Access to Justice

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In November this year, at a workshop for district judges in Chennai on access to justice, each participant was asked to respond to two questions. The first required the recounting of an instance where the judge had been able to ensure effective access to justice; the second, the identification of a barrier to justice. For most judges, the positive experience lay in successfully encouraging parties to resolve a long-pending dispute through a mediated settlement outside of the court. Among the principal barriers to justice identified were lawyers and, surprisingly, laws themselves. At least one judge was emphatic that the legal system and the laws were irrelevant to deal with the problems of those most in need of justice; their formalism, she said, had no space to accommodate the immediate concerns of the poor.

Both responses were in effect saying the same thing – they were acknowledging the failure of the formal legal system to deliver justice. The Indian legal system's inexplicable persistence with its colonial past is reflected in its reluctance to break away from the pattern of institutionalisation of mechanisms of adjudication and enforcement. The breakdown of the justice delivery system has been work in progress for over two hundred years. In his study of the legal history of this country, M.P. Jain notes that the changes brought about by Lord Cornwallis in 1790 failed to tackle the problem of "the inadequacy of criminal courts, the pressure of work on the magistrates, the absence of Indian judges, the reluctance of people plagued by the prospect of an uncertain and delayed justice to prosecute offenders." Even in 1833 criminal justice reforms "had failed to achieve the twin objects of a court, cheap and quick decision of cases."

The Chief Justice of India, in a speech delivered on 26 November 2004 in the lawns of the Supreme Court on the occasion of Law Day, explained the impossible situation under which our judges are expected to perform. No matter how hard the judge in our subordinate courts works, there is a constant backlog of about 2.53 crore cases in the civil and criminal courts. Although 1.32 crore cases are disposed off every year, there is an influx of about 1.42 crore new cases.

The strength of the subordinate judiciary has remained static for many years at about 13,000 and at least 2000 of these posts always remain vacant. On an average, the overburdened judge is able to dispose of 1150 cases per year. The situation in the High Courts is equally appalling. The total annual pendency of cases since 2000 has remained in the region of 33 lakh cases. At any given time at least 200 of the 700 posts of High Court judges remain vacant. Even while the High Courts dispose around 13 lakh cases, there is an equal number which get filed every year.

Each High Court judge is able to dispose of around 1,500 cases. Not surprisingly, we have pendency of criminal appeals in certain High Courts since 1981 and civil appeals of even earlier years. Our judge: population ratio is less than 10 per million; it needs to be five times higher. The government's response has been inversely proportional to

the gravity of the situation. The 9th Five Year Plan made an allocation of 0.071% of the total plan outlay for the judiciary. This rose to 0.078% in the 10th Plan.

Lack of judicial infrastructure is but one of the factors impinging on access to justice. The problems of the legal system become acute when examined in the context of the needs of those socially and economically disadvantaged. For them, in particular, the expense of pursuing cases in courts, the intimidating structure of the legal profession and the courts, and the inability of the legal aid system to reach all sections of the population constitute the major institutional barriers to justice. Illiteracy, cultural inhibitions, bureaucratic and political corruption serve to aggravate the denial of access.

More fundamentally, the basic needs of the poor to shelter, to food, to health, to access common property resources and to basic means of livelihood do not find avenues for redress within the formal legal system. Here, the law itself constitutes the barrier. To explain, many of these issues of protection and enforcement of survival rights are caught in the judicially constructed limitations of justiciability, the law and policy divide and the constitutionally drawn lines between enforceable fundamental rights and non-enforceable directive principles of state policy.

If a petition is filed challenging a policy decision of the government that impinges on the right to livelihood of thousands of peasants, the court is likely to adopt a "‘hands off" approach saying that the validity of a policy is not for the court to decide. Again, if the issue is one of allocation of resources by the government towards basic needs like health and education, the court will itself erect a wall of "judicial incompetence".

The economically and socially disadvantaged sections, therefore, do not in that sense "access" the legal system to seek redress. They engage with it nevertheless, negatively. They are drawn into it unwittingly in situations of conflict with the law, as complainants, suspects, "encroachers" or defendants. These situations accentuate the denial of access to justice, to basic legal services, resulting in grave violations of their liberty. While the response of governments to these endemic problems has been one of indifference, the judiciary and civil society have attempted alternatives that require to be acknowledged and understood.

Expert committees constituted, from 1950 onwards, to advise governments on providing legal aid to the poor have been unanimous that the formal legal system is unsuited to the needs of the poor. The 1977 report of the committee of Justices Krishna Iyer and P.N. Bhagwati, both of the Supreme Court, drew up a detailed scheme which envisaged public interest litigation (PIL) as a major tool in bringing about both institutional and law reform even while it enabled easy access to the judicial system for the poor.

Their report, as those of the previous committees, was ignored. This explained partly the impatience of these two judges, in the post-emergency phase, in making the institution appear responsive to the needs of the population that had stood distanced from it. The two judges played a major role in spearheading the PIL jurisdiction. The earliest PIL, in 1979, tackled the problem of 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.

PIL was meant to overcome the barriers erected by the formal legal system. Any public-spirited person could bring forth a case on behalf of an indeterminate class with a similar grievance. 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. The court could 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.

Over the past two decades, the response of the judiciary in its PIL jurisdiction has neither been consistent nor satisfactory. The issues dealt with have been diverse – human rights, environment, public accountability, judicial accountability, and education, to name a few. Alongside have been the inevitable attempts at misuse of the jurisdiction by interlopers and busybodies on the one hand and the overreaching of their own powers and jurisdiction by the courts on the other. The trend of decisions in the recent past reveals a distinct shift from issues concerning access to justice for the poor to other issues of public interest which at times conflict with the rights of the poor. For instance, the court orders in the PIL seeking protection of the forest cover has led to the curtailment of the rights of forest dwellers and tribals to access community resources essential for their subsistence. The PIL jurisdiction now requires a mid-course correction to restore it as a strategic arm of the legal aid movement.

The judiciary continues to play a prominent role in another sphere as well. Parliament's response to the problem of access to justice has been the Legal Services Authorities Act, 1987 (LSAA), operationalised in 1995. This statute institutionalises the system of legal aid delivery with committees being set up at the taluk, district, state and central levels. The committees are expected to formulate legal services programmes; prepare panels and fix the remuneration of participating lawyers; encourage pre-litigation mediation and counselling; reach out to the community through legal awareness camps and undertake visits to closed institutions like prisons and shelter homes.

There are some positive signs that this is happening in some of the states, Tamil Nadu in particular. Nevertheless, the predominant focus of activity of these committees has been on the organizing of *lok adalats*, a device formally recognized by the LSAA, which facilitates disposal of long pending cases through mediated settlements outside the formal legal process in courts. The judiciary has been quick to proclaim the success of this experiment through statistics that speak of the disposal of a large number of pending cases through *lok adalats*.

According to the Annual Report of the Ministry of Law and Justice for 2003-04, 12.2 lakh cases were settled in about 40,000 lok adalats organized in 2003. Of these, in about 40,970 motor accident cases, compensation of over Rs 667.60 crore was directed to be paid. The rest comprised matrimonial, petty civil and criminal and land acquisition cases. What these statistics do not reveal is that a litigant in a lok adalat is most likely agreeing to a settled verdict for negative reasons – for avoiding uncertainties, delays and expense in pursuing litigation in courts. Lok adalats cannot be the answer to the need for quality justice. They underscore the failure of the formal legal system.

A more concerted and serious response by the judiciary to the expectations of its role under the LSAA is awaited. Such a response will have to take into account certain plain facts. Those who are economically and socially disadvantaged see the entire legal system as irrelevant to them as a tool of empowerment and survival. Since it operates to oppress and disempower them, they have to devise ways of avoiding it rather than engage with it.

Nevertheless, in situations of conflict with the law – as "encroachers" resisting eviction, as street children or as vagrants – the poor are inexorably drawn into the system. 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, the extra fees to the legal aid lawyer, the cost of transport to the court, the bribes paid to the policemen for obtaining documents, copies of depositions and the like or to prison officials for favours. Legal aid beneficiaries do not get services for "free" after all.

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 lower level functionaries, the lawyers, the judiciary and the litigant are prepared readily to engage. For the last of the groups mentioned, the engagement with the justice system is not a matter of choice. For the others the stakes are too high to permit any meaningful change that can threaten their source of living. Thus without fundamental changes in the behaviour of the personnel in 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.

One of the reasons for the formal legal system’s failure is its reluctance to respond to the demands for change emanating from peoples’ movements, and to assimilate indigenous solutions to the need for access to justice. The picture is a mixed one. There have been instances where the system has been compelled to respond as it did to the women’s movement in the early 1980s. The changes in the substantive criminal law governing the offences violence against women including cruelty and rape are owed to the concerted campaign by women’s groups. The campaign by the Mazdoor Kisan Shakti Sanghatan to seek recognition and enforcement of the right to information as an invaluable tool in the struggle for access to justice catalysed the enactment of a statute that promises much.

But not all movements have been able to persuade changes in policy and incite institutional response. Witness the struggle for protection and enforcement of economic and social rights of tribal populations displaced by the Sardar Sarovar Project and the other large and small dams across the Narmada. While the mass movement may have succeeded in giving the issue visibility, it has been unable to persuade changes in a policy that resorts to pragmatic utilitarianism and prioritises the questionable "public good" of ‘development’ over the needs of access to justice of the displaced population. The displaced have been relegated to quasi-judicial grievance redressal authorities to seek enforcement of their entitlements under the rehabilitation package. A testimony to the unwillingness and inability of the formal legal system to address issues concerning those marginalized by the policy decisions of the state.

The impact of the non-formal dispute adjudication structures remains to be acknowledged. While some of the decisions handed down by caste panchayats or informal bodies set up by armed resistance groups may militate against the accepted sense of justice, these mechanisms are often the only ones available for redress to vast sections of the rural population. The 114th Report of the Law Commission on Gram Nyayalayas, 1986 sought to increase the jurisdiction of these decentralized adjudicatory mechanisms in a significant way in order to make justice accessible to the rural masses. This report, like many preceding and succeeding it, has gathered dust.

The approach to reform of the legal system must proceed on a premise that is different from the status quo. The present institution-centric model must give way to a people-centric model. The talisman of Mahatma Gandhi offers the most convincing principle yet on which to base our laws, policies and programmes. This talisman requires us to ask if the step contemplated would benefit the weakest person. The rubric "weakest" encompasses not only social or educational or economic disadvantage but, in the words of the 1963 report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice in the US, a "functional incapacity to obtain in adequate measure the representation and services required by issues, whenever and wherever they appear."

The existing network of legal services committees require to address three major tasks. First, the initiation of law and institutional reform litigation particularly in the context of laws that criminalize the activities of the poor. This would include questioning the justification for the insistence on monetary bail bonds and sureties irrespective of the economic status of the accused, the functioning of penal custodial institutions that hold vagrants, mentally ill, sex workers and women and children in prison-like conditions. Second, the task of aiding the enforcement of existing laws. The abhorrent and demeaning practice of manual scavenging of dry latrines is practised with impunity notwithstanding a 1993 law prohibiting it. Female infanticide, child prostitution, child labour, have all been prohibited by enacted law but flourish in a system that abets violations. This stranglehold of impunity requires to be broken.

Third, reaching legal services to the community. Legal services committees could experiment with working on the pattern of neighbourhood law offices. They could be located in the community and employ a few lawyers as well as other legal service providers belonging to different disciplines on a full time basis. Such offices would coordinate with other agencies including the government offices, police, the courts and the various commissions. They could depute panel lawyers or paralegals or law students to visit these offices, police stations, prisons and other custodial institutions to ascertain the details of those in need of legal assistance and help set the legal processes in motion. They could also act as advice centres that could be accessed at any time of the day.

At a fundamental level, the formal legal system requires to acknowledge that as long as the basic needs of the socially and economically marginalized sections do not get addressed, they are unlikely to engage with it. Integrating the non-formal systems and delineating their jurisdiction consistent with the norms of justice cannot be deferred any longer. It will have to be a consultative process that encourages dialogue with and within the communities.

At another level, the concern with access to justice is not, and ought not to be, the exclusive concern of judges and lawyers. An economist, a sociologist, an anthropologist, a linguist and a historian may have useful suggestions on how to improve the system to make it accessible and affordable. To facilitate change, the formal legal system also requires to be audited from several angles – physical accessibility to differently enabled persons, the litigant's access to information about her case, language comprehensibility and cost efficiency. A beginning has to simplify procedures and demystify the law and the legal process that too often intimidate and confuse the litigant. The language of the law should help in rendering the legal system comprehensible to its user. We need to know how much it costs the tax payer to have the legal system functional and what are the losses incurred by a litigant if any period of the court's functioning is disrupted.

The systemic shift that the situation demands does not depend so much on availability of resources as on the willingness to adapt and change. The choice, if any, is between resignedly witnessing a broken-down system being consigned to irrelevance and redeeming a constitutional promise of equal access to effective justice.