

# ACCESS TO JUSTICE



## Background Note for Regional Consultations on UPR II

Access to justice implies the existence of a normative framework of justice, access to mechanisms of justice and delivery of equitable justice, without bias or blindness. It encompasses the following elements:

- a) A **normative framework** (compatible with human rights and constitutional standards) implemented through statutes, policies and other measures meant to ensure a meaningful application of the norms to the specific realities of diverse groups, particularly the most disadvantaged. Special provisions and measures, including through affirmative action, are necessary to ensure equality of outcomes in realization of fundamental rights to all.
- b) It implies **access to the mechanisms of justice to all**, particularly the most disadvantaged and marginalized, through special procedures where necessary to make justice accessible to them.
- c) It includes the **freedom from bias or blindness** to socio economic realities, or other disabilities, in the substantive law, the interpretation and the application of the law, and in access to mechanisms of justice, as it reinforces pre-existing inequalities, disadvantages and barriers to justice.
- d) Deliverance of equitable justice is also evaluated from the **quality and level of judicial pronouncements** on contestations that raise the issue of the human rights of all, and especially the most marginalized of the population. Representation of a plurality of opinions and faces within the structures of justice delivery, if based on sound and tested principles are also guarantors of a profound justice delivery system and mechanism.

## MECHANISMS FOR ASSISTANCE TOWARDS ACHIEVEING ACCESS TO JUSTICE

There are constitutional and statutory guarantees which enable access to justice. These include:

- The *Legal Services Authorities Act, 1987* to give a statutory base and uniformity to legal aid programmes throughout the country. The Act came into force on 9th of November, 1995. The *Legal Services Authorities Act* deals with the role of Lok Adalats and Legal Aid in India. It is necessary to note that Section 20 (4) of the *Legal Services Authorities Act* ensures that a Lok Adalat cannot side with any one party but rather aims to arrive at a compromise.
- Section 89 of the *Civil Procedure Code* was amended in 2002 to enlarge the power of the courts to refer cases to Lok Adalats. It is now possible for a court to steer cases into Lok Adalats on the basis of judicial opinion even if the parties concerned do not wish to transfer their case to a Lok Adalat.
- Section 12 of The *Legal Services Authorities Act* determines who is entitled to legal aid.<sup>1</sup> The Legal

1 "Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is-

- (a) A member of a Scheduled Caste or Scheduled Tribe;
- (b) A victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
- (c) A woman or a child;
- (d) A mentally ill or otherwise disabled person;
- (e) A person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

Services Authorities, after examining the eligibility criteria of an applicant and the existence of a prima facie case in her favour, provide her a counsel at state expense, pay the required court fee in the matter and bear all incidental expenses in connection with the case.

- For children in contact with law, special mechanisms have been designated under the justice system, *The Juvenile Justice (Care and Protection) Act, 2000*. These include setting up of: (1) Juvenile Justice Boards, (2) Child Welfare Committees and (3) Children Courts.

## REALITIES OF ACCESS TO JUSTICE GUARANTEES

**Systemic impediments:** The criminal justice system is generally flawed with many systemic impediments. Some of main issues of concern are the following:

- In practice, people face **everyday difficulties in accessing** the justice system. The Indian legal system is complex and difficult to understand, with no major effort by the state, the police and the courts to assist the common man in understanding the law and claiming their rights. Because of the way the legal system is constructed (expensive, bureaucratic and involving endemic delay), it tends to become discriminatory and victimizes the poor and the rural population.
- Instead of facilitating access to justice, **the police is often a major impediment**. On the one hand, the police is regularly accused of not registering complaints (First Information Reports, FIR), which blocks access to the entire justice delivery system. On the other hand, the police is often associated to gross violations of human rights, including: illegal arrests, detention, filing of false cases, fakes encounters, custodial death, torture, rape, extortion and corruption.
- A strong **culture of impunity of the powerful** is being perpetuated by section 197 of the Code of Criminal Procedure, which requires prior sanction of the state (often a guilty party or collaborator) for prosecution of individuals who come under the category of “public servant.” In practice it is almost impossible to file complaints against a police officer, a magistrate, or a prison official.
- **Jails are overcrowded** and there are long drawn delays between charging and conviction of accused. D K Basu guidelines and Jail Manuals are flagrantly violated throughout the country.
- Justice delivery also relates to the establishments of Directorates of Prosecution in various states since in the all pervasive culture of Impunity, the state that is meant to prosecute crimes and punish the guilty is often the main subvertor of this deliverance by **weakening investigations**. This process takes place through pressure and influence as well as by the appointment of inefficient or compromised lawyers as prosecutors.
- The quality of **legal aid** is also a matter of concern. The continued relevance and appeal of accessible customary adjudication mechanisms, in conjunction with the inaccessibility of the formal legal system (and its limited notions of justice) has led many community organizations and NGOs to work with the customary systems, or establish alternative forums of dispute resolution/ mediation. Access to justice interventions by donor agencies have also sought to work with customary mechanisms of adjudication. However, there are concerns about ways in which such mechanisms reinforce and legitimize social inequalities, through their composition, norms and approaches.

**New legislation and policy** – There are many relevant laws, which have been drafted and are awaiting discussion to address some of the issues mentioned above, for instance the *Right to Justice Bill*, the *Judicial Accountability*

---

(f) An industrial workman; or

(g) In custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956), or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986), or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or

(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.”

*Bill*, and amendments to criminal law on sexual violence. Some states have recently passed (while some others are adopting) a *Right to Services Bill*, which seeks to guarantee the delivery of public services within stipulated time frames. The proposed *Prevention of Torture Bill*, and the overall push for police and prisons reforms can also provide a considerable check on excesses by the police in custody. There is also a dire need for a robust Witness Protection Programme and mechanisms to ensure time bound trials. In all these legislative efforts, it is crucial that the state engages in adequate and comprehensive pre-legislative consultations. This is also a requirement under the RTI Act.

Access to justice is particularly problematic to those constituencies most vulnerable to human rights abuse, specifically: (1) Dalits, (2) Indigenous People, (3) Economically Most Disadvantaged, (4) Women, (5) Children, (6) Religious and other minorities, (7) Persons with Disabilities (PWD), (8) Lesbian, Gay, Bisexual and Transgender people (LGBT).

Barriers to access to justice may also be caused by specific contexts such as under:

- Communal or caste based violence.
- Structural disadvantages such as low literacy levels, lack of requisite social and economic resources.
- Barriers specific to the legal system, for example, inaccessible language of the law, delays, and the long, cumbersome, and expensive legal process.
- The failure of the Legal Aid and Legal Redressal Authorities often deeply affects the access of the most marginalized sections of the society.