

# LEGAL AID PRACTICES: COMPARATIVE PERSPECTIVES\*

S Muralidhar  
*LLM PhD(Del)*  
*Advocate, Supreme Court of India*

## SUMMARY

This article, from the perspective of a legal aid practitioner, seeks to contribute to comparative analyses by discussing the prominent features of the legal aid systems in the United States, the United Kingdom, India, South Africa and Bangladesh. The broad parameters on which this exercise was based include the recognition of the constitutional right of access to justice, the models and types of legal services, the common concerns and challenges to providing effective access to justice in these countries and the responses to these challenges. The paper argues that the characterisation of the right to criminal legal aid as a non-derogable constitutional right is critical to its enforceability and availability. The paper suggests that 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. It concludes that there is 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.

## 1 INTRODUCTION

Comparative analyses of the legal systems of different countries generally, and in the area of access to justice in particular, are not a recent phenomenon.<sup>1</sup> The political histories of countries earlier dominated by alien rule enable the drawing of parallels in the origin, development and mutation of legal systems. It is possible to learn from the experiences of legal regimes that have undergone similar patterns of influence. The renewed interest in comparative analyses is owed to contemporaneous developments in the international sphere that have irreversibly impacted the legal systems in diverse areas of trade and commerce,<sup>2</sup> crime<sup>3</sup> and human rights.<sup>4</sup> Countries

---

\* This article draws on portions of the author’s recent publication *Law, Poverty and Legal Aid: Access to Criminal Justice* (2004).

<sup>1</sup> Among the exhaustively documented comparative studies are Cappelletti, Gordley and Johnson Jr *Towards Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (1975) followed by Cappelletti and Garth (eds) *Access to Justice – A World Survey* (5 volumes) (1978). For a comparative survey of Asia, Africa and Latin America see, Committee on Legal Services to the Poor in Developing Countries *Legal Aid and World Poverty: A Survey of Asia, Africa and Latin America* (1974).

<sup>2</sup> The laws relating to excise and customs tariffs have long been internationalized through the harmonized system of nomenclature (HSN), and the General Agreement on Trades and

that were earlier unable to disentangle themselves from the residual effects of colonisation, are presently being transformed by the forces of "LPG" (liberalisation, privatisation and globalisation).<sup>5</sup> The rules of international trade set by the World Trade Organisation (WTO)<sup>6</sup> impose obligations on "member" countries to bring about changes, not only in the laws relating to trade,<sup>7</sup> but on a whole range of subjects including labour, environmental protection and services.<sup>8</sup> 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. There is, therefore, a greater need than ever before to examine the contemporary developments elsewhere in the area of legal aid and ask how far these need to be learnt from in devising feasible packages of legal services delivery.

This paper seeks to contribute to comparative analyses by discussing the prominent features of the legal aid systems in the United States, the United Kingdom, India, South Africa and Bangladesh. The broad parameters on which the exercise was based include the recognition of the constitutional right of access to justice, the models and types of legal services, the common concerns and challenges to providing effective access to justice in these countries and the responses to these challenges. The choice of the countries requires some explanation. The influence of the legal systems in both the United Kingdom and the USA on the development of the legal systems in India, South Africa and Bangladesh has been deep and pervasive. A cursory look at the decisions handed down by the constitutional courts in these countries will reveal the extent to which judicial thinking in the latter countries has been in a reactive mode to the decisions handed down by the House of Lords or the US Supreme Court. The influence that these systems have had on constitution and statute making and their interpretation

---

Tariffs (GATT) has formed the role model for the present efforts in other areas through the WTO legal texts.

<sup>3</sup> The laws in India relating to extradition, prevention of drug trafficking and hijacking have been inspired by international conventions in these areas.

<sup>4</sup> Among the laws that have been made pursuant to India's obligations as a state party to international conventions are: The Immoral Traffic (Prevention) Act 1956, the Juvenile Justice (Care and Protection of Children) Act 2000 (and its predecessor the Juvenile Justice Act 1986), and the Protection of Human Rights Act 1993 (PHRA).

<sup>5</sup> 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" (IDE-JETRO *Judicial System and Reforms in Asian Countries: The Case of India* (March 2001) i).

<sup>6</sup> The earlier regime of the GATT is reinforced by the WTO legal texts which contain 60 multilateral agreements: Goyal and Mohd (eds) *WTO in the New Millennium* Academy of Business Studies 5ed (2001) 5.

<sup>7</sup> Pursuant to its obligations under art 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).

<sup>8</sup> See Goyal and Mohd 455; and 645 (General Agreement on Trade in Services and Trade and Labour, Environment and Competition Policy).

can be explained by the sharing of common law traditions. The persistence with the borrowed systems has retarded the evolution of indigenous and relevant models of legal services.<sup>9</sup>

## 2 ACCESS TO JUSTICE AS A HUMAN RIGHT

The recognition of access to justice as a human right is evident in the international human rights law instruments.<sup>10</sup> 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.<sup>11</sup> The right to free legal assistance for persons without the means to engage a competent defence counsel is one of the “minimum guarantees” contained in Article 14(3)(d).<sup>12</sup> 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”.<sup>13</sup> 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 realisation” 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

<sup>9</sup> Noted legal scholar Dias observes: “Most countries of South Asia, upon attaining independence, inherited the legacy of a colonial system ... (they) have found that their ‘received’ legal systems are both alien and alienating” (Dias “The Impact of Social Activism and Movements for Legal Reform” in Hossain *et al* (eds) *Public Interest Litigation in South Asia: Rights in Search of Remedies* (1997) 3 5).

<sup>10</sup> The Universal Declaration of Human Rights (UDHR) recognizes the right of access to justice as a human right and a vital ingredient in the protection and enforcement of other human rights. Art 7 UDHR states that “All are equal before the law and are entitled without any discrimination to equal protection of the law”; art 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”; and art 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”.

<sup>11</sup> Although this is a right that can be derogated from by a state party in a time of public emergency as contemplated by art 4 ICCPR, the human rights committee has, in its General Comment 29 pointed out (par 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 (par 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”.

<sup>12</sup> For a view that the right to counsel applies at all stages of criminal proceedings, including the preliminary investigation and pre-trial detention, see Nowak *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (1993) 256; and Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities 46<sup>th</sup> Session E/CN.4/Sub.2/1994/24 3 June 1994.

<sup>13</sup> Human Rights Committee, General Comment 13 par 2 (U.N.Doc.HRI\GEN\1\ Rev.1 14 (1994).

---

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".<sup>14</sup>

### 3 CIVIL AND CRIMINAL LEGAL AID: DISTINCTION

This dichotomy in the availability and enforceability of civil and political rights on the one hand, and economic and social rights on the other, is reflected in the development of the systems of legal aid in some of the countries surveyed here. Although it is expected that the countries that are state parties to the ICCPR and the ICESCR would be obliged to order their legal systems to conform to their respective requirements, an examination of the relevant provisions of the constitutions of these countries reveals the departures. At this juncture, it is important also to acknowledge the obvious distinctions between civil and criminal legal aid within the formal legal systems of these countries.

Denial of legal aid in the criminal justice system entails severe consequences for the person in the form of loss of liberty and consequently it is not possible for the state to excuse itself from the liability to provide access to justice in this area. A person is invariably defending himself against state action in criminal proceedings and therefore is an involuntary participant in the process. In civil proceedings, the person very often may be invoking the legal processes for relief.

Secondly, the trials of criminal cases have been rigidified through inflexible and technical rules of evidence and complex laws that require intervention by trained legal personnel on behalf of either the prosecution or the accused or the victim. By its very nature, the criminal justice process does not easily lend itself to mutation into alternative and less formal processes. On the other hand, the problems of the civil legal system have inspired innovative methods of dealing with the problems of access. It has inspired the growth of alternative dispute resolution mechanisms including non-formal legal systems and community mechanisms.<sup>15</sup> Thus, civil legal aid lends itself to co-option of paralegals who can be trained to provide help in this area. However, in criminal cases, a skilled lawyer becomes a necessity for ensuring procedural fairness.<sup>16</sup> Much of a criminal trial is taken up with

---

<sup>14</sup> General Comment 3 par 5 (5th 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.

<sup>15</sup> Baxi *Towards a Sociology of Indian Law* (1986) 78.

<sup>16</sup> This has been brought out succinctly in the observations of Didcott J of the Natal Provincial Division in South Africa in *S v Khanyile* 1988 3 SA 795 (N) 798-99: "The guidance he (the magistrate) gave them (the accused) was necessary and important. It was no substitute, however, for the judicial help they missed ... (the) judicial officer whose role is that

issues of procedure and proof which are beyond the grasp and understanding of the accused, particularly if he is unrepresented and is not conversant with the language of the court or the law.

Thirdly, the legal profession also orders itself differently to meet the requirements of either system. While in civil litigation, lawyers are prepared to accept contingency fee arrangements,<sup>17</sup> the lawyer specialising in criminal law tends to collect fees in advance.<sup>18</sup> Also, in the latter system, the lawyer may be more easily co-opted into following an institutional discipline even while he may be a public defender.<sup>19</sup> Lastly, while the ambit of civil and criminal legal aid encompasses the preventive and representative aspects, the rehabilitative aspect of the latter is significant from the point of view of the suspect in jail.<sup>20</sup> While the three criteria – the economic status (means), the *prima facie* case and the interests of justice – determine eligibility for legal aid in civil proceedings, such criteria are generally either not applied or are modified in their application to criminal proceedings.<sup>21</sup> This accords with the notion of the qualifying need being defined “in terms of functional

---

functionally detached one ‘cannot fling the whole weight of his understanding into the opposite scale against the counsel for the prosecution and produce that collision of faculties which is supposed to be the happiest method of arriving at the truth’.”

<sup>17</sup> As is currently in vogue in both the United States and the United Kingdom.

<sup>18</sup> Abraham Blumberg notes: “The defendant in a criminal case and the material gain he may have acquired during the course of his illicit activities are soon parted. Not infrequently the ill-gotten fruits of the various modes of larceny are sequestered by a defense lawyer in payment of his fee” (Blumberg “The Practice of Law as Confidence Game: Organisational Cooptation of a Profession” June 1967 Vol I *Law and Society Review* 15-39, reprinted in Chambliss *Crime and the Legal Process* (1969) 220 227). He further notes (228): “The plain fact is that an accused in a criminal case always ‘loses’ even when he has been exonerated by an acquittal, discharge, or dismissal of his case. The hostility of an accused which follows as a consequence of his arrest, incarceration, possible loss of job, expense and other traumas connected with his case is directed, by means of displacement, toward his lawyer. It is in this sense that it may be said that a criminal lawyer never really ‘wins’ a case.”

<sup>19</sup> Chambliss 223: “Organisational goals and discipline impose a set of demands and conditions of practice on the respective professions in the criminal court, to which they respond by abandoning their ideological and professional commitments to the accused client, in the service of these higher claims of the court organisation. All court personnel including the accused’s own lawyer, tend to be coopted to become agent-mediators who help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty.”

<sup>20</sup> Pye “The Administration of Criminal Justice” 1966 66 *Columbia Law Review* 286 298: “The legal problems of a poor man do not end with a final judgment. His family needs legal assistance in civil matters while he is in prison. He needs to maintain a relationship with counsel to advise him prior to parole hearings and perhaps to prepare a motion for the reduction of sentence or a collateral attack on his conviction. It is extremely helpful to the prisoner if someone assists prison or parole authorities seeking employment for him upon release.” He further points out (299): “A system which is content to provide counsel in a criminal trial and to ignore the problems of pretrial release, the social problems resulting from the defendant’s poverty and his incarceration, and the prospects for his rehabilitation, is very much like a doctor giving morphine to a patient who has a leg infected with gangrene. It may give temporary relief from the pain but it does not help to solve the problem. The infection will continue to get worse unless something is done about the problem.”

<sup>21</sup> Thus under s 12 of the Indian Legal Services Authorities Act 1987, a person in custody is entitled to legal aid as a matter of right irrespective of his income. The *prima facie* test seems to nevertheless apply even to criminal cases.

incapacity to obtain in adequate measure the representation and services required by the issues, whenever and wherever they appear".<sup>22</sup>

These distinctions between civil and criminal legal aid ought not to be a justification for distinguishing between legal aid in the contexts of civil and political rights on the one hand, and economic and social rights on the other. For instance, in India, the right to legal aid at the expense of the state is provided in the chapter relating to directive principles of state policy which are not enforceable by courts.<sup>23</sup> In South Africa too the extent of state obligation to provide legal aid in the civil sphere is still a matter of interpretation.<sup>24</sup> The distinctions must nevertheless require to be acknowledged while demanding that the right of access to justice be afforded to the disadvantaged in both spheres.

#### 4 CONSTITUTIONAL RIGHT OF ACCESS TO JUSTICE

The recognition of the right to indigent defence as a non-derogable constitutional right has taken place along comparable lines in the USA, South Africa and India. The Sixth Amendment to the federal Constitution of the USA,<sup>25</sup> bears comparison with Article 22(1) of the Indian Constitution,<sup>26</sup> both recognising the right of an accused to be represented by a counsel of his or her choice, but not expressly providing for the right of an indigent

<sup>22</sup> Solomon "This New Fetish for Indigency": Justice and Poverty in an Affluent Society" 1966 66 *Columbia Law Review* 248 255.

<sup>23</sup> A 39A of the Indian Constitution: "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

<sup>24</sup> S 34 of the South African Constitution provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." For the view that this implies a binding obligation on the state to provide civil legal aid see Budlender "Access to Courts" [www.humanrightsinitiative.org/jc/papers/jc\\_2003/background\\_papers/Budlender\\_Access%20to%20courts.pdf](http://www.humanrightsinitiative.org/jc/papers/jc_2003/background_papers/Budlender_Access%20to%20courts.pdf) accessed on 28-01-2005.

<sup>25</sup> The Sixth Amendment to the US Constitution reads thus: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

<sup>26</sup> A 22(1) of the Indian Constitution reads thus:

"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply –

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention."

accused to be represented by a lawyer at state expense.<sup>27</sup> The corresponding provision in section 35(3) of the Constitution of South Africa is far better worded.<sup>28</sup>

The initiative taken by lawyers, backed by the civil liberties groups in the USA, was instrumental in getting the Supreme Court to incrementally expand the right to encompass the right to indigent defence in federal cases involving capital sentence,<sup>29</sup> followed by *Gideon*<sup>30</sup> which recognised the right to legal aid in all federal and state felony proceedings and then by *Argersinger*<sup>31</sup> which mandated that legal aid would be made available in all criminal cases. The interpretation placed on the Sixth Amendment right, with the aid of the fourteenth amendment due process right, to imply a non-derogable constitutional right of an indigent accused to fair trial at state expense had its influence on the development of the right both in India<sup>32</sup> and in South Africa.<sup>33</sup>

<sup>27</sup> A 33(1) of the Constitution of Bangladesh is on similar lines and reads thus: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice." However the right to indigent defence at state expense is yet to be recognised as a constitutional right.

<sup>28</sup> S 35. Arrested, detained and accused persons

- "(3) Every accused person has a right to a fair trial, which includes the right –
- a to be informed of the charge with sufficient detail to answer it;
  - b to have adequate time and facilities to prepare a defence;
  - c to a public trial before an ordinary court;
  - d to have their trial begin and conclude without unreasonable delay;
  - e to be present when being tried;
  - f to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
  - g to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - h to be presumed innocent, to remain silent, and not to testify during the proceedings;
  - i to adduce and challenge evidence;
  - j not to be compelled to give self-incriminating evidence;
  - k to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  - l not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - m not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - n to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - o of appeal to, or review by, a higher court."

<sup>29</sup> *Powell v Alabama* 287 US 45 (1932).

<sup>30</sup> *Gideon v Wainwright* 287 US 1 (1967).

<sup>31</sup> *Argersinger v Hamlin* 407 US 25 (1972).

<sup>32</sup> *MH Hoskot v State of Maharashtra* (1978) 3 SCC 544; and *Hussainara Khatoon (IV) v State of Bihar* (1980) 1 SCC 98 both refer to the US Supreme Court judgments. The declaration in *Suk Das v Union Territory of Arunachal Pradesh* (1986) 2 SCC 401 that the right to legal aid is available at all stages and in all criminal trials, was sequential to *Hoskot* and *Hussainara*. It is significant that the decision in *Maneka Gandhi v Union of India* (1978) 1 SCC 248, which served as a turning point and inspired these judgments, was seen as adopting the American doctrine of "due process" for interpreting aa 14, 19 and 21 of the Constitution.

<sup>33</sup> *S v Khanyile supra* which was reiterated in *S v Davids* 1989 4 SA 172 (N).

## 4 1 Consequences of recognition as a constitutional right

The recognition of legal aid in criminal proceedings as a constitutional right has significant consequences:

- The protection and enforcement of the right is essentially a state responsibility and cannot be avoided as being in the realm of policy or as a welfare measure. Thus the fact that the Sixth Amendment to the US Constitution did not provide for indigent defence at state expense made little difference after *Gideon*. State intervention to give effect to the right was a natural consequence leading to the creation of the institution of the public defender.<sup>34</sup> Likewise, in India the fact that free legal aid was recognised as a directive principle under Article 39A of the Constitution made no difference to its enforceability as a fundamental right forming part of the right to life and liberty under Article 21 as explained by *Hussainara Khatoon (IV) v State of Bihar*<sup>35</sup> and *MH Hoskot v State of Maharashtra*.<sup>36</sup> This characterisation also helps position criminal legal aid as a substantive and enforceable fundamental right rather than a welfare measure.<sup>37</sup>
- The nature and content of the right flows from the Constitution and not the statute which purports to give effect to it. Thus the right to criminal legal aid provided under the Criminal Justice Act, 1964 in the USA, the Legal Aid Act 1969 and the Criminal Procedure Act 1977 in South Africa, and the Cr. PC 1973 and the Legal Services Authorities Act (LSAA) in India cannot limit the constitutional right in terms of its content and the stages of its availability.<sup>38</sup> Thus in *S v Ntuli*<sup>39</sup> the South African Constitutional Court found the provision of the criminal procedure law inconsistent with the right to legal aid at the criminal appellate stage; in

<sup>34</sup> *Gideon* was considered a milestone and made a difference to how states responded to the need for providing legal aid. Prior to *Gideon* only six states had a public defender system. Now every state has “Notes – Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense” 2000 113 *Harvard Law Review* 2062 2066. This piece refers to the comment of Anthony Lewis that implementing *Gideon* would be an “enormous social task”. Lewis *Gideon’s Trumpet* (1964: Reprint 1989) 215.

<sup>35</sup> *Supra*.

<sup>36</sup> *Supra*. In the UK, in the absence of a written constitution, the right to legal aid has been treated as a statutory right from the outset. However, it is nevertheless an enforceable human right as articulated in a 6(3)(c) of the European Convention on Human Rights as applicable to the UK.

<sup>37</sup> It also immunises it from interference by successive executive governments with opposing political orientations. The attack suffered by civil legal aid in the United States at the hands of the Republicans is an example. In 1964, the Office of Legal Services was set up within the Office of Economic Opportunity (OEO) and later was transferred to an autonomous Legal Services Corporation (LSC) in 1974. The LSC has survived concerted efforts by successive Republican governments to have it dismantled. See Billings “Legal Services” in Jason (ed) *Encyclopaedia of American Judicial Systems: Studies of the Principal Institutions of the Processes of Law* (1987) 644.

<sup>38</sup> In the US the right is available at the pre-trial and post-trial stages: *Escobedo v Illinois* 378 US 478 (1964) and *Miranda v Arizona* 384 US 486 (1966); *United States v Wade* 388 US 218 (1967). This also forms the basis for the right to legal aid to prisoners within jails: *Bounds v Smith* (1977) 52 L Ed 2d 72 in the US and in India: *Sunil Batra Sunil Batra (I & II) v Delhi Administration* (1978) 4 SCC 494 and (1980) 3 SCC 488.

<sup>39</sup> 1996 1 SACR 94 (CC).



*Hoskot* the Indian Supreme Court read the constitutional obligation to provide a similar right *into* the provisions of the Cr. PC 1973.<sup>40</sup>

- The right is enforceable as a constitutional fundamental right in the higher courts of the country and its violation can have the consequence of voiding convictions on the grounds of not meeting fair trial standards.<sup>41</sup> The denial of the right to legal assistance in criminal proceedings is not merely of a procedural or a statutory right but a constitutional right. Thus, for example, there is no question of an accused being presumed to have waived his right to be defended by a lawyer.<sup>42</sup>

Thus, the recognition of the right of access to justice as a constitutional right has an important bearing on the programmatic content of the legal services as well as the obligation of the state. The present unjustified dichotomy in the approaches to civil and criminal legal aid can also be effectively countered through express provisions in the constitution itself.

## 5 MODELS AND TYPES OF LEGAL SERVICES

The countries surveyed have followed an institutional model of legal services delivery, although the nature and functions of the institution may differ.

Although the United Kingdom does not have a written constitution, a series of statutory enactments has ensured a robust system of legal aid. Beginning with the Legal Aid and Advice Act, 1949, inspired by the report of the Rushcliffe Committee published in May 1945, legal aid was available in all the courts and free of charge to those unable to afford counsel. While it was recommended that criminal legal aid should be administered by the courts, civil legal aid was expected to be administered by the Law Society. In 1973, the Green Form Scheme was introduced, enabling solicitors to offer free legal advice on all cases, including criminal matters, after conducting a quick means test. A white paper tabled in March 1987 titled “Legal Aid in England and Wales: A New Framework” led to the enactment of the Legal Aid Act, 1988 under which civil legal aid was to be administered by the Legal Aid Board (LAB). As far as criminal legal aid was concerned the LAB was responsible for the duty solicitor schemes, and paying the bills for magistrates’ court work. The crown court and the court of appeal paid the legal aid bills in cases before them. More changes followed in 1995 when the Lord Chancellor’s Department circulated a consultation paper titled “Legal Aid-Targeting Need”, proposing a scheme for re-working the system of legal aid and inviting responses.<sup>43</sup> The Consultation Paper pointed out that the scheme, which had survived until then, tended to encourage legal solutions to problems and that such solutions “can be expensive, cumbersome and complex, when less formal solutions might be as effective”.<sup>44</sup> It

<sup>40</sup> *MH Hosket v State of Maharashtra supra* 552-53: “If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal ... there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual ‘for doing complete justice’.”

<sup>41</sup> *Gideon v Wainwright supra*.

<sup>42</sup> *Ibid*; and *Suk Das v Union Territory of Arunachal Pradesh supra*.

<sup>43</sup> *Legal Aid – Targeting Need* Consultation Paper, Lord Chancellor’s Department, 1995.

<sup>44</sup> *Legal Aid – Targeting Need* 5.

pointed out that the phrase “legal services” has traditionally been understood to refer to services provided by the legal profession and suggested: “the definition of legal services, for the purposes of legal aid, should be focused on the needs of the client and not restricted to the skills of a particular type of provider. ‘Legal services’ should therefore include all services aimed at resolving legal problems, whether provided by lawyers or by other suppliers such as advice agencies.”<sup>45</sup> After 1999, the Legal Aid Board (LAB) was replaced by the Legal Services Commission (LSC),<sup>46</sup> with a view to limiting the role of the state to providing a budget with a cap,<sup>47</sup> and leaving the details of providing legal aid in individual cases to the service provider with whom the LAB/LSC enters into a “block contract”.<sup>48</sup> It is also the concern for costs that has brought in the concept of the salaried defender service (SDS).<sup>49</sup>

In the USA on the other hand, the attempt is to remove the overall management, control and supervision of the institution of the public defender from the judiciary and place it in a centralised body, which it is hoped will meet two objectives – ensure greater independence and ensure greater flow of funds.<sup>50</sup> South Africa too has found the Legal Aid Board (LAB) not consistent with the need to provide legal services to a geographically widespread population. It has also been unable to meet the demands of quality and accountability. Among the issues that have arisen, particularly with reference to criminal legal aid, are:

- The division of the legal profession into attorneys and advocates was contributing to increased costs of litigation. There was resistance from advocates to unifying the bar.<sup>51</sup>
- The problems associated with institutionalising the delivery of legal services in the form of the LAB which was seen to be resisting attempts by the government to streamline its functioning and make its governance broad-based.
- The criticism of the LAB's functioning centred around its disproportionate emphasis on criminal cases. Lawyers working for it complained about

<sup>45</sup> *Ibid.*

<sup>46</sup> This was brought about by the Access to Justice Act, 1999.

<sup>47</sup> This was spelt out in the White Paper *Striking the Balance. The Future of Legal Aid in England and Wales*, Lord Chancellor's Department, 1996, which led to the enactment of the Access to Justice Act, 1999. The proposals included “replacing an open ended approach to resources with pre-determined budgets that could be allocated to meet local demand within national priorities” 67-70.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Criminal Defence Service: Establishing a Salaried Defence Service and Draft Code of Conduct for Salaried Defenders employed by the Legal Services Commission A Consultation Paper*, Lord Chancellor's Department (June 2000).

<sup>50</sup> See Prado “Process and Progress: Reviewing the Criminal Justice Act” Winter 1995:1 Vol 58 *Law and Contemporary Problems* 51 referring to the *Report of the Committee to review the Criminal Justice Act* (1993) reprinted in 52 *Crim. L. Rep. (BNA)* 2265. For doubts that the removal of the control from the judiciary will facilitate better flow of funds, see Everett “Foreword” 1995 58(1) *Law and Contemporary Problems* 1 6-7.

<sup>51</sup> See “Representations by the General Council of the Bar of South Africa to Milne Commission” (1993).

delayed settlement of bills. On the other hand, there were criticisms that dishonest lawyers had fleeced the LAB.<sup>52</sup>

- The funds available to the LAB were inadequate and the budget was not expected to increase.<sup>53</sup> This had to be seen in the context of the growing poverty levels,<sup>54</sup> the nexus between crime and poverty<sup>55</sup> as well as the high crime rate.<sup>56</sup>

In India, the LSAA has brought in a multi-tiered institutionalised model of legal services delivery, with committees at the taluk, district and state levels.<sup>57</sup> There is no evaluation of the performance of these institutions. For instance there is very little information on whether they are serving the purposes outlined under the LSAA, whether they are enabling people to access legal services and institutions, and whether they are cost effective.<sup>58</sup> Therefore, it is the lack of information on their performance that precludes comparison of the Indian legal aid institutions with their counterparts elsewhere. This by itself would constitute a starting point for evaluating the performance of these institutions.<sup>59</sup>

The experience in Bangladesh with the enactment of the Legal Aid Services Act, 2000 (LASA) establishes a network of legal aid committees at the national and district levels. However, the survey conducted by the Bangladesh Legal Aid and Services Trust, an NGO in the field of legal aid for several years, it transpired that of the 8 208 cases in which legal aid had been provided in the year 2002-2003, 5 915 were criminal matters.<sup>60</sup> The criticism of the LASA has been that it is not very different from the earlier

<sup>52</sup> "Legal Aid Board 'Milked by Dishonest Lawyers'" 30 August 1999 *Mail & Guardian* <http://www.mg.co.za/mg/news/99aug2/30aug-legalaid.html> accessed on 1 December 2001.

<sup>53</sup> In a letter dated 20 September 1999 to a law firm in London, representing claimants seeking damages from a South African asbestos company, the LAB admitted that it was in a financial crisis. This letter was relied upon by the House of Lords in *Lubbe v Cape PLC* (judgment dated 20 July 2000) to negative the company's plea for a stay of the action in the UK on the basis of *forum non conveniens*.

<sup>54</sup> Report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality *Poverty and Inequality in South Africa – Final Report* (1998) 26.

<sup>55</sup> *Poverty and Inequality in South African – Final Report* 130.

<sup>56</sup> For a view that there has been since 1994 "a national crisis of confidence in the capacity of the criminal justice system to deal with the high level of political crime" see *National Crime Prevention Strategy Document* produced by a team including Departments of Correctional Services, Justice, Safety and Security (May 1996) par 4.11.1.

<sup>57</sup> Ss 3, 6 9 and 11A of The Legal Services Authorities Act of 1987.

<sup>58</sup> Paradoxically, the committees may not be spending the entire monies allotted to them: see Muralidhar *Law, Poverty and Legal Aid: Access to Criminal Justice* (2004) 124.

<sup>59</sup> For evaluation of legal aid systems elsewhere see in particular Currie "Legal Aid Delivery Models in Canada: Past Experiences and Future Developments" 2000 33 *University of British Columbia Law Review* 285; Hunter and Genovese "Qualitative Aspects of Quality: An Australian Case Study" 2000 33 *University of British Columbia Law Review* 319; Regan "Legal Aid Without the State: Assessing the Rise of *Pro Bono* Schemes" 2000 33 *University of British Columbia Law Review* 383; Klijn "Dutch Legal Services Quality Incentives: The Allegedly 'Perverse' Effects of the 1994 Legal Aid" 2000 33 *University of British Columbia Law Review* 433; Sommerlad "English Perspectives on Quality: The Client-led Model of Quality-a Third Way?" 2000 33 *University of British Columbia Law Review* 491; and Leibman "Legal Aid and Public Interest in China" 34 *Txs Int Law Jnl* 211. See also McBride "States Obligations on Access to Justice under International Human Rights Treaties" (mimeo, 1998).

<sup>60</sup> Presentation date 24 March 2004 by BLAST on the government legal aid programme (mimeo).

scheme of 1997 or the 1998 Bill.<sup>61</sup> Further, a large percentage of the funds made available remained unspent,<sup>62</sup> the system was found to be highly bureaucratized, and the response of both the lawyers and subordinate judges was generally lukewarm. Also, there was not enough awareness about the availability of legal aid. Moreover, the unreasonably low income-limit criteria for eligibility has prompted a demand for raising it significantly.

But the concerns expressed elsewhere over the need for the independence of the institution, whether it is legal aid board or the public defender, are equally applicable to the institutions at home which are currently “managed” by a collaboration of the judiciary and the executive.<sup>63</sup> Also unique to the Indian model is the use of the legal aid institutions by the judiciary, to hold *lok adalats*, with a view to disposing of pending cases *en masse*.<sup>64</sup> This exposes it to the criticism that legal aid is perhaps a device to help the judiciary tackle the problems of the backlog of cases. This is in contrast with the *salish* or mediation conducted by the NGOs providing legal aid in Bangladesh, where the effort involves the informed participation of the people and is by and large acceptable to them.<sup>65</sup>

## 5.1 Types of legal services

The countries surveyed have all tried combinations of services both in the traditional model of legal services – with its focus on litigation and therefore representation – as well the preventive model of legal services with its focus on advice, counselling and mediation. The criminal justice system involves a fair amount of litigation in court, with its technical rules of procedure and evidence, thus making the trained lawyer indispensable to a fair trial.<sup>66</sup> Legal aid by way of representation continues to comprise a prominent component of the criminal legal aid services programme.

The role of the lawyer in the growth of legal aid calls for a comparative examination. The growth of voluntarism in legal aid in the early stages of the development in the USA<sup>67</sup> and more recently in the experiences of

<sup>61</sup> The earlier scheme was said to have failed mainly on account of lack of awareness and strict eligibility conditions: “Legal Aid Fund Remains Unutilized for 7 years” News from Bangladesh (7 August 2001) <http://bangladesh-web.com/news/aug/07/lv4n650.html> accessed on 7 December 2001. The principal legal aid body in the private sector, the Bangladesh Legal Aid and Services Trust (BLAST), has said that the new legal aid law “does not invoke confidence regarding its implementation” (BLAST *Annual Report* (January 2000-March 2001) 11).

<sup>62</sup> *Ibid.*

<sup>63</sup> This model has been criticised by Justice Krishna Iyer: see Muralidhar 120.

<sup>64</sup> For a criticism see Dhavan “The Unbearable Lightness of the Indian Legal Aid Programme” in Hossain (ed) *Public Interest Litigation in South Asia: Rights in Search of Remedies* 158. For an empirical study to show that the participation in *lok adalats* is not voluntary see Singh *Legal Aid: Human Right to Equality* (1998) 312.

<sup>65</sup> “Shalish” means mediation and has been in existence in traditional Bengali culture. While it has an advantage in the fact that being an indigenous system, people are much more familiar with the consent than with court procedure, it has a problem in that village elders could impose harsh judgments on parties, at times outside their jurisdiction: *Annual Activity Report (1996-97)* of the Madaripur Legal Aid Association 8.

<sup>66</sup> Recall the words of Justice Sutherland in *Powell v Alabama supra*.

<sup>67</sup> As evidenced by the participation of the civil liberties groups, American Civil Liberties Union (ACLU) and National Association for Advancement of Coloured People (NAACP) and the

Bangladesh<sup>68</sup> and South Africa,<sup>69</sup> has been possible largely on account of the active participation of lawyers driven by a sense of duty as well as moral obligation.<sup>70</sup> In the USA, lawyers continue to be the backbone of the legal services programmes – they are involved in the public defender programme, they contribute monetarily through the interest on lawyers' trust accounts (IOLTA) programme,<sup>71</sup> and they also offer their services *pro bono*.<sup>72</sup> Although in India there are private lawyers' networks that offer legal aid in urban centres,<sup>73</sup> this is too little when compared with the demand for such services. The legal profession in India, however, views legal aid as a welfare activity which is essentially to be provided for by the state.<sup>74</sup> This perhaps explains why there has been hardly any push for the adoption of the public defender concept into the legal services programme.<sup>75</sup> With the acceptability

---

lawyer bodies like National Legal Aid and Defender Association (NLADA): *Balancing the scales of justice: financing public interest law in America – A Report* The Council for Public Interest Law (1976) 28.

<sup>68</sup> These include the Ford Foundation, the Asia Foundation, British Council, USAID, NOVIB and the European Human Rights Foundation, see BLAST *Annual Report 2000-01* (2002) 11. In 2002-2003 the funding was by NOVIB and the Royal Danish Embassy. The Annual Reports of BLAST give a full disclosure of its financial status.

<sup>69</sup> *Report of the Commission of Enquiry into the Structures and Functioning of the Courts* (Hoexter Commission) RP 78/1983 Part II par 6.4.1 quoted in Paper presented by Dr. Penuell M Maduna, MP, Minister of Minerals and Energy, at the National Legal Aid Forum held in Pretoria on 15 January 1998.

<sup>70</sup> Professor Charles Ogletree notes: "A variety of studies of the system indicate that the lack of resources, high caseloads, inadequate training, and tremendous pressure to process cases generate a constant stress on public defenders which leads to an increasing sense of cynicism and disillusionment about the job" (Ogletree Jr "An Essay on the New Public Defender for the 21<sup>st</sup> Century" 1995 58 *Law and Contemporary Problems* 81 85). In Bangladesh this explains how lawyers have been willing to participate in legal aid at even 10% of the normal fee (BLAST *Annual Report 2002-2003* (2003) 6). In South Africa the backdrop of apartheid explains how white lawyers with a conscience found an avenue of protest and dissent in legal aid. For details of the prominent cases handled by the Legal Resources Centre [*Komani v Bantu Affairs Administration Board* 1980 4 SA 448 (A) and *Oos-Randse Administrasieraad v Rikhoto* 1983 3 SA 595 (A)], see Budlender "On Practising Law" in Corder (ed) *Law and Social Practice in South Africa* (1988) 319.

<sup>71</sup> In addition, there are more than 650 *pro bono* programme in operation in the United States. Over 125,000 lawyers participate in the voluntary legal aid movement. In several States, over 50 per cent of the bar is involved. Approximately 1/3<sup>rd</sup> of those engaged in private practice of law participate in providing *pro bono services* to the poor. A programme which provides that interest on lawyers' trust accounts (IOLTA) is used to fund legal services to the poor (Smith Jr and Clark "Legal Services to the Poor in the United States: The Quest for Equal Justice" 23 *Indian Advocate* 15 18).

<sup>72</sup> Billings "Legal services" in Jason (ed) *Encyclopaedia of American Judicial Systems: Studies of the Principal Institutions of the Processes of Law* (1987) 644.

<sup>73</sup> Prominent among these are the Majlis in Mumbai, Prayas in Mumbai, Lawyers' Collective, the Human Rights Law Network in Mumbai and Delhi, Common Cause in Delhi, Legal Aid Society West Bengal in Kolkata, Centre for Social Justice, Ahmedabad, Legal Research for Social Action, Chingleput near Chennai and Free Legal Aid Committee, Jamshedpur. The People's Union for Civil Liberties (PUCL) and the People's Union for Democratic Rights (PUDR) have also been taking up human rights causes in courts and other fora. The activities of these organisations need to be studied to understand the extent of their reach and types of services offered. For an order of the Supreme Court encouraging support to NGOs offering legal services, see *Centre for Legal Research v State of Kerala* (1986) 2 SCC 712.

<sup>74</sup> Muralidhar 132.

<sup>75</sup> The concept of public counsel was tried just once in Kerala under the 1978 Rules and sought to be enforced by the Kerala High Court in *Chandran v State of Kerala* 1983 KLT

of the model in both the UK and South Africa, this position requires a re-examination as far as India is concerned.

The other types of representation that are common to the four countries and India are the *judicare* model,<sup>76</sup> the *pro bono* system<sup>77</sup> and the *amicus curiae* system.<sup>78</sup> Given the extent of the “uncovered” area and “unmet” need of legal services, a combination of these models, as is being mooted in the UK, needs to be tried out. For instance, in serious cases involving offences punishable with imprisonment of over seven years, the *judicare* model will have to be adopted. For cases involving a capital sentence, a combination of a senior and a less experienced counsel may have to be provided. The duty solicitor scheme, which has been tried and tested in the UK, may serve the criminal legal aid system in India well, particularly in the areas of poverty law and legal aid. In the remedial services model, the emphasis on the preventive and rehabilitative aspects has, in comparison say with South Africa, been minimal. The South African model which accommodates a wide range of service providers including paralegals, law academics and law students is capable of being adapted to Indian conditions.<sup>79</sup> It can also be cost-efficient.

## 6 CHALLENGES AND CONCERNS

### 6.1 Quality and choice

Two concerns need to be addressed – the question of quality and the question of choice. Both address the issue from the point of view of the person assisted and assure such person that the right of access to justice is a substantive one and not merely a measure of welfare. Standards are measurable by definite parameters that have now been evolved by the American Bar Association in the context of the public defender programme.<sup>80</sup>

315. However, it failed for a variety of reasons: see Sreekumar “Implementation of Legal Aid in Kerala” 1987 14:1 *Indian Bar Review* 57.

<sup>76</sup> A private counsel undertakes legal aid work at rates fixed by the legal aid board.

<sup>77</sup> Lawyers undertake to conduct cases free of cost. For a position advocating support for the *pro bono* system see Regan “Legal Aid Without the State: Assessing the Rise of *Pro Bono* Schemes” at <http://flair.law.ubc.ca/ilac/Papers/18%20Regan.html> accessed on 27-03-2002.

<sup>78</sup> The court assigns a case to a counsel either from a list or at random. This compares with the assigned counsel programme in the US and the *pro deo* system in South Africa.

<sup>79</sup> *Access to Justice in South Africa: legal aid transformation and paralegal movement* National Community Based Paralegal Movement 2000 <http://www.case.org.za/html/legal3.htm>.

<sup>80</sup> The American Bar Association’s advisory guidelines establish limits on the number of cases, category-wise (150 felony cases, 300 misdemeanours, 200 juvenile cases, 200 mental commitment cases, or 25 appeals) that a public defender can undertake. In 1997, the Attorney General and officials of the Office of Justice Programs and the Bureau of Justice Assistance convened a focus group of 35 leaders of the indigent defense community and identified six areas in which the U.S. Department of Justice (DOJ) could play an effective role in promoting strong and stable indigent defense systems (<http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm> accessed on 25 October 2001):

- Using the DOJ’s leadership role to call attention to the importance of quality indigent defense services.
- Promoting independence in indigent defense structures.
- Allocating resources equitably among indigent defense and other criminal justice system components.
- Focusing on these challenges in the juvenile justice system.
- Promoting standards for indigent defense programs.

The criticism that standards need to be evolved *in advance* and not wait to be evolved on a case by case basis holds good for the Indian scene as well. Closely linked to the question of quality is that concerning the fees paid to lawyers doing legal aid work. The Indian legal aid system still pays its lawyers unrealistically low fees. While comparisons of the levels of earnings of lawyers in relation to their counterparts in other countries may not be appropriate to determine what should be the right figure, there is a need to engage in a dialogue with the legal profession about this issue. The UK proposals<sup>81</sup> serve to show that in the absence of accountability mechanisms, it is imperative, at least in cases involving serious consequences for the life and liberty of an individual, that the assisted person be offered a choice of counsel.

## 6.2 State funding of legal services programmes

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 disadvantaged groups.<sup>82</sup> They echo the words of Judge Blackmun in *Jackson v Bishop*,<sup>83</sup> who said: "Humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations."

The second question is posed essentially by the law and economics school of which the principal exponent is 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.<sup>84</sup> 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.<sup>85</sup>

---

– Building a capacity for computer technology in indigent defense.

<sup>81</sup> *Criminal Defence Service: Choice of Representative* A Consultation Paper, Lord Chancellor's Department June 2000.

<sup>82</sup> The view of the Canadian Supreme Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (1997) 3 SCR par 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* *supra* 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 Budlender "Access to Courts" [www.humanrightsinitiative.org/jc/papers/jc\\_2003/background\\_papers/Budlender\\_Access%20to%20courts.pdf](http://www.humanrightsinitiative.org/jc/papers/jc_2003/background_papers/Budlender_Access%20to%20courts.pdf) accessed on 28-01-2005.

<sup>83</sup> 404 F Supp 2d 571.

<sup>84</sup> Posner *Economic Analysis of Law* 2ed (1977) 355.

<sup>85</sup> Cramton "Why Legal Services for the Poor?" May 1982 68 *Journal of the American Bar Association* 550 553: "Arguments concerning the efficiency of the program fail to reflect the

An even more powerful justification, rooted in the very legitimacy of the legal system, was provided in 1963 in the USA 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".<sup>86</sup>

The allocation of resources in countries belonging to the developing and least developed blocks towards administration of justice has shown a decline.<sup>87</sup> 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.<sup>88</sup> 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."<sup>89</sup> 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 (LDCs) which include Philippines, Kazakhstan, Croatia, Argentina, El Salvador, Yemen, Sri Lanka and Bangladesh.<sup>90</sup> The classification of Bangladesh as a LDC has led to it receiving credit from international financial agencies for structural changes. The World Bank has loaned it \$30.6 million 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

---

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."

<sup>86</sup> *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice* cited in Solomon "'This New Fetish for Indigency': Justice and Poverty in an Affluent Society" 1966 66 *Columbia Law Review* 248 252. See also 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."

<sup>87</sup> The position in India is best demonstrated by the allocations made as a percentage of the total plan outlay: the 9<sup>th</sup> Five Year Plan made an allocation of 0.071%; this rose to 0.078% in the 10<sup>th</sup> Plan.

<sup>88</sup> See generally, Dowdle "Preserving Indigenous Paradigms in an Age of Globalisation: Pragmatic Strategies for the Development of Clinical Legal Aid in China" 24 *Fordham Int'l Law Journal* S56.

<sup>89</sup> IDE-JETRO *Judicial System and Reforms in Asian Countries: The Case of India* (March 2001).

<sup>90</sup> Ghose "Banking on Justice" 2000 15(7) *From the Lawyers Collective* 23.



aid clinics”.<sup>91</sup> The impact of external funding to fill the void created by withdrawal of state support requires critical examination. It portends ill for those demanding accountability of state institutions for delivering on the promise to fulfill constitutional obligations.

### 6.3 Law and poverty: A problematic relationship

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, and 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”.<sup>92</sup>

For the urban poor, the criminalisation of their activities – for instance, vagrancy, street dwelling, sex work – results in their being punished for their poverty.<sup>93</sup> 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.<sup>94</sup> 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

<sup>91</sup> A report is available at: [http://www4.worldbank.org/legal/legop\\_judicial\\_bangladesh.html](http://www4.worldbank.org/legal/legop_judicial_bangladesh.html) accessed 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 resources 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/projects/project.asp?pid=P044810> visited on March 27, 2002).

<sup>92</sup> Madhava Menon “Legal Aid and Justice for the Poor” in Baxi (ed) *Law and Poverty: Critical Essays* (1989) 341 345.

<sup>93</sup> 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 a 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.

<sup>94</sup> Foote “Vagrancy-type Law and its Administration” in Chambliss *Crime and the Legal Process* (1969) 295 303. 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 (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’.”

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.<sup>95</sup>

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 countries.

#### **6 4 Failures of the formal legal system**

A major challenge to providing effective access to justice, particularly for the disadvantaged sections of society, is the failure of the formal legal system 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 marginalised sections of the population. Among the disincentives for a person to avail him/herself 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 of course does not account for the possible bribes paid to the court staff or to prison officials for small favours, the cost of transport to the court, the possible bribes paid to policemen for obtaining documents, copies of depositions and the like. Since the legal system, in their view, 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 to get 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.

#### **6 5 The parallel system**

There is, in many countries belonging to the developing and least developed blocks, a parallel economy facilitated by extensive corruption that subverts the formal legal system. As demonstrated by 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.<sup>96</sup> For the latter

<sup>95</sup> Harrington *The Other America* (1962) 16-17 cited in Solomon "This New Fetish for Indigency: Justice and Poverty in an Affluent Society" 1966 66 *Columbia Law Review* 248 251.

<sup>96</sup> De Soto *The Other Path* (1989).

group, 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.

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.

## 6.6 Failure to integrate the non-formal legal system

In the context of examining effective means of providing access to justice for the disadvantaged sections of society, 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 legal aid programmes, located as they are 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.<sup>97</sup> 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 factors (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."<sup>98</sup> Integrating the non-formal systems, rather than excluding them, and clearly demarcating the scope of their function in the justice system, is imperative.

## 7 THE RESPONSE TO THE CHALLENGES AND CONCERNS

The challenges to providing access to justice, some of which have been noted already, have been responded to, even if inadequately or inappropriately, by the state and civil society. This section seeks to list some

---

<sup>97</sup> 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 Baxi "Popular Justice, Participatory Development and Power Politics: The *Lok Adalat* in Turmoil" in Allot and Woodman (eds) *From People's Law and State Law: The Bellagio Papers* (1985) 171.

<sup>98</sup> Baxi *Towards a Sociology of Indian Law* (1986) 78. The 114<sup>th</sup> 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.

of these responses. An acknowledgement and understanding of these responses might facilitate the exploration of changes.

## 7.1 The “Access-to-Justice” third wave approach

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.<sup>99</sup> 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.

These two authors point out how in the USA, the UK 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.<sup>100</sup> 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”.<sup>101</sup>

In India, the 1971 Gujarat Report, inspired by the American experience of public interest law, suggested that the problems faced by the poor can best be addressed not individually through the traditional legal services programme that is litigation-oriented but by a remedial legal services programme that seeks to tackle the very processes that impoverish people.<sup>102</sup> In a sense it combined the second and third waves of the

<sup>99</sup> Cappelletti and Garth “Access to Justice – the Worldwide Movement to Make Rights Effective: A General Report” in Cappelletti and Garth (eds) *Access to Justice – A World Survey* Vol I (1978) 5 8-9. This shift occurred, according to the authors, simultaneous with the emergence in the 20<sup>th</sup> century of the “welfare state”.

<sup>100</sup> Cappelletti and Garth 21. The authors explain (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.”

<sup>101</sup> Cappelletti and Garth 52.

<sup>102</sup> See Muralidhar 48.

approaches to access to justice when it advocated the tools of attack – class actions and representative actions – as well as the subject matter of the attack – law and institutional reform. Three decades later, the use of litigated reform as a strategy to tackle issues of systemic reform is still being advocated in the USA.<sup>103</sup>

## 7.2 Public interest litigation and ADR

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. This has enabled issues to be brought before the courts by permitting relaxed rules of standing, flexible procedures and creative use of judicial power.

The Indian experience with public interest litigation (PIL) requires recounting. Essentially a judicial innovation, PIL was activated in response to the need for access to justice for a large number of awaiting trial prisoners languishing in jails in the State of 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 (IV) v State of Bihar*,<sup>104</sup> 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.<sup>105</sup>

PIL was seen by the Indian 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 a 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 judiciary by interlopers and busy bodies

---

<sup>103</sup> See fn 34 above: “Notes – Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense.” Reference has been made to the article by Bright “Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer” 1994 103 *Yale LJ* 1835.

<sup>104</sup> *Supra*.

<sup>105</sup> *Azad Rickshaw Pullers’ Union v State of Punjab* (1980) Suppl SCC 601.

on the one hand and the overreaching of their own powers and jurisdiction by the courts on the other.<sup>106</sup>

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 tribes to access community resources essential for their livelihood.<sup>107</sup> Nevertheless, given the number of areas in the functioning of the justice system that need to be reformed to respect the right of access to justice, the use of PIL in initiating law and institutional reform needs to be encouraged and persisted with.

Faced with resource crunches, other countries have promoted alternative dispute resolution mechanisms.<sup>108</sup> In countries like South Africa, paralegal networks<sup>109</sup> are among the devices through which non-governmental groups seek to provide legal services. Other devices to ease the pressure on courts include fast tracking of cases,<sup>110</sup> tribunalisation,<sup>111</sup> and constitution of human rights commissions. Nevertheless, these institutions are modelled on the formal judicial institutions and soon begin to face the same problems of overloading of cases and under-staffing.

### 7.3 Civil society's response

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.

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 a mass people's movement, the Mazdoor Kisan Shakti Sanghathan (MKSS) based in Rajasthan. The

<sup>106</sup> See generally Desai and Muralidhar "Public Interest Litigation: Potential and Problems" in Kirpal *et al* (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (2000) 159.

<sup>107</sup> *Pradeep Krishen v Union of India* (1996) 8 SCC 599 and *Animal & Environmental Legal Defence Fund v Union of India* (1997) 3 SCC 549.

<sup>108</sup> 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 8.

<sup>109</sup> "Access to Justice in South Africa: Legal Aid Transformation and Para-legal Movement" National Community Based Paralegal Movement 2000 <http://www.case.org.za/html/legal3.htm>.

<sup>110</sup> The Report of the Committee headed by Lord Woolf ushered in the system of fast tracking of civil cases. India too is currently experimenting with fast tracking in criminal cases.

<sup>111</sup> For a critical review of the tribunals in England see Leggatt "Tribunals for Users One System, One Service: Report of the Review of Tribunals" 2004 <http://www.tribunals-review.org.uk/leggatthm/leg-00.htm> accessed on 1 March 2004.

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.

#### 7.4 Limits to adaptation of other models

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.<sup>112</sup> 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”.<sup>113</sup> In analyzing the experiments in China with designing models for providing legal services, 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”.<sup>114</sup>

Early in 1974, Metzger, who undertook a comparative study of legal aid systems in the Asian region, noted:<sup>115</sup>

“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.”

The blind adaptation of pre-set models without accounting for local factors may compound the problem of providing access.

---

<sup>112</sup> Upham “Mythmaking in the Rule of Law Orthodoxy” September 2002 *Carnegie Endowment, Democracy and Rule of Law Project No 30* 8.

<sup>113</sup> Upham September 2002 *Carnegie Endowment, Democracy and Rule of Law Project No 30* 33.

<sup>114</sup> See generally Dowdle “Preserving Indigenous Paradigms in an Age of Globalisation: Pragmatic Strategies for the Development of Clinical Legal Aid in China” 24 *Fordham Int'l Law Journal* S56.

<sup>115</sup> 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* (1974) 155 161.

---

## 7.5 The agenda for reform

The comparative analysis reveals that the nature of the right of access to justice determines the extent of state intervention. The characterisation of the right to criminal legal aid as a non-derogable constitutional right is critical to its enforceability and availability. It also determines the consequences resulting from a breach of the right. The importance of such recognition also lies in its consequential immunisation from interference by the state by refusing support on the basis of affordability. Criminal legal aid does not admit of treatment as a measure of welfare.

The absence of an audit and evaluation of the functioning of the legal aid institutions precludes an assessment of their performance in relation to the purpose they are set to achieve. Absent study and documentation, it is also not possible to determine the cost effectiveness of the functioning of these institutions. This explains the difference in the approach to the issue in the UK and South Africa, where auditing of the functioning of legal aid institutions has contributed immensely to informed public debate. However, the concerns about their independence *vis-à-vis* the executive needs to be addressed. The Bangladesh system of community-level mediation (*shalish*) could form the basis for evaluation of the effectiveness of the *lok adalat* system from the point of view of the litigant.

In the criminal justice sphere a beginning could be made by initiating steps towards:

- Decriminalisation of activities of the poor that have unjustly been labelled as offences and are sought to be dealt within the criminal justice system.
- Demanding setting of judicial guidelines on arbitrary use of police powers of preventive arrests.
- Discriminatory laws and practices that adversely impact the poor.
- Increase in the laws with stiffer penalties and prioritisation of law enforcement “over defendants’ procedural rights including the right to counsel”.
- The need to challenge institutional practices that operate harshly against the poor, for example, the monetary bail system.<sup>116</sup>

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 be 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.

---

<sup>116</sup> The Manhattan Bail Project attempted in New York in the 1960s, serves to inspire similar studies that can form the basis for an attempt at litigated reform (Ares, Rankin and Sturz “The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole” 1963 38 *New York University Law Review* 67).