LAW IN THEORY v. LAW IN ACTION:

IMPEDIMENTS TO ACCESS TO JUSTICE

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ABSTRACT

The aim of the paper was to examine whether the law in books is separate from law in action, i.e. whether law is being applied in theory or whether access to justice has been denied to the citizens. For this purpose, the researcher has relied on some primary data which was collected in the course of field work undertaken in the trial court of Bangalore and with the interviews with various lawyers and litigants, police men etc.

This paper seeks to analyze the role played by the social profile of the litigants in their access to justice, and consequently to analyze whether the law in book is separate from law in action, i.e. is the law followed in theory? This will be achieved by examining the influence of biases/stereotypes on the police, the public and the judges and thus determining whether access to justice can ever be fully achieved? This paper does not seek to trace the consequent social exclusionary effects, which would become the subject matter of another paper. Only the cause of lack of access to justice is explained, not the effect.

The paper analyzes the genesis of the access to justice movement, in light of the failures of the existing systems of 'legal aid.' It also does a comparative analysis of the legal aid provided in different countries and traces the importance of the same in India, while looking at the criticisms of the same. It delineates the disjunct between the application of law and justice in theory and in practice, by viewing it through the lens of the social profile of the litigants. It has been further sub-divided into three parts:

- **2.1** **Exclusion in terms of access to courts**: looks at economic reasons and extraneous factors like the police precluding the victim from filing a case which leads to the exclusion of the common man from the justice system.
- **2.2** **Inequality in terms of treatment during the course of the trial and delay caused:** examines the effectiveness of a legal-aid lawyer and the problems caused by increasing pendency of cases.
- **2.3** **The uncertainty and non-uniformity during sentencing:** evaluates the role played by stereotypes and biases in the minds of the judge, while he is pronouncing the judgment.

INTRODUCTION

'Laws were like cobwebs; where the small flies were caught, and the great break through.'[1]

[**Francis Bacon**]

At present, more than 2.5 crore criminal cases and 72.6 lakh civil cases are pending in trial courts.[2] The major contributors to this pendency are the states of Uttar Pradesh, Maharashtra, Gujarat, Karnataka, Orissa, Bihar and Rajasthan, with over 10 lakh cases pending in each of these states. There is currently a need for 77,000 more judges to clear the backlog, whereas the courts suffer a vacancy of 111 judges and 2801 judicial officers.[3] So much so, that it is said that it would take 300 years to clear this backlog, if we proceed at the current rate.

These facts are certainly a cause for worry, since the courts, burdened by such pendency are unable to redress the concerns of the citizens adequately. But what these statistics do not bring out is the kind of cases pending (are they for petty/serious offences), the time period and the social profile of the litigants involved (do they have the kind of resources to fight cases for so long, or are they deterred by the length of trials?) These factors determine the access to justice to the citizens

Access to Justice is a very wide term encompassing pendency of cases, the location of the courts, physical and monetary access *qua* the prisoners and litigants, 'technical legalese' :the law being beyond the understanding of the common man, and the provisions for out of court settlements.[4] But this paper is limited to examining access in terms of the social profile

[1] Gavin Drewry, *Law, Justice and Politics* (London: Longman Group Limited, 1975), at 123.
[2] N Vittal, "Can India Meet the Productivity Challenge?", *Central Vigilance Commission*, February 2002, *at* <http://cvc.nic.in/vscvc/cvcspeeches/sp4feb02.pdf>
[3] Department Related Parliamentary Standing Committee on Home Affairs 128th Report on the Code Of Criminal procedure (Amendment) Bill, 2006 *availible at* <http://www.prsindia.org/docs/bills/1167468093/scr1189073702_Code_of_Criminal_Procedure_Bill__2006.pdf>, at 15.
[4] Michael Zander, *The Hamlyn Lectures: The State of Justice* (London: Sweet & Maxwell, 2000), at 5.

of the litigants, i.e. their economic and social background, gender, the court procedures necessary and the consequences arising out of this. This can be done once the historical emergence and the need for the access to justice movement is understood.

For the purposes of this paper, access to justice, in the context of physical and material exclusion has been taken to refer to a multinational, reform-oriented coalition of government and legal workers and law and society scholars, whose primary concern is to increase the accessibility of the legal system, especially *qua* the common man.[5] Thus it is not just an **end in-itself**, rather the **means to the end of *social justice* to** prevent social exclusion, which has been defined as 'limited access to the full range of social citizenship rights, which precludes the poor from exercise of such rights.'[6]

The evaluation of the success of the governmental and private steps to improve legal knowledge and access to legal systems, especially for the poor, ignorant and the illiterate will be undertaken after examining the process at three steps: pre-trial physical and monetary barriers, trial delays and court prejudices in sentencing. For that, the access to justice movement first needs to be understood.

[5] Christine Parker, *Just Lawyers: Regulation and Access to Justice*, (New York: Oxford University Press, 1999), at 30.
[6] Hilary Sommerlad, "Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid", 31(3) *Journal of Law and Society* 345, 2004 at 349.

Chapter 1: THE ORIGINS OF THE ACCESS TO JUSTICE MOVEMENT

Law according to **Marx** is an instrument of class domination, since it is conservative and resistant to change.[7] Many a times, it reflects the prevalent biases in the society, such as those against the working class, trade-unions and labor laws etc.[8] The existence of law presupposes the existence of deviance (since emphasis on individuality leaves greater scope for non-conformity. Many theories have been propounded to explain the same, like the ***biological theory***, posited by Lombroso,[9] or the ***psychological*** theories. But these have been roundly critiqued and discarded in favor of sociological theories of crime.

One such theory was **Durkheim's** study on Crime and Deviance where he posited that when individuals from a particular class of people (generally lower class) are selected for treatment as deviants, they create a permanent class of deviants.[10] This occurs because of the discrimination they are subject to, on account of being labeled as deviants and hence accepted norms conflict with social reality. [11] It is in this context that I would like to explain access to justice, since even the innocent people get labeled as per their stereotype, which is perverse to the dictum of 'innocent until proven guilty,' and this lack of access to justice may lead to perverse circumstances where citizens decide to take up the law in their hands.

[7] *Supra* note 1, at 125.
[8] For instance *Heaton's Transport Ltd.* v. *Transport and General Workers' Union*, [1973] AC 15, where the trade unions were held legally responsible for the action of their shop stewards, even where such actions constituted unfair industrial actions, not authorized by the union.
[9] Here criminals were associated with certain body types and biological features (i.e *mesomorphs* as compared to *ectomorphs* were more likely to be delinquent. C.f. Anthony Giddens, *Sociology*, (4th edn.., Oxford: Blackwell Publishers Ltd., 2001), at 205
[10] Scot Wortley et al., "Just Des(s)erts? The Racial Polarization of Perceptions of Criminal Injustice", 31 (4) *Law and Society Review* 637, 1997,, at 638.
[11] Anthony Giddens, *Sociology* (4th edn.., Oxford: Blackwell Publishers Ltd., 2001), at 207.

1. A THE ACCESS TO JUSTICE MOVEMENT

The phrase 'Access to Justice' has been in vogue for some time now, a 'political, legal and rhetorical' symbol,[12] signifying the arrangements made by the state to ensure that the general public, especially the *indigent* people can avail the benefits of law and the legal system.[13] This was done to balance the tension between the theoretical provisions of rights in the constitution with their practical applications,[14] i.e. between legal and substantive justice.

Historically, it traces its popularization/recognition to the 1960s-1970s, where normative and empirical work for the Florence Access to Justice Project was undertaken by Cappelliti and others to help the socially disadvantaged take advantage over their legal rights.[15] It was a repercussion to the censure of liberalism, democracy and the concept of a '***rechtsstaat***' which had been questioned on grounds of their effectiveness in overcoming the earlier system. Earlier, people were discriminated against openly on the basis of their social position (for instance the **feudal Lords** in UK and the **Brahmans versus the Dalits** in India), which was discarded after the *bourgeois* revolution and the incorporation of the rule of law.[16]

The Cappelliti project was followed by Lord Woolf's 'Access to Justice' report in 1995, where he sought to revolutionize the civil litigation system, by promulgating the Civil Procedure Rules, 1998, meant to counter delays by using case-management and mediation methods.[17] Even the Australian federal Labor government commissioned an Access to Justice Advisory Committee, for the same purpose.[18] But these have had varying degrees of

[12] Austin Sarat, "Review: Access to Justice by Mauro Cappelletti ; Bryant Garth ; John Weisner ; Klaus-Friedrich Koch", , 94 (8) *Harvard Law Review* 1911, 1981, at 1911.
[13] *Supra* note 4, at 6.
[14] Lua Kamál Yuille, "No-one's perfect (not even close): Revaluating Access to Justice in United States and Western Europe", 42 *Columbia Journal of Transnational Law* 863, 2004, at 863.
[15] *Supra* note 12, at 1912.
[16] Mauro Cappelletti , "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to- Justice Movement ",56(3) *The Modern Law Review* 282, 1993, at 294.
[17] Kenneth M. Vorrasi, "England's Reform to Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England and the United States", 30 *Journal of Legislature* 361, 1993 at 380.
[18] *Ibid*, at 385.

success; while the US model did not lay as much emphasis on the government's role as UK, its focus on the other systems such as pro-bono work/public interest litigation firms etc. was appreciated.[19]

But these developments were not simultaneous; instead the whole movement was in waves[20]:

1. **Legal aid**- to improve access to formal means of justice by facilitating improved access to courts with the help of good attorneys. In light of the ineffective, existing UK system of ***munus honoroficum,***[21] India enacted Art.39A to provide for compulsory legal aid, and greater state affirmation of rights.
2. **Representation of Diffused Interests**- to eliminate the disadvantage of approaching the courts for private enforcement of rights of diffused interests by allowing for class actions.
3. **Informal justice**[22]- was a broader conception of justice, encompassing non-traditional, cheaper and speedier methods of dispute resolutions such as mediation, conciliation or *Lok Adalats* (as in India).

Thus, the Access to Justice Movement was a response to the formalistic, normative legal tradition, which failed to account for institutional responses and inequalities (social and economic). By acknowledging these drawbacks and the '**labeling effects**'; it purported to change the system which had precluded people from getting justice, due to the prejudices against them. This reform movement, responding to the societal needs, demands and aspirations,[23] did not seek to replace the traditional rights discourse, rather supplementing the same (unlike Critical Legal Studies). Therefore, it was a sociological response as much as anything else, adding a 'social dimension' to the rule of law. This **sociological perspective**

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[19] *Supra* note 14, at 906.
[20] Some like Cappelletti and Garth view the Access to Justice Movement in terms of 3 waves, while Parker views it in terms of 4 waves, since during Cappelleeti's time the 3rd wave was emerging. *See* Christine Parker, *Supra* note 5, at 32.

[21] These were the services provided by the private bar without compensation. Thus the state recognized the right to access, and supported it, *but* it did not undertake any affirmative action to guarantee it. C.f. Mauro Cappelletti ,"Access to Justice: Vol. I: A World Survey", (Mauro Cappelletti Ed., Milan: 1978)
[22] *Supra* note 5, at 38.
[23] *Supra* note 16, at 283.

is very important if we consider that a majority of the people affected by the lacunae in the system, who may be young with their lives ahead of them. If they were denied justice by neglecting this 'social-aspect', it would signal the waste of a bright generation.

1. B NEED FOR THE ACCESS TO JUSTICE MOVEMENT

Law is supposed to herald social change and meet the needs and aspirations of everyone,[24] the aim being not ***merely*** access to law, rather **access to justice**. But theory is disparate from practice, evinced from the fact that most cases are getting stuck in the system for many years, thereby creating a sense of distrust in the minds of citizens *qua* the courts. It is not just the number of years for which the cases are pending, but also, the type of cases pending which is a cause of concern. At the present scenario, more than 30,005 cases took more than 10 years to be disposed.[25] **While it is not in the hands of the court to control the types of cases coming before it, the disposal of such cases and uniform sentencing is surely their prerogative**. This problem can help understand the need for the Access to Justice Movement.

The judgments also suffer from a lack of consistency wherein the prescribed punishments and sentencing are not uniform across classes and sections of society. A study conducted in Chicago reported that the non-Whites and the laborers (race and income) were twice as likely to stay incarcerated between arrest and final disposition and be given longer prison sentences.[26] In India, this problem can be viewed by studying the trial courts wherein most cases get stalled because of hostile witnesses, who under threat or the lure of money retract their statements, and thus affect the chances of the poor victim, for instance the Zahira Sheikh (Best Bakery case).[27] The problem of hostile witnesses is so vast, that in August 2006,

[24] Justice Krishna Iyer, *Justice and Beyond*, (Delhi: Deep & Deep Publications, 1982), at 3.
[25] National Crime Records Bureau, "Snapshots: 2004", *available at* < www.nationmaster.com/country/in-india/cri-crime>
[26] Alan J. Lizotte, "Extra Legal Factors in Chicago's Criminal Courts: Testing the Conflict Model of Criminal Justice", 25(5) *Social Problems* 564, 1978, at 564.
[27] In Gujarat, India, 59 Hindus were killed after a train was burnt down by Muslim fanatics. In response, Gujarat faced its worst communal Hindu-Muslim riots, wherein 12 Muslims and 2 others were burnt down

the Law Commission of India came out with its 198th report on Witness Identity Protection and Witness Protection Programs.[28]

Thus the factors determining this access vary across countries such as exogenous factors like **race** (predominating in the US) and **occupation** (a laborer will always be worse off than his master, since we tend to believe the rich man more); and six endogenous variables like prior **arrests, evidence, seriousness of the case, not making bail**, **bail amount**, and **Legal Counsel's degree of success in sentencing**.[29] These variables introduce uncertainty in the justice procedure, which results in distrust, since people take the law into their hands. These disadvantages led to the emergence of the access to justice movement.

1. C ADVANTAGES OF THE MOVEMENT

In law, both parties can never emerge as winners, and it is inevitable that human error will creep in, and that the judgment will not be pronounced in ideal circumstances.[30] But to hold **such factors** (an inefficient legal system combined with technical procedures) responsible for ***the*** lack of Access to Justice is **incorrect**. Though it may have its drawbacks (which I will be expounding on, in the next chapter), it has helped incorporate norms alongside socio-economic and cultural practices, thereby answering **society's demand for an intervention**.

In theory, and in a lot of cases in practice, it has helped overcome three impediments (the three waves): [31]

1) **Economic inequality (legal aid)** - the poor can not afford good legal counsels to

alive allegedly by a Hindu mob in what was known by 'The Best Bakery Case.' The main witness Zahira Sheikh turned hostile under pressure from local politicians, so much so that the Supreme Court of India had to hold the trial outside India. *See* Geeta Pandey, "'Best Bakery perjurer' surrenders", *BBC, available at* <http://news.bbc.co.uk/2/hi/south_asia/4784776.stm>.

[28] Law Commission of India, "198th Report on Witness Identity Protection and Witness Protection Programs", August 2006, *available at* < http://lawcommissionofindia.nic.in/reports.htm>/.

[29] *Supra* note 26, at 567.

[30] *Supra* note 1, at 124.

[31] *Supra* note 16, at 283.

get them out on bail, nor can they afford the bail amount. This was sought to be remedied by the provisions of **legal aid** and **an attorney** for all those below a certain specified income bracket. They have a right to be informed about the same, since being illiterate and poor, they are often unaware of their rights[32] (although ignorance of law is no excuse)

2) **Organizational impediments (diffused interests) -** to facilitate collective action, since the individual was too small to play a significant role/effect a change. According to Justice Krishna Iyer, another reason for justice '***on the streets, rather than the courts***' is that the constitution with its mandate of socio-economic rights is in contradiction with the colonial Justice and law hangover.[33] These are not attuned to the Indian social realities and the 'mystiques of lacunose legalese and processual pyramids with sophisticated rules', along with 'slow-motion justice and high priced legal services has led to victimization of the common man.

3) **Procedural obstacles (informal justice)**- to overcome the current, traditional procedures through alternate dispute resolutions,[34] specialized or small claims courts such as the Family Courts or the Lok Adalats etc.

1. D LEGAL PROVISIONS IN TERMS OF LEGAL AID

The government in pursuance of Article 39A[35] of the Constitution has enacted suitable legislations like the NALSA Act (National Legal Services Authorities), 1995 which deal with matters like **legal aid, legal literacy and legal awareness** besides holding of Lok Adalats or "people's Courts".[36] This incorporated the provisions of S.12 of the Legal Services Authority Act, 1987 which laid down conditions precedent for applying for free legal aid.

[32] *Supra* note 1, at 132
[33] *Supra* note 24, at 19.
[34] *Supra* note 16, at 282.
[35] A. 39A: 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.
[36] Justice A.S. Anand, ": Access To Justice And The Role Of Courts - An Indian Experience", *The Journal of Law, available at* <http://www.thejournaloflaw.org/documents/0001_001.doc.>

Some of them are: being a woman/child, an SC/ST, an industrial workman or a victim of a disaster/trafficking etc.[37] the income limit set to Rs.25, 000 for all courts except the Supreme Court, for which the limit is Rs.50,000. NALSA also used Lok Adalats extensively, and one of its aims is to 'promote conciliation instead of litigation.'[38]

It is not just the Constitution and the laws passed in pursuance of it which have provided for legal aid. Case law has been developed in India which elaborates on Art. 39A read with Art. 22(1).[39] The foremost case is *Suk Das* v. *Union Territory of Arunachal Pradesh*,[40] where Justice Bhagwati clarified that failure to apply for legal aid ***would not*** preclude the accused from accessing such a right, and if he did not have the opportunity to do, his trial would be vitiated. Free legal assistance from the State is a fundamental right *vide Khatri (II)* v. *State of Bihar*[41] financial burden and administrative instability can be no excuse used by the State. Nor can the Magistrate shy away from his responsibilities from informing the accused, since most illiterate citizens are unaware of the provisions of legal aid and thus the intention of such a provision would fail. But these well-intended propositions seem to be nullified by the exceptions (to legal aid) stated in the *Khatri* case, namely economic offences and offences against laws prohibiting prostitution and child abuse. This disadvantages the 'innocent' accused, inasmuch as if we follow the principle of 'innocent until proven guilty,' then mere allegations should not affect an individual's legal aid.

Though these aims are undoubtedly noble, theory does not always translate into practice and many of the lawyers employed under this scheme are mostly unhelpful, to the extent that some of the accused did not even know the provisions of the act which were applicable to the case. The accused claimed that the lawyers would pass on the cases to other lawyers (in exchange for a 50% commission) without the requisite *vakalatnama*, and these people would

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[37] "History of Free Legal Aid in India", *Cyber Legal Aid, available at* <http://www.vmslaw.edu/cyberaid/vms%20legal%20aid/history%20of%20legal%20aid.htm>, *last visited on* 7th May 2008.
[38] R.C. Chopra, "NALSA: Legal Aid Movement in India-Its Developments and Status in India", *available at* <http://causelists.nic.in/nalsa/> *last visited on* 7th May 2008.
[39] Art. 22 (1): 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.
[40] [1986] 2 SCC 401.
[41] [1981] 1 SCC 627.

be left with no choice but to run around from lawyer to lawyer.

The lawyers may be obligated by their *dharma* to follow the professional ethics code, and uphold the tenets of the constitution,[42] but they are themselves a harassed lot. A visit to the trial courts in any district in any State in India will show you the conditions of the 50-60 year old buildings, which have spit and dirt all over, teeming with people. Lawyers do not have any offices of their own, rather they all sit outside in a row. The number of female lawyers in any of these courts is very low and they have to match up to their male counterparts in every field.[43]

Thus, the attempt of providing legal aid under the NALSA is commendable, especially considering that countries like UK, in pursuance of 'capping' their budget have abolished the provisions of legal aid and replaced it with a Legal Services Commission. This has been severely criticized on grounds that legal aid will cease to be a national service which is accessible equally, since capping will affect cases of equal merit differently.[44]

[42] Justice Krishna Iyer, *Law, Lawyers and Justice*, (Delhi: D.K. Publishers Distributors (P) Ltd., 1988), at 104.
[43] The researcher has visited some of the trial courts in Bangalore (Karantaka), Bhopal (Madhya Pradesh) and Delhi etc. these are the observations from the previous visits.
[44] *Supra* note 4, at 25.

Chapter 2: DISJUNCT BETWEEN LAW IN BOOKS AND LAW IN ACTION: ROLE OF THE SOCIAL PROFILE OF THE LITIGANTS IN THEIR ACCESS TO JUSTICE

The idea of an Access to Justice Movement is profound and this has been laid down in the statue books and constitution; nonetheless, the **law in action** is still beset by many **quandaries** which the researcher will be elucidating on, based on her **experience and observations during the course of fieldwork**. These have been divided into three stages:

1. Social exclusion in terms of access to courts
2. Inequality in terms of treatment during the course of the trial and delay caused
3. The uncertainty and non-uniformity during sentencing

2. A EXCLUSION IN TERMS OF ACCESS TO COURTS

Exclusion here has been taken to be in comparison to the rich can be divided into two stages:[45]

1. **Physical exclusion** in terms of coming before the courts due to prohibitive costs and distrust in the system and the police.
2. **Material exclusion** in terms of paucity of resources such as good attorneys, due to economic inequality resulting in 'not making bail' or matching the bribes.

In terms of the **first stage**, the distrust in the courts and the supposed bias in favor of the rich precludes the poor from approaching the courts.

This labeling by the police (as to who would/wouldn't be filing a truthful FIR) can be

[45] These observations are based on certain interviews conducted by the researcher in the course of her field study.

understood in terms of their reaction '***proactively***' v. '***reactively.***' Whereas in the former, the police act under pressure from society, in the latter their actions can be explained by understanding their pre-conceived notion that certain people have a greater proclivity toward crime as compared to others.[46] Though labeling theorists explain the effects (*ceteris Paribas* the police are more likely to arrest a poor man), they fail to explain the casual determinants for the same.[47]

Access to Justice envisages a situation where the common man can **lodge a complaint**, assuming that the people will apprehend the ***correct*** person. But both these situations do not occur. The police, on being questioned admitted to corruption, justifying it as education expenses, in lieu of a paltry Rs.7000 p.m. salary. The Inspector interviewed listed out four types of corruption which prevail:

> a) ***Nazrana***- money paid for future work, to keep the police in good books
> b) ***Shukrana***- money paid to show appreciation for the work already done by them
> *c)* ***Hakrana-*** money paid to do the present work. E.g. "If I help you, I want 5000/-
> *d)* ***Zabrana-*** when the police start negotiating, say "Rs. 5000 not enough, I want 10,000 to do your work"

While the 1st 3 are acceptable and allowed, the last one is taboo and **only 10%** of the police force engage in that. Money is not exchanged in the station, since there are cameras panning, but are kept with the ***paan/chai wala***, and collected by the police while on their daily round. Another impediment in this Access to Justice is the false implication of a man by say, implanting a knife on him and booking him under the Arms Act. The police justify this by terming it as '**harmless'**, since only '**serious'** criminals (with more than 4 cases pending) are implicated. It also helps the police in disposing off pending cases faster: "*It* ***is better that they are out than in, since they are a menace to society.*****"** Another contention postulated was that the police never bothered to search for any independent witnesses, and most of the

[46] Trevor Bennet, "The Social Distribution of Criminal Labels", *British Journal of Criminology*, 19 Brit. J. Criminology 134, 19(2), Apr. 1979, at 134.
[47] *Ibid.*, at 136.

witnesses listed out in the FIR were '**pocket witnesses'**[48] (the network of witnesses (like the *chai or paan wala*) which the police use on a need based basis.

Therefore, the prevailing perception of the lower classes is to view the courts as the 'rich man's court' who had a greater chances of winning the case, since the poor and the lower castes are considered inherently untrustworthy. This is because of having been labeled once, they face discrimination at all stages and behave as Durkheim had predicted. For instance, while on the roads of Bangalore, I observed a police man slap an auto driver, because he had collided with a motorcyclist and was 'arguing' with him. The auto-driver was helpless, since if he did anything else, the police man would have taken him to the police station and harassed him there. Thus instead of taking recourse to the law, he meekly submitted to the wrongdoings of the master/the powerful class. The police, knowing their upper-hand, label all such drivers as 'deviants' and emerge as the winners of this conflict.[49]

Exclusion occurs also in terms of **material exclusion**, i.e. after the FIR has been registered when economic inequality and the question of legal aid comes into play. Economic inequality has a direct bearing on the kind of attorney one can avail. The lower income groups are not able to afford the good, private attorneys and hence have to do with legal aid provided by the government.[50] The problem with such a system is that, since the compensation for the lawyers is minimal, it is the domain of mostly **inexperienced lawyers**, who use it as a training ground which is the case throughout the world, from the courts in Bhopal to USA.[51] Additionally, the kinds of matters taken up are limited, so as to avoid a conflict-of-interest with the regular clients.[52] Since the accused was generally from a lower/middle income group, he had to make do with a relatively inexperienced lawyer.

The problem of the Indian courts can be evinced from the fact that the Indian courts acquit

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[48] These people later turn hostile, not being able to face intense cross examination, since they were not present at the site of the incident and hence do not know the exact details); or were the relatives or acquaintances of the informant, who were not present at the site of the incident/accident

[49] *Supra* note 10, at 648.

[50] *Supra* note 26, at 564.

[51] Rodney Uphoff, "Convicting the Innocent: Aberration or Systemic Problem", *Wisconsin Law Review*, Legal Studies Research Paper Series: Research Paper No. 20:2006, Jun., 2006, 740, *available at* < http://ssrn.com/abstract=912310>,

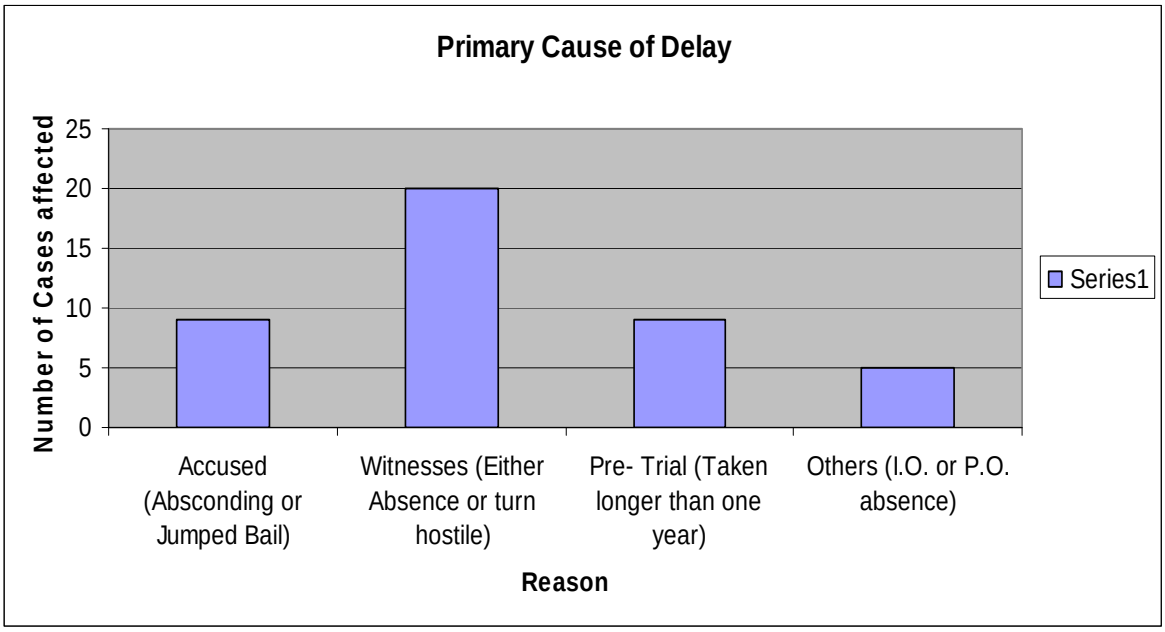
[52] *Supra* note 14, at 907.

the largest number of people[53] more than the 4 next countries put together. this could be because of the pervasive apathy and lethargy in the office of the Assistant Public Prosecutors' (*hereinafter* APP's) who are given a fixed salary, while the defense lawyers were paid on a case-to-case basis along with a commission. Therefore, there is no incentive for them to work. The APP's face the problem similar to most governmental organizations, i.e. they are overburdened combating a lack of resources like *manupatra* etc. Additionally, in civil cases, the *loser pays* principle also prevails, which acts as another deterrent to the poor man from going to court. Thus, both the physical and the material exclusion result in a sort of social exclusion, insofar as the poor are excluded from the justice system.

2 B. INEQUALITIES IN TERMS OF TREATMENT DURING THE COURSE OF THE TRIAL AND DELAY CAUSED

Once the citizens get past the police, they come to the courts, where they are faced with seemingly insurmountable delays, legalese, difficult procedures and the lawyers who take them for a ride. This is especially difficult for those who are on the fringes of the NALSA Act and thereby get excluded. Thus, they have to engage the services of a lawyer, who is generally not as well-connected, powerful and effective. This affects the accused, in terms of 'making the bail' and getting released. A study released claims that a richer person has a higher chance of making bail, with the help of a better attorney and a more favorable probation report.[54] But the bail aspect is a small part of the legal trial proceedings and the difficulties which the citizen is faced with. The larger problems deal with the delay in cases, which go on due to either absence of witnesses or accused. The following graph was obtained after interviewing a court clerk and examining the records of the Bangalore Courts.

[53] National Crime Statistics, *available at* < www.nationmaster.com/country/in-india/cri-crime>.
[54] *Supra* note 26, at 566.



This affected the Access to Justice, since the citizens get stuck in the courts for many years. The absence/hostility of the witnesses can be attributed to the social profile of the accused and the victims. The cases analyzed can be divided into three groups:

a) **Poor-Poor**: Here both the accused and the victim were of the lower income strata, and thus were left to the whims of their respective lawyers, or even worse the *babus*/court clerks. The latter took bribes worth Rs.20-50 for even the smallest work like taking out case files, or for issuing the summons as directed by the court. The poor citizen is sometimes left at the mercy of this police-*babu* nexus.

b) **Powerful-Poor**: Here the accused is the local goon and the victim/informant is an ordinary poor citizen. The accused generally pays the witness between Rs. 2000-5000 for non-appearance., who usually agrees since he is not familiar with the law and would prefer steering away from the courts. In the more serious cases, where the impugned punishment is greater, even threat and intimidation is used. The lawyers are many a times used to strike such deals, and thus though theoretically, *prima facie* the legal aid provisions and the law seem sound, the practical application is something beyond the very realms of law. Judges themselves accept that income inequality affects the equality of a trial. For instance, Justice Black once said, "**There can never be equal justice where the kind of trial a man gets depends on the**

amount of money he has."[55]

c) **Poor-Powerful**: Occurs in cases where the accused is generally a driver, and the victims is a rich/powerful individual. Here the economic inequality results in difference in the lawyers selected. So while the victim may engage the services of an experienced/ in the case of district courts: the senior lawyer (who is well connected), the accused is left for the already overburdened APP.[56]

One of the ways to circumvent this problem has been an increased use of alternate dispute resolution measures, which focuses on mediation, negotiation, conciliation etc. Another way to improve the pendency rate is using methods such as Differentiated Case Management (*hereinafter* DCM) which emphasizes on pre-trial allocation of resources through time tables, listing orders etc. so that specific number of days is assigned for each process. [57] DCM is different from traditional case management, since the latter believes in the FIFO (First In First Out) Concept as being fair, and the case status and age are determined only later at an issue conference, calendar call or trial date.[58] DCM follows a tracking system; assigning cases on the level of the resources, time and management required instead of holding the belief that within a conventional category of say criminal, civil or family law, all case are the same.

2 C. UNCERTAINTIES AND NON-UNIFORMITY DURING SENTENCING

This sub-section can best be explained with the help of Scrutton LJ. acknowledgement of the inherent bias of all judges, when he said, "***How can a Labor man and an trade unionist get impartial justice?***"[59]

[55] *Supra* note 46, at 780.

[56] All these reports are based on interviews conduced by various lawyers

[57] "Civil (Non Domestic) Differentiated Case Management Plan for Howard County, Maryland, at 1 *available at*
< http://www.courts.state.md.us/circuit/howard/pdfs/civilnddcm2007.pdf>

[58] Holly Bakke & Maureen Solomon, "Case Differentiation: an approach to Individualized Case Management", *Judicature*, 73 Judicature 17 1989-1990.

[59] *Supra* note 1, at 129.

During the course of sentencing, these biases come into play, and can range from biases *qua* colour, gender or caste. It is here that ***labeling theory*** (an 'interactionist theory)[60] propounded by Becker. This looks at deviance as a 'process of interaction' between deviants and non-deviants. Here the label is both the cause and the effect, and the important question is not the actual deviant behavior, but the process of labeling, i.e. who applies the label to whom and when?[61] They posit that an individual from a less powerful group is more likely to be labeled a deviant for the same act, as compared to an individual from a dominating group, since one is defined by one's race, gender, social class and characteristics which together are ascribed by their social status.[62] Nevertheless, it was this fixation with the process of labeling itself, and the disregard for the actual behavior of the deviant which led to the evolution of the *Conflict* theorists. This assumes that society is in a state of conflict and *law is a type of social control*, though 'power' determines the outcome of this conflict.[63] George Vold posed questions such as "Why are some acts defined as criminal, while others are not?" It is this, and not the reasons for committing a crime which are given greater importance.

But, irrespective of various criminology theories, judges ascribe to biases on the basis of stereotypes which relate to:

a) **Description**- the defining characteristics of the accused, whether gentle/rough/loud. The public perception, influencing the judges is to equate violence with crime, and therefore, a criminal is perceived to be ruthless, pathological evil predator who is sick, mad or bad.[64] This perception can be traced to the depiction if crime in **popular culture** (movies, books etc.) where economic crimes or others are not touched on.
b) **Motivation** – the imputation of his motives and judgment of culpability, inasmuch would a woman be capable of committing a cold-blooded core, requiring use of physical strength?

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[60] *Supra* note 9, at 209.
[61] Ronald L. Akers, "Criminological Theories", (London: Fitzroy Dearborn Publishers, 1999), at 99.
[62] *Id*.
[63] *Supra* note 53, at 137.
[64] Sharon Casey and Philip Mohr, "Law and Order Politics, Public-Opinion Polls and the Media", *Psychiatry, Psychology and Law*, 12 Psychiatry Psychol. & L. 141, 12(1), 2005, at 144.

c) **Acceptance** – an assessment of the potential threat to society, i.e. the probability of a Black man committing a crime as compared to a legal White citizen.
d) **Disposition**- recommended lines of action to be taken, keeping in mind the first three criterions.[65]

Therefore, one of the many stereotypes which the judges ascribe to is a bias towards women, who are generally labeled as 'uncriminal.' Most of the times women are perceived as poor victims of male oppression and society's disinterest, though some people take the contradictory view of women being cunning and counting on male chivalry to escape punishment.[66] In India judges seem to be taking the former view, actually holding that '*Indian women don't lie*' since it would bring '*disrepute to their character and would result in the loss of love and respect of society.*'[67] This may be due to that fact that most of the offenders who come before the lower courts are men and therefore, when the occasional woman offender does come, the judge takes a lenient view towards her.

The number of females currently in India's prisons is 3%.[68] Such statistics clearly create a certain stereotype in the mind of the judge, which comes into affect when he pronounces the sentence of the accused. But the stereotype exists as long as the individual behaves as expected, i.e. a woman who rides a bike, wears torn jeans and chews gum would probably discriminated even more than a man, since she does not fit into her 'societal description.'[69] Another such stereotype is that of colour and race, as was evinced from the **JustDesserts** case,[70] wherein the entire white population was regarded as victims of racial-crime.[71] Such stereotypes are one of the single biggest reasons which act as an impediment to the access to justice for innocent people whose only crime is their colour/ the other person's (accused's) gender.

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[65] Dretha M. Phillips and Lois B. DeFleur, "Gender Ascription and the Stereotyping of Deviants", *Journal of Criminology*, 20 Criminology 431 1982, 20(3 and 4), Nov., 1982, at 434.
[66] *Supra* note 57, at 433.

[67] *Bharwada Bhoginbhai Hirjibai* v. *State Of Gujra*t, AIR 1983 SC 753.
[68] India Crime Statistics, http://www.nationmaster.com/country/in-india/cri-crime
[69] *Supra* note 57, at 435.
[70] In this case, three black men stormed into a cafeteria, Just Desserts and murdered a white woman, in the process of robbing the cafeteria. This resulted in a lot of racial hatred and the case got blown out of proportion to represent a black v. white issue. C.f. *Supra* note 10, at 645.
[71] *Supra* note 10, at, 644.

The judge's greatest predicament is how to balance justice on a case-by-case basis with the public enforced norms and stereotypes. By upholding the public opinion (which is often shaped by the media), the judge may be sentencing incorrectly, but the cost of not doing so, would be to incur the public distrust (who are anyhow not familiar with the nuances of the case).[72] This explains the nature of the problem with the access to justice movement. Though in theory it seems a very 'achievable' solution, in practice it falls short, on account of three grounds, namely access to courts, inequality in terms of the course of the trial and delay caused and the uncertainty and inconsistency during sentencing. The problem lies in the fact that despite the reputations which the courts have acquired, they are still viewed by the citizens as their only way out in desperation, although this is reducing.[73]

But sometimes, the problem lies not in the fact that the sentencing was unfair, but in the treatment in the prisons. India has a bad record of custodial violence, since there were 86 custodial deaths in India in 2004, out of which there were 2 cases of custodial rape. Nonetheless, only 15 police men were charge-sheeted and only 4 were convicted.[74] Thus it is even more essential that we ensure that there is proper access to justice.

[72] *Supra* note 58, at144.
[73] Marc Galanter and Jayant K. Krishnan, "'Bread for the Poor': Access to Justice and the Rights of the Needy in India", *Hastings Law Journal*, 55, Mar., 2004, pp. 789-834, at 790.
[74] *Supra* note 25.

CONCLUSION

The Access to Justice Movement began as a response to the existing inequalities in the system and the neglect of the institutional failures, to uphold the rule of law and ***rechtsstaat.*** It endeavored to tackle the inequalities (poverty) present which were resulting in a lack of access to the courts of law, and distrust *qua* the same, especially on account of inordinate delays and inconsistency in sentencing. All this had led to a situation where the people were taking the law in their hands by following the '*might is right*' philosophy.[75]

Thus, though the aims of our Access to Justice Program were lofty, inasmuch as they aimed to provide all citizens, high or low, equal justice ***through law-in-action,***[76] this may not have been the case in practice. The question which needs to be considered is "**Does it make sense to ask for Justice, if the Justice delivered is not worth obtaining**?"[77] Consequently, is access to justice a value or an end in itself? According to Krishna Iyer, **Justice** is an **end** of the government, whereas **law is an instrument**',[78] since each case reflects a certain human element, and not just a 'cold question of law'.[79]

If this is the case, then the end is certainly not being met. This was the question which the researcher had set out to answer at the beginning of the paper, and after a thorough analysis the researcher's conclusion is that **justice is not being meted out** and the **courts clearly reflect an upper class bias** (even if not consciously in the sense of active discrimination, at-least indirectly since the tedious and expensive procedure preclude the poor man from accessing the courts in the first place.)

During the course of research, it emerged that the story **behind the scenes** is something completely different. The police, *supposedly* the **guardians** of law, were one of the main

[75] *Supra* note 33.
[76] *Supra* note 39, at 107.
[77] *Supra* note 12, at t 1919.
[78] *Supra* note 39, at 9.
[79] *Supra* note 24, at 3.

organizations responsible for the problem. They are the first impediment to the access to justice, due to their refusal to lodge FIR's and the amount of bribe which needs to be given. If the citizen does get past the police, he is confronted with inordinately long cases, which require money and more importantly will and faith to fight.[80] The last barrier to access of justice was the inconsistency in sentencing which is a product of the judge's inherent biases and the consequences of labeling.

These three factors prove that the law in books is different from the law in action, and if the two are to be reconciled, steps like popularization of alternate dispute resolution measures need to be undertaken. Though, the access to justice movement is a step in the right direction, it still needs to be taken forward, if the socially disadvantaged are to take advantage over their legal rights. The negative consequences of this could be that, losing faith in the system in lieu of delays and labels, they would take the law into their hands.

The aim of the justice system should be '**equal justice according to law**' **being a living reality, and not merely as a 'litigative possibility**'.[81]

[80] Sometimes, it is not so much the lack of money which is the impediment, but the loss of the faith in the system and the assumption that the case will go in favor of those who command greater resourced.
[81] Justice Krishna Iyer, "Law versus Justice", (Delhi: Deep & Deep Publications, 1989), at 10.