usually does not account for the bribes paid to the court staff or to prison officials for small favours, the cost of transport to the court, the bribes paid to the policemen for obtaining documents, copies of depositions and the like. Since it operates to oppress and disempower them, they have to devise ways of avoiding it rather than engage with it. Thus, the poor generally view the legal process as a nuisance resulting in irreversible consequences, an uninvited 'trouble' that has to be got rid of. It is irrelevant to them as a tool of empowerment and survival. Without fundamental systemic changes, if legal aid attempts at getting people to engage with the system, however promising the results may seem, it is bound to be viewed with suspicion. This explains in part why, in many countries, the poor turn to the parallel system for redress of their grievances.

The parallel system

2.17 There is, in many countries belonging to the developing and least developed blocks, a parallel system of economy facilitated by extensive corruption that subverts the formal legal system. As demonstrated by Hernando de Soto in the context of Lima, the parallel system, which started as a by-product of the formal system, has for long been the only system with which the police, the lawyers, the judiciary and the litigant are prepared to readily engage.[75] For the last of the groups mentioned, the engagement with the criminal justice system as accused is not a matter of choice. For the others it becomes a source of additional means of livelihood. The attitude towards maintaining the status quo therefore gets firmly entrenched. This constituency has also managed to use the existing system for their own benefit. There exists a system of pre-paid legal services for those involved in organised crime rackets and other 'criminalised' trades. This indeed demonstrates how 'violators' are able to organise themselves better and engage with the system to the mutual benefit of the police, the court staff, the lawyers and themselves.

2.18 Thus without fundamental changes in the behaviour of the personnel manning the institutions that comprise the legal system, the mere provision of legal services may not alter the way in which the poor are treated within it.

Failure to integrate the non-formal legal system

2.19 In the context of examining effective means of providing access to justice for the disadvantaged sections, a significant aspect that has not received the required attention, is the continuance of informal and non-formal systems in many countries outside of the developed block. Not accounting for the impact of the non-formal legal system might hamper the acceptability of the legal aid programmes, located as they are at present, within the formal legal system and more particularly within the institutions of the latter. It must be noticed in this context that although non-state legal systems may not be the most appropriate to deal with complex criminal law issues, they continue to be relevant to a majority of the rural masses, to whom the formal legal system remains alien and oppressive.[76] Professor Upendra Baxi tells us: "The state legal system, pervasive in urban areas, is only slenderly present in rural areas. The low visibility of the state legal system, and its slender presence, renders official law (its values and processes) inaccessible and even irrelevant for people. Other fac-

tors (such as the language of the law, which is alien to about 95 per cent of the people) compound the distance between the state's law and the subjects".[77] Integrating the non-formal systems, rather than excluding them, and clearly demarcating the scope of their function in the justice system is imperative.

B. The response to the Challenge

2.20 The challenges to providing access to justice, some of which have been noticed, have been responded to, even if inadequately or inappropriately, by the state and civil society. This section seeks to list out some of these responses at the international and national levels. An acknowledgement and understanding of these responses might facilitate the exploration for changes.

International fora for access to justice

2.21 The complaints procedures under the treaty bodies offer one avenue of redress for violations of human rights. Under the ICCPR, the Human Rights Committee can enquire into complaints from individuals belonging to state parties that have ratified the first Optional Protocol who claim to be victims of violations of rights contained in the ICCPR. The decision of the HRC has only persuasive value on the concerned State. The Optional Protocol to the CEDAW also provides for a complaints mechanism. Its objective "is to allow individuals or groups of individuals who have exhausted national remedies to petition the Committee directly about alleged violations of the Convention by their Governments."[78]

2.22 Then there are Thematic Mechanisms consisting of a number of Special Rapporteurs, representatives, independent experts or working groups appointed usually by the UN Commission on Human Rights to look at specific types of human rights violations wherever in the world they occur. The first of these mechanisms was the Working Group on Enforced or Involuntary Disappearances, created in 1980. During the 1990s new mandates were established to deal with the sale of children, child prostitution and child pornography; arbitrary detention; internally displaced persons; racism; freedom of opinion and expression; violence against women etc.

2.23 In an acknowledgment of the absence of an effective mechanism to provide access to justice in the context of crimes against humanity, genocide, war crimes and aggression, the UN Security Council established two international tribunals in the context of the conflicts in Yugoslavia (in 1993) and Rwanda (in 1994). These in turn led to the constitution of the International Criminal Court (ICC), which has with the ratification of over a 100 countries, come into force. Nevertheless, the ICC's effectiveness is sought to be seriously undermined by the United States in the form of bilateral agreements with state parties that will immunize U.S. citizens from the jurisdiction of the ICC.[79]

2.24 There are, however, limitations to the efficacy and effectiveness of these mechanisms. Accessing these international fora, invariably located in countries far away from those whose peoples require help most, has not been easy for a variety of reasons which include expense and delay. Secondly, the reporting procedures, the meetings of the committees, the response of the state party to the queries and consequential follow up action are part of a long-drawn procedure that may extend to several years. This considerably reduces the effectiveness of the intervention by the international human rights mechanism. Thirdly, the comments, reports and suggestions made by these mechanisms are at best of persuasive value and fail to compel recalcitrant state parties to alter their systems to conform to the basic minimum requirements of international human rights law. Fourthly, the problems of lack of awareness of the applicable law and availability of remedies is a barrier to many pressing problems being brought before the international fora. In many countries, the presence of international NGOs

is dependent on the preparedness of the government at that point in time to permit access to information. Nevertheless there has been a demand for a complaints procedure in relation to other conventions including the ICESCR[80] since they offer a means to NGOs and individuals to report the violations of human rights.[81] They also constitute an important source of valuable information about current developments in human rights.

Three 'waves' of access to justice

2.25 A look now at how national jurisdictions have responded. In their monumental comparative work on civil justice systems, Cappelletti and Garth point out that the emergence of the right of access to justice as "the most basic human right" was in recognition of the fact that possession of rights without effective mechanisms for their vindication would be meaningless.[82] 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.

2.26 These two authors point out how in the U.S.A, the U.K. and certain European countries, beginning in 1965, there were three practical approaches to the notion of access to justice:

- the **'**first wave' was legal aid, which really meant providing a lawyer to an indigent litigant in a case before a court or tribunal*;*

- the second wave concerned the reforms aimed at providing legal representation for 'diffuse' interests, especially in the areas of consumer and environmental protection. This would mean expanding the notion of 'standing', permitting others like public spirited persons to represent an indeterminate mass of litigants with a common grievance; and

- the third wave was "the 'access–to–justice approach,' which includes, but goes much beyond, the earlier approaches.[83] The last mentioned approach required "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."[84]

2.27 The approaches typified by each of these waves are yet to be tried out in many countries. In some, the traditional legal aid systems have sought to be firmly entrenched by institutionalizing legal services through state support. The recent examples are that of South Africa[85] and India.[86] The limitations of the institutionalised model are that they invariably compromise quality of legal services at the altar of costs. They are located within the formal legal systems and tend to be affected by the same problems: excessive formalism, intimidating structures and general alienation from the people they seek to serve. In some others, the second and third waves have been in evidence as will be noticed presently.

Public Interest Litigation

2.28 The judiciary in some of the countries has displayed activism to bridge the gap between the practice and the constitutional promise of effective access to equal justice (see box below for the example of public interest litigation in India). This has enabled issues to be brought before the courts by permitting relaxed rules of standing, flexible procedures and creative use of judicial power.

PUBLIC INTEREST LITIGATION: A CASE STUDY OF INDIA

Following the landmark decision of the Supreme Court of India in Maneka Gandhi v. Union of India,[87] there were a series of decisions declaring legal aid as a fundamental right and integral to a just fair and reasonable procedure as contemplated by Article 21 of the Constitution. The judiciary played a decisive role in raising it beyond a statutory right to an enforceable fundamental right.[88] The directive principle regarding free legal aid in Article 39-A was used to interpret the scope and content of the right.

The judicial innovation of public interest litigation (PIL) was activated essentially in response to the need for access to justice for a large number of undertrial prisoners languishing in jails in Bihar for periods of time long beyond the maximum sentence they would have had to serve had each of them been convicted. In the earliest of the PIL cases, Hussainara Khatoon v. State of Bihar[89] the Supreme Court recommended release of the indigent prisoner on personal recognizance bonds, rather than on unaffordable monetary bail bonds. Another instance of creative judicial activism was in moulding reliefs for rickshaw pullers from Punjab facing problems of obtaining finances to purchase rickshaws.[90]

PIL was seen by the judiciary as answering many of the problems thrown up by the formal legal system in providing access to justice. Thus, any public spirited person could bring forth a case before the High Courts or the Supreme Court even though such person was not seeking any relief but agitating the case on behalf of and for the benefit of an indeterminate mass of people with a similar grievance. Secondly, the requirement of a formal petition, drawn up in legal language, was dispensed with. Any letter or even a telegram addressed to the court would suffice. Thirdly, the court would go on with the case on the basis of the facts, however brief, brought before it as long as the issue was one of genuine public interest. It would appoint amicus curiae to present the case before it, appoint commissioners to verify the facts and expert committees to advise on how to deal with matters of a technical nature. The past two decades have witnessed range of PIL cases on diverse issues – human rights, environment, public accountability, judicial accountability, education, to name a few. With it has come the inevitable attempts at misuse of the jurisdiction by interlopers and busy bodies on the one hand and the overreaching of their own powers and jurisdiction by the courts on the other.[91]

PIL is not without its difficulties. There has been a distinct shift, in the recent past from issues concerning access to justice for the poor to other issues of public interest which at times even conflict with the rights of the poor. Thus, PIL raising environmental concerns like protection of forests may bring about judicial verdicts that curtail the rights of forest dwellers and tribals to access community resources essential for their livelihood.[92] Nevertheless, given the number of areas in the functioning of the justice system that require to be reformed to respect the right of access to justice, the use of PIL in initiating law and institutional reform requires to be encouraged and persisted with.

2.29 Faced with resource crunches, other countries have promoted alternative dispute resolution mechanisms.[93] In countries like South Africa, para-legal networks[94] are among the devices through which non-governmental groups seek to provide legal services. (see box below for the experience in Ghana)

THE LEGAL LITERACY PROGRAMME IN GHANA

extracted from
International Commission of Jurists,
Legal Services in Rural Areas in Africa (1997) p.50-51

The legal literacy programme has been operational since 1990. It started as a result of the realization that women and the public in general lack awareness about their rights.

The focus has been on simplifying four basic laws into English and the local languages and on disseminating information through workshops and seminars. The laws simplified include the law of intestate succession, Marriage, Wills, and the Maintenance of Children. The pamphlets produced are sold to the public for 300 cedis. There is a two-pronged approach to the seminars and workshops run by lawyers. The first involves lawyers going out to give talks and to respond to people's questions. The second approach which emanated from limited human and financial resources to enable lawyers go out to give seminars, concentrates on the dissemination of information through link persons called "queen mothers". These are women in leadership positions to whom people generally go for advice. They are seen as appropriately placed to deal with problems involving the law.

The "queen mothers" are not trained as para-legals but as link persons with a limited role of identifying problems and referring individuals to appropriate institutions. They may also help by accompanying the women to the police and describing the nature of the problem which the women are encountering. Their level of training is therefore minimal and is limited to two days duration. Sketches and role plays are used to illustrate what happens in problems with regard to payment mainly because this work is in synchrony with their general activities. Although they are not paid, incidental costs are reimbursed. However, not all areas have "queen mothers" as they tend to be found in District capitals. Furthermore, some areas do not have tribunals which hear cases and, therefore, there is a need to train people in such areas to be able to give substantial aid rather than merely identifying the problem.

The training of "queen mothers" is undertaken in house by lawyers. Various training programmes have been made available to the trainers. For instance a few of the members have attended the WiLDAF "train the trainer" programmes. Whilst the ICJ manual has been made available, it has not been used in training for a number of reasons. Firstly, the people trained have not been trained as paralegals and FIDA regards its training as not really being not concentrated on training fully fledged paralegals for a number of reasons. The first hinges on problems of working out the qualifications of who should be trained and the second is centred on the debate of how far paralegals can be expected to go in their operations. There is a fear that paralegals may pose as lawyers but at the same time there is also a view that the term paralegal should be limited to people with more specialized training. The overall concern has been with the low level of literacy.

2.30 These experiences need to be documented and shared with other countries facing difficulties in providing effective access to justice over a wide range of population.

Civil Society's Response

2.31 Meanwhile, civil society, both in the urban and rural setting continues with informal dispute resolution mechanisms, which at times may not comport with the accepted standards of justice. Every system throws up a set of reactions among civil society. Those refusing to acknowledge the growth of mass movements and peoples' home-grown responses to the need for access to justice do so at their own peril. One of the principal problems is the formal legal system's inability to accommodate the demands for change from peoples' movements.

2.32 The right to information is an invaluable tool in the struggle for access to justice. In India the enactment of laws in some of the provinces was owing to the effectiveness of the strategies adopted by of a mass people's movement, the Mazdoor Kisan Shakti Sanghatan (MKSS) based in Rajasthan. The concerted campaign of the MKSS which began with demanding information from village administrative bodies (*panchayats*) on the expenditure incurred on projects meant to serve the needs of villagers, has been responsible for an increasing awareness amongst people of the power of information and how it can be used to bring about changes in the attitude of the bureaucracy. This has spurred the drafting of the Right to Information Bill, a central law which remains to be operationalised.

III. THE CHANGING NATURE OF THE WELFARE STATE AND FOREIGN FUNDING

3.1 A discussion on access to justice for disadvantaged groups has to acknowledge certain developments in related spheres. The changes in the recent past in the re-organisation of trade relations between countries has had a definite impact on the re-ordering of legal systems. The rules of international trade set by the World Trade Organisation (WTO)[95] imposes obligations on 'member' countries to bring changes, not only in the laws relating to trade,[96] but on a whole range of subjects including labour, environment protection and services.[97] Increasingly, the economic 'efficiency' of laws and institutions in terms of tangible costs and benefits, as determined by international 'norms', is the predominant factor that determines the justification for the continuance of a system. For instance, the international developments in the area of criminal justice too have their impact in the domestic sphere.[98] There is, therefore, a greater need than ever before to examine the contemporary developments elsewhere in the area of legal aid and the justice system and ask how far these need to be learnt from in devising feasible packages of legal services delivery.

3.2 Another context is the changing nature of the welfare state. The allocation of resources in countries belonging to the developing and least developed blocks towards administration of justice has shown a decline.[99] This has led to increased interest shown by international financial institutions in funding projects aimed at judicial reforms in general and legal aid in particular.[100] Witness the study conducted in March 2001 by the Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO) of the judicial systems in seven countries viz., China, India, Indonesia, Malaysia, Philippines, Thailand and Vietnam. The preface to the report on the Indian judicial system explains: "With the evolution of the market-oriented economy as well as the increase in cross-border transactions, there is an urgent need to conduct research and comparisons of the judicial systems and the role of law in development in Asian countries".[101] The World Bank funds, in addition to over 300 projects which have a "legal and judicial reform" component, several "freestanding legal and judicial reforms" projects located in the less developed countries which include Philippines, Kazakhstan, Croatia, Argentina, El Salvador, Yemen, Sri Lanka and Bangladesh.[102] The classification of Bangladesh as a LDC has led it to receive credit from international financial agencies for structural changes. The World Bank has loaned $30.6 million to it for a 'Judicial and Legal Capacity Building Project', one of the main components of which

is "assisting local NGOs and other civil society groups involved in public education, including dissemination of relevant materials and support for legal aid clinics."[103]

3.3 External funding of law reform gives rise to questions about enforceability of state obligations and accountability for providing basic minimum access to justice.

A. Limitations in Adapting other 'Models'

3.4 The experimentation with research on legal systems in the developing nations and suggesting the best ways of reforming them has had to contend with critics who question the wisdom of such an approach. Early in 1974, Barry Metzger who undertook a comparative study of legal aid systems in the Asian region noted:[104]

> *"The context with which we are concerned is the deprivation of basic legal services. Precisely, poverty can be defined as an absence of resources (not necessarily money) that prevents the individual from using the legal system as he otherwise would. The deprivation involved may not be solely one of money; by virtue of illiteracy and isolation, a man may lack informational resources about rights, remedies, services and obligations. In identifying legal poverty within a given country, it is necessary to have a firm knowledge of the types of services available within the legal system, the pricing of such services, and the quantitative constraints on such services (that is, how much of a given service can be provided, given a limited number of lawyers and para professionals in the system and given a court system of finite capacity."*

3.5 With the hindsight of over three decades of funding by international agencies of judicial reforms projects, the studies show that their persistence with "a formalist model of law detached from the social and political interconnections that form actual legal systems" may be misplaced.[105] Frank Upham reminds us that "the secret to legal borrowing and to legal reform in general therefore, is not merely attention to the foreign model or the institutional goal; it must include close attention to, genuine respect for, and detailed knowledge of the conditions of the receiving society and its pre-existing mechanisms of social order."[106] In analyzing the experiments in China with designing models for providing legal services, Michael Dowdle observes that "the relationship between indigenous and foreign paradigms is ultimately complementary, rather than competitive. But the shape of that complementary relationship cannot be designed a priori. It must be discovered."[107]

B. Action Measures to Address the Issues at the National, Regional and International Levels

3.6 We may begin with acknowledging that the existing systems in many countries are not uniform and defy any general acceptable approach to reform. But a beginning has to be made with re-affirming the basic minimum standards that ought not to accommodate derogations on grounds of affordability or cultural relativism. This includes a recognition by states that a denial of the right of access to justice to the disadvantaged has the effect of de-legitimizing the legal system and undermines the rule of law. The international level approach should be a consultative and inclusive one that accommodates the peculiarities of indigenous legal system instead of persuading states to adapt a pre-set 'model' law.[108] Encouraging regional level consultations and developing minimum acceptable principles that would form the basis of a legal system may constitute one approach.

3.7 The existing international and regional mechanisms for providing access require to be audited for their effectiveness and reviewed from the point of physical accessibility, language comprehensibility and affordability. The plethora of international legal instruments and mechanisms has perhaps invited a justified criticism of obfuscation and mystification of laws and procedures. Independent assessment of the working of these systems is required to determine whether in fact it has been possible to provide equal and effective access irrespective of economic, educational and social disadvantages.

3.8 At the national level a review of extant systems of laws that adversely affect the disadvantaged groups will have to be comprehensive. For instance, within the criminal justice system it should include measures aimed at:

- Decriminalisation of activities of the poor that have unjustly been labeled as offences and are sought to be dealt within the criminal justice system.
- Setting of judicial guidelines on use of police powers of preventive arrests.
- Challenge to institutional practices that operate harshly against the poor, for e.g., the monetary bail system.[109]

3.9 Reform proposals based on the need for accountability of the institutions that comprise the legal system, of which the legal services institutions form part, should include measures to enhance transparency, sharing of relevant information and ability to receive and deal with complaints. There is also a need, given the substantial 'uncovered' and 'unmet' areas of legal services, both by way of representation and by way of preventive and rehabilitative legal aid, to persist with more than one service provider and in more than one model. A dialogue has to opened with the legal profession to determine the incentives that need to be built into the programme in order to sustain the continued involvement of lawyers.

3.10 The issues sought to be highlighted in this background paper cannot lay claims to being exhaustive and the discussions hopefully may cover a wider range of themes.

Endnotes

[1] Erin Kelly (Ed), John Rawls, Justice As Fairness: A Restatement, Universal (Indian Reprint) 2004, 42. (emphasis supplied)

[2] Cited in Harold W. Solomon, "'This New Fetish for Indigency': Justice and Poverty in an Affluent Society", (1966) 66 *Columbia Law Review* 248 at 251. (emphasis supplied) Poverty is defined as "the inability to attain a minimal standard of living", and is measured in terms of basic *consumption* needs or *income* required to satisfy them. Poverty is thus characterised by the inability of individuals, households or entire communities to command sufficient resources to satisfy their basic needs: see *Poverty and Inequality in South Africa – Final Report,* Report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality (1998), 26.

[3] *Prevention of Discrimination: The rights of non-citizens*: Final Report of the Special Rapporteur, Mr. David Weissbrodt submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283 (E/CN.4/Sub.2/2003/23 dated 26 May 2003)

[4] *Id*. at para 28. In addition, see, Convention relating to the Status of Stateless Persons, 1954; Convention relating to the Status of Refugees,1951; Protocol relating to the Status of Refugees,1966; Declaration on Territorial Asylum,1967; Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 1985.

[5] Conclusions and recommendations of the Regional Seminar on Minority Rights: Cultural Diversity and Development in Southeast Asia (E/CN.4/Sub.2/AC.5/ 2003/2 April 8, 2003, p.4.

[6] *Id*. at para 10 of Recommendations. The meeting further recommended that "For that purpose, independent courts or tribunals should be established and due process guarantees be afforded to victims of violations of minority rights. Courts or tribunals should comprise some members of minority communities."

[7] Report of the Sessional Working Group on the Administration of Justice, August 9, 2004, E/CN.4/Sub.22004/6, paras 55 and 59.

[8] Declaration on the Rights of Disabled Persons, 1975.

[9] Declaration on the Rights of Mentally Retarded Persons,1971; Principles for the protection of persons with mental illness and the improvement of mental health care, 1991.

[10] In 1991 the General Assembly adopted the United Nations Principles for Older Persons, 1991.

[11] In 1992, and in commemoration of the tenth anniversary of the adoption of the Vienna International Plan of Action by the Conference on Ageing, the General Assembly adopted the Proclamation on Ageing in which it urged support of national initiatives on ageing so that older women are given adequate support for their largely unrecognized contributions to society and older men are encouraged to develop social, cultural and emotional capacities which they may have been prevented from developing during breadwinning years.

[12] Article 7 UDHR states that "All are equal before the law and are entitled without any discrimination to equal protection of the law"; Article 8 guarantees that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"; Article 10 states "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[13] Although this is a right that can be derogated from by a state party in a time of public emergency as contemplated by Article 4 ICCPR, the human rights committee has, in its General Comment

29 pointed out (at para 6) that there is "a legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation" and that a state party has "a duty to conduct a careful analysis under each article of the Covenant (sought to be derogated from) based on an objective assessment of the actual situation." Further, the Committee has pointed out that (at para 9) "Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law."

[14] For a view that the right to counsel applies at all stages of criminal proceedings, including the preliminary investigation and pre-trial detention, see Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary,* N.P. Engel, Kehl-Strasbourg-Arington, 1993 at 256 and Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994.

[15] Human Rights Committee, General Comment 13, para 2 (U.N.Doc.HRI\GEN\1\Rev.1 at 14 (1994).

[16] *Id*. at para 16.

[17] General Comment 3, para 5 (Fifth Session 1990), Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies, U.N. Document, HRI/Gen/1/Rev.1/July 1994. Considerable progress has been made towards a draft Optional Protocol for the ICESCR to provide for a complaints procedure.

[18] Article 12 requires prompt an impartial investigation into acts of torture and Article 13 the prompt an impartial enquiry into the complaint by a victim of torture.

[19] Article 6 of the Rome Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, provides for the right to a fair trial including the right of free legal assistance "when the interests of justice so require". Article 13 guarantees everyone whose rights under the convention are violated "an effective remedy before a national authority."

[20] Article 8 of the American Convention on Human Rights, 1969 provides for the right of fair trial including free legal assistance. Article 25 provides for the right to judicial protection. Article 25 (2) (a) requires state parties to ensure that any person claiming remedy for violation of his rights "shall have his rights determined by the competent authority provided for by the legal system of the state."

[21] Article 7 of the African Charter on Human and Peoples' Rights, 1981, Charter guarantees the right to an appeal before competent national organs against acts in violation of the rights guaranteed by the Charter. Under Article 30 an African Commission on Human and Peoples' Rights has been constituted which deals with complaints for individuals and groups.

[22] General Comment 7 (1997), The right to adequate housing: forced evictions, para 11.

[23] *Id*. at para 12 (emphasis applied)

[24] 2001 (1) SA 46 (CC)

[25] For a detailed discussion see Sandra Liebenberg, "Socio-economic rights" in Chaskalson and others (eds) *Constitutional Law of South Africa (revision Service 3, 1998)* 41-33

[26] *Supra* note 24 at paras 29 to 31.

[27] *Id*. at para 99. The court nevertheless declined to read into the provisions any 'minimum core' obligation of the state to provide housing to the most disadvantaged populations: see Sandra Liebenberg, *supra* note 22.

[28] (1997) 6 SCC 241.

[29] *Id*. at 251.

[30] *Id.* at 254.

[31] *A (FC) v. Secretary of State*, Session 2004-05 [2004] UKHL 56 dated December 16, 2004.

[32] *Id*. at para 73.

[33] *Id*. at para 68.

[34] *Id*. at para 136. With a view to overcoming the judgment, the Home Secretary of the United Kingdom, Charles Clarke has proposed that the men should be released from prison but placed at the control orders and that the same rules would apply to British Nationals in similar circumstances: see Bill Kirkman, "Flawed Fight" in *The Hindu (Magazine)*, February 6, 2005, 3.

[35] Dimitrina Petrova, "Strengthening the Rule of Law in Building Democratic Societies: Human Rights in the Administration of Justice" (mimeo) presented at Seminar on the Interdependence between Democracy and Human Rights, organized by the OHCHR, Geneva, November 25-26, 2002, para 2.1.C. Prof. Shadrack Gutto in "The Rule of Law, Human and Peoples' Right and Compliance/ Non-compliance with Regional and International Agreements and Standards by African States", Paper prepared for the African Forum for Envisioning Africa – Nairobi, April 26-29, 2002 also points out that the incorporation of the international norms in domestic legal systems is problematic in the African continent.

[36] Abdullahi An-Na'im, Human Rights in Africa – Cross Cultural Perspectives, The Brookings Institution, Washington, D.C., 1990 332.

[37] *Id*. at 339-340.

[38] Richard Falk, "Cultural Foundations for the International Protection of Human Rights in Abdullahi An-Na'im (ed.), Human Rights in Cross-Cultural Perspectives – a quest for Consensus, University of Pennsylvania Press, 1991. For a further dimension on the Asian values debate see Yash Ghai, "Human Rights and Governance: The Asia Debate" 15 Australian Yearbook of International Law, 1 (1994) 5.

[39] Rhoda Howard, "Dignity, Community, and Human Rights", in Abdullai An-Na'im (ed.), Human Rights in Cross-Cultural Perspectives *supra* note 38 at 81.

[40] Paul Hunt, "Introduction" to Reclaiming Social Rights: International and Comparative Perspectives, Dartmouth, 24.

[41] "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" UN Doc E/CN4/1987/17 and General Comment No.3 of the Committee on ESC rights

[42] General Comment No.3, UN Doc E/1991/123. The Maastricht Guidelines, agreed upon in 1997 by a group of experts, established a list of violations of ESC rights with a view to facilitating an adjudicative exercise,

[43] Mathew Craven, The International Covenant on Economic, Social and Cultural rights: A Perspective on its Development, (1995), 28

[44] Steiner HJ and Alston P, Internationl Human Rights in Context: Law, Politics, Morals (1996) 298.

[45] Asbjorn Eide, "Future Protection of Economic and Social Rights in Europe" in A.Bloed et al (eds.), Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms, (1993) 187 at 214.

[46] *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664 at 696: "[I]t was only the concern of this court for the protection of the fundamental rights of the oustees under Article 21 of the Constitution of India which led to the entertaining of this petition."

[47] Kirpal J., wrote the majority opinion for himself and Anand C.J. Bharucha J dissented on the question of environmental clearance, which he found to be mandatory and non-existent and further on the consequent issue of *pari passu* rehabilitation of the oustees which again he found to be wholly unsatisfactory. While the majority opinion permitted the raising of the height of the dam, the dissenting opinion injuncted further construction till the grant of environment clearance and prior satisfactory rehabilitation of the oustees.

[48] *Id.* at 702-03.

[49] *Id.* at 764.

[50] *Ibid.*

[51] *Id.* at 765.

[52] *Id.* at 763.

[53] *Id.* at 762. The majority opinion envisioned the role of the court thus: "the central government had taken a decision to construct a dam as that was the only solution available to it for providing water to the water-scarce areas. It was known at that time that people will be displaced and will have to be rehabilitated. There is no material to enable this court to come to the conclusion that the decision was malafide. A hard decision need not necessarily be a bad decision."

[54] *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ159

[55] *Rasul v. Bush* 542 U.S.___(2004). Also see the recent decision of Judge Green of the Federal Court accepting a habeas corpus petition of a detenus in Guantanamo Bay: Judge allows appeal over Guantanamo 'unconstitutional' ruling. 04/02/2005. ABC News Online.

[56] Human Rights Committee, General Comment No.29 (2001), "Article 4 ICCPR – States of Emergency, para 11.

[57] Article 39-A of the Constitution of India. It required creative interpretation by an activist judiciary to declare the right to legal aid as an enforceable fundamental right inherent in the right to life under Article 21 of the Constitution: See generally, S. Muralidhar, Law, Poverty and Legal Aid: Access to Criminal Justice, Lexis Nexis Butterworths (2004), Chapters IV and V.

[58] The view of the Canadian Supreme Court in *Reference re Remuneration of Judges of the Provincial Court of Price Edward Island* (1997) 3 SCR at para 281-284 is instructive. The court observed "While purely financial considerations are not sufficient to justify the infringement of Charter rights, they are relevant to determining the standard of deference for the test of minimal impairment when reviewing legislation which is enacted for a purpose which is not financial." The Supreme Court of India in *Hussainara Khatoon (IV) v. State of Bihar*, (1980) 1 SCC 98 at 107 observed: "The state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial." For a strong argument against impairing access to justice on the plea of financial considerations see Geoff Budlender, "Access to Courts" at (website address:www.humanrightsinitiative.org/jc/papers/jc_2003/background_papers/Budlender_Access%20to%20courts.pdf) visited on January 28, 2005.

[59] 404 F Supp 2d 571.

[60] Richard A. Posner, Economic Analysis of Law, Little, Brown and Company (2nd Edition: 1977) 355: "Many poor people may be able to get along well enough without a lawyer, either because

they are fortunate enough to cope with them unaided by a lawyer. But since the lawyer is free, they will use him unless the value of his service exceeds the (often-slight) value of their time in dealing with him. Faced with an excess demand for his time, the lawyer will try to limit his services to those whose needs for legal service seem most acute. Since this requires a difficult judgment, there are bound to be many cases where a poor person receives legal services that cost $100 but are worth only $50 to him. The waste involved in the use of the lawyer in these circumstances would be avoided if poor people were given $100 instead of free lawyers. They would use the $100 to hire a lawyer rather than to buy food, medicine, education, or housing only when the value of legal services to them was at least $100."

[61] Roger C. Cramton, "Why Legal Services for the Poor?", Volume 68, (May 1982) *Journal of the American Bar Association*, 550 at 553: "Arguments concerning the efficiency of the program fail to reflect the benefits provided to poor people when small claims, uneconomical to litigate individually by any claimant, are pursued systematically on behalf of several persons as a class. One of the great advantages of the program is that substantial benefits accrue even to those who are not represented. To the extent that legal rules and procedures are modified in favor of welfare recipients, consumers, tenants, and other classes, everyone in the class, even those not eligible for free legal services, is benefited."

[62] *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice* cited in Harold Solomon, "'This New Fetish for Indigency': Justice and Poverty in an Affluent Society", (1966) 66 *Columbia Law Review* 248 at 252. See also, E.J. Cohn, "Legal Aid for the Poor", LIX *Law Quarterly Review* 256 who argues: "the state is responsible for the law. That law again is made for the protection of all the citizens poor and rich alike. It is, therefore, the duty of the state to make a machinery work alike for the rich and the poor."

[63] N.R. Madhava Menon, "Legal Aid and Justice for the Poor," in Upendra Baxi (ed.) Law and Poverty: Critical Essays, N.M. Tripathi, 1989, 341 at 345.

[64] In India, the soliciting of clients by sex workers is punishable under a criminal law statute, the Immoral Traffic (Prevention) Act, 1956. Wandering and vagrant mentally ill persons can be dealt with by the police and the Magistrate in terms of the powers conferred by the Mental Health Act, 1987. In 15 States in India there are vagrancy laws that punish beggars and other persons who have no visible means of sustenance.

[65] Caleb Foote, "Vagrancy-type Law and its Administration", in William Chambliss, Crime and the Legal Process, McGraw Hill Book Co. 1969, 295 at 303. This was a culmination of Foote's painstaking research which included observing the courts of magistrates in Philadelphia for three continuous years from June 1951 to March 1954. He adds at 304: "To the extent that the police actually are hampered by the restrictions of the ordinary law of arrest, by the illegality of arrests on mere suspicion alone, and by the defects and loopholes of substantive criminal law, vagrancy-type statutes facilitate the apprehension, investigation or harassment of suspected criminals. When suspects can be arrested for nothing else, it is often possible to 'go and vag them'."

[66] Harrington, The Other America, 16-17 (1962) cited in Harold W. Solomon, "'This New Fetish for Indigency': Justice and Poverty in an Affluent Society", (1966) 66 *Columbia Law Review* 248 at 251.

[67] For a brief but depressing account of the appalling acts of barbarism committed in Chile and elsewhere in the world including torture, murder and the unexplained disappearance of individuals, all on a large scale during the period of the Senator Pinochet regime, see the decision of the House of Lords in *R v. Evans and the Commissioner of Police Ex p Pinochet*, decision dated March 24, 1999 (1999) 1 All ER 577 (HL). The House of Lords ruled that in relation to conduct prior to December 8, 1988, General Pinochet enjoyed immunity and that thereafter by virtue of U.K's ratification of the Convention Against Torture, the immunity was lost.

[68] In response to the genocide unleashed by the Khmer Rouge in Cambodia in the late 1970s, it was

only on January 2, 2001 that the National Assembly of Cambodia authorized the formation of a special tribunal with international character and standards to "hold accountable the architects of the murderous Pol Pot regime: Tom Fawthrop, "Khmer Rouge trial law makes legal history" Phnom Penh Post, Issue 10/1, January 5-18, 2001. It remains to be seen whether this 'mixed tribunal' which will witness a Cambodian trial with international character and standards will in fact bring justice to the victims.

[69] See the report of the Working Group on Administration of Justice *supra* note 7 at paras 71 and 75.

[70] A draft of a Code for Multinational Corporations and Human Rights has been discussed for some years now: See Draft *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, E/CN.4/Sub.2/2003/12/Rev.2 (August 28, 2003).

[71] Affidavit dated December 18, 1985 of Nani Ardeshir Palkhivala in support of defendant UCC's motion for dismissal on Forum Non Conveniens Grounds – reproduced in Upendra Baxi and Thomas Paul (prepared) Mass Disasters and Multinational Liability: The Bhopal Case, N.M. Tripathi (1986) 222 at 225.

[72] *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38 at 43.

[73] Usha Ramanathan, A Critical Analysis of the Laws Relating to Compensation for Personal Injury, Thesis submitted for the Degree of Doctor of Philosophy, Delhi University (September 2001), 356.

[74] Affidavit dated December 5, 1985 of Marc Selig Galanter in support of Union of India's Claim, reproduced in Mass Disasters*, Supra* note 71, 161 at 178.

[75] Hernando de Soto, The Other Path, Harper & Row (1989).

[76] For an illuminating account of the conflict between the state and non-state mechanisms in the context of a criminal trial arising out of the death of a young woman in a village in Gujarat see, Upendra Baxi, "Popular justice, participatory development and power politics: *The Lok Adalat* in turmoil" in A. Allot and G.R.Woodman (ed.), From People's Law and State Law: The Bellagio Papers, Foru Publications (1985) 171.

[77] Upendra Baxi, Towards a Sociology of Indian Law, Satavahan, (1986) 78. The 114th Report of the Law Commission on Gram Nyayalayas sought to increase the jurisdiction of these grass roots adjudicatory mechanisms in a significant way in order to make justice accessible to the rural masses.

[78] Optional Protocol to CEDAW, October 6, 1999. The Optional Protocol also permits the Committee to conduct inquiries into grave or systematic violations of the Convention in countries that are parties to the Convention and to the Optional Protocol.

[79] Usha Ramanathan, "Combating Impunity", available at www.ielrc.org/f0203.htm visited on February 1, 2005.

[80] See Sandra Liebenberg, *supra* note 25 at 14.

[81] For a positive experience of the creative exercise of jurisdiction by the African Commission on Human and People's Rights see *The Social and Economic Rights Action Centre v. Nigeria* Comm 155/96 October 2001. The Commission found Nigeria in violation of its obligation by permitting destruction of the lives and livelihoods of the Ogoni community as a result of the exploitation of their natural resources by the oil consortium.

[82] M. Cappelletti and B. Garth, "Access to Justice - the worldwide movement to make rights effective: a general report" in M. Cappelletti and B. Garth (eds.), Access to Justice–A World Survey, Volume

I, Sijthoff & Noordhoff – Alphanaanderijan (1978), 5 at 8-9. This shift occurred, according to the authors, simultaneous with the emergence in the twentieth century of the "welfare state".

[83] *Id*. at 21. The authors explain (at 49): "We call it the 'access-to-justice' approach because of its overall scope; its method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as but several of a number of possibilities for improving access."

[84] *Id*. at 52.

[85] The Legal Aid Act, 1969 constituting the legal aid board which has, since been transformed in many ways. The work of the legal aid board is overwhelmingly focused on criminal matters and the public defender modem has been adopted as the main means of delivering services. For a comparative analysis of the extant legal aid systems in India, South Africa, the United Kingdom, U.S.A. and Bangladesh, see S. Muralidhar, Law, Poverty and Legal Aid *supra* note 57 Chapter 7.

[86] The Legal Services Authorities Act, 1987 has constituting legal aid committees at various administrative hierarchical levels beginning with clusters of villages up to the national level.

[87] (1978) 1 SCC 248.

[88] *MH Hoskot v. State of Maharashtra* (1978) 3 SCC 544; *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81; *Khatri v. State of Bihar* (1981) 1 SCC 623; *Suk Das v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

[89] *Supra* note 88.

[90] *Azad Rickshaw Pullers' Union v. State of Punjab* (1980) Suppl SCC 601.

[91] See generally Ashok Desai and S. Muralidhar, "Public Interest Litigation: Potential and Problems" in B.N. Kirpal *et al.,* (ed.) Supreme But Not Infallible: Essays in Honour of the Supreme Court of India, Oxford (2000) 159

[92] *Pradeep Krishen v Union of India* (1996) 8 SCC 599 and *Animal & Environmental Legal Defence Fund v Union of India* (1997) 3 SCC 549.

[93] In Bangladesh, the use of 'Shalish', a system of mediation, has been effective in resolving civil disputes: see generally "Annual Activity Report (1996-97) of the Madaripur Legal Aid Association", p.8.

[94] *Access to Justice in South Africa: legal aid transformation and paralegal movement*, National Community Based Paralegal Movement, 2000, available at http://www.case.org.za/htm/legal3.htm.

[95] The earlier regime of the General Agreement on Tariffs and Trade (GATT) is reinforced by the WTO legal texts which contain sixty multilateral agreements: Arun Goyal and Noor Mohd (eds.), WTO in the New Millennium, Academy of Business Studies (5th ed: 2001) 5.

[96] Pursuant to its obligations under Article 27 (3) (b) in Part II of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), India has enacted recently the Protection of Plant Varieties and Farmers' Rights Act 2001. The Arbitration and Conciliation Act 1996 was enacted on the lines of the Model Law adopted by the United Nations Commission on International Trade Law (UNCITRAL).

[97] See Arun Goyal and Noor Mohd (eds.), WTO in the New Millennium *supra* note 96 at 455 and 645 (General Agreement on Trade in Services and Trade and Labour, Environment and Competition Policy).

[98] At a meeting of the International Law Association in New Delhi on April 2, 2002 the Chief Justice of India is reported to have said that "the systems of law of every country in the world,

democratically ruled or otherwise, must to meet and overcome the challenge of terrorism, be substantially uniform…That this is an urgent universal necessity is shown by what happened in New York on September 11 last year": "Laws on terrorism must be uniform: CJI", *The Hindu*, New Delhi, April 3 2002, 11. At the same meeting a message from the U.N. Secretary General stated: "twelve global conventions and protocols, as well as numerous declarations, have already been adopted under UN auspices, providing the basic legal tools to combat international terrorism."

[99] The position in India is best demonstrated by the allocations made as a percentage of the total plan outlay: the 9th Five Year Plan made an allocation of 0.071% ; this rose to 0.078% in the 10th Plan

[100] See generally, Michael Dowdle, "Preserving Indigenous Paradigms in an age of Globalisatiojn: Pragmatic Strategies for the development of Clinical legal Aid in China", 24 *Fordham Int'l Law Journal* S56

[101] IDE-JETRO, Judicial System and Reforms in Asian Countries: The Case of India, (March 2001).

[102] Sanjoy Ghose, "Banking on Justice", (2000) 15 (7) *From the Lawyers Collective* 23.

[103] A write up is available at: http://www4.worldbank.org/legal/legop_judicial/bangladesh.html visited on December 7, 2001. The project as such is stated to have five components. The first component strengthens court administration, improves case management, provides training and upgrading of training facilities and other human recourses needs that raise the stature of the judiciary and regulate the court performance at all levels of the judiciary, and upgrades court infrastructure. The second component improves access to justice by strengthening small cause courts, developing alternative dispute resolution mechanisms, raising the level of general sensitivity, improving access to legal aid, promoting legal literacy at the grass roots level, national level and through bar associations. The third, fourth and fifth components "strengthen the law commission and the ministry of law, finance studies that prepare for future reforms and support project implementation": http://www4.worldbank.org/sprojects/project.asp?.pid=P044810 visited on March 27, 2002.

[104] Barry Metzger, "Legal Services Programs in Asia", in Committee on Legal services to the Poor in Developing Countries, Legal Aid and World Poverty: A Survey of Asia, Africa and Latin America, Praeger, New York (1974) 155 at 161.

[105] Frank Upham, "Mythmaking in the Rule of Law Orthodoxy", Carnegie Endowment, Democracy and Rule of Law Project, No.30 (September 2002) 8.

[106] *Id.* at 33.

[107] *Supra* note 100 at 13.

[108] This 'model law' approach is extensively used in the areas of trade and commerce, particularly laws relating to taxation, arbitration and intellectual property.

[109] The Manhattan Bail Project tried in New York in the 1960s serves to inspire similar studies that can form the basis for an attempt litigated reform: Charles Ares, Anne Rankin, Herbert Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole", (1963) 38 *New York University Law Review* 67.

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