7.1 Introduction

Hon'ble Justice V.R. Krishna Iyer, in a Report of the Expert Committee, which was the first comprehensive report on legal aid titled, ‘Processual Justice to the People’. Chaired by him in May, 1973, wrote:

“The socio-legal landscape of India reveals large valleys of penury, illiteracy as social squalor over which presently blow strong winds of aspiration and change. A strong, though exaggerated criticism has been voiced in some quarters, that side by side, in uneasy co-existence, survives a law administration shaped by the British and enshrining values of wholly indigenous or agreeable to Indian conditions, scaring away or victimizing the weak through slow-motion justice, high-priced legal services long distance delivery centers, mystiques of legalese and lacunose laws and a processual pyramid made up of teetering tiers and sophisticated rules and tools. Our nation, with all its hopes and all its boasts, can never really be free and just till all its citizens, high and low, can claim equal justice though law-in-action.

And by offering legal advice and counsel in Court, by educating people in their legal rights and helping to win them in practice, by reducing or
subsiding the cost and delay of litigation, by
listening to the grievances of the humble and by
identifying where law lags or is injuriously
obscure and suggesting suitable action through
reform-oriented litigation or legislation, by
championing the cause of the worker, wife,
consumer, tenant, tiller and victim of wooden
officialdom, injecting into legal studies and
research the problems of law and poverty, by
involving the community in the judicial process at
certain levels and through other forward looking
measures, the legal aid ensemble seeks to make the
rule of law a dependable ally of the weak and a
liaison between the statue book and the deprived.
Law leads to order only with legal aid, and
tensions and mass violations are often the
syndrome of the malady of Law versus Poverty.
Legal aid, if efficacious, creates a vested interest
for the poor in the law”.

Justice V.R. Krishna Iyer, while heading an expert committee
on legal aid, stated and quoted in the famous case of M.H. Hoscot v.
State of Maharashtra.1 “The finest hour of the Indian Bar arrives not
when a fancied few draw astronomical incomes but when the
profession as a whole with a lively sense of internal distributive
justice agrees to be geared to a scheme of legal service at once
competent, cheap and socially promising”.

The notion of access to justice inheres within its compass the
notion of justice with two basic purposes of ensuring that each is able
to invoke the legal process for redressal, irrespective of the social or

1 (1978) 3 SCC 544.
economic status; and that each should receive just and fair treatment within the legal system. The question of equal/easy access to justice can be used as a tool for achieving social objectives.

The ‘non-access to justice’ is also called ‘docket exclusion’ in the sense that the ‘have-nots’ are excluded from the system in the sense that either they are not able to seek redressal of their grievances or they reach the Court but are not able to articulate themselves by not proving the case for want of effective service of lawyers and for delay in administration of justice. However, the former aspect has been discussed in this chapter, whereas the latter part is partly discussed in the other chapters.


“17. The present case is a glaring instance of the hard reality that access to justice is not limited to access to Courts. Undoubtedly, the constitutional mandate creates an ideal legal system that treats everyone equally. The legal system seeks to ensure protection of equality, liberty and justice. However, to those living on the fringes of society and are marginalised, the psychological ability and impetus to take the decision to approach the Court would be lacking. There is neither the finance nor the necessary family or social support system to facilitate access to the formal justice dispensation mechanisms. Illiteracy and lack of awareness, fear and lack of trust in judicial authorities may also constitute tremendous barriers.”
7.1.1 Though Equal yet Unequal

“Whatever standards a man chooses to set for himself, be they religious, moral, social or purely rational in origin, it is the law which prescribes and his rights and duties towards the other members of the community. This somewhat arbitrary collection of principles he has very largely to take as he finds and in a modern society it tends to be so diverse and complex that the help of an expert is often essential not merely to enforce or defend legal rights but to recognize, identify and define them”.

Mathews and Outton\textsuperscript{2}

The poverty is the greatest barrier to justice. Though we are all equal before law, we are not socially and economically equal. Yet “Human beings are entitled to be treated as if they are equal on all matters important to them and matters really important to them are matters that are common to them”.\textsuperscript{3} Equality needs no justification. Belief in equity, namely, one man should not be preferred to another without sufficient reason, is a deep rooted principle of human thought.\textsuperscript{4} Men cannot be absolutely equal. One may have better qualities, better nature, and better mind than the other. These are intrinsic values which distinguish man from man. The assertion that all persons are equal in law implies that in some fundamental respects which are crucial to the very existence of a person as dignified individual regardless of obvious differences between them, get the same treatment in society. In simple language, the basis of the notion

\begin{itemize}
\item Mathews and Outton, \textit{Legal Aid & Advice}, (Butterworths, London, 1971).
\item K.K. Mathew, \textit{Right to Equity and Poverty under the Indian Constiution}, 6 (National, Delhi, 1980).
\item \textit{Id.} at 6.
\end{itemize}

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of equality is that, "the poorest he that is in England, has a life to live as the richest he". The American Declaration of Independence says:

We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit by their happiness that so secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

Equality means that adequate opportunities are laid open to all. By adequate opportunities we mean equal opportunities but not necessarily equal benefits. All of us cannot be treated in the same manner unless all of us are equal in upbringing and education, which is unthinkable. Children who come hungry to school cannot profit by education in the same manner as those who are well fed. The provision of adequate opportunities is therefore, one of the basis conditions of equality. No one can prevent natural differences, but their injurious effects on society may be minimized by the welfare laws.

But Swami Vivekananda, the great Hindu monk of India was apprehensive of even the doctrine of equality of opportunity. He provides that the equality of opportunity does not solve the problems in equality but becomes a mask to conceal the accentuation of social injustice where opportunities, though equal in law, become in fact more sharply unequal, owing to many causes, including primarily the mal-distribution of wealth and income and of educational opportunity. Swami Vivekananda suggested that greater help must be given to him, whom nature has not endowed with an acute intellect from birth. He says, that if Brahmin is clever, he will teach himself. If the others are not born clever, let them have all the teachings and the teachers they

\[ld: at 4.\]
want. Swami Vivekananda suggests that if there is inequality in nature, weaker should be given more chance.

Swami Vivekananda admitted that exact equality cannot be attained, but what can be attained is elimination of privilege. According to the Swamiji, the difficulty is not that one body of men are naturally more intelligent than the other, but whether a body of men, because they have the advantage of intelligence should take away even physical enjoyment from those who do not possess that advantage. Some people, through natural aptitude, should be able to accumulate more wealth than others is natural, but on account of the power to acquire wealth, they should tyrannise and ride roughshod over others is not part of the law; and the fight is against that Swami Vivekananda had struck this beautiful note as early as nineteenth century.  

7.1.2 ‘Access to Justice’ and ‘Legal Aid’: Meaning and Significance

Our system is based upon the rule of law. Therefore, if the people approach the Courts of law for redressal of grievances, the system must provide for everything at its command to see and ensure that they have real access to the Courts. If the doors of the Courts are not wide open to the disputants, it would be a mockery of the ‘rule of law’. The access is not merely superficial attendance in Court. It connotes ‘access’ in letter and spirit.

The legal Aid is a movement that envisages that the poor have easy access to Courts and other government agencies. It implies that the decisions rendered are fair and just taking account of the rights and disabilities of parties. The focus of legal aid is on distributive

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justice, effective implementation of welfare benefits and elimination of social structural discrimination against the poor.

Conventionally, ‘Legal Aid’ has been taken to mean the organized effort of the bar council, the community and the government to provide the services of lawyers free, or for a token charge, to persons who cannot afford the usual exorbitant fees. Inability to consult or to be represented by a lawyer may amount to the same thing as being deprived of the security of law.

‘Legal Aid’ traditionally means providing lawyers for persons who are unable to pay fees for legal services. Its object is to make it impossible for any man, woman, or child to be denied the equal protection of the laws simply because he or she is poor. The idea underlying the same is that no person should on account of poverty or lack of means, suffer an injustice for the redress of which a remedy is provided by the Courts of Law or by administrative tribunals. ‘Legal aid is the right of every indigent’ and constitutional obligation of the government. The concept of Legal aid has broadened in the social welfare State. Now it means not only representation through lawyer at state expenses in Court proceedings but includes legal advice, legal awareness, legal mobilization, public interest litigation, law reform and a variety of strategic and preventive services, which instead of assisting each individual case basis, will help them as a class to avoid helplessness arising from poverty, and promote equal access to justice.

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10 Background Material for Workshop on Legal Aid and Clinical Education, organised by CH.A.S. Pondicherry, (January, 1985)
In the present adversary system of adjudication, the access to the Courts cannot be equal unless the parties are placed at equal footing economically, culturally and educationally. The poverty is the greatest barrier to access. Inaccessibility due to poverty is not a new problem. It is an age old problem and the indigents have always been denied the access. The Story of Alice\textsuperscript{11} begging the Courts for help because she was very poor and her adversary was very rich, and she has none to plead for her, has been repeated oft times. As the political philosophy of the state is changing, the 'access' approach is also widening. In the present welfare concept, the “access to justice” has emerged as a social right of the individual and to protect this right, the state is under duty to act positively. This is what can be described as ‘Access to Justice’ which covers a wide range of activities and the traditional and relatively narrower concept of ‘Legal Aid’ has surpassed the necessary phase and a plethora of judgments and the upheavals in the Indian political and judicial front which is discussed in the latter part of the chapter.

Smith conceptually believed that legal aid should be an integral part of the administration of justice. He felt that since judges and clerks were paid out of public funds, the legal aid lawyer should also be paid out of public fund. He remarked in his book, “Justice is not merchandise; it cannot be granted or withheld according to the purchasing power of the applicant. It is the affirmative duty of the state, at public expenses, to do all that is needful to secure justice to everyone. The state does afford all that is necessary with the exception of the attorney. As this omission is fatal in certain cases, the argument

\textsuperscript{11} Maguire, Story of Alice is discussed with other similar stories in “Poverty and Civil Litigation”, 36 Harvard Law Review, 361 (1923).
concludes that the state must administer its justice better by supplying the attorney in such cases'.'

The opaque canvas of 'non-access to justice' has to be painted in such a manner that it could truly depict the miseries of the 'have-nots' and could ensure the meaning and significance of democracy and could pave the way to sort out the problems of the people who, by way of compulsion or choice, litigate before the Courts of Justice. The significance lies in the fact that in case such a system of ensuring access to justice, does not exist, there can not be worst travesty of justice than deciding the matters upon hearing one party for the other party does not know, does not have ability to understand the consequences of the decision. Therefore, most of the systems of the world have evolved the system of free legal aid with different parameters keeping in view the needs of their society in mind, but with the same underlying idea.

7.1.3 Civil Legal Aid and Criminal Legal Aid: Distinction

The legal aid schemes and statutes have tended to treat civil and criminal legal aid as two parts of one comprehensive plan of legal services. The peculiarities that characterise criminal legal aid may not get adequately acknowledged in such a treatment for the reason that the denial of legal aid in the criminal justice system entails severe consequences for the person in the form of loss of liberty, and therefore, it may not be possible for the state of excuse itself of the liability to provide access to justice in this area. The important points of distinction between civil and criminal legal aid are as follows:

(a) A person is invariably defending himself against state action in criminal proceedings. This is non-voluntary and the person is an unwitting participant in the legal process.

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Such person would require access to justice which is fair and reasonable. In Civil proceedings, the person may, very often be invoking the legal processes for relief, and the decision is bound to go against him in the form of ex parte proceedings presuming that he has nothing to say against the alleged claim.

(b) 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 mechanism. While non-formal legal systems and community mechanism\(^\text{13}\) lend themselves to providing a forum for resolution of civil disputes, disputes arising in the criminal jurisdiction are bound by the rigid rules of procedure. Notwithstanding the existence of alternative and non-formal legal systems, like nyaya panchayat, the criminal disputes of a serious nature may not lend themselves to satisfactory resolution in these fora.\(^\text{14}\) For long, the criminal trials have involved complex procedures and rules of evidence that make the requirement of representation of the accused by a person trained in the law indispensable. This may not be practical or even permissible in the context of the adjudicatory functions of nyaya panchayat.

(c) Another point of difference is the participation of lawyers in the systems. The 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

\(^\text{13}\) Upendra Baxi. *Towards a Sociology of India Law*, 78 (Satavahan, 1986).


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becomes a necessity for providing procedural fairness.\textsuperscript{15} ‘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 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 facilities which is supposed to be the happiest method of arriving at the truth”. Much of criminal trial is taken up with 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.

(d) The accessibility of the lawyers to the clients differs significantly since they rarely move outside the Court premises or their chambers or their places of work. Unlike civil litigation, the criminal cases involving clients held in custody, would require lawyers to visit their clients to seek instructions. In practice, however, this does not easily happen. The Prisoners are less likely to be able to consult their counsel on a regular basis since visits by lawyers to jails are not frequent and is further made difficult by the rules in the prison manuals. The prisoners have to wait for the dates of their production in Court or depend on relatives and friends to be able to meet and consult their lawyers.

(e) While costs can be awarded and recovered (even though only partially) in civil cases, none at all can be won by

\textsuperscript{15} This has been brought out succinctly in the observation of Didcott, J of the Natal Provincial Court in South Africa in \textit{S v. Khanwile}, 1988(3) SA 795, 798-99.
the successful accused.22 (there is no provision in the CrPC, 1973 for a criminal Court to award costs of the proceedings in favour of an accused who is acquitted. Even in practice, Courts are not known to award costs to the accused who secures an acquittal. Section 357 of CrPC, 1973 only deals with the question of compensating the victims of a crime upon conviction of the accused. Initiating proceedings under Sections 219 or 220 of Indian Penal Code against the police officer for malicious prosecution or even instituting civil proceedings for damages would require legal aid and push the person acquitted back into litigation). The accused in a criminal case is a loser notwithstanding that he may ultimately be acquitted by the Court. Abraham Blumberg notes: The defendant in a criminal case and the material gain he may have acquired during the course of his illicit activism are soon parted. Not infrequently the ill-gotten fruits of the various modes of larceny are sequestered by defense lawyer in payment of his fee.16 He further notes, ‘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 arrest, incarceration, possible loss of job, expense and other traumas connected with his case is directed, by means of displacement, towards his lawyer. It is in this sense that


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it may be said that a criminal lawyer never really “win” a case.\textsuperscript{17}

(f) The legal profession also orders itself differently to meet the requirements of either system. While in civil litigation, the lawyers are prepared to accept contingency fee arrangements. The lawyer specializing in criminal law tends to collect his fees in advance.

(g) The repeat players represented by the state and its prosecuting agencies stand a far better chance to influence the way the law is interpreted rather than an accused in a case can be usefully adapted to criminal litigation as well.\textsuperscript{18} The attempts, though PIL, at initiating law reform and institutional reforms within the criminal justice system has not yet met with that significant degree of success.\textsuperscript{19}

(h) 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. ‘A system which is content to procure counsel in a criminal trial and to ignore the problems of pre-trial release, the social problems resulting from defendant’s poverty and his incarceration, and the prospects for his rehabilitation, is

\textsuperscript{17} Id. at 228.

\textsuperscript{18} The seminal work by Mare Galanter in Relation to Civil Litigation, “Why the “Haves” Come out Ahead” “Speculations on the Limits of Legal Change”, \textit{Law and Society}, 95 (Fall 1974).

\textsuperscript{19} Chapter 5. On the contrary, any talk of reformation of the criminal justice system, is with a view to restoring the faith of the ‘common man’. E.g., M.L. Sharma, “Need for Strengthening Criminal Laws”, \textit{CBI Bulletin}, (February, 2000), pp. 21-22, where he says:

“India’s criminal justice system is in shambles emboldening certain Sections of our people to take law in their own hands. . . . The common man has no concern with the intricacies and complexities of the law and niceties of procedure. He has lost faith in the criminal justice system which delivers so little”.

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very much like a doctor giving morphine to a patient who has a leg inflected with gangrene. It may give temporary relief from the pain but it does not help to solve the problems. The infection will continue to get worse unless something is done about the problem.  

(i) While the economic status (means) determine eligibility for legal aid in civil proceedings, such criteria are generally either not applied or are modified in their application to criminal proceedings. This accords with the notion of the qualifying need being defined ‘in terms of functional incapacity to obtain in adequate measure the representation and services required by the issues, whatever and whenever they appear’.

7.1.4 Access for whom

When we debate the concept of ‘access to justice’, an important question arises as to ‘whose access’ we are discussing. Whether it is of certain individuals or a group of persons, children, women, age-old/experienced wealth of nation, workers, victims of crimes like rape etc., under-trials, mentally-ill persons, detenues, destitute, beggars, handicap persons etc. Undisputedly, it applies to all vulnerable Sections of society including the aforesaid groups. It includes all those persons and groups which by reason of its disabilities and deficiencies whether social or economic or otherwise of any kind, are not able to reach the Court of Justice. It is at this stage that the concept of ‘locus standi’ was bid adieu by the Indian Supreme Court in the last more than three decades.

21 Thus, under Section 12 of the Legal Services Authorities Act, 1987, a person in custody is entitled to legal aid as a matter of right irrespective of his income.
In the landmark judgment titled as *S.P. Gupta v. President of India and Ors.*, delivered on 30 December, 1981, by a seven judge Constitutional bench headed by Justice P.N. Bhagwati, the Supreme Court of India discussed the concept of locus standi, and the cause of poor, unapproachable, downtrodden masses was recognized and it marked the beginning of an era which led to the emerging of the Public Interest Litigation in our country.

"13. When these writ petitions reached hearing before us, a preliminary objection was raised by Mr. Mridul, appearing on behalf of the Law Minister, challenging the locus standi of the petitioners in Iqbal Chagla's writ petition. He urged that the petitioners in that writ petition had not suffered any legal injury as a result of the issuance of the Circular by the Law Minister or the making of short term appointments by the Central Government and they had therefore no locus standi to maintain the writ petition assailing the constitutional validity of the Circular or the short term appointments. The legal injury, if at all, was caused to the additional Judges whose consent was sought to be obtained under the Circular or who were appointed for short terms and they alone were therefore entitled to impugn the constitutionality of the Circular and the short term appointments and not the petitioners. The basic postulate of the argument was that it is only a person who has suffered legal injury who can maintain a writ petition for redress and no third party can be permitted to have access to the Court for the

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purpose of seeking redress for the person injured. The same preliminary objection was urged by Mr. Mridul against the writ petition of S.P. Gupta and the contention was that the petitioner in that writ petition not having suffered any legal injury had no locus standi to maintain the writ petition. So far as the writ petition of V.M. Tarkunde is concerned, Mr. Mridul said that he would have had the same preliminary objection against the locus standi of the petitioner to maintain that writ petition because the petitioner had suffered no legal injury, but since S.N. Kumar had appeared, albeit as a respondent, and claimed relief against the decision of the Central Government not to appoint him for a further term and sought redress of the legal injury said to have been caused to him as a result of such decision, the lack of locus standi on the part of the petitioner was made good and the writ petition was maintainable. Mr. Mridul asserted that if S.N. Kumar had not appeared and sought relief against the decision of the Central Government discontinuing him as an additional Judge, the writ petition would have been liable to be rejected at the threshold on the ground that the petitioner had no locus standi to maintain the writ petition. This preliminary objection urged by Mr. Mridul raised a very interesting question of law relating to locus standi, or as the Americans call it ‘Standing’, in the area of public law. This question is of immense importance in a country like India where access to justice being restricted by social and economic constraints, it is necessary to democratise judicial
remedies, remove technical barriers against easy accessibility to Justice and promote public interest litigation so that the large masses of people belonging to the deprived and exploited Sections of humanity may be able to realise and enjoy the socio-economic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes”.

“17. It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. Where the weaker Sections of the community are concerned, such as under-trial prisoners languishing in jails without a trial
inmates of the Protective Home in Agra or Harijan workers engaged in road construction in the Ajmer District, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public spirited individual espousing their cause and seeking relief for them. This Court will readily respond even to a letter addressed by such individual acting pro bono publico. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The Court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public minded individual as a writ petition and act upon it.

Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights.
and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief. It is in this spirit that the Court has been entertaining letters for Judicial redress and treating them as writ petitions and we hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented approach. But we must hasten to make it clear that the individual who moves the Court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be activised at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the Court or even in the form of a regular writ petition filed in Court. We may also point out that as a matter of prudence and not as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases, where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of
persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal aid organisation which can take care of such cases”.

“19A. Now, as pointed out by Cappellatti in Vol III of his classic work on “Access to Justice” at page 520, “The traditional doctrine of standing (legitimatio ad causam) attributes the right to sue either to the private individual who ‘holds’ the right which is in need of judicial protection or in case of public rights, to the State itself, which sues in Courts through its organs”. The principle underlying the traditional rule of standing is that only the holder of the right can sue and it is therefore, held in many jurisdictions that since the State representing the public is the holder of the public rights, it alone can sue for redress of public injury or vindication of public interest. It is on this principle that in the United Kingdom, the Attorney-General is entrusted with the function of enforcing due observance of the law. The Attorney-General represents the public interest in its entirety and as pointed out by S.A. de Smith in “Judicial Review of Administrative Action” (Third edition) at page 403: “the general public has an interest in seeing that the law is obeyed and for this purpose, the Attorney General represents the public”. There is, therefore, a machinery in the United Kingdom for judicial redress for public injury and protection of social, collective, what
Cappellatti calls ‘diffuse’ rights and interests. We have no such machinery here. We have undoubtedly an Attorney General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field; see Sections 91 and 92 of the Civil Procedure Code, but even if we had a provision empowering the Attorney General or the Advocate General to take action for vindicating public interest, I doubt very much whether it would be effective. The Attorney General or the Advocate General would be too dependent upon the political branches of Government to act as an advocate against abuses which are frequently generated at least tolerated by political and administrative bodies. Be that as it may, the fact remains that we have no such institution in our country and we have therefore to liberalise the rule of standing in order to provide judicial redress for public injury arising from breach of public duty or from other violation of the Constitution or the law. If public duties are to be enforced and social collective ‘diffused’ rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the Court and act for a general or group interest, even though they may not be directly injured in their own rights. It is for this reason that in public interest litigation – litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, ‘diffused’ rights and interests or
vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable Sections of the people by creating new social, collective 'diffuse' rights and interests and imposing new public duties on the State and other public authorities, infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the Court in a particular case has sufficient interest to initiate the action”.

“607. In Municipal Council, Ratlam v. Vardhichand, this Court upheld the right of the residents of a certain locality in Ratlam town to adopt proceedings under Section 133 of the Criminal Procedure Code against the Municipal
Council compelling it to provide certain basic amenities like sanitary facilities on the roads, public conveniences for slum dwellers who were using the road for that purpose and to abate nuisance by constructing drain pipes with flow of water to wash the filth and stop the stench. While permitting such legal action ventilating public grievances Krishna Iyer, J. observed thus (at p. 1623 of AIR):

"The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the center of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us between the Ratlam Municipality and the citizens of a ward, is a path-finder in the field of people's involvement in the just icing process, sans which as Prof. Sikes points out (Melvyn P. Sikes, Administration of Justice), the system may 'crumble under the burden of its own insensitivity'. The key question we have to answer is whether by affirmative action a Court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-
bound basis. At issue is the coming of age of that branch of public law bearing on community actions and the Court’s power to force public bodies under public duties to implement specific plans in response to public grievances”.

“608. In the Fertilizer Corporation Kara-gar Union’s case, the question for consideration was whether the workers in a factory owned by Government could question the legality and/or validity of the sale of certain plants and equipment of the factory by the management and though the Court ultimately did not interfere because it did not find the sale to be unjust and unfair or mala fide, on the maintainability of the challenge the Court has made certain observations having a bearing on the aspect of the workers’ locus standi. Chief Justice Chandrachud at p. 65 (of SCR): (at p. 350 of AIR) of the Report has observed thus:

But, we feel concerned to point out that the maintainability of a writ petition which is correlated to the existence and violation of a fundamental light is not always to be confused with the locus to bring a proceeding under Article 32. These two matters often mingle and coalesce with the result that it becomes difficult to consider them in watertight compartments. The question whether a person has the locus to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social
obligations to take a broader view of the question of locus to initiate a proceeding, be it under Article 226 or under Article 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the Court that representative segments of the public or at least a Section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations. Public enterprises are owned by the people and those who run them are accountable to the people. The accountability of the public sector to the Parliament is ineffective because the Parliamentary control of public enterprises is “diffuse and haphazard”. We are not too sure if we would have refused relief to the workers if we had found that the sale was unjust, unfair or mala fide.

Since the question as regards ‘access to justice’, particularly under Article 226 of the Constitution, was dealt with by Krishna Iyer, J. at some length, Chief Justice Chandrachud did not consider it necessary to dwell upon that topic. On that aspect Krishna Iyer, J. has at p. 74 (of SCR): (at p. 355 of AIR) of the Report made the following observations:

Public interest litigation is part of the process of participate justice and ‘standing’ in Civil litigation of that pattern must have liberal reception at the judicial doorsteps. The floodgates argument has been nailed by the Australian Law Reforms Commission:

The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the Court.

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If a citizen is no more than a way-farer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the Court will not be ajar for him. But he belongs to an organization which has special interest in the subject matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered. I, therefore, take the view that the present petition would clearly have been permissible under Article 226”.

“808. The public interest like public policy is an unruly horse and is incapable of any precise definition and, therefore, it was urged that this safeguard is very vague and of doubtful utility. It was urged that these safeguards failed to checkmate the arbitrary exercise of power in 197G. This approach overlooks the fact that the Lakshman Resha drawn by the safeguards when transgressed or crossed, the judicial review will set at naught the mischief. True it is that it is almost next to impossible for individual Judge of a High Court to knock at the doors of the Courts because access to justice is via the insurmountable mountain of costs and expenses. This need not

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detain us because we have seen that in time of crisis the Bar has risen to the occasion twice over in near past though it must be conceded that judicial review is increasingly becoming the preserve of the high, mighty and the affluent. But the three safeguards, namely, full and effective consultation with the Chief Justice of India, and that the power to transfer can be exercised in public interest, and judicial review, would certainly insulate independence of judiciary against an attempt by the executive to control it.

“968. In Municipal Council, Ratlam v. Vardhichand, Krishna Iyer, J. upheld the right of the people who were residents of Rat-lam town to institute a case against its Municipal Council ventilating a public grievance thus:

It is procedural rules’ as this appeal proves, ‘which infuse life into substantive rights, which activate them to make them effective’. Here, before us, is what looks like a pedestrian quasi-criminal litigation under Section 133 CrPC, where the Ratlam Municipality – the appellant – challenges the sense and soundness of the High Court’s affirmation of the trial Court’s order directing the construction of drainage facilities and the like, which has spiralled up to this Court. The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero in on them as they involve problems of access to justice for the people beyond the blinkered rules of ‘standing’ of British Indian vintage. If the center of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us
between the Ratlam Municipality and the citizens of a ward, is a pathfinder in the field of people’s involvement in the Justicing process, sans which as Prof. Sikes points out, the system may ‘crumble under the burden of its own insensitivity’. The key question we have to answer is whether by affirmative action a Court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the comma of age of that branch of public law bearing on community actions and the Court’s power to force public bodies under public duties to implement specific plans in response to public grievances”.

In *Bihar Legal Support Society v. The CJI*, by Justice P.N. Bhagwati, the Supreme Court observed in para 2:

“2. . . . Now, we may point out that so far as this Court is concerned, the special leave petitions of “small men” are as much entitled to consideration as special leave petitions of “big industrialists”. In fact, this Court has always regarded the poor and the disadvantaged as entitled to preferential consideration than the rich and the affluent, the businessmen and the industrialists. The reason is that the weaker Sections of Indian humanity have been deprived of justice for long, long years: they have had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the fights and benefits conferred upon them by the Constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their fights and they do not have the material resources with

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25 1987 SCR (1) 295.
which to enforce their social and economic entitlements and combat exploitation and injustice. The majority of the people of our country are subjected to this denial of access to justice and, overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings. This Court has always, therefore, regarded it as its duty to come to the rescue of these deprived and vulnerable Sections of Indian humanity in order to help them realise their economic and social entitlements and to bring to an end their oppression and exploitation. The strategy of public interest litigation has been evolved by this Court with a view to bringing justice within the easy reach of the poor and the disadvantaged Sections of the community. This Court has always shown the greatest concern and anxiety for the welfare of the large masses of people in the country who are living a life of want and destitution, misery and suffering and has become a symbol of the hopes and aspirations of millions of people in the country. It is, therefore, not correct to say that this Court is not giving to the “small men” the same treatment as it is giving to the “big industrialists”. In fact, the concern shown to the poor and the disadvantaged is much greater than that shown to the rich and the well-to-do because the latter can on account of their dominant social and economic position and large material resources, resist
aggression on their rights where the poor and the deprived just do not have the capacity or the will to resist and fight”.

7.2 Evolution of the concept of Legal Aid

7.2.1 Pre-Independence era

‘A deplorable state of affairs led to the British formally taking over the criminal justice system in 1790’. This was considered the most significant reform that Lord Cornwallis, the Viceroy, ushered in after getting the response of several magistrates to a questionnaire on the prevailing criminal justice system. MP Jain notes ‘He (Cornwallis) framed a new scheme which the Government promulgated on 3rd December, 1790. Its most important features were- abolition of the last vestigates of the shadowy authority of the Nawab and transferring administration of criminal justice from Muslim law officers to the Company’s English servants’. The scheme brought in a three-tier system of adjudication- magistrates at the lowest rung, Court of circuits in between and the sadar nizamat adalalat at the top. However, the salaries were meager; bribes with impunity were accepted, crime was promoted as criminals felt that money could save them from the law; proceedings in criminal Courts were dilatory; prisons were overcrowded and insanitary. Thus ‘major crimes were committed with impunity and lawlessness prevailed throughout Bengal, Bihar and Orissa.’ Further changes followed in 1783. The ‘executive was not only separated from judiciary but was even placed under the Courts for breaches of law’. The purpose was to make the executive accountable. But the inadequacy of criminal Courts made it ineffective and a reversal was attempted in 1833 by William Bentick. The right to

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27 Id. at 133
28 Id. at 139.
counsel in criminal proceedings did not begin to be recognized till 1850 despite the legislation of 1839.

The study done by Samuel Schmittheneer\(^\text{29}\) portrays ‘an interesting insight into the general perception of the black-robed gentry’. While on the one hand lawyers were looked down upon as being the most undesirable aspect of a legal system\(^\text{30}\) ‘on the other hand, the rise to eminence of the Indian barrister led ultimately to stage when there was no movement in any sphere of public activity-educational, cultural, or humanitarian- in which lawyers were not in the forefront’.\(^\text{31}\) Their entry into the political scene was owned in no small measure to the magnetic presence of Mahatma Gandhi, who abandoned a distinguished career as a barrister to become a prominent figure in the freedom movement. ‘Gandhiji did not hold too high an opinion of lawyers. Men take up that profession not in order to help others out of their miseries, but to enrich themselves. It is one of the avenues of becoming wealthy and their interest exists in multiplying disputes….. Their touts, like so many leeches suck the blood of the poor people and saw them as having been co-opted by the national non-cooperation requires legal system’.\(^\text{32}\) He pointed out that ‘without lawyers Courts could not have been established or conducted and without the latter the English could not rule’. He, therefore, urged that ‘national non-cooperation requires suspension of their practice by lawyers’.\(^\text{33}\) ‘Many lawyers heeded his call and took to active political life’.\(^\text{34}\) In a speech delivered by him at the Federal Structure Committee on 23rd October, 1921, in the course of a discussion on ‘Federal Court of India’, Gandhiji said:


\(^{30}\) *Id.* at 320.

\(^{31}\) *Id.* at 308.


\(^{33}\) *Id.* at 233-234.

\(^{34}\) *Ibid.*
“I recall the names of Motilal Nehru, C.R. Das, Manmohan Ghosh, Badruddin Tyebi and a host of others, who gave their legal talent absolutely free of charge and served their country faithfully and well. The taunt may be thrown at my face that they did so because they were able to charge princely fees in their own professional work. I reject that argument for the simple reason that I have known every one of them with the exception of Manmohan Ghose. It was not that they had plenty of money and therefore gave freely of their talent when India required it. I have seen them living the life of poor people and in perfect contentment... I can point out to you several lawyers of distinction who, if they had not come to the national cause, would today be occupying seats of the High Court benches in all parts of India”.35

Schmittheneer notes that ‘when Gandhiji began the investigation into the conditions of the indigo farmers in Champaran in Bihar, he first spoke to a gathering of vakils in Patna seeking ‘clerical assistance and help in interpretation’.36 For more than a year, the lawyers toured the area and collected statements on 22,000 peasants. This later formed the basis for the satyagraha which was a decisive turning point in the freedom struggle. Rajendra Prasad, who later became the first president of India, was then a young lawyer who volunteered. ‘He recounted: ‘When we had finished the work in Champaran, we returned home with new ideas, a new courage, and a new programme... we could feel and relies that if the public life of Bihar was to be at all effective, some of us would have to devote

35 S. Murlidhar, Law, Poverty and Legal Aid, 35 (LexisNexis Butterworths, 2004).
ourselves to it to the exclusion of everything else'. Lawyers played an important role in political trials as well. The renowned lawyer Bhulabhai Desai defended the accused in the INA trials at Red Fort.

'During this period, the British used the Courts as a weapon to neutralize political personages and dissent'. The denial of the right of representation in defence to Raja Lal Singh of Kashmir in 1846 reduced the trial into a farce. The poor Raja Lal Singh went virtually unrepresented. The Lahore Durbar could hardly defend him as enthusiastically as he might have if he had been separately represented by his own vakil'. The denial of the right of representation in his defence to Bahadur Shah Zafar in 1858. One who was to assist him in his defence and appeared as such was forthwith summoned as a prosecution witness. The frail 82-year old king went virtually unrepresented before a hostile Court consisting of military officers. It was not till the enactment of the Code of Criminal Procedure in 1898 that the right of an accused to legal representation was formally recognized. The representation at state expenses, however, was available only where an indigent accused was being tried for an offence punishable with a capital sentence. This was not a statutory right but made available at the discretion of the Court as was observed in Emperor v. Sukhdev. It was not until 1973 that the Criminal Procedure Code provided for assignment of counsel at state expenses. It is of interest that in the trial of the assassins of Mahatma Gandhi, also held at the Red Fort, the accused Shankar Kistayya, the servant of co-accused Bagde (the illegal arms supplier

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38 Moti Ram, Two Historic Trials in Red Fort, (1946).
40 Id. at 101.
41 Id. at 15.
42 Emperor v. Sukhdev, AIR 1929 Lahore 705.
who turned approver), was unable to engage a lawyer and was defended by an assigned counsel at state expenses. The co-accused Savarkar, who was acquitted, was represented by seven lawyers'.

The other initiative, other than by that of the judiciary, in providing legal aid in this phase was by the Bombay Legal Aid Society (BLAS), which was formed in 1924. Some of its objects were to make justice accessible to the poor and reducing the costs of litigation, providing lawyers to the poor on the basis of need; rendering legal aid, an applicant had to satisfy the means test and to have a bona fide case. The government, the High Court of Bombay and other Courts soon developed a practice of referring persons in need of legal assistance to BLAS'. The Society was funded by a grant-in-aid of Rs. 12,000 from the Government of Bombay and also received donations including as annual grant of Rs. 300 from Sir Ness Wadia. The Society held conferences in 1949 and 1955, brought out pamphlets titled ‘Justice and Poor’ and also moved both the Courts and the government for making amendments in the practice and the procedure of the Courts. It was this society that initiated the move to have the Government of Bombay constitute a committee to make recommendation for formulating a scheme of state-sponsored legal services'.

On December 1945, BLAS wrote to the Law member of the Government of India inviting attention to the Report of the Rushcliffe Committee in England, published in May 1945. The Rushcliffe Committee had made a number of recommendations for improving the

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system of legal aid in England. The letter suggested that a similar committee should also be appointed in India.

7.2.2 The Second Phase: 1949-1970

7.2.2.1 The Bombay Committee

On 23 March, 1949, the Government of Bombay appointed a Committee under the Chairmanship of Justice N.H. Baghwati, which gave the following recommendations.\textsuperscript{46} The committee submitted its report on 31st October, 1949, and made the following recommendations:

(a) The system of legal aid delivery would comprise a hierarchy of committees at the taluk, district, High Court and State levels.

(b) Legal aid was to cover Court fees, process fee, out of pocket costs, diet money for witnesses, costs of obtaining certified copies as well as the fees of pleaders.

(c) Legal aid was to be available at the trial and appellate stages.

(d) As far as criminal cases were concerned, the legal aid was to be made available to accused charged with an offence punishable with a substantial sentence of imprisonment.

(e) There would be two tests of eligibility- the means test and the \textit{prima facie} test. As regards criminal cases, the latter test was to be replaced by as ‘interests of justice’ test.

\textsuperscript{46} The recommendations of the Bombay Committee are set out in the 14\textsuperscript{th} Report, Appendix I, p. 601.
(f) The formation of panels of lawyers for legal aid work was to be left to the bar associations. Only those lawyers with at least five years’ experience should be empanelled and once empanelled, should not refuse to undertake legal aid work. Every lawyer should do a maximum of six cases a year without charging fees. They would be paid fees, and were to be on par with government pleaders. Lawyers on the panel of legal aid committees were also expected to give legal advice.

(g) The major sources of funds for the legal aid committee would be government grants, donations from trade associations, local bodies, charitable trusts, costs recovered in civil litigation; contributions by partially assisted persons and fees collected for rendering legal advice.

(h) Adequate publicity had to be given about the availability of legal aid. Every notice and summons issued by the Court would inform the recipient about legal aid. Notice boards would also be put up at police stations to inform people picked up in connection with criminal investigation about the availability of legal aid.

Though not implemented, the recommendations contained the facets of state-sponsored traditional legal services programme. The Committee was clear that state intervention in the area was imperative. The main thrust was to provide representation in litigation. Legal aid was seen as forming part of the Court system which was inherently litigation-oriented. The limitation of the availability of legal representation to cases involving offences punishable with a substantial sentence of imprisonment was an attempt at balancing the financial capacity of the state against the right of the accused to a fair
trial in all criminal proceedings involving loss of liberty. The Bombay Committee, was clear that the problem of legal aid is under the modern conception of the obligation of the state to be treated on par with other social insurance schemes like old age pensions, free education, free medical relief... and thereof, the state must take upon itself the responsibility of providing legal aid to poor persons and persons of limited means.

7.2.2.2  **Trevor Harries Committee in West Bengal**

Simultaneous with the Bombay Committee in Calcutta, there was a committee constituted by the Government of Bengal under the chairmanship of Sir Arthur Trevor Harries, a retired Chief justice of the Calcutta High Court to examine the question of the availability and administration of legal aid services in that state. The Trevor Harries Committee in 1949, like the Bombay Committee, recommended a three-tier institutional structure for delivery of legal aid services and restricted its availability to cases where the accused was charged with an offence punishable with a minimum sentence of imprisonment of five years or more or with death sentence. The recommendations of the Trevor Harries committee are set out in 14th Report of the Law Commission of India. However, it took a different view on other significant aspects. The persons who had acted bona-fide in exercise of right of private defence and complaints whose cases had not been taken by the police, were also entitled to legal aid. The empanelment of lawyer and prescribing a minimum criteria were left to the bar associations. The absence of any particular emphasis on standards and on providing incentives to lawyers to participate in the scheme was conspicuous. The question of legal awareness was also not addressed. Legal aid itself was viewed as being limited to providing representation in the Courts.
7.2.2.3 Initiatives by the Governments

Following the two reports, the Central Government wrote to the state government in 1952 requesting them to make provision for legal aid in criminal cases in respect to offences punishable with not less than five years' imprisonment and further appeals. There was sporadic response in some of the states. A survey of some of the state schemes of this period was attempted in the 14th Report of the Law Commission of India. The Legal Aid and advice Society in West Bengal formed in 1952 employed the means test, the merit test and the justice of the case test as eligibility criteria for granting legal aid in cases. The legal aid body formed in 1952 in Uttar Pradesh had done very little work. Likewise, the legal aid committee formed in 1954 in Madras was non-functional. A government order was issued in Tamil Nadu in 1950 under which legal aid would be available to a dalit who had to institute or defend a criminal case against a caste Hindu. In Andhra Pradesh, a local cultural association had renamed itself as ‘Legal Aid Organisation’. The Bangalore Legal Aid Society provided assistance to poor persons in criminal appeals in the High Court. In Bihar, there was a voluntary association of lawyers that gave legal assistance. ‘There was a legal aid society in Orissa as well. However, these were, as was to be noted by the Law Commission later, limited in their scope and reach and moreover, the government of states have not in general been very enthusiastic proposals calculated to enlarge the scope of legal aid. Nor has the legal profession with some exception regarded the rendering of legal aid to the poor litigant as its responsibility’.48

In 1956, the Central Government sent a renewed request to the state government and asked, ‘while the question of including in the Five-Year plan schemes for granting legal aid to the poor was under

48 14th Report, p. 592.
consideration, the state government might examine the matter again'.

However, there was nothing significant on the part of the state governments. In September 1957, this was mooted at the Law Ministers' Conference held in New Delhi, and they unanimously agreed that for the formulation of a scheme for legal aid to the poor by every state. It was suggested that committees be appointed at different levels and 'services of every member of the bar up to a limit of 6 cases in a year,' be requisitioned.

7.2.2.4 Kerala Rules

A fresh approach was advocated by the Kerala Aid (to the poor) Rules, 1957, reissued with minor changes in 1958. 'Under these rules, a poor person was given legal aid in proceedings before the High Court, the Court of sessions, and the Court of district magistrates in all criminal trials, appeals and revisions. A wife or a child while claiming maintenance under Section 488 of CrPC, 1898, was also eligible for legal aid. The Court was given the power to decide on the poverty of the person on the basis of a report of a tehsildar or any other appropriate officer. The members of scheduled castes and scheduled tribes, if poor, were entitled to legal aid for prosecuting or defending all types of criminal cases'.

'A unique feature of these rules was that legal aid by way of representation was provided in cases arising out of legislation intended of safeguard the interests of, or confer benefits upon, a Section or class of people like workers, tenants, etc. Thus representative actions were already envisaged as a method of providing legal assistance to a class of persons having a common interest, thus constituting the beginnings of what would

50 Ibid.
51 The Kerala Rules were made 'with the earnest insistence of then Labour Minister of Kerala. Sh. VR Krishna Iyer'. See also S. Sreekumar, "Implementation of Legal Aid in Kerala", 4 (1) Indian Bar Review, 58 (1987).
develop two decades later as public interest litigation'. 52 Once the 
grant of Legal aid was made by the Court, the person seeking legal aid 
could contact any counsel of his choice from those willing to act. Go 
Koppell, who in 1966 made as extensive study of the extant state 
schemes, noted that the Kerala scheme was ‘comprehensive in its 
coverage, has the merit of simplicity in that no extensive 
administrative structure has been created to operate the programme’. 53 
The rules also prescribed the state of fees payable to such lawyers. 
The lawyers were forbidden from receiving any fee from the 
beneficiary of legal aid.

One reason for the distinguished and remarkable approach in 
Kerala was that the communist party formed its first government in 
Kerala, which naturally ‘had redistribution of wealth and affirmative 
action for achieving equality and social justice on its agenda and law 
was perceived as an instrument to attain this purpose’. 54 BP Pande 
points out that ‘the spurt for legal services for the poor in our country 
in the last decade can be explained, party, as a reaction to the ill-
effects of urbanization and industrialization and as a product of political realization of the utterly raw deal given to the ‘so-called 
equal’ weaker Sections of the society’. 55 These rules of 1957 tried to 
encounter the inequality by economically and socially disadvantaged 
Sections in accessing the justice system, which was made explicit in 
the preamble which acknowledged that ‘in the administration of 
justice in both criminal and civil Courts the members of the scheduled 
castes and scheduled tribes and engage counsel to appear and plead for 
them.56 The concept of providing legal aid at state expense was

55 Ibid.
56 As quoted in S. Sree Kumar, “Implementation of Legal Aid in Kerala”, 57.
considered a measure to mitigate this inequality. This model did not emanate from the judiciary, and upheld the responsibility for providing legal aid of the state without giving weightage to the plea of lack of resources.

In essence, it can be rightly considered as a blueprint of the legal aid programme for the future and this model of rules proved to be a big stimulating factor at the dawn of the freedom of India.

7.2.2.5 14th Report of Law Commission of India

In 1958, the First Law Commission of India Submitted a two-volume report on Reforms in the Administration of Justice. The Law Commission explained:57

“. . . unless some provision is made for assisting the poor for the payment of Court fees and lawyers’ fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice. The rendering of legal aid to the poor litigant, is, therefore, not a minor problem of procedural law but a question of a fundamental character”.

It accepted the view that the legal aid is the responsibility of the state, and ruled out any compulsion upon the lawyer to work for legal aid. Legal Aid should be extended to persons accused of serious crimes. The preference be given to the SCs and STs, to really poor persons. It partly accepted the report of Bombay committee and Trevor Harries Committee. However, no link between legal aid and the need to provide access to fair and speedy justice, was made or emphasised. The Governmental took a meager 15 years to implement the suggestions! The Code of Criminal Procedure, 1973 contained Section

57 14th Report, 587.
304 for providing legal aid to accused at state expenses. By this time
the Law Commission had released three of its reports (36th, 41st, and
the 48th) which touched the question of free legal aid in different
perspectives.

7.2.2.6 Central Government Schemes, 1960

In 1960, the Central Government formulated a scheme for legal
aid and circulated it to all the state governments to enable them to
draft similar schemes. However till 1970, some of the states had been
giving legal assistant as per their respective schemes and nothing
extra-ordinarily needed was done.

7.2.3 The Third Phase: 1970- 1977

7.2.3.1 National Conference on Legal Aid

The National Conference on Legal Aid, held on 28th and 29th
March, 1970 in Delhi, drew a wide participation. This provided the
occasion to present objective assessment of the extant legal aid
programmes and of the functioning of institutions comprising the
justice system. Various papers were presented. A paper presented by
C.H. Scott pointed out that ‘aside from provisions for SCs and STs
and the High Court Rules regarding capital offences, 22 states and
territories gave no legal assistance to a person accused of crime’. 58

The conference helped to generate awareness and public
debate. 59 One view stated to have been endorsed by the Conference
was that ‘the control of the legal aid programme should be with the
bar and not with the government, lest the autonomy of the programme

presented in the conference, and quoted in Barry Metzger, “Legal services
programmes in Asia” in Committee on Legal Services to the Poor in the
Developing Countries, Legal Aid and World Poverty: A Survey of Asia, Africa
and Latin America, 155 (Praeger, New York).

59 V.G. Ramachandran, Legal Aid and Imperative Social Need, (1970) 2 SCC
(Journal) 44.
and of its component lawyers and their effectiveness vis-à-vis the government be jeopardized’.  

7.2.3.2 Gujarat Committee

On 22nd June 1970, the Government of Gujarat constituted a committee under the chairmanship of Justice P.N. Bhagwati, ‘to consider the question of grant of legal aid in civil, criminal, revenue, labour and other proceedings to poor person, to persons of limited means and to persons belonging to backward classes, and to make such recommendations as may be desirable so as to render legal advice more easily available and make justice more easily accessible to such financial including recommendation on the question of encouragement and financial assistance to institutions engaged in the work of such legal aid’ [Notification of the Government of Gujarat under Government Resolution Legal Department No LAC-1070-D dated 22nd June, 1970. On 31st August, 1971, the Committee submitted its report and noticed the international developments particularly the United Nations Conference on Human Rights in Teheran in 1968 and International Covenant on Civil and Political Rights. The focus was the indigent person seeking to access justice as the principal objectives of legal services programme were:

(a) ‘to organise poor and weak Sections of the community,

(b) to spread consciousness amongst them of their rights and obligations and of the role which they have to play moulding and fashioning democratic society...and

(c) to make democracy not merely a political form of government but a way of life based on liberty and justice’.

60 L.M. Singhvi and Daniel Friedman, “Free Legal Services in Delhi and Bombay, India”, Legal Aid and World Poverty, 231.
It recognized the preventive goal of legal services programme unlike the remedial programme. The preventive legal services called for attack on poverty itself. It sought changes in the laws so as to tilt the balance in favour of the poor. The representation was intended to ensure the proper function of the welfare system, the enforcement of the rights etc. It rejected the notion that legal aid would encourage the litigation. It recommended that legal bodies should be free from government control. The committee took note of the fact that a large number of persons are languishing in jails despite grant of bails, because they are unable to furnish monetary bonds.

The Gujarat Committee was strong on developing the philosophy of legal aid as a tool to achieve social objectives. In attempting bail reform, in opening up prisons, in providing duty counsel and in recommending class action, it sought to look beyond the legal aid from the framework of the traditional legal services programmes. The Government of Gujarat accepted the report and in January 1972, commenced a pilot project of legal aid and advice in certain select areas restricted to a specified category of persons.62

7.2.3.3 Expert Committee, 1973

By a notification dated 27th October, 1972, the Ministry of Law and Justice, Government of India, appointed an Expert Committee on Legal Aid with Justice VR Krishna Iyer as its chairman with 10 other members some of whom were advocates of the Supreme Court of India, to examine the matter of making legal aid and advice available to the community. The terms of reference were:

(a) to consider the question of making available to the weaker Sections of the community and persons of limited

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means in general, and citizens belonging to the socially and educationally backward classes in particular, facilities for:

(i) legal advice so as to bring among them an awareness of their constitutional and legal rights and just obligations and for the avoidance of vexations and unnecessary litigation; and

(ii) legal aid in proceedings before civil, criminal and revenue Courts so as to make justice more easily available to all Sections of the community;

(b) to formulate having regard to the resources available a scheme for legal advice and aid for the purposes aforesaid; and

(c) to recommend the time and manner in which the scheme may be implemented.

The Report\textsuperscript{63} devoted a full chapter to legal aid in criminal proceedings. The main points were:

(a) The adversary system tended towards inequality and operated to the disadvantage of the indigent accused when unrepresented by counsel. The right of an offence to have a counsel for his defence included the right to have a counsel at state expenses if he was too poor to engage one at his own expense. It also referred to the decision of the American Supreme Court in \textit{Gideon v Wainwright}.

\textsuperscript{63} 1973 Report, 69 - 73.
\textsuperscript{64} 372 US 335 (1963).
(b) Crime and poverty bore a close relationship. The problem was compounded because the poor were ignorant 'not only of the complexities of the legal procedure but also of the language of judicial administration.

(c) A further dimension of the problem was the deliberately selective enforcement of the law in which 'the police rather than the law determine what is right and what is wrong'.

(d) Given the complex nature of the problem, 'it is not enough if we take steps to ensure that the poor receive equal treatment under law as the rich and the affluent; it is also necessary to reform the institutions and procedure of the system itself so as to improve the quality of criminal justice'.

The Report\textsuperscript{65} categorically provided that the legal aid must be available at the very first stage of interrogation by the police. It was clarified that:

"....a lawyer may not legally instruct his client to remain totally silent but he may certainly advise him on which question he may refuse to answer and which aspects of police investigations he need not submit to... the introduction of lawyer in this preliminary stage of criminal process will not only help the poor in securing equal justice under the law but will also have a redeeming influence in investigating procedures".

\textsuperscript{65} 1973 Report, 76.
It was also needed at each of the stages prior to the commencement of trial. The following further recommendations were made:

(a) The police officer at the time of arrest and the magistrate at the time of the first appearance of the arrested person had to inform the arrested person of: the right to be released on bail; the right to consult with and be defended by a lawyer as provided by the local legal aid committee.

(b) A legal aid lawyer had to be admitted to a prison or a police station upon request to see the arrested person or under-trial, as the case may be.

(c) The period of trial had to be shortened and repeated adjournments requiring the presence of the accused avoided. The accused should be able to plead guilty in petty case involving short sentences.

(d) The local legal aid committee would have the right to interview any under-trial remaining in jail for more than a month and bring pressure, through the Court, on the police to file the charge-sheet/challan.

(e) Legal aid to victims of crime would include making over of the case, at the end of the criminal trial, to the civil Court for the question of determination of damages payable to the victims without having to commence the trial in the civil proceedings _de novo._

(f) There would be a combination of salaried lawyer at the taluka and block levels and private counsel who would be compensated at certain fixed rates for engaging in legal aid work.
Legal aid was to be given ‘to all accused persons in cases triable by a Court of session’.

When the report of this expert committee came, the bill to amend the CrPC had been passed in the Rajya Sabha and was pending in the Lok Sabha. In the meantime, many state reports from the states of Madhya Pradesh, Tamilnadu, Rajasthan also came in emphasizing the need for legal aid.

7.2.3.4 Juridicare committee

On 19th May, 1976, the Government of India appointed a two-member committee consisting of Justice P.N. Bhagwati as chairman and justice V.R. Krishna lyer as member. One of its purposes was establishment of adequate legal service programme in all states on a uniform basis. However its real purpose was to project a benign face of the government of emergency was in operation since June, 1975 and there was consequent repression of freedom of expression and detention of political opponents. The move in the post-Kesavananda Bharati Sripadagalavaru v. State of Kerala, phase and the subsequent developments particularly the superseding of senior judges in the Supreme Court, the ADM Jabalpur v. Shiv Kant Shukla, had already charged the atmosphere.

Meanwhile ‘on 29th May, 1976, ten days after the two-member Committee was constituted, the Swaran Singh Committee tabled its recommendations before the All India Congress committee’ In an attempt to give effect to some of the recommendations of that committee, but going beyond, the Constitution (42nd Amendment) Act

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67 (1973) 4 SCC 225.
68 (1976) 2 SCC 521.
was passed by the parliament and it came into force on 18 December, 1976. Among the explanations offered in the statement of objects and reasons of the act, it was stated that it intended 'to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate social economic reforms for implementing the directive principles. Although there was no other specific explanation given, it was through this amendment that Article 39-A was introduced into the Constitution, much before the Juridicare Committee gave its Report on 31st August, 1977. This Report was an amalgamation of 1971 Gujarat Report and 1973 Report.

'The 1977 Report focused on the orientation of the different actors who would be the participants in the programme. These included members of the Judiciary, law universities and law students, voluntary agencies and social workers. Their participation would be relevant in the context of the criminal justice system where, the experience with the system of visits by lawyers to custodial institutions and police stations has not proved to be encouraging for a variety of reasons, the main among was the unattractive remuneration for such work and secondly, the non-availability of sufficient number of lawyers willing to undertake the work. There was an emphasis on university law clinics and their functions were identified as the following:

(a) Preventive and positive service at pre-litigation stage by negotiating and conciliating disputes outside the Court;

(b) Seeking administrative and legislative remedies against wrongs done:
(c) Giving postal advice in respect of legal problems of individuals;

(d) Offering legal advice and counsel in Court in litigation;

(e) Litigating in Court, preferring appeals and review petitions and dispensation of competent legal services;

(f) Attending to grievances of the humble and suggesting suitable action;

(g) Championing the cause of the worker, widow, consumer, tenant, tiller and victims of oppression; and

(h) Interviewing and counseling the clients, collecting the facts about disputes and searching the law for their benefit and developing case strategy, preparing for trial and litigation and following up their cases'.

7.2.4 The Aftermath of the 1977 Report to the enactment of the Legal Services Authorities Act, 1987, and so on

The government that had appointed the Juridicare Committee was not in power when the 1977 Report was submitted. Nevertheless, the agenda of social justice was equally important to the new political dispensation that had come to power primarily on account of public disenchantment with the oppressive regime during the Emergency years of 1975-77. However, the Janata Government elected to power in 1977, was beset with internal outbursts among its constituents and had little time for programmatic action on several fronts. Consequently, the 1977 Report remained on the shelf and alongwith it the National Legal Services Bill. The constitution of the Juridicare Committee was an outcome of certain developments on the political front. The non-

implementation of its recommendations was also the final outcome thereof.71

The Legal Services Authorities Act, 1987, provides a broad framework of free legal aid to the persons satisfying the criteria provided by Section 12.

"12. Criteria for giving legal services - 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 in Article 23 of the Constitution;

(c) a woman or a child;

(d) a person with disability as defined in Clause (i) of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);

(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

(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

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71 A view was that legal aid was an aspect of the political strategy in India and therefore came as a part of the social justice package and not as a part of civil liberties: I.M. Singhvi’s address to the International Colloquium on Legal Aid and Legal Services at London in October, 1976. “Samachar News”, Times of India, November 1, 1976) as quoted in B.P. Pande, ‘Institutionalization of Legal Aid in India’, 11 JCPS 76, 81 (1977).
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.

13. Entitlement to Legal Services

(1) Persons who satisfy or any of the criteria specified in Section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend.

(2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.

The hierarchy of bodies under the Act

A nationwide network has been envisaged under the Act for providing legal aid and assistance. National Legal Services Authority is the apex body constituted to lay down policies and principles for making legal services available under the provisions of the Act and to
frame most effective and economical schemes for legal services. It also disburses funds and grants to State Legal Services Authorities and NGOs for implementing legal aid schemes and programmes. In every State a State Legal Services Authority is constituted to give effect to the policies and directions of the Central Authority (NALSA) and to give legal services to the people and conduct Lok Adalats in the State. State Legal Services Authority is headed by the Chief Justice of the State High Court who is its Patron-in-Chief. A serving or retired Judge of the High Court is nominated as its Executive Chairman.

District Legal Services Authority is constituted in every District to implement Legal Aid Programmes and Schemes in the District. The District Judge of the District is its ex-officio Chairman.

Taluk Legal Services Committees are also constituted for each of the Taluk or Mandal or for group of Taluk or Mandals to coordinate the activities of legal services in the Taluk and to organise Lok Adalats. Every Taluk Legal Services Committee is headed by a senior Civil Judge operating within the jurisdiction of the Committee who is its ex-officio Chairman.

**Constitution of the National Legal Services**

The Central Authority shall consist of:

(a) the Chief Justice of India who shall be the Patron-in-Chief;

(b) a serving or retired Judge of the Supreme Court to be nominated by the President, in consultation with the Chief Justice of India, who shall be the Executive Chairman; and

(c) such number of other members, possessing such experience and qualifications, as may be prescribed by
the Central Government, to be nominated by that
government in consultation with the Chief Justice of
India.

The Central Government shall in consultation with the Chief
Justice of India, appoint a person to be the Member-Secretary of the
Central Authority, possessing such experience and qualifications as
may be prescribed by that Government, to exercise such powers and
perform such duties under the Executive Chairman of the Central
Authority as may be prescribed by that Government or as may be
assigned to him by the Executive Chairman of that Authority. The
administrative expenses of the Central Authority, including the
salaries, allowances and pensions payable to the Member-Secretary,
officers and other employees of the Central Authority, shall be
defrayed out of the Consolidated Fund of India.

**Supreme Court Legal Services Committee**

The Central Authority shall constitute a Committee to be called
the Supreme Court Legal Services Committee for the purpose of
exercising such powers and performing such functions as may be
determined by regulations made by the Central Authority.

The Committee shall consist of - a sitting judge of the Supreme
Court who shall be the Chairman; and b. such number of other
members possessing such experience and qualifications as may be
prescribed by the Central Government to be nominated by the Chief
Justice of India.

The Chief Justice of India shall appoint a person to be the
Secretary to the Committee, possessing such experience and
qualifications as may be prescribed by the Central Government.

The schemes and measures implemented by the Central
Authority:
a. After the constitution of the Central Authority and the establishment of NALSA office towards the beginning of 1998, following schemes and measures have been envisaged and implemented by the Central Authority:

(a) Establishing Permanent and Continuous Lok Adalats in all the Districts in the country for disposal of pending matters as well as disputes at pre-litigative stage;

(b) Establishing separate Permanent & Continuous Lok Adalats for Govt. Departments, Statutory Authorities and Public Sector Undertakings for disposal of pending cases as well as disputes at pre-litigative stage;

(c) Accreditation of NGOs for Legal Literacy and Legal Awareness campaign;

(d) Appointment of “Legal Aid Counsel” in all the Courts of Magistrates in the country;

(e) Disposal of cases through Lok Adalats on old pattern;

(f) Publicity to Legal Aid Schemes and programmes to make people aware about legal aid facilities;

(g) Emphasis on competent and quality legal services to the aided persons;

(h) Legal aid facilities in jails;

(i) Setting up of Counseling and Conciliation Centers in all the Districts in the country;

(j) Sensitisation of Judicial Officers in regard to Legal Services Schemes and programmes:
Publication of “Nyaya Deep”, the official newsletter of NALSA;

Enhancement of Income Ceiling to Rs.50,000/- p.a. for legal aid before Supreme Court of India and to Rs.25,000/- p.a. for legal aid up to High Courts; and

Steps for framing rules for refund of Court fees and execution of Awards passed by Lok Adalats.

Constitution of State Legal Services Authority

A State Authority shall consist of--

(a) the Chief Justice of the High Court who shall be the Patron-in-Chief;

(b) a serving or retired Judge of the High Court, to be nominated by the Governor, in consultation with the Chief Justice of the High Court, who shall be the Executive Chairman; and

(c) such number of other Members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

The State Government shall, in consultation with the Chief Justice of the High Court, appoint a person belonging to the State Higher Judicial Service not lower in rank than that of a District Judge, as the Member-Secretary of the State Authority, to exercise such powers and perform such duties under the Executive Chairman of the State Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority.
A person functioning as Secretary of a State Legal Aid & Advice Board immediately before the date of constitution of the State Authority may be appointed as Member-Secretary of that Authority, even if he is not qualified to be appointed as such under this sub-section, for a period not exceeding five years.

The administrative expenses of the State Authority, including the salaries, allowances and pensions payable to the Member-Secretary, officers and other employees of the State Authority shall be defrayed out of the Consolidated Fund of the State.

**High Court Legal Services Committee**

The State Authority shall constitute a Committee to be called the High Court Legal Services Committee for every High Court, for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the State Authority. The Committee shall consist of –

(a) a sitting Judge of the High Court who shall be the Chairman; and

(b) such number of other Members possessing such experience and qualifications as may be determined by regulations made by the State Authority, to be nominated by the Chief Justice of the High Court.

**Functions of the State Authority**

It shall be the duty of the State Authority to given effect to the policy and directions of the Central Authority. The State Authority shall perform all or any of the following functions, namely:

(a) give legal service to persons who satisfy the criteria laid down under this Act.
(b) conduct Lok Adalats, including Lok Adalats for High Court cases;

(c) undertake preventive and strategic legal aid programmes; and

(d) perform such other functions as the State Authority may, in consultation with the Central Authority, fix by regulations.

Constitution of the District Legal Services Authority

A District Authority shall consist of:

(a) the District Judge who shall be its Chairman; and

(b) such number of other Members, possessing such experience and qualifications as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

The administrative expenses of every District Authority, including the salaries, allowances and pensions payable to the Secretary, officers and other employees of the District Authority shall be defrayed out of the Consolidated Fund of the State.

Functions of District Authority

The District Authority may perform all or any of the following functions, namely:

(a) co-ordinate the activities of the Taluk Legal Services Committee and other legal services in the District;

(b) organise Lo Adalats within the Districts; and

(c) perform such other functions as the State Authority may fix by regulations.
Constitution of the Taluk Legal Services Committee

The Committee shall consist of:

(a) the senior Civil Judge operating within the jurisdiction of the Committee who shall be the ex-officio Chairman; and

(b) such number of other Members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

Functions of Taluk Legal Services Committee

The Taluk Legal Services Committee may perform all or any of the following functions, namely:

(a) co-ordinate the activities of legal services in the taluk;

(b) organise Lok Adalats within the taluk; and

(c) perform such other functions as the District Authority may assign to it.

The Legal Services could be provided in any of the following modes:

1. By payment of Court fee, process fee, expenses of witnesses, preparation of the paper book, lawyers fee and all other charges payable or incurred in connection with any legal proceedings;

2. Through representation by a legal practitioner in legal proceedings;

3. By supplying certified copies of judgments, order notes or evidence and other documents in legal proceedings;
4. By preparation of appeal, paper book, including printing, typing and translation of documents in legal proceedings;

5. By drafting of legal documents;

6. By giving legal advice on any legal matter;

7. Through Mediation Centers or Family Counseling Centers and also permanent lok adalat.

The Principle Statute concerning legal aid is the legal Services Authorities Act, 1987 (LSAA), and the rules and regulations thereunder, also have its shortcomings. By confining the entitlement of a person to the legal aid to filing or defending a case, the emphasis in the Legal Services Authorities Act, 1987 (LSAA) has remained on litigation-oriented assistance (Section 12 of the Act confines entitlement to legal assistance to those filing or defending a case). The LSAA creates a network of legal services institutions at the state, district and taluk levels. The institutional model of legal services delivery has its limitations.

(a) The manner of their constitution, the structure, the funding and the functioning of the legal aid institutions involve a pervasive control by the executive and a cooperation of the judiciary for a collaborative venture. The lack of autonomy of the legal aid institutions challenges their ability to mount a credible challenge to the laws, policies and practices of the state that may result in deprivation or violation of fundamental rights including the right of access to justice. This also questions the ability to maintain the independence of the judiciary vis-a-vis the executive.

(b) This also has negative fallout from the point of view of the assisted person. The Legal aid institutions are part of
the institutions of the state and therefore, are subject to state control. In effect, those requiring legal assistance have little participation in designing the legal services programme or in overseeing its implementation. As in many similar state-administered welfare programmes, the 'consumers' are disabled from demanding quality of services or accountability of the legal aid bureaucracy. This explains, in part, the reluctance on the part of the indigent person to look to legal aid for a reliable defence.

The Rules and Regulations under the LSAA, which detail the structure and contents of the legal aid schemes in the different states, fail to account for the factors that led to the failure of the earlier schemes, some of them are:

(a) They do not recognize the facets peculiar to the criminal justice system that require a different approach to the question of providing legal aid; barring a few exceptions, there is no system for making legal assistance available at police stations;

(b) The preventive and rehabilitative aspects of legal aid are not built into the programme; legal aid invariably begins and ends with Court proceedings and is not made available at the pre-trial and post-trial stages;

(c) The problems of the justice delivery system are not addressed in a composite manner; the present schemes do not view the need for legal reforms as having to be simultaneously undertaken with the implementation of the programme for legal services;

(d) The legal aid committee are not charged with the responsibility of initiating moves to reforms the system
of monetary bail, to question arbitrary laws and procedure that discriminate against the poor, or to provide legal aid at all stages of the process from the point of arrest till the person exists the system;

(e) They offer few incentive to the competent lawyer to participate in the legal services programme- Whether in the matter of preparation of panels of lawyers, or in fixing of fees payable for legal aid work or in developing certain measurable minimum standards of performance; they also do not encourage the participation of a wider base of legal service providers like paralegals, law academics and studies and students;

(f) There is hardly any mechanism for evaluating the schemes with a view to examining its relevance to the needs of the people requiring legal assistance;

(g) further, the legal aid needs of the victims of crime are not accounted for.

Thus, we are facing a problem where despite the paraphernalia of huge judgments in the form of ‘judicial activism’, the existence of the LSAA and the network of legal aid institutions:

(a) A large number of persons get routinely arrested, including those who are arrested for keeping peace and good behavior, others for activities unconnected with crime such as those picked up as the wandering mentally ill and vagrants; and having thus entered the system are unable to exist it for want of legal assistance;

(b) Custodial violence, including deaths, torture, disappearance and encountered killing are on the increase;
A substantial number of indigent accused are unable to post bail or furnish monetary bonds and sureties and therefore, languish in jail despite being arrested for bailable offences or even after grant of bail in non-bailable ones;

The accused in criminal trials involving loss of life or liberty go unrepresented; this position continues in the further stages of appeal, revision and review;

And indigent person is not always assigned a competent lawyer; nor when he is assigned a lawyer have a choice of lawyer; further, she cannot repudiate the services of an ineffective or incompetent lawyer;

Legal aid is generally not available in prisons and other custodial institutions with an effective and efficient access; prisons are overcrowded and the inmates subjected to continuing violations of human rights; and

Many jail inmates are unaware about the status of their case, the availability of legal aid; about their right to receive legal assistance at all stages of their case and for preparing mercy petitions, seeking remission and parole.

It will not be out of place to say that the legal services programmes have not been able to envision effective as well as efficient access to justice. The need of the hour is to take effective steps to realize the constitutional mandate of equality.

7.3 Access to Justice and the Judicial catalyst

7.3.1 First Phase: 1898-1950

In the early days of British colonization in India, the application of an alien system of law and practice, and that too, not uniformly in
the three regions where it took roots, [Studies in legal history refer to
the law as it developed in the presidencies of Bengal, Madras and
Bombay] brought with it the problems of inconsistency and
unpredictability. One study indicates that as far as the criminal
Courts, the sadar nizamat adalats, were concerned, the parties before a
sessions Court could take the advice of a vakil, who could not plead
before the judge or intervene in the proceedings. The right to counsel
in the Supreme Courts was granted in 1839 and Act 38 of 1850 gave
parties to criminal trial the right to counsel. This continued to be
reflected in the versions of the Codes of Criminal Procedure that
emerged in 1861, 1872 and 1882.

Section 340 of the Code of Criminal procedure, 1898,
prescribed the right of an accused to be defended by a pleader as it
provided ‘Any person accused of an offence before a criminal Court,
or against whom proceedings are instituted under this Code in any
such Court may of right be defended by a pleader’. Thus, there was
only a conferment of right to be defended by a pleader and no
visualization of any form of legal aid to the accused was there. It was
left entirely to the judicial discretion, to assign lawyer to the accused,
if the accused was unable to do so. At that juncture also, the criminal
justice system was facing problems like lack of awareness, delays,
costs as well as the absence of legal aid. The majority of the litigants
could not afford the expenses of litigation and this prompted the

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73 Orby Mootham, The East India Company's Sadar Courts 1801-1834, Indian Law
Institute 1982- the Brief Study by Orby Mootham, a former Chief Justice of the
Allahabad High Court, of the Courts during the early British rule looks at the
period between 1801 and 1834.
74 T.K. Banerjee, Background to Indian Criminal Law, (Orient Longman, 1963) as
quoted in Radhika Singha, A Despotism of the Law: Crime and Justice in Early
75 Radhika Singha, A Despotism of the Law : Crime and Justice in Early Colonial
India, 304 (Oxford 1998).
Journal 2241.
judiciary to evolve principles with a view to strictly construing the requirements of Section 340.

7.3.1.1 From the Wasudev case to Llewelyn Evans judgement vis-a-vis the right to consult lawyer

One of the early reported cases is that the wife of Wasudev Hari Chapekar, an accused in a criminal case, had engaged pleaders to defend him. The investigating magistrate declined permission to the pleaders 'to have an interview with him or to appear and sit in Court'.\textsuperscript{77} This was disapproved by Parsons J., the acting chief justice of the Bombay High Court, who gave the following opinion for the Division Bench.\textsuperscript{78}

'It was the duty of the magistrate to have afforded the accused and his friends every opportunity of making his defence, and he should not personally have interposed in any way between them'

The right of counsel even at the stage of investigation as well as the right to confidentiality, freedom from interference by the police and the Courts, were implicitly recognized at a fairly early stage of contemporary legal history. This position was further strengthened three decades later when the case concerning Llewelyn Evans came for consideration before a Bombay Court. The prisoner was arrested in Aden on 15 June 1926, and brought to Bombay on a charge of criminal breach of trust. The magistrate granted a remand upto 10\textsuperscript{th} July in police custody. The legal adviser of Evans' was not allowed access to him by the police, despite that the Section 40 of the Prisons Act 1894, provided that an unconvicted prisoner should, subject to proper restrictions, be allowed to see his legal adviser in jail, but the

\textsuperscript{77} Queen Empress v. Wasudev Hari Chapekar, (1899) 1 Bom LR 856.
\textsuperscript{78} Queen Empress v. Wasudev Hari Chapekar, (1899) 1 Bom LR 856. The Bench included Ranade J.
committing magistrate held that he had no jurisdiction to order access. There was a doubt whether this extended to the stage when the prisoner was still in police custody.

Evans approached the Bombay High Court with an application under Section 561A of the CrPC, 1898, invoking the inherent powers of the Court to secure the ends of justice. The Court was informed by the commissioner of police, just when the decision was about to be pronounced its judgment, that Evans' lawyer would be permitted reasonable access and in accordance with the rules of the jail manual, the interview would take place within sight, but out of hearing, of a police officer. The Court, nevertheless, proceeded on to pronounce the judgment since the question was of general importance. Justice Fawcett in his opinion referred to the report of the Rawlinson Committee in England which had led to steps being taken to remove any obstacles in the way of an unconvicted prisoner communicating with his legal adviser. The judge noted:

'... The days have long since gone by, when the state deliberately put obstacles in the way of an accused defending himself, as, for instance, in the days when he was not allowed even to have counsel to defend him on the charge of felony'.

He also referred to the amendment in 1923, to Section 340 of the CrPC, 1898, whereby the right contained therein was not only to a person accused of an offence in a criminal Court but also to the case of any person against whom any proceedings are instituted under the CrPC in any Court. This, therefore, implied that the accused should not only be defended by a pleader at the time the proceedings were actually going on but 'also implies that he should have a reasonable opportunity, if in custody, of getting into communication with his

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79 Re Llewelyn Evans, AIR 1926 Bombay 551, 552.
The same principle had to be followed when the accused was in police custody. The Court relied on the earlier judgments of the High Court in *Re petition of Shaik Dadabhaee* and *Queen Empress v. Wasudev Hari Chapekar*, which had laid down that prisoners and others ought to have fullest opportunity for giving vakaltnama to whomever they pleased. Fawcett J., rejected the obstacles put forth by the police in denying the lawyer access to the prisoner. In his concurring opinion, the other judge on the Bench, Madgavkar J., pointed out that:

"......if the end of justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely and fairly, before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice-so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very state which undertakes the prosecution of the prisoner, also provides him, with such legal assistance".  

It could be rightly stated as the first categorical pronouncement from the Bench about the state providing legal assistance to the poor. Madgavkar J., categorically stated that the right began 'at least from the moment after the 24 hours of arrest that he appears before the Court' and access would be allowed 'before and irrespective of the charge sheet'. This was a significant pronouncement from the point

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80 Ibid.
81 (1883)1 Bombay HCR 16.
82 (1899)1 Bombay LR 856.
83 *Re Leevedyn Evans*, AIR 1926 Bombay 551. 552. 554.
84 *Re Leevedyn Evans*, AIR 1926 Bombay 551. 552. 554.
of view of the stage at which legal representation was envisaged, whereby the need for the state of provide legal assistance to the poor, was acknowledged.

7.3.1.2 Jahangiri Lal and Sunder Singh judgments of Lahore High Court and the right to consult lawyer of his own choice

In two cases that came before the Lahore High Court within a span of five years, the right of an arrested person to consult with the counsel of his choice was discussed. In the first case, in 1930, after arrest by the police, the accused had been removed from the police station to different places which had no connection with the offence charged against them. The Court took exception at this practice and said that the rules permitting the accused to have the assistance of a counsel and to communicate with friends and relatives ‘cannot be evaded by removing the accused person to a place so that nobody knows where he is .... The matter is really reduced to a farce if interviews are allowed only after a confession has been recorded’. Dalip Singh J, who wrote the judgement (with which Currie J, concurred) said: ‘Speaking for himself I can only say that, in future, I shall look with suspicion on confessions obtained where the accused has been so confined and where interviews with counsel or friends or both have been evaded.’

In the second case, the petitioner challenged his son’s detention on the ground that the police had not allowed his son access to legal advice. ‘Justice and fair play’, the Court said, ‘obviously require that an accused person should have access to proper legal advice when he is accused of a criminal offence’. The Court referred to Crawford

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86 Jahangiri Lal v. Emperor, AIR 1935 Lahore 244.
87 Sunder Singh v. Emperor, AIR 1935 Lahore 945 at 946-47.
Bailey & Co., said in Sunder Singh case (p. 946): 'days are long gone by when the State deliberately put obstacles in the way of the accused defending himself and the present day trend is entirely in the opposite direction'. The Court directed that the detenu would be allowed reasonable opportunities for interviews with his adviser as long as he remained in custody.

7.3.1.3 Right to prepare defence and to be granted adequate facilities to the lawyer representing the accused

In 1925, the Madras High Court, explained that the presence of a lawyer for the accused would be necessary at the stage of examination in chief in order to 'check not only leading questions but to prevent irrelevant evidence being recorded'. This was a case where the lawyer who was conducting the trial for the accused, was suddenly summoned over night by the magistrate, on the application of the police, as a prosecution witness. The lawyer, keeping strict standards of professional ethics declined to appear for the accused. Consequently, there was no cross-examination of the lawyer and of the prosecution witnesses thereafter. The High Court termed this action of the police as 'highly reprehensible'. Further, 'the action of the magistrate in allowing himself to be a tool in the hands of the police is open to grave criticism'.

The facility of being represented by a lawyer was available at almost all stages in the criminal justice process. In a case which came up before the Allahabad High Court, the accused was a lawyer practicing in the district Court and his younger brother was a student of law in the Allahabad University. They were picked up by the police in connection with the stabbing of a person near the house of their father, who was a mukhtar practicing in the revenue Courts. The

98 AIR 1926 Allagabad 551.
99 Manmargar v Emperor, AIR 1925 Madras 1153, 1154.
100 Manmargar v Emperor, AIR 1925 Madras 1153, 1154.
accused were denied bail and within three days of their arrest, the magistrate went to the jail to hold an enquiry before committing the accused for trial to the Court of sessions. No notice was given by the magistrate to the accused regarding holding of the proceedings in jail. The father of the accused, acting upon rumours, reached the jail and requested the magistrate for an adjournment on the ground that in the absence of information, and of documents, no lawyer had been engaged and some time would be required to prepare the defence. This was rejected. When a lawyer was engaged for the accused at short notice, the magistrate allowed him to cross-examine the witness but refused to give him any time for preparation. The lawyer was also humiliated by being made to wait outside the jail gates for 45 minutes and again at the hearing, he was made to stand throughout. Till the conclusion, no papers were given to the lawyer for preparing the defence. Under such circumstances, an application was made to the High Court for transfer of the case under Section 526 of the Cr PC to some other Court.

The Allahabad High Court placed reliance on the judgments of the Bombay, Madras and Rangoon Courts and held that the magistrate had acted with undue haste. The commitment proceedings were undoubtedly ‘in the nature of judicial proceedings in a criminal Court and the applicants were entitled, as a matter of right, to be defended by a pleader. The magistrate was bound to give to the accused sufficient opportunity/facility to be represented by a lawyer especially as they were in custody from the time they had been arrested and accused of the offence.91 The compliance with Section 340 of the CrPC, 1898, was made mandatory. The access to justice included ‘actual physical access’. The Court explained that though it was not illegal for the magistrate to hold an enquiry inside the jail, ‘the place where the inquiry is held must be deemed to be an open Court where

91 Kailash Nath v. Emperor, AIR 1947 All 436.
the public, as such, have a right to attend and that such right may be controlled in a proper case on special grounds by the Court and not by the jail rules or by the officer in charge of the jail. If the magistrate cannot have the absolute right to regulate the proceedings at the place where he is holding the trial, he ought not to hold trial or inquiry at such a place'.

The concept of access to justice also required granting adequate facilities to the members of the bar. The Court transferred the case from the Magistrate who had dealt with it that there were enough grounds for apprehension in the mind of the accused that they would not receive a fair trial. The Court said:

'....no lawyer can do his duty to his client nor can a magistrate discharge his duties as such, in a room where the magistrate sits in one corner with the prosecuting inspector on one inside, and the reader on the other, all the three of them having chairs, with members of the bar standing in front as supplicants for favours... it is impossible to administer justice properly without legal aid and in the absence of the members of the bar (who) probably do as important work as judges themselves and, therefore, for the proper administration of justice, it is necessary that the members of the bar should be given adequate facilities and proper treatment'.

The exclusion of advocates from appearance before juvenile Courts was also not permitted. This is despite strong indications

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92 Kailash Nath v. Emperor, AIR 1947 All 440.
93 Kailash Nath v. Emperor, AIR 1947 All 440.
through empirical surveys that advocates may, far from helping the cause of justice, be thwarting it by their presence in juvenile Courts.\footnote{Mohamad Alan v The Crown, AIR 1950 Sind 16.}

Even at one point of time, the importance of having a lawyer to represent the accused was given far greater importance than the inconvenience that might be caused to the state in the context of administration of justice. The magistrates were pulled up if they ignored this requirement and showed undue haste in completing a case. When a magistrate first declined to give time to the accused to engage a lawyer for his defence and gave him just one day to prepare his defence, even after the accused had engaged a lawyer in haste, the superior Court held that action to be unlawful and the case was transferred to another Court.\footnote{U. Po Mya v. The King, AIR 1938 Rang 198.}

7.3.1.4 No appointment of lawyer without consent, express or implied, of the accused

The need to ensure proper legal assistance was also recognized in the sense that it was held that a Court could not appoint a lawyer for an accused without the consent of the accused, as was explained in Emperor v. Sukh Dev.\footnote{AIR 1929 Lah 705.} In a case where 16 accused stood charged for grave offences including that of murder, one of them was unable to appear before the magistrate conducting the pre-commitment proceedings. His lawyer also informed the Court that the accused did not wish to be represented by him. At the adjourned date, when the accused remained absent and there was no lawyer representing him either, the magistrate proceeded to appoint a pleader for him in order to expedite inquiry. The High Court disapproved the same.

Section 540(2) of the CrPC 1898, as amended in 1923, prescribed one of two courses of action for a magistrate to adopt if the
accused, who is unrepresented by a lawyer, is absent or unable to attend the hearing. The Court cannot proceed with the case but has either to adjourn it or direct that the case of the absent accused be heard separately. The attention of the Court was drawn to a direction issued by the High Court to the Sessions judges requiring them ‘to employ counsel at government expense for a person charged with an offence punishable with death if he cannot afford to engage counsel himself’. This, however, did not enable magistrate, during the pre-commitment stage, to engage counsel at state expenses for the defence of an accused. Nevertheless, the Court pointed out:

‘... There can be little doubt that when a Sessions judge or the Magistrate engages a counsel for the defence of an accused he does so with the express or implied consent of the latter and no Court has any authority to force upon a prisoner the services of a counsel, if he is unwilling to accept them’.

In another case involving the award of death sentence, the Patna High Court expressed concern that ‘those whose duty it is to select lawyers to defend at the expenses of the Crown should not treat the selection as a matter of patronage for the benefit of the lawyer so appointed. The selection should be made from among young men of marked ability’ and four years later, this was reiterated in Dikson Mali v. Emperor. The Court was at the same time conscious of maintaining high standards of professional ethics. An accused, who also happened to be a lawyer, was not permitted to appear as counsel for the other co-accused since ‘he cannot be in the Court in the same matter in two capacities’. The Court was not impressed with the

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97 Emperor v. Sakh Dev, AIR 1929 Lah 705.
98 Emperor v. Sakh Dev, AIR 1929 Lah 705 at 706.
99 Darpan Potdarin v. Emperor, AIR 1938 Patna 153, 158.
100 AIR 1942 Patna 90, 93.
101 Re S Subramanaya Sarma, AIR 1941 Mad 808, 809.
argument to facilitate early disposal of the case on the ground that the question is not one of expediency; it is one of principle.

7.3.1.5 A paradigm shift of right of legal representation in quasi-criminal proceedings and duty to inform the grounds of the detention

This phase also placed on a firm footing the right to have legal representation in quasi-criminal proceedings including the preventive detention. In 1943, the Nagpur High Court dealt with the question whether the detention of persons under the Defence of India Act, 1939, would be vitiated on account of refusal of permission by the authorities to allow the detenues to meet their counsel, seek legal advice or approach the Court in person. In the wake of the quit India Movement in 1942, a large number of Congress leaders had been detained under this Act. Others who protested against the detentions were also detained and these detenues were prevented from seeking legal advice or approaching the Court. They petitioned the Nagpur High Court with an application under Section 491 of the CrPC, 1898. For the government, it was argued that with the enactment of the Defence of India Act, 1939, the right to move a habeas corpus petition under Section 491 of the CrPC, 1898, stands impliedly repealed, the Court did not buy this and relied on the observations of Lord Hailsham in Eshugbayi v. Officer Administering the Govt. of Nigeria,\(^{102}\) that:

> ... such fundamental rights, safeguarded under the constitution with elaborate and anxious care and upheld time and again by the highest tribunals of the realm in language of utmost vigour cannot be swept away by implication or removed by some sweeping generality. No one doubts the right and

\(^{102}\) AIR 1928 PC 300.
the power of the proper authority to remove, but
the removal must be express and unmistakable; and
this applies whatever government be in power, and
whether the country is at peace or at war.\textsuperscript{103}

Vivian Bose J, gave the leading opinion of the Court, explained
that the right to move the High Court remained intact notwithstanding
the Defence of India Act, 1939. He relied upon the decision of the
House of Lords in \textit{Liversidge v. Anderson},\textsuperscript{104} and pointed out that even
at the time of war ‘the executive cannot suddenly step in and claim
the right to wield absolute and arbitrary power’.\textsuperscript{105} Though the Courts
allow latitude to the executive and presumptions in favour of the
liberty of the subject are weakened, those rights do not disappear
altogether. Any law which restricted the liberty of the citizen had to
have in-built safeguards in the absence of which the executive order of
detention would have to be interfered with, notwithstanding the
supervening objective of preserving the safety. Among the safeguards
pointed out by the House of Lords was the duty ‘to inform the objector
of the grounds upon which the detention order has been made and to
furnish him with such particulars as are in the chairman’s opinion
sufficient to enable him to state his case. In this case, there was
absence of such safeguards, whereas the applicants have not even been
allowed to see counsel and to have legal advice. They have not been
allowed to come before the Court in person, nor have they been given
any reasons for their detention. The Court observed that it was
difficult to see how the object of public safety, defence of British
India, maintenance of public order or efficient prosecution of the War
‘can be endangered just because some obscure person in a District Jail
is allowed legal advice and is permitted to place his case properly
before the Court under Section 491. The government cited rule 26(f)

\textsuperscript{103} \textit{P.K. Tare v. Emperor}, AIR 1943 Nagpur 26, 29.
\textsuperscript{104} (1941) 3 All ER 338.
\textsuperscript{105} \textit{P.K. Tare v. Emperor}, AIR 1943 Nagpur 26, 28.
under which restrictions could be imposed, with a view to preventing a detenu from acting in a manner prejudicial to public safety, on his communicating with other persons. Certain government orders of general nature in relation to ‘security prisoners’ were also cited. The Court rejected the same citing that those orders had no reference to the applicants and were made even before they were arrested. The Court categorically ruled that ‘this attempt to keep the applicants away from this Court under the guise of these rules, is an abuse of power and warrants intervention’. It was clarified that ‘the applicants cannot insist on seeing counsel A, B or C any more than government can say that only X shall be allowed. There must be reasonableness on both sides’. In response to the argument that even if the right to legal representation was provided, subjective satisfaction of the government, the Court pointed out that it had nevertheless to examine whether ‘the order was in fact made in exercise of power by or under the Act. In these quasi-criminal matters, just as in criminal cases, judges have to apply the law to the best of their ability and cannot ignore points which strike their attention merely because counsel have omitted to argue them. In his concurring opinion, Pollock J., agreed that the persons detained should be granted access to legal advice so that their cases may be properly represented in the Court. Ultimately, the government was directed to afford the detained persons,

“... all reasonable facilities for obtaining such legal advice as may reasonably be necessary; the applicants should then be permitted to place their grievances before the Court in petitions properly and legally drawn up; and they should be allowed, subject again to such safeguards as may seem reasonably necessary, to press these petitions in the usual way, if not personally, at least through

106 P.K. Tare v. Emperor, AIR 1943 Nagpur 26. 31.
counsel in whom they have reasonable confidence.107

7.3.1.6 The Tare judgment: A reflection towards equality, judicial independence and a foundation towards constitutionalism and swaraj

The aforesaid decision in Tare reflects the emerging and existing tension between the executive and the judiciary as well as the assertion by the Court of the notions of equality of the law and equal protection of the law. The repeated reference by the Nagpur High Court to Liversidge was to make it explicit that the Indian citizens were not less than their British counterparts in this sphere of law. In his inimitable style, Bose J underscored the importance of the right of any person to apply to the Court and demand that he be dealt with according to law. He said,

'The right is prized in India no less highly than England, or indeed any other part of the Empire, perhaps even more highly here than elsewhere; and it is zealously guarded by the Courts.'108

Further, in what could be considered to be clever use of judicial space to counter-balance a depleting advantage on the political front, Bose J reminded the colonisers that they should be tested by the same legal yardstick as was available to British citizens. He referred to the opinion of Lord Wright in Liversidge case and pointed out:

'. . . . if the facts placed before us are true the applicants appear to have done no more than many other responsible and respected persons more powerfully placed and who are still at liberty have

107 P.K. Tare v. Emperor, AIR 1943 Nagpur 32, 34.
108 P.K. Tare v. Emperor, AIR 1943 Nagpur 28.
done, namely protest against the detention of certain Congress leaders; that is to say, they have endeavored to do what Lord Wright considered the natural and obvious thing if in their view they felt that there had been an abuse of power either generally or in a particular case; indeed he considered it the residuary safeguard under the constitution against executive excesses and abuse of power. 109

'Thus, Bose J. asserted the supremacy of the law and made the executive accountable to it even while underscoring that the essential fight was one of equality in both the legal and the political sphere. Significantly, the case also symbolized the concretization of innate constitutional and fundamental rights- of equality, of human dignity, of freedom of speech and expression and therefore, to protest against injustice, of access to justice and above all, the judicial review. This is perhaps the finest example of an Indian judge asserting judicial independence vis-a-vis the alien executive without compromising the dignity of the office or the requirements of the proper functioning of the judiciary. For the purpose of this analysis, it is significant that the right of access to counsel and to legal advice were put on a high pedestal. Their infringement was sufficient to nullify an executive action resulting in deprivation of liberty even when it was in the quasi-criminal sphere.110

Thus, the dawn of Indian freedom was already filled with recognition of certain inalienable fundamental rights which formed a part of the legal firmament. These included the right to have legal representation at the stages of interrogation, remand and trial. The

109 P.K. Tare v. Emperor, AIR 1943 Nagpur 33.
110 S. Muralidar, Law, Poverty and Legal Aid, Access to Criminal Justice, 150 (Lexis Nexis Butterworths, 2004).
concept of mandating the legal assistance at state expenses to an accused facing trial for offences punishable with capital sentences was in vogue. The Courts insisted that this was not a mere formality and that competent lawyers had to be assigned to conduct trials of poor-accused. The Courts were emphasizing the need for substantive equality and not formal equality to ensure a level playing field. This right extended to persons held under preventive detention laws as well. The firm entrenchment of the right to move Courts to challenge illegal detention, was the high point of this creative phase. In this way, it will not be out of place to say that the *Tare* judgment was an epitome of equality and judicial independence and laid down the foundation towards constitutionalism and *swaraj* so far as the judicial front is concerned.

7.3.3 Second Phase 1954-1974

The dawn of freedom required a lot of work to be done for shaping the destiny of the nation. One of the foremost tasks was the making of the Constitution of India. The drafting committee was elected and it took up the onerous task of giving shape to the expectations of the masses. In addition to various other things, the draft constitution of India added a new Article 15A. Dr Ambedkar who was conscious of the criticism that Article 15 had invited because of its eschewing the ‘due process’, stated that Article 15A was being introduced in order to make ‘compensation for what was done then in passing Article 15. In other words, it means providing for the substance of the law of ‘due process” by the introduction of the Article 15A’. The text of Article 15A which later became Article 22 of the Constitution in its draft form provided as under:

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15A. (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 a legal practitioner of his choice.

7.3.3.1 The discussion in the Constituent Assembly: Different Views

Dr Ambedkar had conceded that the lifting of the two facets of the fundamental principles from the provisions of the Criminal Procedure Code, which every civilized country follows as principles of international justice, in Article 15A.\textsuperscript{112} There were objections and suggestions to the wording of these clauses. In response to Pandit Thakur Bhargava’s suggestion that the draft of Article 15A should include a clause providing for ‘right of consultation after arrest and before trial and the right of being defended by the counsel of his choice,’ Dr Ambedkar relented and suggested that the following words be added in the last line of clause 1 of 15A:

‘(Nor shall he) be denied the right to consult or to be defended by a lawyer of his choice’\textsuperscript{113}

Despite extensive discussion on the due process clause and the requirement for production of an arrested person before a magistrate within 24 hours, there appears to have been no issue raised on the question of providing legal representation at state expenses. There was, however, a discussion on the denial of some of these rights, including the right of representation to the persons who were preventively detained. Certain members were unhappy that these

\textsuperscript{112} Constituent Assembly Debates, Vol. IX, (3\textsuperscript{rd} Edition, 1999), Lok Sabha Secretariat, p. 1499. He explained that its purpose is ‘to put a limitation upon the authority both of Parliament as well as of the provincial Legislature not to abrogate these two provisions’.

\textsuperscript{113} Constituent Assembly Debates, Lok Sabha Secretariat, Vol. IX, 1502 (3\textsuperscript{rd} Edition, 1999).
safeguards were not adequate. Dr PS Deshmukh submitted that the Criminal Procedure Code, 1898, was inadequate and that,

'... the situation is grave; our respect for law is certainly decreasing. We are ruling our people in manner much less generous that the aliens did; if these rights that were conferred by the alien rulers upon the people of India as early as 1898, which continued though with very many violations throughout this period of 50 years, are not at all respected, if you want to respect them, if you want to safeguard the freedom of the people and their liberty there should be a more radical provision in the constitution than what has been proposed'.

H.V. Kamath referred to the ‘frequent cases of physical or mental ill-treatment to which detenues during the British regime especially during the dark days of 1942 and immediately thereafter’ were subjected to and that it is but fair that our Constitution should lay down specifically that no detenue will be subject to physical and mental ill-treatment'.

An interesting discussion took place when K. Kamaraj of Madras posed a question to M Ananthysanam Iyyangar, who was expressing his agreement with the amendment suggested by Dr Ambedkar. The question was: 'if the choice of a person for instance a communist of the day, is a Russian Lawyer, would you allow it'? The response was: ‘let us not be prejudiced against lawyers. As a matter of fact, but for lawyers, this Constitution would not have come

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115 Constituent Assembly Debates, Vol. IX, Lok Sabha Secretariat, 1519 (3rd Edition, 1999). This amendment does not seem to have been accepted.
into existence'. There was also the comment that the present criminal law ‘has been made with a view to protect property much more than a person’ and that the Constitution itself must provide for at least one right of appeal.

In this response, Dr. Ambedkar adverted to the suggestions made in regard to the right of an accused person to consult a legal practitioner. With a view to removing ambiguity, he said: ‘I am prepared to add after the words “Consult” and the words “and be defended by a legal practitioner” so that there would be the right to consult and also the right to be defended’. He also explained that the words ‘legal practitioner of his choice’ had been deliberately used ‘because we do not want the government may think fit to appear in his case because the accused persons may not have confidence in him’ [Constituent Assembly Debates, Vol. IX, third Edition, 1999, Lok Sabha Secretariat, p.1559]

7.3.3.2 The retrogressive judgments of Janardhan Reddy and Tara Singh

After the Constitution came into force, the progression of the spirit of the Constitutionalism was expected. The issue of affording counsel to indigent accused at state expenses came for consideration before a Constitutional bench of five judges headed by Saiyid Fazl Ali by the Supreme Court in Janardhan Reddy v. State of Hyderabad, delivered on 16th March 1951. The issue was whether the failure to provide a lawyer to an accused facing trial for an offence punishable with death would vitiate the trial. A separate Code namely Hyderabad

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120 AIR 1951 SC 217: 1951 SCR 344.
Code of Criminal Procedure was applicable and its Section 271 corresponded with Section 340 of the CrPC, 1898. In two cases considered by the High Court at Hyderabad in 1950 itself in Golla Kankiah v. Hyderabad State,\textsuperscript{121} and Bairam Ramreddy v. Hyderabad State,\textsuperscript{122} it had been held that where in a case of capital punishment, the Court did not try to find out whether the accused were unable to employ counsel or incapable of making their own defence and whether they wanted to engage defence counsel, the fundamental right of the accused to be defended by a counsel was violated and retrial must be ordered. The case against the accused in Janardhan Reddy, who were described as ‘communists wedded to the policy of overthrowing the government by violence and setting up in its place Communist Raj,\textsuperscript{123} was that they had attacked certain villages in the district of Nalgonda, which was within the jurisdiction of the military, and committed the murder of certain persons using firearms. The trial of these accused persons took place before the special tribunal set up under a regulation made for this purpose. They were tried and sentenced to death and the Judgment of the special tribunal was upheld by the High Court. Thus, the accused approached the Supreme Court. One of the several arguments advanced before the Supreme Court was that there was no fair trial and thus it was vitiated for the reason the persons accused in those cases were not afforded any opportunity to instruct counsel and they had remained undefended throughout the trial. Although the Supreme Court ‘could not help feeling that the special tribunal should have taken some positive steps to assign a lawyer to aid the accused in their defence’,\textsuperscript{124} it nevertheless held that the evidence on record did not show that the accused desired or asked the High Court to engage a lawyer for them and that ‘curious attitude adopted by the accused, to

\textsuperscript{121} AIR 1951 Hyderabad 87.
\textsuperscript{122} AIR 1951 Hyderabad 39.
\textsuperscript{123} AIR 1951 SC 217, 219.
\textsuperscript{124} AIR 1951 SC 217, 219, 223.
whatever cause it may have been due, to some extent accounts for their not being represented by a lawyer. The accused had also pointed out that the lawyers were afraid to defend him since they might incur the displeasure of the police. Diluting the scope and content of Section 340 of the Cr.P.C. 1898, the Supreme Court held:

`. . . . the proper view seems to be: (1) that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated and (2) that a Court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to a negation of fair trial`.  

Therefore, on the macro perspective, the Supreme Court left it to the subjective satisfaction and discretion of the trial judge to determine if the accused would ‘be so handicapped for want of legal aid. There could have been no doubt that in criminal cases involving capital sentence, there should be no further need to demonstrate prejudice on account of absence of counsel. In some way, this also imposed a burden upon the accused to demonstrate his handicap and to show that he was unable to defend himself. However, this decision completely overlooked the fundamental right guaranteed in Article 22(1) of the Constitution. Consequently, it will not be out of place that this judgement took one step further but two steps behind, the spirit of progression.

125 AIR 1951 SC 222.
126 AIR 1951 SC 222.
In another pronouncement *Tara Singh v. State*, a narrow view of the right to legal representation, was adopted. Tara Singh was convicted for murder and sentenced of death. Three of the eyewitnesses were examined by the magistrate at a time when the accused were not being represented by a counsel. Notwithstanding the fact that it was the duty of the magistrate to inform the accused about the availability of legal aid, the Supreme Court expected the accused to make a complaint and held it against him that 'he did not at any of the subsequent proceedings before the committing magistrate, ask for permission to engage a counsel or indicate in any way that he desired to be represented by one'. The Supreme Court held that the right conferred by Section 340(1) does not extend to a right in an accused person to be provided with a lawyer by the state or by the police or by the magistrate. The Court seems to be under the misplaced perception that it was 'a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relation to engage one for him. The only duty cast on the magistrate is to afford him the necessary opportunity' [AIR 1951 SC P 443]. Surprisingly, shockingly and much to the disgust, the Supreme Court expected the accused persons, who were predominantly illiterate and indigent, to demand enforcement of their fundamental right by making a specific demand to engage a lawyer.

Undoubtedly, these decisions were regressive particularly when in the pre-constitutional period, the Courts had already recognized the rights regarding the legal representation in different expanding facets and had reacted severely to any infraction of the right of the accused on the part of the state.

127 AIR 1951 SC 441.
128 AIR 1951 SC 441 at 443.
7.3.3.3 The era of conservatism in the Supreme Court: From A.K. Gopalan onwards and the gradual progress towards the liberal phase

The conservatism of the Court could also be explained with reference to the relatively recent, and among the first pronouncement in A.K. Gopalan v. State of Madras. In this case, the theory of 'due process' forming part of Article 21 was expressly repudiated and it was held that as long as there was some procedure established by law under which a person's liberty could be taken away, even though it is an arbitrary law, there would be no violation of the fundamental right to life. In fact, the procedural component of the negative right to life was emphasized rather than the substantive component. Although Dr Ambedkar had hoped that Article 22(1) would provide the substance of the law of 'due process', but this way was not adopted when the Courts were to interpret the same.

The Supreme Court examined the scope and content of Article 22(1) in the case of State of Punjab v. Ajaib Singh. It was the appeal by the State of Punjab Against the judgment of the High Court of Punjab in a habeas corpus petition of Ajaib Singh for the production of a girl who had been taken away by the police and lodged in the Recovered Muslim Women's Camp in Jullundhar City. The background of the case was that the partition in August, 1947 had resulted in a mass exodus of Muslims from India to Pakistan and Hindus and Sikhs from Pakistan to India. There were numerous unfortunate instances of abduction of women and children on both sides of the border. To sort out a part of these issues, a conference of the representatives of the two governments was held in Lahore in December, 1947 and special recovery police escorts and social...

129 1950 SCR 88.
131 1953 SCR 254.
workers began jointly functioning on both sides of the border. The Abducted Persons (Recovery and Restoration) Act, 1949, was passed and it came into effect from December, 1949, permitted the recovery of abducted persons and their delivery to the officer in the nearest camp for eventual repatriation to the country of origin. In pursuance therof, the recovery police in February, 1951 raided the House of Ajaib Singh, recovered a twelve-year old girl and took her to the camp in Jullandhar. Ajaib Singh petitioned the High Court for writ of habeas corpus questioning the action of the police. An interim stay was granted. The matter was then inquired into by a tribunal constituted from persons of India and Pakistan. The tribunal directed that the girl be sent back to Pakistan. The High Court held Section 4 and 7 of the Act to be violative of Article 22(1) and (2), and directed the release of the girl.

The Supreme Court was informed by the state that the order of release need not be interfered with since the state agreed that the tribunal was not properly constituted, and only the Constitutional validity of the Act insofar as the High Court had held it to be violative of Article 22 of the Constitution, was to be examined. The Supreme Court first held that the word 'arrest' in Article 22(1) meant physical restraint put on a person as a result of an accusation that he has committed a crime or an offence of quasi-criminal nature. Secondly, the requirement of production of arrested persons was intended to give protection only against arrests by an executive or non-judicial authority. In other words, where the arrest of a person was pursuant to a warrant issued by a Court, Article 22(1) was not attracted since the warrant itself would indicate the grounds of arrest. The Supreme Court concluded that,

'... the physical restraint put upon a abducted person in the process of recovering and taking that person into custody without any allegations or
accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest, and delivery of the persons to the nearest camp under Section 4 of the impugned Act cannot be regarded as arrest and detention within the meaning of Article 22(1) and(2)

A distinction was made between arrests pursuant to executive orders, which would have the protection of Article 22(1), and those pursuant to warrants issued by Court, which would not have such protection, the Supreme Court denied the benefit of this fundamental right to a large Section of persons arrested under and brought within the purview of the criminal justice system. This ran counter to the intention of the framers as in response to Pandit Tahakurdas Bhargava’s query whether the right to consult or to be defended by a lawyer of one’s choice would be available ‘in trials as well as in criminal proceedings’, Dr ambedkar replied: “defended” means that, Ajaib Singh effectively set the law back considerably. That decision was thereafter relied upon by the High Court to deny the right to legal assistance in proceedings of criminal nature before the nyaya panchyat as well. The judgements in the Janardhan Reddy and Tara Singh too had a negative effect on the enforcement of the right of accused to be defended by counsel in cases involving capital sentence. In a death reference for confirmation of the capital sentence awarded to three murder accused by the trial Court. To the same effect was

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132 1953 SCR 254 at 269.
134 Ibid.
the decision of the Orissa High Court in State v. Dukhi Dei;\(^{137}\) but in Re Alla Nageswara Rao,\(^{138}\) the objections for the third accused was that the trial judge erred in assigning the same counsel for all the accused although their interests may have been conflicting since it was alleged that the three accused had, pursuant to a plan, committed the murders in the course of committing burglary. It was contended that the trial judge ought to have directed the third accused to engage a different counsel to defend him. The Mysore High Court rejected this and relied upon Tara Singh. It said:

‘The trial judge had no voice in the appointment of the legal adviser by the third accused Govinda Reddy. The learned judge was under no obligation to appoint one for him. There is no constitutional or statutory requirement to provide legal assistance to the accused persons. An accused person has no right to demand the Court to supply him with a lawyer. It is his duty to ask for a lawyer if he so desires to engage one. The choice of the lawyer is always the look out of an accused person’.\(^{139}\)

Although the circular orders issued by the High Court laid down that if an accused being tried for an offence punishable under Section 302 IPC, stated that he has no means to engage a lawyer and the Court had to appoint a counsel to defend him, in the instant case there was nothing to show that Govinda Reddy had asked for a counsel on the ground that he had no means to engage a counsel. This trend of not recognizing any right in the accused to a counsel of his choice and of making the same subservient or an express demand by the accused

\(^{137}\) AIR 1963 Orissa 144.

\(^{138}\) AIR 1957 AP 505, where the Court emphasized that a mere formal compliance with this rule by engaging a lawyer two hours before the trial, will not carry out the object underlying the rule.

\(^{139}\) Re Govinda Reddy, AIR 1958 Mys 150 at 159
continued in the High Courts. Under the rules of most of the High Courts, two requirements had to be met before the Court could assign a counsel for defence at the expense of the State:

‘1. The case had to involve a capital sentence; and
2. The accused had to be demonstrably without means to engage a counsel of his own’.140

There was a discernible difference in the way certain High Courts approached the issue during this period. They preferred a liberal interpretation of both Article 22(1) as well as Section 340 CrPC, 1898. Various decisions of the High Courts contributed a lot in taking the march towards interpretation of these provisions in their truest sense. These great steps culminated in the form of various decisions of the Supreme Court.

In *Kharak Singh v. State of Uttar Pradesh*,141 the Supreme Court examined the scope of the fundamental rights particularly under Article 19 and 21 in petitions challenging the validity of restrictions on movement imposed through statues or government orders. It held that clause (b) of regulation 236 of the State Act, which permitted that police to undertake domiciliary visits at night, was plainly violative of Article 21. However the majority declined to hold this clause to be violative of the freedom of movement under Article 19(1) (d). The majority explained:142

‘personal liberty’ is used in the Article 21 as a compendious term to include within itself all the varieties of rights which go to make up the ‘personal liberties’ of man other than those dealt

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with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. We have already extracted a passage from the judgment of Field, J. in *Munn v. Illinious*,\(^{143}\) where the learned judge pointed out that 'life' in the 5\(^{th}\) and 14\(^{th}\) amendments of the US Constitution corresponding to Article 21, means not merely the right to the continuance of person; animal existence, but a right to the possession of each of his organs- his arms and legs etc. We do not entertain any doubt that the word 'life' in Article 21 bears the same signification'.

Thus, this paved the way to expand the scope of fundamental rights by curtailing the power of the state to impose restrictions thereon. However, this did not immediately have an impact on the outlook of the Court in relation to cases arising in the criminal jurisprudence particularly with reference to the right to have a defended of one's choice under Article 22(1).

The decision in *Ram Sarup v. Union of India*,\(^{144}\) reflected the unmoveing position of the Court as that of Tara Singh or Janardhand Reddy. The Court was still insisting that the person had to make an express demand in clear language and wait for mercy to be bestowed by the authority that was responsible for his loss of the liberty. The Court unquestioningly accepted the version of the military authorities that even where there is a Court martial, and the death sentence was awarded, and that too without the services of lawyer of his choice for the accused, there would be no judicial review whatsoever either

\(^{143}\) 94 US 113 (1877), p. 142.
\(^{144}\) (1964) 5 SCR 931.
procedurally or substantively. Instead of striking down the rule in the military, the Court threw the burden on the accused to first make a demand and to then prove that he had in fact made such a demand.

Nevertheless, there was a trend to move away from the restrictive interpretation of A.K. Gopalan. This happened when the Court considered the question whether a prisoner detained by the Government of Maharashtra under rule 30 (1) (b) of the Defence of India Rules, 1962, was deprived of his fundamental rights to the extent that he could be prevented from writing and publishing a book of scientific interest in the famous case of State of Maharashtra v. Prabakar Pandurang Sangzgiri. The Court held the restrictions of the to be unreasonable.

In State of Madhya Pradesh v. Shobharam, the Supreme Court revived the importance of the Article 22 (1) and freed it from the stranglehold of Tara Singh and Janardhan Reddy judgements. In Bashira v. State of Uttar Pradesh, the Supreme Court that the legal aid counsel should not only be appointed but also be given adequate time to prepare the case so as to put up an effective defence. In this murder case, the amicus curiae was appointed and on that very day, the evidence of the two principal prosecution witnesses was recorded, but the application of the amicus curiae was recalling one of them for further cross-examination filed subsequently was dismissed. The Court held it to be violative of the fundamental rights of the accused.

In Re Madhu Limaye, the Supreme Court upheld the contention of the petitioner in person that there was a violation of Article 22(1) of the Constitution. It was held that the person whose liberty has been taken away, must be informed about the grounds of

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145 (1966)1 SCR 702.
146 1966 CrLJ 1521.
147 (1969) 1 SCR 32.
148 1969 Cri LJ 1440.
arrest. This decision was another landmark and it emphasized the importance of safeguarding civil liberties.

The Supreme Court in * Ranchod Mathur Wasawa v. State of Gujarat, ¹⁴⁹* observed that the indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronizing gestures to raw entrants to the bar. Sufficient time and complete papers should also be made available, so that the advocate chosen may serve the cause of justice with all the ability at his command.

Another development during this period was that the decision in *R.C. Cooper v. Union of India, ¹⁵⁰* whereby the Supreme Court refused to accept the argument that certain articles in the Constitution exclusively dealing with specific matters while determining as to whether there is an infringement of the individual’s rights, the effect of laws on the fundamental rights of individuals should be ignored.

In essence, this phase provided fruitful bedrock for the ultimate enactment of the Code of Criminal Procedure, 1973, and the emergence of pro-poor judgments and finally, the concept of public interest litigation.

7.3.4 The Subsequent developments and the Modern Current

In the backdrop of the developments as narrated in detail in the Chapter 8 of the present work, the divorce from the traditional rules had become necessary so as to answer to the needs of the time. Unless law is used as an instrument of social change, to bring about a more egalitarian society, there is real danger of violent explosion in the social fabric. The inspiration for public interest litigation flows from

¹⁴⁹ 1974 Cri LJ 799.
¹⁵⁰ (1970) 1 SCC 248.
the preamble of our constitution wherein the people of India have undertaken to secure justice, social, economic and political and the mandate by Article 39-A of the Constitution. This necessarily means that there should be equal access to law to the poor and deprived Sections of the society un-hindered by technical rules of procedure or the traditional concept of the Judiciary.

Mr Justice Brennan of Supreme Court of U.S.A. has said:151

"Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with but injustice, makes us want to pull things down. When only the rich can enjoy the law as a doubtful luxury and the poor who need it most cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness".

In the fair name of social justice, a new crop of litigation known as public interest litigation developed. The idea got currency after the decision of the Supreme Court in People's Union for Democratic Rights v. Union of India,152 popularly known as the Asian Games case where the Court observed:153

"Where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reason of poverty, disability or

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socially or economically disadvantaged position are unable to approach the Court and the Court is moved for this purpose by a member of the public by addressing a letter drawing the attention of the Court to such legal injury or legal wrong. Court would cast aside all technical rules of procedure and entertain the letter as a writ petition on the judicial side and take action upon it”.

It was poignantly mentioned by Justice Bhagwati in the Asian Games case, referred to earlier:

“Public interest litigation . . . is essentially a co-operative or collaborative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable Sections of the community and to reach social justice to them”.

It was further observed in Asiad case:

“... public interest litigation ... is a strategic arm of the legal aid movement ... which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, ...

While reiterating the urgency of the Courts to entertain public interest litigation, the Supreme Court in People’s Union for Democratic Rights v. Union of India, emphasized.

“Millions of persons belonging to the deprived and vulnerable Sections of humanity are looking to the Courts for improving their life conditions and making basic human rights meaningful for them. The time has now come when the Courts must become the Courts for the poor and struggling masses of this country. Fortunately, this change is gradually taking place and public interest litigation is playing a large part in bringing about this change”.

Even the Kerala High Court in *A.N. Rajamma v. State of Kerala*,157 observed:

> “Rules of procedure are not incapable of waiver and must necessarily be waived in appropriate circumstances in the interests of justice by a Court sitting under Article 226 of the Constitution of India, for, the ultimate object of the exercise of jurisdiction is to mete out justice in matters which fall within its jurisdiction .... A Court should not be rigid or inflexible in its approach to the case and should not throw out a case merely because a person has not come to the Court in the manner in which the rules envisage he should come to this Court. Otherwise, this Court will be inaccessible to a large Section of the people who, by reason of impecuniousness and want of technical know-how as how to approach a Court, are unable to get the benefit of adjudication by this Court in an issue of importance, in an issue in which, had they been

able to approach this Court by engaging a counsel, which they were unable to do, they would have obtained appropriate relief".

In *Hussainara Khatoon (V) v. Home Secy., State of Bihar,*\(^{158}\) Justice Bhagwati held:

"it's the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State and the State is under a constitutional mandate to provide a free lawyer to such accused person if the needs of justice so require. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and it is hoped that every State Government would try to avoid such a possible eventuality".

In *Khatri (II) v. State of Bihar,*\(^{159}\) the Supreme Court answered the question the right to free legal aid to poor or indigent accused who are incapable of engaging lawyers and held:

"the state is constitutionally bound to provide such aid not only at the stage of trial but also when they are first produced before the magistrate or remanded from time to time and that such a right cannot be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. Magistrates and

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\(^{158}\) (1980) 1 SCC 108.

\(^{159}\) (1981) 1 SCC 627.
Sessions Judges must inform the accused of such rights. The right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. The State cannot avoid this obligation by pleading financial or administrative inability or that none of the aggrieved prisoners asked for any legal aid at the expense of the State. The only qualification would be that the offence charged against the accused is such that on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may, however, be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal or child abuse and the like, where social justice may require that free legal services need not be provided by the State”.

The Supreme Court in *Suk Das v. Union Territory of Arunachal Pradesh*,\(^\text{160}\) and said,

\(^{160}\) (1986) 2 SCC 401.
"It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21".

The Hon’ble Gujarat High Court in Dineshbhai Dhemenrai v. State of Gujarat, decided on 31st July, 2000, a division bench comprising Hon’ble Justice J. N. Bhatt and J. Vora, quoted:

"47. The Hon’ble Apex Court has, also, in the following epoch-making decisions, lucidly, expounded the principles of providing free legal aid and fairness in criminal trials and the rights of indigent accused persons:


Air 1953 SC 318.
(1978) 3 SCC 544.
(1980) 1 SCC 98.
(1981) 1 SCC 627.
8. Sheela Barve v. State of Maharashtra.\textsuperscript{169}

9. Suk Das v. Union Territory of Arunachal Pradesh.\textsuperscript{170}

10. Sheela Barve v. Union of India.\textsuperscript{171}

11. Centre for Legal Research v. State of Kerala.\textsuperscript{172}

12. Bajiban Salambhai Chauhan v. U.P. State Road Transport Corporation.\textsuperscript{173}

13. Kishore Chand v. State of H.P.\textsuperscript{174}

14. State of Maharashtra v. Manubhai Pragaji Vashi.\textsuperscript{175}

The journey of the Indian constitutionalism through the canvas of Supreme Court of India, has reached at its pinnacle in the form of more than hundred judgements ranging from judicial creativity to clarifying the existing laws, from judicial legislation to removing the lacunae in the existing laws and factuality of the justice delivery system. The activism of the judiciary resulted into emergence of prison, environmental, consumer, women and poverty jurisprudence etc., but its dimensions can not be covered within the periphery of this chapter.

7.4 Access to Justice: National and international perspective

Justice is closely related to core issues i.e. poverty eradication and human development. There are strong links between establishing democratic governance, reducing poverty and securing access to justice. Any democratic governance is undermined where access to

\begin{itemize}
\item \textsuperscript{168} (1982) 1 SCC 545.
\item \textsuperscript{169} (1983) 2 SCC 96.
\item \textsuperscript{170} (1986) 2 SCC 401.
\item \textsuperscript{171} (1986) 3 SCC 596.
\item \textsuperscript{172} (1986) 2 SCC 706.
\item \textsuperscript{173} (1990) Supp SCC 769.
\item \textsuperscript{174} (1991) 1 SCC 286.
\item \textsuperscript{175} (1995) 5 SCC 730.
\end{itemize}
justice for all citizens (irrespective of gender, race, religion, age, class or creed) is absent. The access to justice is linked to poverty reduction for the reason that being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making. The lack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability. The creation of a sustainable environment with equal access to justice requires working with different types of institutions and with various actors, such as: the police, the Courts, prosecutors, social workers, prison officials, community leaders, paralegals, traditional councils and other local arbitrators; and taking account of the linkages between them. Informal and traditional mechanisms of justice are often more accessible to poor and disadvantaged people and may have the potential to provide speedy, affordable and meaningful remedies to the poor and disadvantaged, though they are not always effective and do not necessarily result in justice.

At the international level, the United Nations Development Programme (UNDP) recognizes the progress represented by uniform and codified law, and the need for traditional systems to evolve toward serving justice in full respect of international human rights standards, such as gender equality, non-discrimination for reasons of age or social status, respect for life and due process guarantees for criminal defendants. There is a general tendency for access to justice reform to focus on programmes supporting formal mechanisms of justice, especially processes of adjudication through the judiciary. This is understandable from a governance perspective. However, from access to justice perspectives, it is essential that common parameters of assessment be applied. Hence, UNDP’s approach to justice sector reform focuses on strengthening the independence and integrity of both formal and informal justice systems, making both more
responsive and more effective in meeting the needs of justice for all—especially the poor and marginalized. Within the broad context of justice reform, UNDP’s specific niche lies in supporting justice and related systems so that they work for those who are poor and disadvantaged. Moreover, this is consistent with UNDP’s commitment to the Millennium Declaration and the fulfillment of the Millennium Development Goals. The empowering of the poor and disadvantaged to seek remedies for injustice, strengthening linkages between formal and informal structures, and countering biases inherent in both systems can provide access to justice for those who would otherwise be excluded. It is committed to using a human rights-based approach in its programming, guided by international human rights standards and principles. The access to justice is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts.

The Founding Fathers of the Constitution of India, have right from the preamble, taken a positive approach of doctrine of philosophy of Equal Justice which becomes apparent on the plain perusal of the preamble of the Constitution. Justice is not only in Court of law, but justice in economic and politics. This preambular promise is further strengthened by the constitutional provisions in Articles 14, 19, 21, 32, 39A, 51A and 226 of the Constitution of India.

Article 39A of the Constitution of India, has, again, amplified and magnified the concept and philosophy of free, fair and full justice, which reads as under:

“39-A: Equal justice and free legal aid: - 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”.

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A plain perusal of the aforesaid provisions, evidently, leads us to believe that it is an obligation of the State Authority to provide free and competent legal aid to the persons, who are, unable to procure or engage services of a private lawyer on account of financial or any other disability. Fairness in trial of a person, who is facing an indictment is a basic feature of criminal jurisprudence. That is how, provisions are, specifically, incorporated in Section 304 of the CrPC, which prescribe that legal aid shall be provided to the accused, in certain cases, at the State expenses. Section 304 reads as under:

"304. Legal Aid to accused at State expense in certain cases-

(1) Where, in a trial before the Court of session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) the mode of selecting pleaders for defence under sub-Section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-Section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-Sections (1) and ((2) shall apply in relation to any class of trials before other Courts in the
State as they apply in relation to trials before Courts of session.

Rule 46 of the Bar Council of India requires, “Free legal assistance to the indigent and oppressed is one of the highest obligations an Advocate owes to Society”.

The National Commission to Review the working of the Constitution, 2002 recommended that ‘access to justice’ must be incorporated as an express fundamental right as in the South African Constitution of 1996. In the South African Constitution, Article 34 reads as follows:

“Article 34- Access to Courts and Tribunals and Speedy justice:

1. Every one 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 tribunal or forum or where appropriate, another independent and impartial Court, tribunal or forum.

2. The right to access to Courts shall be deemed to include right to reasonably speedy and effective justice in all matters before the Courts, tribunals or other forum and the State shall take all reasonable steps to achieve that object”.

Accordingly, the National Commission for Review the working of constitution has recommended insertion of Article 30A on the following terms:

“30A: Access to Courts and tribunals and speedy justice:

1. Every one has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent Court or, where
appropriate, another independent and impartial tribunal or forum.

2. The right to access to Courts shall be deemed to include right to reasonably speedy and effective justice in all matters before the Courts, tribunals or other forum and the State shall take all reasonable steps to achieve the said object.

The global norm underlying the legal aid is surely implied in Article 8 of the universal Declaration of Human Rights, which reads:

Everyone has the right to an effective remedy by the competent national tribunals for act violating the fundamental rights granted by the constitution or by law.

And in Article 14(3) of the International covenant of civil and Political rights which guarantees to everyone.

The right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interest of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Article 47 of Chapter VI of the Charter of Fundamental Rights of the European Union, 2000, deals with right to an effective remedy and to a fair trial. It provides.

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously
established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Most of the countries in the world have made it a constitutional right to have the assistance of a lawyer or a Counsel in criminal proceedings. Under the Sixth Amendment of United States’ constitution, it is provided that in any of criminal prosecutions, the accused shall enjoy the right of Counsel. The right to have Counsel by the accused has been considered so fundamental that many other countries have incorporated it in the constitution or the Bill of Rights. Under Section 2(c) (ii) of the Canadian Bill of Rights, it is clearly provided that:

“No law amended shall be so construed or be applied so as to deprive assistance to a person who has been arrested or detained and instruct a counsel without delay”.

The Japanese constitution and the International Convenant on Civil and Political Rights are instances, where Right to Counsel is recognised. No doubt, in England, there is no such right in the Common Law, but instruments like “Poor Persons’ Defence Act, 1930” and “The Legal Aid and Advice Act” provide Legal Aid to poor at public expenses.

The Universal Declaration of Human Rights and the Constitutional provisions enshrined in Chapters III and IV and the provisions of Legal Services Authorities Act 1987 and the provisions of Section 304 of the Code of Criminal Procedure manifest the human rights deriving from the dignity and worth in the human beings. Articles 3, 10, and 11 of the Universal Declaration of Human Rights...
adopted and proclaimed by the General Assembly (UNO) Resolution 217A (III) of 10th December, 1948 and recognised and ratified by India, are as under:

Article 3. Every one has the right to life, liberty and security of person.

Article 10. 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.

Article 11.1. Everyone charged with a penal offence has the right to be presumed, innocent until proved guilty according to law in a public trial, at which he has had all the guarantees necessary for his defence.

The aforesaid provisions take us to the conclusion that the thrust for equal, easy and effective access to justice has been made by most of the legal systems of the world.

The Hon’ble Gujarat High Court in Dineshbhai Dhemenrai v. State of Gujarat, decided on 31st July, 2000, a division bench comprising Hon’ble Justice J. N. Bhatt and J Vora, beautifully and wisely observed:

“33. This Court in Labhu’s case, wherein, one of us (J.N. Bhatt, J.) was a party to the decision, has made relevant observations about the rights of the accused. Therein 28 rights of the accused-persons are enumerated and highlighted for his proper defence in para 21 of the judgment. Therefore, it would be expedient to refer to and recount them so

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(2001) 1 GLR 603.

that serious error committed by Trial Court could be obviated in future and Constitutional commands could be observed in true spirit and letter.

1. Protection against arbitrary or unlawful arrest;\(^{178}\)

2. Protection against arbitrary or unlawful searches;\(^{179}\)

3. Protection against “Double Jeopardy”;\(^{180}\)

4. Protection against conviction or enhanced punishment under ex-post facto law;\(^{181}\)

5. Protection against arbitrary or illegal detention in custody;\(^{182}\)

6. Right to be informed of the grounds, immediately after the arrest;\(^{183}\)

7. Right of the arrested person not to be subjected to unnecessary restraint;\(^{184}\)

8. Right to consult a lawyer of his own choice;\(^{185}\)

9. Right to be produced before a Magistrate within 24 hours of his arrest;\(^{186}\)

10. Right to be released on bail, if arrested;\(^{187}\)

\(^{178}\) Article 22 of the Constitution and Sections 41, 55 and 151 of CrPC.

\(^{179}\) Sections 93, 94, 97, 100(4) to (8) and 165 of CrPC.

\(^{180}\) Article 21(2) of the Constitution and Section 300 of CrPC.

\(^{181}\) Article 20(1) of the Constitution.

\(^{182}\) Article 22 of the Constitution and Sections 56, 57 and 76 of CrPC.

\(^{183}\) Article 71(1) of the Constitution and Section 50 of CrPC as also Sections 55 and 75 CrPC.

\(^{184}\) Section 49 of CrPC.

\(^{185}\) Article 22(1) of the Constitution and Section 303 of CrPC.

\(^{186}\) Article 22(1) of the Constitution and Sections 57 and 76 of CrPC.

\(^{187}\) Sections 436, 437 and 439 CrPC, also Sections 50 and 167 CrPC.
11. Right not to be a witness against himself; 188

12. Right to get copies of the documents and statements of witnesses on which the prosecution relies; 189

13. Right to have the benefit of the presumption of innocence till guilt is proved beyond reasonable doubt; 190

14. Right to insist that evidence be recorded in his presence except in some special circumstances; 191

15. Right to have due notice of the charges; 192

16. Right to test the evidence by cross-examination; 193

17. Right to have an opportunity for explaining the circumstances appearing in evidence against him at the trial; 194

18. Right to have himself medically examined for evidence to disprove the commission of offence by him or for establishing commission of offence against his body by any other person; 195

19. Right to produce defence witnesses; 196

20. Right to be tried by an independent and impartial Judge; 197

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188 Article 20(3) of the Constitution.
189 Section 173(7), 207, 208 and 238 of CrPC.
190 Sections 101-104 of Evidence Act.
191 Section 273 CrPC; also see Section 317 CrPC.
192 Section 218, 228(2), 240(2), etc. of CrPC.
193 Section 138 of Evidence Act.
194 Section 313 CrPC.
195 Section 54 of CrPC.
196 Section 243 of CrPC.
21. Right to submit written arguments at conclusion of the trial in addition to oral submission;\textsuperscript{198}

22. Right to be heard about the sentence upon conviction;\textsuperscript{199}

23. Right to fair and speedy investigation and trial;\textsuperscript{200}

24. Right to appeal in case of conviction;\textsuperscript{201}

25. Right not to be imprisoned upon conviction in certain circumstances;\textsuperscript{202}

26. Right to restrain police from intrusion on his privacy;\textsuperscript{203}

27. Right to release of a convicted person on bail pending appeal;\textsuperscript{204}

28. Right to get copy of the judgment when sentenced to imprisonment.\textsuperscript{205}

34. It may, also, be stated, at this stage that provisions for providing legal aid to needy and indigent persons, particularly, in criminal trial has been made, as it is reported, in more than 132 Nations out of 192 UNO member states. Even in affluent capitalist and developed democratic countries like United States, Legal Aid is provided, as of right, to needy and deserving persons facing criminal trial. The Legal Aid Corporation has been constituted, which is manned, managed and monitored by the American Bar Association and

\textsuperscript{198} The Scheme of Separate of Judiciary as envisaged in CrPC, also Sections 470, 327, 191, etc. of CrPC.
\textsuperscript{199} Section 314 of CrPC.
\textsuperscript{200} Sections 235(2) and 248(2) of CrPC.
\textsuperscript{201} Section 309 CrPC.
\textsuperscript{202} Sections 351, 374, 379, 380 CrPC and Articles 132(1), 134(1) and 136(1) of the Constitution.
\textsuperscript{203} Section 360 of CrPC, and Section 6 of the Probation of Offenders Act.
\textsuperscript{204} Article 31 of the Constitution.
\textsuperscript{205} Section 380 of CrPC.
\textsuperscript{206} Section 363 of CrPC.
many other American Law Societies or organisation provide Attorneys. Interestingly, the provisions came to be incorporated even in the Constitution of United States by virtue of Fourth Amendment in 1789, whereby, the life, liberty and freedom is preserved and cannot be taken away without due process of law. It would be interesting to refer to the Fourth Amendment made in the United States Constitution, which came into force in 1789:

"Amendment IV. The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

Again, in the United States, by virtue of Amendment XIV, the right and liberty of a citizen is proclaimed and strengthened. It reads as under:

"Amendment XIV. Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The right to counsel in a criminal trial is very important. In USA this aspect is very well developed. We may, therefore, peep into it. The right of an indigent accused in a criminal trial to the assistance of counsel, which is guaranteed by the 6th Amendment, is made applicable to the States. The 14th Amendment, in Gideon v. Wain
In the case of Wright, it is not governed by the classification of the offence or by whether or not jury trial is required. It has been, clearly, propounded that no accused may be deprived of his liberty as a result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel is not determined by the seriousness of the crime.

35. The assistance of counsel will best avoid conviction of the innocent, an objection as important in the Municipal Court as in Court of general jurisdiction. Therefore, in our view, the opinion of US Supreme Court in Jon Richards v. Raymond Haling is landmark and epoch-making in the realm of right to counsel for an indigent accused in a criminal trial. The 6th Amendment, which enumerated the situation, has been applicable to the States by reason of 14th Amendment and it provides specified standards for "all criminal prosecutions". The federal constitutional right to counsel is not, thus, limited to trials for offences punishable by certain amount of punishment or imprisonment. Our view is, also, therefore, very much reinforced by the decision of the US Supreme Court.

40. There are several reasons why, the right to legal aid or to avail legal services in a country like India, which is under-developing, democratic republic, wherein, the 'Welfare State' doctrine has been adopted, assumes wider significance. There are several reasons, aspects and facets prevalent in this country, which would prompt to have a very effective, useful and efficient infrastructure for providing free and competent legal aid in a country like India, where, less than 33 per cent of the people know how to write and read sufficiently and usefully. It is in this context, the provisions for legal services have been made in the Constitution as well in the Legal Services

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\(^{206}\) 372 US 335.
\(^{207}\) 407 US 25.
Authorities Act, 1987, over and above the provisions made in Section 304 of the Criminal Procedure Code, 1973”.

7.5 Reasons/Barriers to Access to Justice

There are many stumbling blocks which deter the poor man from moving the Court of law. They may be cultural weaknesses, educational deficiencies or economic, geographical and psychological barriers. In an equal society, the ultimate result of litigation should depend upon the relative legal merits of the opposing positions but in practice the factors extraneous to legal merits play a very effective role in assertion and vindication, and implementation of the legal rights.

The Hon’ble Gujarat High Court in Dineshbhai Dhemenrai v. State of Gujarat, decided on 31st July, 2000, a division bench comprising Hon’ble Justice J. N. Bhatt and J Vora, beautifully summarized the necessity for legal aid,

“48. There are innumerable reasons why Free and Competent Legal Aid in India is, extremely, imperative and should be liberally construed. Therefore, it would be appropriate and expedient to highlight some of the significant facets and features, at this juncture, in nut-shell, which are as follows:

(i) India is largest Democratic, Republic, Secular State which has adopted the doctrine of Welfare State and has followed Welfare State’s doctrine.

(ii) Almost 50 per cent of our population constitutes women and, undoubtedly, in the present social set up, there is, unfortunately, still undesirable strong gender-bias in practice. And majority of them are in rural areas and illiterate.

(2001) 1 GLR 603.
(iii) Out of the total population of the women in this country, almost less then 50 per cent is literate.

(iv) Most of the rural people in India resides in more than 5,18,000 villages who are either illiterate indigent or ignorant of their rights. They have started to look upon the system as a foe and not a friend, which is, undoubtedly, an unhealthy syndrome.

(v) Pending work load of cases in Indian Courts has rapidly crossed the 30 millions as per latest survey, and many more are under inquiry or investigation stage, etc.

(vi) Roughly, 91 per cent of cases instituted in the Courts go for trial and only 9% of cases are settled without judicial agitation, which is reverse in the USA. Thus in USA, more than 90% of cases involving legal disputes are settled before they go for trial.

(vii) The ratio of judges per million in India is almost 9, whereas, it is more than 115 in U.S.A. Even in a country like Pakistan, the ratio is more than the ratio in India.

(viii) In case of ratio of advocates available, in India, is far less than developed countries. There are about only 4,50,000 and odd numbers of advocates in India which has populous of 1 billion.

(ix) Even in case of urban populous most of them are ignorant about their legal rights, who are otherwise, literate. The urbanised populous lack awareness about their Legal Rights.

(x) The life span of a civil case or a law suit in civil side, is ranging, average, between 8 to 12 years. Who knows even
after a successful decision or order in favour of a party, whether he would be able to see light at the end of tunnel after having passed through the long legal and procedural conduit pipes?

(xi) The Courts have to interpret, analyse and apply the provisions of law in the beginning of the 21st Century, which are made more than 8 to 9 decades old. Some of them are even century old and even more. Let us not forget that there is nothing constant except 'change'.

(xii) Our traditional Legal system is founded upon British legacy which had a basis and basion of Roman jurisprudence which historically proved to be a great and grand failure in terms of local and personal in terms of Indians.

(xiii) Even after decree award or order passed on judicial side in favour of a party, after numbers of years, successful party has to again undergo the second round of litigation at the stage of execution. Is it not a Pity v. Duty?

(xiv) Our present traditional system of justice is suffering from 3 main maladies and unhealthy syndromes.

(a) Huge and heavy expenses

(b) Unexpected and unpredictable inordinate delay in disposal,

(c) Cumbersome and complex process of Court.

(xv) In view of the failure to provide easy, cheap and expeditious accessibility, mental barrier is developed amongst many persons to suffer injustice. As a result of
which, a common man has started looking at it, as foe rather than, a friend.

(xvi) The country like ours, the largest democratic welfare state, in which Rule of Law has been recognised as one of the basic features of the Constitution.

(xvii) Majority of the people are poor or indigent and most of them live below the poverty line, even though poverty line is drawn liberally and not upon an International Standard.

(xviii) The voice of the litigant who is the heart of the system is soft and weak. It is drowned out by the roar of fear. It is ignored by voice of desire. It is contradicted by the voice of some strong. It is hissed away by hate and finally extinguished by fire of anger.

(xix) The Legal Aid which aims at providing free and competent Legal Aid, which is protective as well as preventive aspect assumes higher degree of importance, when we have astronomical arrears in our Courts, at present.

(xx) The Legal Aid system covers all the 3 stages prepending and post litigation. Therefore, by mediation or any other effective Alternative Dispute Redressel (ADR) Forum dispute can be resolved. National Legal Service Authority (NALSA) has reported that more than 50,000 cases have been settled at pre-filing stage, out of which more than 18,000 cases have been finally settled in Gujarat by GSLSA.

(xxi) Legal Aid under the Legal Services Authorities Act, 1987, has become a mission whereas it was a vision
earlier and right from the Highest to the Lowest Court mechanism under the direction and guidance of NALSA has been set up.

(xxii) Legal Aid means to assist or provide some help to the needy, whereas, under the 1987 Act, the concept is changed and Legal Aid is substituted by Legal Services. It is also the duty to provide it.

(xxiii) The revolutionary evolution of resolution of dispute by one or other means, ADR has been, successfully, translated in various countries.

(xxiv) It promotes dispensation of socio-economic justice to the deserving indigent who is wronged or done injustice.

(xxv) It is a means to achieve the end enshrined in the Constitution to reach the goal of equal accessibility to the justice system.

(xxvi) The weaker Section, viz. Scheduled Caste and Tribes, underprivileged, oppressed and depressed, destitutes and deserted millions of illiterate and ignorant have started losing faith in the traditional system. It can, hardly, be denied that in the present set up of the society, corruption has not only become endemic but also epidemic. Therefore, easy and speedy access to justice for a common man is imperative.

(xxvii) 34 per cent of the total world's poor population is in India. More than majority persons live below poverty line. Even in state like Gujarat, as per latest survey 39 percent population, in reality, lives below poverty line.
UNICEF has declared the year 2000 as International Year of culture of peace. The preventive and protective Legal Aid creates jurisprudence of peace.

Legal Aid is in full swing even in a rich country like USA, where, average annual per capita income is more than $ 27,000 whereas it is almost $ 350 in India.

Juridicare is equally important, if not more than the medicare, for the survival of the rule of Law. It, also, revives, rejuvenates, restatements and for revivification of values and ethos. It helps to create renaissance of National Legality and provides a rendezvous for social, amity, and affinity and social justice.

It is no longer a plan but it is a pledge. It is no longer a chart, but a charter. It is no longer a cry or call but a creed. It is, therefore, necessary to consider to have (i) National Legal Aid Corporation, (ii) National Equal Access to Justice Library for better monitoring and Management of Legal Aid and providing competent Legal Aid to poor and not the poor Legal Aid.

It aims at promoting larger interest, harmony, comity and polity and jurisprudential cohesion and environment.

It creates not only peace but a culture of compromise. In our country, amount spent or expenditure for administration of law and justice is reportedly 0.2 per cent of the Gross Domestic Product (GDP) which is grossly inadequate and insufficient in a democratic set up. It is, therefore, necessary to constitute a regular mechanism, whereby, we can take and evaluate Judicial
Cardiogram for necessary urgent and useful, effective and ebullient reforms to translate constitutional mandates and obligation propounded right from Preambular Promise in their fighting faith by its Founding Fathers, a reality.

(xxiv) As per the report of World Health Organisation, (UNO Aids) the victimization of children and women due to various health syndromes is very high in India, apart from regional disparities and bias.

(xxv) It is also reported by the UNICEF that in the year 2000, India will be the world’s most illiterate nation.

(xxvi) It is further reported by the UNICEF that India has maximum school drop out and every third illiterate in the world is an Indian.

(xxvii) The custodial violence, investigating abuses and social exploitation pose the greatest challenges to the human rights in India.

(xxviii) It is necessary, in view of the retrogradation in authenticity of judicial system value. The right corrosion in the public life and ethical value and moral ethos have been in fall-downward swing.

(xxix) We have reached a situation where law and justice in many cases becomes distant neighbours. Despite the accepted practice and norms of having a separate Court or a judge per about 700 cases in India as per the last report, average, work load is exceeding per Court 5600 and again it is reported that in a Court of Metropolitan City like Ahmedabad work-load per Court is almost around 70,000 cases. In many Courts, cause list or popularly known as Board of the day of the cases, runs into more than two
hundred cases a day, one would be tempted to say that there is high time for scientific Court management and Legal and Judicial continuing education and training.

(xl) It must be remembered that the present system is diabolic and dilatory instead of being dialectical and speedy.

(xli) A common man has started feeling that justice itself is on trial. It is, therefore, imperative to evolve effective and efficient strategies both preventive and protective:

1) To manage : Unmanageable
2) To break : Unbreakable
3) To beat : Unbeatable
4) To hit : Unhitable
5) To defend : Indefensible.

(xlii) Looking to the present situation in the country, we are obliged to create and constitute a Neo Jurisprudence, a public oriented participation performing, progressive, professional and pervasive, programmes.

(xliii) Legal education must, urgently, be upgraded if the grammar of anarchy is not to invade the Bar, the Bench and constitutional order. It is necessary to consider various modern ways and means for high order of Legal Aid and ADR, like use of the Information Technology and also the concept of 'PLEA-BARGAIN' which is in practice in US, UK, France and many other countries and reported to be productive, at least to begin with certain petty offences and earmarked or defined minor offences, wherein, individual interest and not the Public Interest or
Policy is involved and on experimental basis and that too within the monitoring and controlling supervision of Courts.

(xliv) To save the Nation, a catalytic role has to be played by Legal Aid in the larger interest of weaker Section. NALSA has undertaken various important and effective and appreciable Legal-Aid programmes and, therefore, members of Bench and Bar, NGOs and Governmental Agencies must render voluntary helping hand in such noble and novel projects.

(xlv) Unfortunately, in the present system, the litigant, who is the heart of judicial anatomy, is the most neglected segment. He is the consumer of justice and he should be respected. The litigant - consumer of justice - and heart of our system - must receive equal, effective, inexpensive and speedy trial and justice.

(xlvi) It is imperative to reach the goal of ‘Equal access to justice’, which is a constitutional commandment and statutory imperative. Jurisprudential history speaks, unequivocally, that the concept of equal justice came to be manifested in the ancient and early laws. Even in a classic statement, Magna Carta, in its most glorious enunciation in 40th para, evidently, has inscribed, “TO NO ONE WILL WE SELL, TO NO ONE WILL WE REFUSE OR DELAY RIGHT OF JUSTICE”.

(xlvii)Legal-Aid is not a charity or a chance but, as stated, it is a constitutional mandate to the State and right of public, which is not, now, an opinion, but a constitutional obligation and compulsion. As such, it is not a pledge or a plan of a Government, but has assumed, the status of
peoples' movement. Somebody has, rightly, said, "What is the use of the system, which does not help lowly and lost, poor and downtrodden and which creates distance between law and justice".

(xlviii) Needless to state that Legal-Aid becomes legal service in real sense when it becomes accessible to the subjects of its objects and when they get benefit by taking advantage of impartiality and integrity of the system.

(xlix) Legal Services Authorities and Committees and institutions providing free legal aid ought to be sufficiently funded by the State and must receive adequate support and ample assistance from the civil service, which is badly required. It should, also, liberally be assisted by the Bench and the Bar between whom always exists an unbreakable, irrevocable and irretrievable partnership.

(l) In various countries, particularly, in United States and other Western countries, the contribution of the Bar in rendering free and competent legal-aid is praiseworthy and it must be emulated. Legal Aid fraternity must respond with juristic sensitivity to the voice from the silence zone (a class of litigants) and mass voice of weak, meek, poor, suppressed and exploited, women, and destitute children so as to create evolving ebullient echo for the silent sector. The Bar must evolve scheme to ensure that unprotected is not priced out of Market. The Bar is, really, a backbone of the legal services to compliment and complete the constitutional obligations and obtain statutory rights of millions of indigent, needy, handicapped and deserving people".
7.5.1 Economic Barrier

The litigation in Courts generally is very expensive. Though the government has provided the machinery for dispensing justice to the people and pays the salaries of judges and other Court personnel and provides buildings and other facilities necessary to try the cases. The litigants have to bear other costs of settling the disputes e.g. the stamp fee, lawyer’s fee and other Court costs. The poor persons, not sure about the result hesitate to initiate the litigation and prefer to forgo the right. The risk of losing the case operates as a great barrier to the access to justice because the plaintiff will not be able to estimate how much it will cost him to lose and so the indigent chooses not to pursue the right of which he is not very sure and sometimes he is sure but the time and the cost constraint puts him on the back foot, though in litigation none can be absolutely sure always about the result of case. This uncertainty is a big barrier to access.

In addition to payment of attorney’s fees and meeting other expenses directly connected with the litigation, there are certain opportunity costs such as loss of income while helping to prepare the case or attending the proceedings. An indigent suffers at the time spent in connection with litigation. The opportunity costs of lost wages can be prohibitive for the indigent who is just keeping his body and soul together.

The dilatory judicial process also affects the poor adversely. It helps the rich and puts the indigent at a great disadvantage in case the dispute is between the rich and the poor. The ‘delay’ generally multiplies the costs of litigation which puts great pressure on the economically week to forgo his claim or settle for much less than his legitimate claim.

Thus, the persons with means and resources have obvious advantage in pursuing or defending claims. Firstly, they are able to
litigate, secondly, they can present their arguments more effectively because the passive decision makers in the adversarial judicial system, despite their other more admirable characteristics; rely on parties for investigating and presenting evidence and for developing and arguing the case. The parties with better resources can employ better lawyer and use better techniques to win the case.

7.5.2 Geographical Barrier

The geographical situation of the Court can also act as barrier to access. A centralized system of Courts may probably save money for the government, but it is definitely inconvenient for the litigants living at far off places, as the same makes physically or economically impossible for the most of the disputants to use the Courts for small disputes.

7.5.3 Barrier of illiteracy and social status

In addition to financial resources, the difference in educational background and social status is of crucial importance in determining the accessibility to justice. An important barrier is the lack of knowledge about the legally enforceable rights. One who does not know his rights or one who does not know its violation, can not think of enforcing the same much less than deciding the course of action to do something. ‘The people, specially the underprivileged, have no awareness of available facilities and how to use them’.209 ‘The capability of the disputants is very central to the provision or denial of effective access. Some of the parties enjoy strategic advantages over their adversaries’.210

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7.5.4 Psychological Barriers

The lack of awareness, relates to another major barrier to access i.e. the psychic willingness of people to resort to legal procedure. Even those who know how to find qualified legal advice may not do so. The psychological inaccessibility is a more subtle phenomenon. It is compounded of several factors; the anxiety provoking formality of legal process, typical Court room setting, the language barrier for some litigants, the mysterious legal machinations, the fear of lawyer, of even entering lawyers’ chambers, and life considerations. Many disputants overcome these feelings and file their claims with the Court, at least when their grievances are acute especially when they have been able to hire the comforting hand of a lawyer familiar with the process. Others are thrust into the judicial arena as defendants and, finding no other choice manages to participate in the proceedings with varying effectiveness.

But for some people the psychological barrier may prove insurmountable particularly for the poor, the uneducated and those unable to speak the languages of the majority. Courtroom may appear to be something awe-inspiring. The complicated procedures, detailed forms, intimidating Court rooms and over bearing judges and lawyers make the litigants feel lost, a prisoner in an alien world. We can understand the varying degree of psychological impact in the form of following i.e. To the person who waits all day to pay a traffic fine, the young man who spends a few months in jail for possessing marijuana, the woman who finds no remedy in Court for exorbitant rent hike, the black who still cries for implementation of “civil rights” legislation, the student who resists serving in an illegal war, the judicial process appears to worsen pressing problems rather than solve them.
7.5.5 ‘One-Shot Litigants’ Versus Repeat Litigants

Prof. Galanter\textsuperscript{211} has coined the two different types of litigants. Those facing the Court for the first time are according to him “One shot” litigants and are at a disadvantaged position as compared to those litigants who have frequent encounters with the judicial system. And some have long judicial experience. Prof. Galanter calls such litigants as ‘repeat players’. The advantages to a repeat player are:

(i) the experience with the law enables better planning for litigation;
(ii) the repeat player has economics of scales because he has more cases;
(iii) the repeat player has opportunities to develop internal relations with members of decision making institutions;
(iv) he may spread the risk of litigation over more cases; and
(v) he can utilize the strategies with particular cases to secure a more favourable posture for future cases.

That is why the organized litigants are more effective than individual ones. The individual consumer would normally abandon his right against the manufacturer but a consumer organization will be ready to vindicate the rights of its members.

7.5.6 Diffuseness of Interests

Another barrier is the diffuseness in interests or collectiveness or fragmentation of interests, for example right to clean air etc. in collective interests, either none has the right to remedy, or the share of interests is too small to induce the individual to enforce the right. For Example, a public authority orders for deforestation of a particular

\textsuperscript{211} Galanter, “Why the Haves come out Ahead, Speculations on the Limits of Legal Change”, \textit{9 Law & Society Review}, 95 (74).
area which threatens serious and irreversible harm to natural environment affecting all the individuals living in that area. But for an individual person a lawsuit against deforestation will cost more than what he aspires to gain.

Thus, the economic, geographical, and psychological and other related barriers including delay in the system and the population explosion etc. deter an indigent to have access to the Court for redressal of his grievance or enforcement of his rights and so different strategies have to be evolved for the protection of the rights of the indigents. Either it is the government which provides free legal services to the poor and ensures that the free legal service is equivalent to what his adversary can afford. In this task, the private charitable or social societies can also help and in India and many countries in the world, they are doing yeoman service.

7.6 Consequences

One of the most important outcomes of everything is that it entails certain consequences whether good or bad. It is these consequences which have impact on some or all entities and therefore, these entities, human or otherwise, are persuaded to do or not to do a particular thing to make differences in the outcome. This requires us to ponder over the consequences of a problem and to take steps to reduce and eliminate the same.

In the present context, the problem of non-access or lack of adequate access to justice, apart from the constitutional obligation and preambular spirit and the doctrine of fair play, needs to be tackled keeping in view the ill-effects it has on the society as a whole, on the nation as a separate entity and on the universe at a macro level.

The ever-widening divide between the rich and the poor results into social outbursts. That is why various social movements started
which, in fact, were the results of exploitation of the under-privileged masses. The poor fell to criminal tendencies i.e. Terrorism, naxalism, maoist movements or other movements against jamindars and established order. The problem of non-access or lack of adequate access to justice results into exploitation of the poor as they do not get opportunity to assert their right or to raise voice against the wrong, if any, done to them in that particular matter.

This also results into recidivism. One, who is condemned once, is exposed to condemnation again. The person becomes unresponsive to the social order. He fell to criminal tendencies easily or considered to be suspect of another crime. When he does not get true, real and much required representation, the thought of his getting corrective and reformative treatment is nothing but a luxury. The also increases the crime rate and therefore, it strains the whole system, which also results into increase in unreported crimes as the people finds the factum of complaint to be more difficult than the loss suffered by them.

In essence, it can be said that the problem of non-access or lack of adequate access to justice continues to make an indirect but fatal dent, which disturbs the social fibre and the established order.

7.7 Existing state of affairs of the access to justice and the conclusion

Despite having obligations as enshrined in the Constitution, various legislations and international commitments and the endeavour of the judiciary, the existing state of affairs of the ‘access to justice’ is not encouraging. The poor and downtrodden are not able to get its benefits. The question arises as to whether the present model is a paper-model or role-model in its structure, progressive or retrogressive in its functions, a farce or reality in its actuality. The immediate needs of a country relating to access to justice can vary
significantly depending, inter alia, on whether an acceptable legal and institutional framework is in place; whether trained and experienced personnel are available within the country; whether the physical infrastructure exists; whether weaknesses of the justice and security sector was among the causes of insecurity and instability; and most importantly, whether laws and institutions are themselves under contestation and therefore need to be considered as part of a solution to the problem. Such assessments should encompass both formal and informal justice mechanisms, particularly examining the role of traditional structures in enhancing access to justice where formal institutions are not available to a majority of the population. A functional analysis of some of the naked truths is as follows:

1. A litigant goes to an advocate thinking that he is to file a case regarding some alleged right. Generally, it is the litigant who decides as to what he wants. A lawyer does not go into the merits of the alleged claim, if any, of his client rather he simply advises that he will file the case irrespective of the inherent of the weakness or falsehood of the claim. The experience shows that the litigant come to the Court by challenging a registered document executed and registered by him even one or more decades ago. Such kind of litigation unnecessarily wastes the time of the various instruments of the justice delivery system.

2. The lawyer keeps into mind the fee which he can get from the client in lump sum or by way of undisclosed and undetermined installments. The lawyer knows that if he demands the whole fee, the client may flee away thinking that he will find some other lawyer who would seek fewer fees. In order to keep and maintain the client, the litigant will be asked to come on each day of hearing even in a
3. Consequently, the litigant will be guided/misguided to pay on each day of hearing under the garb of obtaining copies of every order, for alleged bribing of the subordinate staff, for furnishing the meager process fee. The litigant is grinded in this whole exercise of exploitation.

4. Once who enters into the vicious circle of litigation particularly as accused in a criminal case, however small it may be, he ends up losing a huge amount of time, money and energy, even though he is finally acquitted or convicted but not sentenced and released on probation in a particular case. From the perspective of a poor accused, he has to pay a handsome amount of Rs. 50/- or some time even Rs. 100/- to get type-written an application containing two or three lines seeking exemption from personal appearance on a particular day due to illness or some urgency, or for some other application. Surprisingly, the filing of a legible hand-written application would have been sufficient to convey the prayer.

5. The litigants are blatantly misled by the worthy lawyers. The other truth is that litigants want to be misled because the exactly true and faithful advice does not suit the common man now-a-days.

6. Some corrupt practices are also going on both on the part of lawyers and judges who sell their orders. The most unfortunate part is that some times both the lawyers of
the opposing party collude with each other and they make money in the name of judiciary.

7. A poor litigants who obtains legal aid, may not be having much at stake. Such litigant sometimes does not bother the lawyer for assistance regarding their own case. Similarly, the legal aid counsel does not take as much interest as they are expected to be.

8. A poor litigant who enters into the loop of criminal justice system, and generally does not know the technicalities and niceties of law and the legal system, is further grinded if he fails to appear on a particular day and thereby, jumps the concession of bail.

9. The legal profession is probably the easiest profession of the world to enter into as the standards of the legal education have downgraded considerably by the ever falling standards of the institutions and of the teaching. Finally, it results into entry of unscrupulous elements, who sucks the blood of the litigants, without having any fears of any rule or regulation.

10. The subordinate staff attached with the Court also plays mischief as it also sometimes colludes with the community of lawyers so as to misguide the litigant on the various issues. The ignorance of every litigant has become a source of exploitation at each and every stage of litigation.

11. A significant percentage of litigation is palpably false and frivolous. The experience has also shown that many a times, a bare reading of the case without going into the merits and analysis of the evidence, it is almost clear that
the case will definitely fall in the ultimatum. Still the party wants the same to continue.

12. It is often said that one party is always interested in delaying the case. This can be found out almost in every case.

13. The litigant does not understand the implications of the law and the position of a neutral umpire namely the judge. The litigant is interested only in the disposal of his case and that too as he wishes it to be. This has also been described by the Hon’ble CJI, Sh. S.H. Kapadia that one of the biggest problem of the present day is that the people want ‘desired justice’.

14. The experience also shows that in some percentage of cases, both the parties are not interested in the disposal of cases. The reason of the same is that there is some other dispute(s) between the parties and they turn the proceedings into the ‘battle of Panipat’. The case lingers on and on and the system is blamed for the fault of the parties.

15. Most of the lawyers are interested in their fees only and think that they should be confined to their fees only, lest the client should go to other advocate. These lawyers put aside the professional ethics. If the litigant is poor, most of the lawyers approached by the poor litigant do not advice him to approach the authority constituted under the Legal Services Authority Act. Such kind of approach frustrates the very efficacy of the legal aid programme.

16. Some of the advocates are known for their extra-ordinary delaying tactics in the form of adjournments, filing of one
application or the other even the most irrelevant and most of these applications are unknown to the legal system.

The aforesaid enumeration of the harsh realities shocks our conscience. Thus the need of the hour is to implement the legal aid programmes through educating the masses. Secondly, the advocacy coalitions can help foster reforms in favour of poor and other disadvantaged people. They can also develop the capacities of the organizations involved, as they are able to share experiences and motivation. However, the coalitions can suffer internal disagreement and frictions that can distract them from achieving their goals. Thirdly, the NGOs particularly in the legal fields should be encouraged to disseminate the different legal aid schemes to the poor masses. They be given financial assistance and due recognition. Fourthly, the training on pro-poor and pro-human rights legislation is also necessary. Justice initiatives have often used training as a successful entry point for the reform processes. Training constitutes an important entry point, but it needs to be linked to practical skills to be effective. Active participation of target groups in choosing training methodology and content is important. Successful training programmes consistently evaluate their impact on policy orientation and attitudinal change, and identify other strategies that may be necessary. The judicial officers should be given adequate training to make efforts while dealing with cases to ensure that the litigant should remain unrepresented. Similarly, the training and sensitization of the other instruments like police, prosecution, Court staff etc. is equally important. Fifthly, the representatives from local communities must participate in determining appropriate solutions of the problems of the day. The eminent persons of the city should be involved in such programmes. Sixthly, the establishment of National Human Rights Institutions may not be a solution, but the role of human rights monitoring may instead be undertaken on a transitional basis by

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national and international NGOs. Any international effort to monitor human rights including effective access to justice should also simultaneously focus on developing national capacities to eventually undertake this task.

The National Legal Services Authority (NALSA) was constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker Sections of the society and to organize Lok Adalats for amicable settlement of disputes. The following innovative steps have been introduced in the functioning of NALSA:-

- A National Plan of Action to be executed by all State Legal Services Authorities and Calendar for activities was put in place.
- NALSA Regulations on Lok Adalat were published in the Gazette.
- NALSA Regulations on Free and Competent Legal Services were published in the Gazette of India.
- Legal Services to Trans-Gender people was taken up as a new project of NALSA
- Training of Para-Legal Volunteers and engaging them in the front offices of Legal Services Institutions and in the village level legal aid clinics were started.
- Legal Literacy Programmes in schools and colleges started in an organised manner with the assistance of the Department of Education in all States.
- School Legal Literacy Clubs set up in all High Schools under the State Legal Services Authorities in order to create legal awareness, obedience to law and spread the
philosophy of rule of law amongst the younger generation.

- Legal Aid Clinics in all villages to be manned by Para-legal Volunteers and panel lawyers.

- Retainer lawyers are engaged at Taluk, District, High Court and Supreme Court level for handling legal aided cases.

Thus, we can find a paradigm shift in the approach of the Supreme Court towards the concept of legal aid from a ‘duty of the accused to ask for a lawyer’ to a ‘fundamental right of an accused to seek free legal aid’. But in spite of the fact that free legal aid has been held to be necessary adjunct of the rule of law. The legal aid movement has not achieved its goal. There is a wide gap between the goals set and met. The major obstacle to the legal aid movement in India is the lack of legal awareness. The people are still not aware of their basic rights, which lead to exploitation and deprivation of rights and benefits of the poor. Thus the need of the hour is that the poor illiterate people should be imparted with legal knowledge and should be educated on their basic rights which should be done from the grass root level of the country. Because if the poor persons fail to enforce their rights etc. because of poverty, etc. they may lose faith in the administration of justice and instead of knocking the door of law and Courts to seek justice, they may try to settle their disputes on the streets or to protect their rights through muscle power and in such condition there will be anarchy and complete dearth of the rule of law. Therefore, the legal aid to the poor and weak person is necessary for the preservation of rule of law. In this area, we have a huge number of laws in the form of judgements as well as legislations but they have just proven to be a myth for the masses due to their ineffective implementation. Thus the need of the hour is that we need to focus on
effective and proper implementation of the existing laws instead of passing new legislations to make legal aid in the country a reality instead of just a myth in the minds of the countrymen.

We need to implement the existing initiatives, infrastructure and the legal framework. We have to prepare for the future. Let there be access to justice for all irrespective of their stature, caste, creed or religion or anything of the like. Let equality as enshrined in our Constitution be executed in the judicial sphere in letter and spirit.